

No. 05-20-00517-CV

**IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS**

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**IN RE MARRIAGE
MALCOLM JOHNSON
Appellant,**

v.

**VERONICA POWELL-JOHNSON,
Appellee.**

On Appeal from the 255th Judicial District Court of Dallas County, Texas
No. DF-19-12398

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENTS AND AUTHORITIES

I. The Court of Appeals may take judicial notice of the public disciplinary action against Malcolm’s trial attorney for his violation of the Texas Disciplinary Rules in handling Malcolm’s divorce case.

In her Brief, Veronica objects to appendices 8 and 9 of Malcolm’s Brief on the grounds that they are not part of the formal appellate record. Appellee argues that documents attached to an appeal that are not a part of the “formal appellate record” cannot be considered by this Court. Appellee’s Brief pgs. 23-24. However, there are exceptions to this rule. Specifically, this Court may take judicial notice of a public record, and a request to take judicial notice can be done for the first time on appeal. *Office of Pub. Util. Counsel v. Public Util. Comm’n*, 878 S.W.2d 598, 600 (Tex. 1994).

“An appellate court...has the discretion to take judicial notice of adjudicative facts that are matters of public record on its own motion and for the first time on appeal.” *Ex Part Barrett*, 608 S.W.3d 80, 86 (Tex. App. – Dallas 2020, no pet.). This includes matters related to disciplinary actions taken by the State Bar of Texas. *Langdale v. Villamil*, 813 S.W.2d 187 (Tex. App. – Houston [14th Dist.] 1991, no pet.) (a court may take judicial notice of the disbarment of appellant’s attorney at any time during the legal proceedings, including upon appeal); see also *Hunnicut v. State*, 531 S.W.2d 618, 623 (Tex. Crim. App. 1976) (an appellate court may take judicial notice of whether an attorney holds a license to practice law in Texas); see

also *Maddox v. State*, 591 S.W.2d 898, 900 (Tex. Crim. App. 1979) (appellate courts have consulted the Texas Legal Directory to verify an attorney’s practice within this jurisdiction.).

“An appellate court may take judicial notice of a fact that is not subject to reasonable dispute because it (1) is generally known within the trial court’s territorial jurisdiction, or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. *Ex Parte Barrett*, 608 S.W.3d at 86; Tex. R.Evid. 201(b); *Cty of El Paso*, 584 S.W.3d at 77-78; *Office of Pub. Util. Counsel v. Public Util. Comm’n*, 878 S.W.2d at 600. In fact, “[j]udicial notice is mandatory if requested by a party and the court is supplied with the necessary information.” *Office of Pub. Util. Counsel*, 78 S.W.2d at 200; Tex. R. Evid. 201(c)(2).

Appendix 9 at issue is the Agreed Judgment of Fully Probate Suspension entered in File No. 202001432; *In the Matter of Paul Gomez*; Bar No. 24-63778. Appellant’s Brief pg. 93. The language within the Agreed Judgment specifically states “This suspension shall be made a matter of public record and appropriately published in accordance with the Texas Rules of Disciplinary Procedure.” Appellant’s Brief pg. 98. This Agreed Judgment can also be readily found and viewed at Texasbar.com. All one need do is hover over the Find a Lawyer tab, type in Paul Gomez, select full profile (there is only one Paul Gomez), scroll down to the

section entitled “Public Disciplinary History” and select the document located to the right.

Since the disciplinary record is public record, can be accurately and readily determined, and is specifically relevant to Malcolm’s representation in this case, Malcolm asks that this Court to take judicial notice of the Agreed Judgment of Probated Suspect at Appendix 9 of Appellant’s Brief on the Merits.

Furthermore, Malcolm’s Motion for New Trial revolved around the negative actions and omissions of his trial counsel. C.R. 1 pg. 282-83. Specifically, Malcolm stated that he had provided answers and documents to his trial counsel that were responsive to discovery requests but that his trial counsel failed to timely serve them on opposing counsel. R.R.1 pg. 47. This resulted in sanctions which prevented Malcolm from testifying to or presenting evidence as to the property in his possession, the valuation of that property, as well as any information on the community property. R.R.1 pg. 40. Additionally, Malcolm’s Motion for New Trial addressed the fact that his trial counsel failed to appear at a hearing on a motion to compel which resulted in monetary sanctions against Malcolm. C.R. 282.

