STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1468
A22-1469

Matthew James Beland,
Appellant (A22-1468),

vs.

Kurtis Rylander,
Respondent,

Kurtis Rylander,
Respondent,

vs.

Matthew Beland,
Appellant (A22-1469)

Filed April 3, 2023
Affirmed
Frisch, Judge

Polk County District Court
File No. 60-CV-20-895

Sarah Kyte, Kyte Law Office, Grand Forks, North Dakota (for appellant)

Kurtis Rylander, East Grand Forks, Minnesota (pro se respondent)

Considered and decided by Jesson, Presiding Judge; Bjorkman, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

In these consolidated appeals related to proceedings for two harassment restraining order (HRO) petitions, appellant argues that the district court judge was not authorized to issue an order disqualifying his counsel, that the district court abused its discretion in disqualifying his counsel, and that the disqualification order is impermissibly broad. Because the district court judge was authorized to issue the disqualification order and we discern no abuse of discretion or error in that order, we affirm.

FACTS

These two consolidated appeals (A22-1468 and A22-1469) are the fourth and fifth appellate matters arising out of HRO proceedings occurring in district court in files 60-CV-20-895 and 60-CV-21-760. Other appellate matters arising out of those HRO files are A20-0958, A21-1485, and A21-1487. These five HRO-related appellate matters are a part of a larger constellation of litigation spawned by the acrimonious breakup of the relationship between appellant Matthew Beland and his former wife, Heidi Hamre-Rylander. *See* A20-0957, A20-1070, A21-0002, A21-1486, A21-1488, A21-1675, A22-0086, A22-1467, A22-1761. In all 14 of these appellate matters, Beland has been the appellant or the petitioner. The respondent in both the consolidated appeals currently before this panel is Hamre-Rylander's current husband, Kurtis Rylander.

File 895 (Beland's HRO Petition Against Rylander)

In May 2020, Beland filed an HRO petition against Rylander on behalf of himself and the joint children he shares with his ex-wife. Beland alleged that Rylander committed

various acts of harassment against Beland and abuse against the joint children. The district court initially denied the petition without an evidentiary hearing. We reversed that decision and remanded for further proceedings. *Beland v. Hamre-Rylander*, No. A20-0957, 2021 WL 416735, at *4 (Minn. App. Feb. 8, 2021).

In May 2021, on remand in file 895, Beland's then-fiancée and now wife Sarah Kyte filed a notice of representation on behalf of Beland and a notice that she intended to act as an advocate-witness. Rylander moved to disqualify Kyte in file 895 pursuant to Minnesota Rule of Professional Conduct 3.7 (lawyer as a witness). A referee filed a recommended order granting the motion, and Judge Harbott confirmed the referee's order. Beland requested the district court reconsider the order disqualifying Kyte.

In June, the district court issued a notice of hearing to address, among other things, Beland's request to review the disqualification order. The notice provided that Judge Harbott was assigned to preside over the matter. On June 16, Judge Harbott presided over the scheduled hearing. On September 27, Judge Harbott issued an order refusing to alter the disqualification order.

On October 1, following the hearing and Judge Harbott's order disqualifying Kyte, Beland filed a notice to remove Judge Harbott pursuant to Minn. R. Civ. P. 63.03. Rylander filed correspondence with the district court objecting to Beland's notice of removal. The district court issued an order granting Beland's notice to remove. But in November 2021, the chief judge issued a notice of reassignment, assigning Judge Harbott back to file 895. The record on appeal does not reflect any objection to this reassignment.

File 760 (Rylander's HRO Petition Against Beland)

Also in May 2021, Rylander filed an HRO petition against Beland (file 760). In June, Kyte filed a certificate of representation that she intended to represent Beland in file 760, and Rylander then filed a motion to disqualify Kyte as Beland's attorney. At the June 16 hearing related to file 895, the district court also heard arguments on Rylander's motion to disqualify Kyte in file 760. On September 27, the district court issued an order granting Rylander's motion to disqualify Kyte in file 760. The district court's order incorporated by reference its September 27 order disqualifying Kyte in file 895.

