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09/09/2025

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 25-0426

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 25-0426

ALAN BURCH,

Petitioner,

v.

TWENTIETH JUDICIAL DISTRICT COURT,
SANDERS COUNTY, HONORABLE MOLLY
OWEN,
Presiding,

Respondent.

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Clerk of Supreme Court
State of Montana

ORDER

Pursuant to M. R. App. P. 14(3)(a), Petitioner Alan Wayne Burch Sr. (“Burch”), through counsel, seeks a writ of supervisory control. Burch asserts the Twentieth Judicial District Court, Sanders County, (District Court) is proceeding under a mistake of law because it granted the motions to quash his subpoenas of victim advocate Tara Vanek (“Vanek”) and the two alleged minor victims in the underlying criminal proceedings, S.B. and B.B. (collectively, “the children”). The State and Vanek, through counsel, filed responses objecting to Burch’s request.

Burch is charged with six counts of incest against minors S.B. and B.B. due to alleged conduct which occurred in April and May of 2022. Burch requested and the clerk of court issued subpoenas directing Vanek, S.B., and B.B. to testify at his upcoming jury trial. Through counsel, Vanek moved to quash the trial subpoena on the basis § 26-1-812, MCA, confers absolute immunity from examination on victim advocates. On Burch’s request, the District Court scheduled an evidentiary hearing for May 6, 2025, to address whether S.B. and B.B. had waived the victim advocate privilege. Witness subpoenas were issued for purposes of securing the testimony of S.B., B.B., Vanek, and the children’s mother, Nicole Burch

("Nicole"), for the hearing. The State filed an "emergency motion" to quash the subpoenas of the alleged victims the day before the scheduled hearing, and the District Court granted the motion 49 minutes later. At the hearing, the court reiterated its refusal to allow Burch to call S.B. and B.B. Vanek was then called as a witness and asserted categorical immunity from answering Burch's questions, including whether she even had any communications with S.B. and B.B. Burch unsuccessfully requested the court take Vanek's answers on the record in camera. Next, Burch called Nicole to testify. Nicole advised that she does not believe S.B. and B.B., ages 11 and 9, respectively, understood the meaning of "waiver." She further advised that she has never asked them about waiving the victim advocate privilege. Nicole confirmed joint meetings had occurred between herself, law enforcement investigators, Vanek, and the prosecutors to discuss the case. Vanek had additional conversations with Nicole about the status of the case and Nicole's dissatisfaction with the pace of prosecution. While she disclaimed any meetings between the children and Vanek outside of Vanek's assistance with the forensic interviews, Nicole advised the children had never discussed the allegations "in detail" with Vanek.

When recalled to provide further testimony, Vanek refused to answer whether she witnessed conversations between Burch, law enforcement investigators, and the prosecution regarding the children's disclosures. To every question posed by Burch's counsel, Vanek then answered, "I cannot answer that; it calls for privilege." Following the hearing, the court issued its order granting the motion to quash the subpoena of Vanek, reasoning that advocate privilege provided for by § 26-1-812, MCA, applies.

This Court has supervisory control over all other courts in Montana, and may, on a case-by-case basis, supervise another court through a writ of supervisory control. Mont. Const. art. VII, § 2(2); M. R. App. P. 14(3). We will assume supervisory control of a district court to direct the course of litigation where the district court is proceeding under a mistake of law, which if uncorrected, would cause significant injustice for which an appeal is an inadequate remedy. *Truman v. Mont. 11th Jud. Dist. Ct.*, 2003 MT 91, ¶ 13, 315 Mont. 165, 68 P.3d 654 (citing *Park v. Sixth Jud. Dist. Ct.*, 1998 MT 164, ¶ 13, 289 Mont. 367, 961 P.2d

1267). Whether it is appropriate for this Court to assume supervisory control is a “case-by-case decision that depends on the presence of extraordinary circumstances and a particular need to prevent an injustice from occurring.” *Truman*, ¶ 13 (citing *Park*, ¶ 13):

In general, “orders pertaining to discovery are interlocutory in nature and are generally not reviewable in an original proceeding.” *Hegwood v. Fourth Jud. Dist. Ct.*, 2003 MT 200, ¶ 6, 317 Mont. 30, 75 P.3d 308. We have previously “expressed disfavor in granting a writ in the context of a discovery issue.” *State ex rel. Burlington N. R. R. v. Dist. Ct.*, 239 Mont 207, 212, 779 P.2d 885, 889 (1989). This Court has refused to “micromanage discovery[.]” *Mont. State Univ.-Bozeman v. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 17 n.12, 392 Mont. 458, 426 P.3d 541 (quotation omitted).