The matters contained in appendices 8 and 9 directly relate to the issues that were before the Trial Court at both the bench trial and Motion for New Trial hearing; therefore, the matters in the Disciplinary Committees report should be admissible in this appeal. Specifically, The Disciplinary Committee found the following facts:

1. Trial counsel did not timely respond to requests and a hearing was held regarding his late discovery responses. Trial counsel did not attend this hearing which resulted in Malcolm being sanctioned;
2. Trial counsel neglected the legal matter entrusted to him and failed to carry out completely the obligations owed to Malcolm; and
3. By not informing the court or opposing counsel that he did not plan to appear at the hearing, trial counsel took a position that unreasonably increased the costs or other burdens of the case or that unreasonably delayed resolution of this matter.

Appellant's Brief Appendix 9 pg. 95. Had this document been published at the time of Malcolm's Motion for New Trial, it would most certainly have been brought to the attention of the Trial Court. However, these documents did not exist until almost six months after Malcolm filed his Notice of Appeal and several months after the Trial Court lost its plenary power.

The complete failure of Malcolm's trial counsel to provide timely discovery responses to opposing counsel prevented Malcolm from presenting necessary evidence to the Trial Court on the issue of the fair and just division of the community estate. This inexcusable error prevented the Court from issuing a proper judgment in dividing the community estate. Malcolm should be entitled to a new trial.

Malcolm is not seeking a new trial based solely on the argument of "ineffective assistance of counsel" and understands that the term may be more readily associated with criminal cases. Malcolm is seeking a new trial to present his evidence in the Trial Court that he was never able to raise due to his trial counsel's multiple errors. Veronica argues that Malcolm's avenue for relief should be a

malpractice case against his trial counsel instead of a new trial. Malcolm disagrees vehemently with this argument. The time to allow Malcolm to correct the mistakes of his trial counsel is now by a new trial in the Trial Court while the sales proceeds of the marital home are in the court's registry and a new trial on the distribution of the estate will take a matter of hours—not a legal malpractice case that will take years to make its way through the court system.

The State Bar agreed that Malcolm's trial counsel failed him and the court system for completely failing to carry out his obligations to timely respond to discovery requests. Appellant's Brief Appendix 9 pg. 95. Based on this information, the Trial Court abused its discretion in denying Malcolm's Motion for New Trial. Based on the Trial Court's unreasonable and arbitrary denial of Malcolm's motion for new trial, this Court should reverse and remand and order the Trial Court to hold a new trial on this issue, and to allow Malcolm to introduce the evidence he should have been able to.

II. Malcolm's Objections to Veronica's Statement of the Facts.

Malcolm asks this Court to disregard those Statements of the Facts by Veronica which are purely argumentative and not supported by the appellate record. In her Brief, Veronica makes several unfounded statements about Malcolm's purported intention to prevent the sale of the marital home after it was awarded to

Veronica in the divorce. Veronica makes these statements to paint Malcolm as the bad guy when Malcolm was simply trying to protect his rights pending this appeal.

Malcolm filed a lis pendens with the court clerk; however, Malcolm did so in order to protect his rights and to protect the res pending this appeal, and not for the purpose of preventing the sale of the marital home.

Pending this appeal, and while the Trial Court maintained jurisdiction over this case, Malcolm filed a request with the Trial Court seeking a supersedes bond and asking the Trial Court to order that if the marital home was sold, the sales proceeds would be placed into the Trial Court's registry, and that Malcolm was willing to post a bond. C.R. 5 p. 5. Malcolm's counsel contacted Veronica's counsel at least twice regarding this motion, but did not receive a response. C.R. 5 p. 8. A few days later, Veronica filed a request for an Emergency Ex Parte hearing requesting that the proceeds from the sale of the home be placed into the registry of the Court—the same relief Malcolm had requested. C.R. 5 p. 9. Veronica complains in her Brief that Malcolm objected to this motion in order to impede the sale of the home again. Appellee's Brief pg. 20. However, this is inaccurate. The objection made was that an Ex Parte hearing was an improper vehicle and that the Trial Court should set the motion on the regular docket so that an evidentiary hearing could be held. C.R. 5 p. 39.