Second Appeal and Remand

In November 2021, Beland appealed the September 27 orders disqualifying Kyte in the HRO files. *Rylander v. Beland*, No. A21-1485, 2022 WL 1297843 (Minn. App. Apr. 22, 2022). We consolidated those appeals and concluded the district court did not abuse its discretion in determining that Kyte is a necessary witness in all of the HRO proceedings, but we reversed the disqualification order and "remand[ed] the matter to the district court for the limited purpose of making express findings based on the existing record balancing the competing interests contemplated by Minn. R. Prof. Conduct 3.7." *Id*. at *2.

Following remand, in September 2022, Judge Harbott issued amended orders again disqualifying Kyte in both HRO matters. The district court reiterated its findings that Kyte is a necessary witness to the HRO proceedings; that it was reasonably foreseeable she would be called as a witness; that it was highly probable given the nature of the HRO petitions that Kyte's testimony would conflict with other witnesses; and as a material fact witness, Kyte's testimony could mislead the court and/or prejudice Rylander if Kyte asserts

the attorney-client privilege during her testimony. The district court made additional findings of fact, expressly balancing the competing interests contemplated in Rule 3.7. The district court concluded that Beland had "not made a sufficient showing of hardship that would overcome the grounds for disqualification" of Kyte. It ordered Kyte disqualified "as counsel for Respondent, Matthew Beland, in any capacity, pursuant to Minn. R. Prof. Cond. 3.7."

Beland appeals.

DECISION

Beland asks us to vacate the disqualification order in file 895, alleging that Judge Harbott lacked authority to issue an order in that file. Alternatively, Beland asks us to reverse the disqualification orders in both files because he established that disqualification would result in "substantial hardship" as contemplated in the Minnesota Rules of Professional Conduct and that the orders are otherwise overbroad.[1] We disagree and address each argument in turn.

I. Judge Harbott was authorized to issue the amended disqualification order.

Beland argues Judge Harbott lacked the authority to issue the September 2022 amended order in file 895 because Beland had timely filed a notice to remove Judge

[1] Beland also makes extensive arguments that the district court abused its discretion by reiterating that Kyte is a necessary witness under Rule 3.7. But we affirmed the district court's determination that Kyte is a necessary witness in the most recent appeal, *Rylander*, 2022 WL 1297843, at *2, which is now the law of the case. *See* Minn. R. Civ. App. P. 140.01 ("No petition for rehearing shall be allowed in the Court of Appeals."); *Loo v. Loo*, 520 N.W.2d 740, 744 n.1 (Minn. 1994) (stating law-of-the-case doctrine "ordinarily applies where an appellate court has ruled on a legal issue and has remanded the case to the lower court for further proceedings"). We decline to revisit this issue.

Harbott and the district court had granted that removal. We reject this argument because Beland's notice was not timely under the rules and was otherwise waived when Beland did not renew his objection following reassignment of Judge Harbott to file 895 by the chief judge.

We review de novo whether a notice of removal complies with Minn. R. Civ. P. 63.03. *Citizens State Bank of Clara City v. Wallace*, 477 N.W.2d 741, 742 (Minn. App. 1991). Failure to honor a timely removal notice is reversible error. *Id*.

The right to remove a district court judge assigned to a case is governed by Minnesota Rule of Civil Procedure 63.03. To effect removal, the rule requires a party to serve and file a removal notice "within ten days after the party receives notice of which judge or judicial officer is to preside at the trial or hearing, but not later than the commencement of the trial or hearing." The rule prohibits a party from filing a notice of removal as a matter of right "against a judge or judicial officer who has presided at a motion or any other proceeding of which the party had notice."

