[Cite as *Smith v. Smith*, 2019-Ohio-990.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 107205 and 107373

RAYMOND E. SMITH

PLAINTIFF-APPELLANT

vs.

KARYN DENISE SMITH

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DR-17-363987

BEFORE: Blackmon, J., E.T. Gallagher, P.J., and Sheehan, J.

RELEASED AND JOURNALIZED: March 21, 2019

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PATRICIA ANN BLACKMON, J.:

{¶1} Raymond E. Smith ("Raymond") appeals from the trial court's disqualifying his counsel and granting Karyn Denise Smith's ("Karyn") motion to strike in this divorce case. Raymond assigns the following errors for our review:

> I. The trial court erred as a matter of law and abused its discretion by disqualifying counsel for Raymond without prior notice or hearing.

II. The trial court erred as a matter of law and abused its discretion in failing to apply the Dana [sic][1] test when considering whether to disqualify counsel due to an alleged conflict of interest raised by the trial court.

III. The trial court erred as a matter of law and abused its discretion in granting the appellee's motion to strike.

{¶2} Having reviewed the record and pertinent law, we affirm the trial court's judgment. We review Raymond's assigned errors out of order for ease of analysis. The apposite facts follow.

{¶3} On February 10, 2017, Raymond filed for a divorce from Karyn. At the time of the filing, Raymond was represented by attorney Judith S. Hunt. On June 15, 2017, the court appointed Becky S. Blair as guardian ad litem ("GAL") for Raymond and Karyn's minor child. On January 23, 2018, attorney Joseph G. Stafford filed a notice of appearance on behalf of Raymond. It is undisputed that, at the time Stafford filed his notice of appearance in the case at hand, he was also representing the GAL in her personal divorce. Both cases are in the Cuyahoga County Common Pleas Court, Domestic Relations Division.[2] *See Alexanderson v. Blair*, Cuyahoga C.P. No. DR-15-358224.

{¶4} On February 14, 2018, the court issued a journal entry, the pertinent parts of which state as follows:

> Counsel for the parties shall inform the scheduler via email of their availability for a two hour pretrial in March 2018 * * *. The Court takes judicial notice that

[1]"Dana" refers to *Dana Corp. v. Blue Cross & Blue Shield Mut*., 900 F.2d 882 (6th Cir.1990).

[2]During oral argument, the issue was raised of whether the GAL's divorce case and the instant divorce case were being heard by the same judge within the Cuyahoga County Common Pleas Court, Domestic Relations Division. We note for the record that this issue is moot. On August 24, 2015 — which is prior to when the case at hand was filed — all five of the judges sitting on the Cuyahoga County Common Pleas Court, Domestic Relations Division at the time — Judges Diane M. Palos, Cheryl S. Karner, Leslie A. Celebrezze, Rosemary Grdina Gold, and Francine B. Goldberg — recused themselves from hearing the GAL's divorce case. On September 10, 2015, the Ohio Supreme Court assigned retired Judge David Eric Stucki of the Stark County Court of Common Pleas to preside over the GAL's divorce case. The case at hand is being heard by Judge Diane M. Palos.

> [Raymond's] new counsel is also counsel for the Guardian ad Litem in this matter. To allow for the continued representation without conflict, the parties may submit a finalized parenting plan (thereby relieving the Guardian ad Litem of any further obligation) or [Karyn] may waive the conflict in writing.

{¶5} On February 20, 2018, Karyn filed a response to the court's February 14, 2018 journal entry, stating that "she is not in agreement with a parenting plan at this time, and that she does not waive the conflict presented by the appearance of Plaintiff's new counsel in this matter." On February 23, 2018, the court granted attorney Hunt's motion to withdraw as Raymond's counsel. Stafford, acting on behalf of Raymond, did not file a response to the court's February 14, 2018 journal entry.