Veronica filed a motion with the Trial Court in an attempt to remove the lis pendens property. C.R. 5 p. 73. In her Brief, Veronica alleges that Malcolm filed an objection to the cancellation of the lis pendens in order to block the sale of the home. Appellee's Brief p. 21. Again, this is inaccurate. Malcolm objected to Veronica's motion because it failed to comply with the Texas Property Code by not providing for certain requirements to be pled prior to the cancellation. Malcolm never objected to the sale proceeds being placed into the registry of the Court upon the sale of the marital home. C.R. 5 p. 78.

Based on the argumentative nature of Veronica's Statements of Fact that are unsupported by the appellate record, Malcolm requests that these purely argumentative and opinionated statements be disregarded.

III. Clarification of point in Appellant's Brief that Veronica received 100% of the community property.

Malcolm acknowledges that his Brief states that Veronica received 100% of the community property and that such statement is inaccurate. However, Malcolm's intent was not to mislead. While the caption says 100% of community property, it was meant to state 100% of the marital home which is confirmed by the body of Malcolm's Brief making it clear that Veronica received 100% of the marital house and everything in it, down to Malcolm's personal property and even his clothing. This is supported by the appellate record and Appellant's own Brief where he details the value of the property awarded to each party:

Veronica was awarded 100% of the marital home, its furnishings, and fixtures, as well as other assets for a total value of \$177,545.02. C.R. Vol. 2 p. 4-7. Whereas Malcolm was awarded what was in his possession at the time of the divorce, for a total value of \$35,400.00. These numbers are based solely on the appraisal submitted to the Trial Court by Veronica because Malcolm was not permitted to submit any documents due to the actions of Paul Gomez.

Appellant's Brief pg. 40. Malcolm provides a detailed breakdown of the property awarded:

Malcolm was awarded the following:

- a. Household items in Malcolm's possession: \$0.00
- b. Personal items in Malcolm's possession: \$0.00
- c. Handgun: \$2,000.00
- d. Two generators: \$1,500.00
- e. GMC Yukon: \$16,900.00 (equity is unknown)
- f. Forest River Wolf Pup Camper: \$15,000.00 (equity is unknown)

Veronica was awarded the entire marital estate, including the following:

- a. New equity in the marital home: \$131,145.02
- b. Infinity M37: \$8,500.00 (equity unknown)
- c. Household furniture, furnishings, etc.: \$26,200.00
- d. Personal Items (including Malcolm's clothing): \$7,000.00
- e. Malcolm's personal separate property: \$2,300.00
- f. Veronica's personal separate property: \$2,100.00
- g. Checking Account #1: \$50.00
- h. Checking Account #2: \$50.00
- i. Savings Account: \$50.00

Appellant's Brief pg. 47.

This was on top of the \$12,900 that Veronica already pulled out of the 401(k) in a fraudulent manner and kept for herself. What is important is the inequitable and grossly disproportionate distribution of the estate, as argued at length in Malcolm's Brief. The evidence at trial simply did not support such a finding by the Trial Court.

PRAYER

For the reasons set forth in his Brief and Reply Brief, Appellant Malcolm Johnson prays this Court resolve Appellant's issues in his favor, reverse the Trial Court's entry of the Final Decree of Divorce and remand the case for further proceedings on the property division of the community estate. Or in the alternative, this Court reverse and remand and grant Malcolm a new trial. Malcolm further prays that he be awarded his costs on appeal and receive such other or further relief to which he is justly entitled.

CERTIFICATE OF COMPLIANCE

I, Lindsey M. Rames, certify:

1. This brief complies with the type-volume limitations of TEX. R. APP. P. 9.4(i)(2)(B) because it contains 2,140 words, excluding the parts of the brief exempted by TEX. R. APP. P. 9.4(i)(1).
2. This brief complies with the typeface requirements of TEX R. APP. P. 9.4(e) because it has been prepared in a proportionally typeface using Microsoft Word Version for Mac in Times New Roman 14-point font.

/s/ Lindsey M. Rames
Lindsey M. Rames

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing Appellant's Reply Brief has been served on all counsel of record via electronic services on this 23rd day of March 2021.

/s/ Lindsey M. Rames
Lindsey M. Rames

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