Section 46-15-101(1), MCA, provides for a statutory right to issue subpoenas to witnesses, but a district court may quash or modify a subpoena if compliance would be unreasonable or oppressive. Section 46-15-101(3), MCA. Here, Burch contends the District Court is proceeding under a mistake of law by quashing his subpoenas of Vanek and the alleged victims.

We first address the quashing of Burch’s subpoenas of S.B. and B.B. Victim advocate privilege belongs to the victim and may not be waived, “except by express consent.” Section 26-1-812(2), MCA. This “privilege continues even if the victim is unreachable.” Section 26-1-812(2), MCA. The right of confrontation is a trial right and “not equivalent to a constitutionally compelled rule of pretrial discovery.” *Daenzer v. Municipal Court*, 2020 MT 140, ¶ 6, 400 Mont. 179, 464 P.3d 996. Here, Burch ostensibly sought the testimony of S.B. and B.B. as to whether they expressly waived their victim advocate privilege. Nicole, as the parent of the children, testified that they had not expressly waived the privilege and that they had only discussed the allegations during their forensic interviews. In addition to receiving those forensic interviews, Burch knows that S.B. and B.B. are the alleged victims in this case and will be at trial to testify and be cross-examined. *See Daenzer*, ¶ 8. Nicole attested on behalf of her daughters that they would not understand what a waiver was of the victim advocate privilege. Although the subpoena was for an evidentiary

hearing and not for the purposes of securing the children's presence at trial, the court correctly granted the motion to quash as unreasonable and overly burdensome on S.B. and B.B.

We turn next to Vanek's testimony at the evidentiary hearing. "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part." Section 26-1-801, MCA. "Unless a report is otherwise required by law, [a victim advocate] may not, without consent of the victim, be examined as to any communication made to the advocate by a victim and may not divulge records kept during the course of providing shelter, counseling, or crisis intervention services." Section 26-1-812(1), MCA. Although § 26-1-801, MCA, plainly states that a witness under this part cannot be examined, we have allowed in camera review of documents protected by the enumerated privileges and proffers to be made upon examination, so that a court may assess the validity of a claim of privilege. While we do not opine whether that is appropriate here, we have no reasoning from the court, findings and conclusions, proffers of evidence from the parties, or legal analysis supporting a categorical denial by Vanek. This would be the first time this issue is before the Court, and no context or analysis has been provided explaining why a victim advocate may categorically assert a privilege without court review or oversight, while other enumerated privileges may be reviewed. Similarly, while we understand Burch's argument that he cannot make a record without examining Vanek, there must be enough in the record to distinguish Burch's request from that of a fishing expedition. Even a proffer from counsel as to what exculpatory information they believe was provided to Vanek, with the court's reasons for assessing privilege, would be helpful.

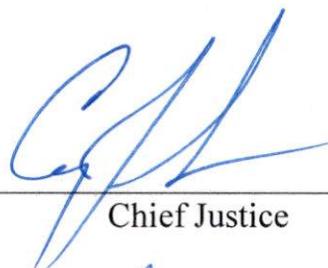
Here, Burch has not proffered what evidence, if any, compelling the testimony of Vanek might yield to meet his burden of persuading this Court to grant his writ of supervisory control. The incomplete record in this case prevents us from considering the scope of Vanek's asserted privilege on the merits. Should the matter be properly presented for appellate review, we would consider the issue on a more complete and developed record.

However, at this juncture, we are unconvinced Burch lacks an adequate remedy of appeal, a fundamental requirement for this Court to take supervisory control of the District Court proceedings. For the same reasons, we decline to order the District Court conduct in camera review of Vanek's possible testimony.

Accordingly, Burch's application for a writ of supervisory control is DENIED.

The Clerk is directed to provide a copy of this Order to the Hon. Molly Owen, Twentieth Judicial District Court, Sanders County; the Clerk of the District Court; Sanders County; and to all counsel of record.

Dated September 9, 2025.



Chief Justice









Justices