{¶6} On May 7, 2018, the court issued a judgment entry disqualifying Stafford from representing Raymond in the case at hand. This entry states, in part, as follows:

> This matter is before the Court upon its previous Judgment Entry of February 14, 2018. The Court took judicial notice of a conflict between new counsel for [Raymond] and the Guardian ad Litem and provided a mechanism for continued representation of counsel, to-wit: submit a finalized parenting plan or submit a waiver of the conflict by [Karyn] in writing.
>
> The Court notes that as part of its February 14, 2018 Judgment Entry, counsel was ordered to inform the court's scheduler of availability for a two (2) hour pretrial in March 2018. On February 20, 2018, [Karyn] filed her Notice with the Clerk in response to the aforementioned Judgment Entry. [Raymond's] new counsel failed to submit any response whatsoever, by email or otherwise. No dates were submitted for pretrial.
>
> [Karyn's] Notice informed the court that she did not waive any conflict. Insofar as no finalized parenting plan has been submitted, the Court must proceed to order the disqualification of Attorney Joseph G. Stafford, as legal representative of [Raymond] in this matter for the following reasons.
>
> It is well settled that trial courts have the "inherent authority to supervise members of the bar appearing before it and this necessarily includes the power to disqualify counsel in specific cases" such as when "an attorney cannot, or will not, comply with the Code of Professional Responsibility when representing a client." (Citations omitted.)

> The Guardian ad Litem has been instrumental in assisting the parties with implementing a workable parenting time schedule so as to minimize the potential harm to a vulnerable child with troubles brought on by her parents' contentious divorce. The Guardian's role is central to maintaining her ward's safety and mental health.
>
> With [Raymond's] counsel also serving as counsel for the Guardian ad Litem in her personal matter in this Court, the Court will not permit the Guardian's critical role to be compromised. Therefore, the Court must order [Raymond's] counsel disqualified to regulate these proceedings.

{¶7} On May 18, 2018, Stafford filed a "written proffer,"[3] alleging that the court's May 7, 2018 journal entry "is inaccurate and does not properly reflect the events which occurred between Counsel and court personnel." First, Stafford argued that he discussed scheduling the pretrial "on at least two (2) occasions" with court personnel. Second, Stafford "unapologetically" requested that the court retract its reference to the Code of Professional Responsibility and the implication that Stafford violated the same in its May 7, 2018 journal entry. Third, Stafford made the blanket argument that "there is no conflict of interest," although he fails to cite any law to support or facts to explain this argument. Fourth, Stafford argued that the court's reference to "a vulnerable child" is not supported by the record. Fifth, Stafford argued that the court failed to follow "the mandates of basic due process" by not holding a hearing before disqualifying him, "stressing" and "highlighting" that the issue was raised sua sponte.

{¶8} Later that same day, Stafford filed a notice of appeal from the court's May 7, 2018 order disqualifying him from representing Raymond.

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[3] "A proffer is, by definition, an offer of evidence." *Hocker v. Hocker*, 188 Ohio App.3d 755, 2010-Ohio-2835, 936 N.E.2d 1003, ¶ 43 (2d Dist.). The "written proffer" filed in this case is not an offer of evidence. Rather, the document presents arguments as to why Raymond's disqualified counsel thinks the court erred in issuing its February 14, 2018 journal entry.

{¶9} On June 21, 2018, the court granted Karyn's motion to strike Stafford's "written proffer," finding that the document failed to address "the primary reason why this Court issued its Judgment Entry of Disqualification," i.e., the "fundamental conflict inherent in counsel's representation of" Raymond and Raymond's child's GAL in the GAL's divorce. On June 26, 2018, Stafford filed a notice of appeal regarding the court's granting Karyn's motion to strike, and this court consolidated the two appeals.

Motion to Strike

{¶10} As an initial matter, we must determine whether the trial court's journal entry granting Karyn's motion to strike is a final appealable order. "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

{¶11} In *Grahl v. Matthews*, 172 Ohio St. 135, 136, 174 N.E.2d 100 (1961), the Ohio Supreme Court held the following: "The sustaining of the motion to strike * * * leaves the cause still pending in the trial court. The order of the trial court, considering the motion to strike * * * and sustaining it, is not a final order from which an appeal may be taken." *See also George H. Ritz, Jr., Ph.D., Inc. v. Lefton*, 8th Dist. Cuyahoga No. 36722, 1977 Ohio App. LEXIS 8542 (Dec. 8, 1977) (court's granting motion to strike not a final appealable order; "[a]s plaintiff's action remains to be resolved, this court lacks jurisdiction to entertain this appeal * * *").