In May 2021, Judge Harbott first participated in file 895 by signing an order. In June 2021, the district court issued a notice to Beland identifying that Judge Harbott was assigned to preside over a scheduled June 16 hearing. Beland appeared at that hearing and argued the merits of the motion without objecting to the assignment of Judge Harbott as presiding judge. Judge Harbott issued an order following that hearing. Then, following the notice, hearing, and issuance of the order, in October 2021, Beland for the first time filed a notice to remove Judge Harbott under Rule 63. To be clear, Beland did *not* file the removal notice within ten days of notification of the assignment of Judge Harbott to preside

at a hearing in file 895 as required to invoke the right of removal under Rule 63.03. And Beland's removal notice also violated the provision in Rule 63.03 prohibiting the filing of a notice to remove a judge who has already presided at a hearing. Because the removal notice did not comply with the plain language of Rule 63.03, it was not effective. *See id.* (recognizing Rule 63.03 "mandates case reassignment when a removal notice is filed in compliance with the rule's requirements").

Beland argues the district court's order granting his removal "confirms that appellants' removal notice was timely filed in conformity with the requirement under Rule 63.03." But we review compliance with Rule 63.03 de novo, and therefore we "need not defer to the trial court on this issue." *Id.*

Independently, Beland's failure to object to Judge Harbott's reassignment to file 895 by the chief judge in November 2021 amounts to a waiver. *See Baskerville v. Baskerville*, 75 N.W.2d 762, 766 (Minn. 1956) (concluding a party waives the right to remove a judge by proceeding without a timely assertion of the right); *Uselman v. Uselman*, 464 N.W.2d 130, 139 (Minn. 1990) (stating that party failing to remove a judge before the start of trial waives the opportunity to do so as of right). We reject Beland's current assertion that no court notice identified Judge Harbott's reassignment to file 895. The record shows that on November 30, 2021, the district court sent Beland a notice of the judicial reassignment order in the 895 file.[2] There is nothing in the record showing that

[2] In his brief, Beland makes other assertions related to the reassignment of Judge Harbott which are not supported by the record on appeal. For example, Beland asserts that Rylander's objection to Beland's removal notice was denied, but the record contains no evidence of any such denial.

Beland objected to Judge Harbott's reassignment. Thus, Beland's argument is waived, and Beland has not shown that Judge Harbott was unauthorized, many months after his reassignment to the file, to issue the September 2022 amended order in file 895.[3]

II. The district court did not abuse its discretion by disqualifying Kyte.

Beland argues the district court abused its discretion by disqualifying Kyte based on its balancing of the interests contemplated in Minnesota Rule of Professional Conduct 3.7.

"We review the district court's decision regarding disqualification of counsel for an abuse of discretion." *State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 816 (Minn. 2014). A district court abuses its discretion if it misapplies the law, makes findings that are unsupported by the record, or resolves the discretionary question in a manner that is contrary to logic and the facts on record. *Honke v. Honke*, 960 N.W.2d 261, 265 (Minn. 2021). We review the district court's interpretation of a rule of professional conduct de novo. *Prod. Credit Ass'n of Mankato v. Buckentin*, 410 N.W.2d 820, 823 (Minn. 1987).

The Minnesota Rules of Professional Conduct provide that an attorney cannot act as a witness and represent a client in the same proceeding unless one of three delineated exceptions apply. Minn. R. Prof. Conduct 3.7(a). Of those three exceptions, only the last is applicable here: disqualification of counsel is not warranted when it would impose a

[3] We note that there is no plenary right to judicial removal in a case that is a continuation of a previously filed action. *McClelland v. Pierce*, 376 N.W.2d 217, 220 (Minn. 1985) (holding that right to remove a judge is not permitted upon remand after an appeal because remand is a continuation of the original proceeding); *see also In re Ihde*, 800 N.W.2d 808, 811 (Minn. App. 2011) (concluding the right to remove a judge is not permitted for motion to modify child custody because motion is not independent from original dissolution action).

substantial hardship on the client. *Id*. (a)(3). Comment four to the rule explains that, in determining whether disqualification would impose a substantial hardship, the district court must give due regard to the effect of disqualification on the client and must balance the interests of the client against the likelihood that counsel's testimony will mislead the tribunal or cause prejudice to the opposing party. *Id.*, 3.7 cmt. 4. "Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses." *Id.* In weighing these interests, "[i]t is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." *Id.*

September 2022 Amended Order

In its amended order, the district court made findings of fact in balancing the interests contemplated in Rule 3.7. In assessing Beland's interest in retaining Kyte as counsel for the HRO proceedings, the district court found that Beland's arguments that it would be too costly to bring a new attorney up to speed on his highly contentious and litigated case primarily referred to the underlying family court file, not the HRO matters. The district court also found that Beland "did not submit any evidence substantiating a substantial hardship." The district court found that, by statute, HRO proceedings are limited in scope. It also found that Beland is very knowledgeable about the facts and allegations in the petition. Relatedly, it found Beland could represent himself or retain another attorney because of the limited scope of the HRO proceedings and Beland's knowledge of the facts.

In assessing the interests of the tribunal and the opposing party, the district court found the nature of the HRO proceedings were "highly emotional, conflicted, and contested." The district court also found the HRO petitions identified Kyte, and it found that she was a material witness to the proceedings. The district court found there is a high probability that Kyte's testimony will conflict with that of other witnesses. It also found that, given the specific allegations set forth in the petition, it was reasonably foreseeable that Kyte would be called as a witness. The district court found that Rylander did not force Kyte's disqualification by trying to call her as a witness, and Kyte's notice of advocate-witness made it reasonably foreseeable she in fact would provide testimony as a fact witness. The district court also found that while Kyte would be allowed to question Rylander, Rylander may not have an equal opportunity to question Kyte as a material fact witness because she could claim the attorney-client privilege. The record does not reflect that Kyte offered to waive the privilege to address this concern. Based on these findings, the district court concluded that Beland would not suffer substantial hardship that outweighed the interests of the tribunal and opposing party, and therefore the balance of factors warranted Kyte's disqualification.

We see no abuse of discretion in the balancing conducted by the district court. As a threshold matter, Beland does not argue that any of the district court's findings are erroneous; he instead appears to ask us to reweigh and reconcile conflicting evidence, which we cannot do on appeal. *See In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221-22 (Minn. 2021); *see also Bayer v. Bayer*, 979 N.W.2d 507, 513 (Minn. App. 2022) (applying *Kenney* in a family-law matter). And here, the district court by its findings

properly exercised its discretion to credit evidence demonstrating the absence of substantial hardship due to Kyte's disqualification. *See Straus v. Straus*, 94 N.W.2d 679, 680 (Minn. 1959) ("Conflicts in the evidence, even though the presentation is upon affidavits, are to be resolved by the trial court."); *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (noting that "[t]he district court's findings implicitly indicate that the district court found respondent's testimony credible" and stating that "[w]e defer to this credibility determination").

Even so, we conclude that the record supports the district court's findings. *See Honke*, 960 N.W.2d at 265. The record shows that Beland had successfully represented himself in the past and demonstrated knowledge of the issues in the HRO petitions at the June 2021 hearing during which he represented himself. The record also shows that Beland did not submit evidence of the estimated cost of bringing new counsel up to speed or that retention of substitute counsel would result in any identified financial hardship. To the extent Beland made assertions to the district court about financial hardship, the expenditures were related to his dissolution proceedings that began in 2015.

The record also supports the finding that Kyte is a foreseeable material witness, as the petitions reference Kyte as a witness to various alleged acts of harassment and she self-identified as an advocate-witness.[4] And the district court's concern that Kyte's dual role

[4] Beland argues the district court abused its discretion because it did not specifically identify what facts Kyte could testify to or what would be the conflicting testimony. But such findings are not necessarily required to balance the interests under Rule 3.7.

as attorney and witness may limit Rylander's ability to question Kyte is supported by Minnesota Statutes section 595.02, subdivision 1(b) (2022).