{¶12} We also take into consideration the general rule of law that "the trial court loses jurisdiction to take action in a cause after an appeal has been taken and decided." *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978).

{¶13} In the case at hand, Stafford filed a "written proffer" after the trial court's judgment disqualifying him from representing Raymond, then immediately appealed the court's ruling. Stafford now argues on appeal that the trial court had no jurisdiction to strike the proffer while his appeal was pending. Stafford further argues that the proffer "is part of the record before this Court on appeal."

{¶14} It is clear, however, that Stafford's "written proffer" was not part of the record when the trial court issued its journal entry disqualifying him. The trial court did not consider this document in rendering its decision, because it did not exist at the time. Consequently, we will not consider it on appeal.

{¶15} Upon review, we need not pass judgment on whether the court erred by striking the "written proffer" from the record. Because it was filed after the judgment being appealed and it is not a final appealable order, we cannot consider it. Accordingly, Raymond's third assigned error is overruled.

Disqualification

{¶16} Pursuant to Ohio Prof.Cond.R. 1.7(a)(1), a "lawyer's acceptance or continuation of representation of a client creates a conflict of interest if * * * the representation of that client will be directly adverse to another current client * * *." What constitutes "directly adverse" representation is explained in the comments to Ohio Prof.Cond.R. 1.7. Comment 10 states in part as follows: "The concurrent representation of clients whose interests are directly adverse always creates a conflict of interest." Comment 11 illustrates that "a directly adverse conflict also may arise when effective representation of a client who is a party in a lawsuit requires a lawyer to cross-examine another client, represented in a different matter, who appears as a witness in the suit."

{¶17} It is, of course, conceivable, if not probable, that during a trial in the case at hand, Raymond's attorney would cross-examine the GAL. This creates a conflict of interest under Prof.Cond.R. 1.7(a)(1).

{¶18} Additionally, pursuant to Prof.Cond.R. 1.7(a)(2), a conflict arises if "there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client * * *."

{¶19} Comment 17 lists examples of a "material limitation" conflict when a lawyer represents current clients in different matters, or what the comment refers to as "simultaneous representation in unrelated matters." The comment elucidates that a material limitation conflict of interest exists

> if there is a substantial risk that a lawyer's action on behalf of one client in one case will materially limit the lawyer's effectiveness in concurrently representing another client in a different case. For example, there is a material limitation conflict if a decision for which the lawyer must advocate on behalf of one client in one case will create a precedent likely to seriously weaken the position taken on behalf of another client in another case. Factors relevant in determining whether there is a material limitation of which the clients must be advised and for which consent must be obtained include: (1) where the cases are pending; (2) whether the issue is substantive or procedural; (3) the temporal relationship between the matters; (4) the significance of the issue to the immediate and long-term interests of the clients involved; and (5) the clients' reasonable expectations in retaining the lawyer.

{¶20} It is conceivable in the case at hand that the GAL's recommendation regarding Raymond and Karyn's minor child is adverse to Raymond. It is also conceivable that, should this scenario come to fruition, Stafford's representation of the GAL would be compromised or "weakened." Additionally, if the GAL's recommendation regarding the minor child is favorable to Raymond, it creates the appearance that she may be acting favorably toward Raymond's counsel, who is, of course, her personal counsel in another matter.

{¶21} In looking at the factors outlined in the Comment 17, the following apply to Stafford's concurrent representation of Raymond and the GAL:

> (1) Both cases are pending in the Cuyahoga County Common Pleas Court, Domestic Relations Division.
>
> (2) The issue in both divorce cases is substantive.
>
> (3) Both cases are currently active. The GAL's case was filed in August 2015, and Raymond's case was filed in February 2017. The GAL was appointed in Raymond's case in June 2017. Stafford filed a notice of appearance in the Smith case in January 2018.
>
> (4) The issue in both cases is significant. In Raymond's case, it is the GAL's recommendation concerning the best interest of the child, and in the GAL's personal case, it is her divorce.
>
> (5) The GAL retained Stafford before she was appointed in Raymond's case and before Raymond retained Stafford. Although Raymond may have not know that Stafford represented the GAL in a different matter, Raymond, did not have a reasonable expectation in retaining Stafford given the circumstances.

{¶22} Stafford should not have accepted representation of Raymond. This creates a conflict of interest under Prof.Cond.R. 1.7(a)(2).

{¶23} In law, there exists "the inherent power of the court to protect the integrity of its proceedings." *Royal Indem. Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 34, 501 N.E.2d 617 (1986). This "includes the authority to dismiss an attorney who cannot, or will not, take part in [the court's proceedings] with a reasonable degree of propriety." *Id.* *See also Clucas v.*

Vojtech, 119 Ohio App.3d 475, 477, 695 N.E.2d 809 (9th Dist.1997) ("Thus the trial court possesses the authority to disqualify an attorney from the representation of clients if the attorney cannot conduct such representation in compliance with the Code of Professional Responsibility").

{¶24} "[T]he standard of review for determining whether the court erred in its pretrial disqualification of defense counsel is whether it abused its broad discretion." *State ex rel. Keenan v. Calabrese*, 69 Ohio St.3d 176, 180, 631 N.E.2d 119 (1994). Furthermore, a trial court "is not required to hold a hearing on every motion to disqualify counsel on the basis of a conflict of interest." *Tabbaa v. Raslan*, 8th Dist. Cuyahoga No. 97055, 2012-Ohio-367, ¶ 18. *See also Kala v. Aluminum Smelting & Refining Co., Inc*., 81 Ohio St.3d 1, 13, 688 N.E.2d 258 (1998) (the court must hold an evidentiary hearing regarding disqualification only when "an attorney has left a law firm and joined a firm representing the opposing party").

{¶25} In the case at hand, Raymond argues that the court erred by not providing notice and a hearing prior to disqualifying his counsel. We note that the court's February 14, 2018 journal entry did, in fact, notify the parties that, "[t]o allow for the continued representation without conflict," certain conditions must be satisfied. These alternative conditions were to file a parenting plan, thus relieving the GAL of her duty, or file a waiver of the conflict. It is undisputed that neither condition was met. Accordingly, Stafford was provided with notice of potential disqualification.

{¶26} As to the hearing, the Ohio Supreme Court in *Kala* made it clear that evidentiary hearings regarding attorney disqualification are required only in "side-switching" cases. We find no error in the court's failure to hold a hearing in this case. As this is not a

"side-switching" case, no hearing was necessary. Accordingly, Raymond's first assigned error is overruled.

{¶27} Raymond next argues that the court abused its discretion by disqualifying his attorney without applying the test in *Dana Corp.*, 900 F.2d 882. The *Dana* test, however, applies to situations in which an attorney's *previous* client relationships are called into question. "A review of the first prong of the [*Dana*] test shows that it actually requires a prior attorney-client relationship between the party seeking disqualification and the attorney he or she wishes to disqualify." *Legal Aid Soc. v. W&D Partners I, L.L.C.*, 162 Ohio App.3d 682, 2005-Ohio-4130, ¶ 21 (8th Dist.). In the case at hand, it is Stafford's *current* representation of two adverse clients that is the basis for the conflict of interest. The *Dana* test is not applicable to violations of Prof.Cond.R. 1.7(a)(1) or (2) involving simultaneous representation of adverse clients.

{¶28} Additionally, Sup.R. 48(D)(1) states that a "guardian ad litem shall represent the best interest of the child for whom the guardian is appointed." Furthermore, a guardian ad litem "shall avoid any actual or apparent conflict of interest arising from any relationship or activity, including, but not limited to, those of employment or business or from professional or personal contacts with parties or others involved in the case." Sup.R. 48(D)(9).

{¶29} Therefore, we hold that it is a violation of Prof.Cond.R. 1.7(a)(1) and (2) for an attorney to simultaneously represent: 1) a client in a domestic relations proceeding; and 2) the GAL in that domestic relations proceeding in the GAL's personal matter. The court acted within its discretion when taking judicial notice of the conflict of interest and raising it sua sponte. The court did not err or abuse its discretion in disqualifying Stafford from the instant case, and Raymond's second assigned error is overruled.

{¶30} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Common Pleas Court, Domestic Relations Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

EILEEN T. GALLAGHER, P.J., and
MICHELLE J. SHEEHAN, J., CONCUR