Thus, the record supports the district court's findings that Beland's unsubstantiated assertions of hardship were outweighed by the interests of the tribunal and the opposing party. Because the district court resolved the discretionary question of disqualification in a manner that is not contrary to logic and the facts in the record, we see no abuse of discretion in the disqualification order.[5] *Honke*, 960 N.W.2d at 265.

III. The disqualification order is not overbroad.

Beland argues that the district court erred in disqualifying Kyte from acting as his counsel in any capacity because Rule 3.7 is limited to disqualifying counsel only "at a trial." We see no error in the district court's order.

Beland argues that the disqualification order impermissibly extends beyond the limiting language of Rule 3.7 providing only for a disqualification at trial. We do not read

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[5] Beland also argues the district court abused its discretion when it did not consider that he would suffer substantial hardship because *Rylander's* attorney is a "necessary witness" and it would be difficult for Beland as a pro se litigant and law-enforcement officer to question Rylander's attorney about allegedly relevant police reports. In the September 2022 amended order, the district court found, separately from the disqualification issue, that Rylander's attorney is not a necessary witness, and the issues about the police report are related to the family proceeding, not the HRO proceedings. Beland did not appeal those determinations, and the issue is therefore not properly before us.

Beland also seems to argue he will suffer substantial hardship if Kyte is disqualified because Rylander will threaten Beland's safety if Beland represents himself. Beland asserts that this argument was presented to the district court at the June 2021 hearing, but we see no record of such an argument, and we therefore consider it waived and improperly briefed. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating inadequately briefed issues are not properly before an appellate court).

the disqualification order in the same manner as Beland. Rather, we read the district court's order as limiting the scope of disqualification to that *allowed under the rule*. By including the language ordering Kyte's disqualification "in any capacity, *pursuant to Minn. R. Prof. Cond. 3.7*," the district court restricted the scope of disqualification to that permissible under Rule 3.7. (Emphasis added.) The scope of disqualification under Rule 3.7 is set forth in the plain language of the rule and is informed by the rule comments emphasizing concerns that an advocate witness may confuse or mislead the tribunal and prejudice opposing party's rights in litigation. Minn. R. Prof. Conduct 3.7. cmt. 2; *cf. Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-OA1*, 775 N.W.2d 168, 177-78 (Minn. App. 2009) (assuming a district court rejected an argument rather than assuming it erred by not addressing the argument), *rev. denied* (Minn. Jan. 27, 2010).

It appears that on appeal, Beland has assumed that the district court's order disqualifies Kyte from representation in *any proceeding* and without regard for the parameters of Rule 3.7.[6] But we do not read the order as providing for such broad disqualification, and "on appeal error is never presumed." *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949). We also emphasize that Beland has the burden to show error on appeal.

[6] It appears that only the evidentiary hearing remains to resolve these petitions. We share the parties' expressed concerns at oral argument that these matters have progressed well beyond the accelerated timing set forth in the HRO statute. *See, e.g.*, Minn. Stat. § 609.748, subd. 4(b) (authorizing the district court to grant a temporary HRO if the district court has "reasonable grounds" to believe harassment occurred); (c) (authorizing issuance of temporary HRO without notice to respondent); (f) (requiring respondent to request a hearing, if at all, within 20 days of service of the HRO petition) (2022). Accordingly, we anticipate that the district court will expeditiously schedule the contested hearing to resolve the petitions.

Id. ("[T]he burden of showing error rests upon the one who relies upon it."). Accordingly, we affirm the district court's order because the order expressly comports with the plain language of Rule 3.7, and Beland has not established error.[7] *See Palladium Holdings*, 775 N.W.2d at 177-78.

Affirmed.

[7] We observe that the district court's order extends to Kyte's role as an advocate at trial and does not preclude Kyte from otherwise counseling Beland. We express no opinion as to future proceedings that are not before us on appeal. Although we again emphasize that the timing in the HRO statute contemplates the swift resolution of such petitions, to the extent Beland desires Kyte's representation as an advocate in future proceedings, Beland is not precluded from seeking clarification from the district court as to the scope of disqualification.