

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-12-1209

Appellee

Trial Court No. CR0201102258

v.

Lee Anne Henry, et al.

DECISION AND JUDGMENT

Appellant

Decided: May 31, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Frank H. Spryszak, Assistant Prosecuting Attorney, for appellee.

Ann M. Baronas, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an accelerated appeal from a judgment of the Lucas County Court of Common Pleas in which the trial court granted a motion filed by appellee, the state of Ohio, to disqualify defense counsel retained by appellant, Lee Ann Henry, in a criminal case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant was the foster mother of two school-age children, D.A. and her brother, A.A., from February 2, 2010, until June 16, 2011. On February 5, 2010, as part of a proceeding to terminate the parental rights of their natural parents, the juvenile court appointed attorney Ann Baronas to act as guardian ad litem (“GAL”) for both children. On June 20, 2011, Baronas was removed as GAL for D.A., however, she continued as GAL for A.A. Attorney Charles Rowell was appointed as GAL for D.A. After June 16, 2011, D.A. and A.A. went to live with foster parents Lisa Hunter and her husband, who expressed interest in adopting the two children.

{¶ 3} On August 17, 2011, appellant was indicted by the Lucas County Grand Jury on two counts of endangering two other children who were in her care (“criminal case”). Appellant retained Attorney Baronas as her defense counsel in the criminal case. On November 1, 2011, the state filed a motion in which it asked the trial court to conduct an inquiry as to whether Baronas’ dual roles as GAL for A.A. and defense counsel for appellant presented a “real or potential conflict of interest in this ongoing criminal matter.” In support of its motion, the state argued that at least a potential conflict of interest exists because D.A. is a potential witness in appellant’s criminal case.

{¶ 4} A two-part hearing began on January 11, 2012. Testimony was presented on that day by Lisa Hunter, who stated that Baronas, Rowell and Lucas County Children’s Services social worker Julie Miller came to her home on September 27, 2011, to interview D.A. and A.A. Miller stated that Rowell held only a superficial conversation with D.A., and Baronas talked to A.A. for only a few minutes. However, Baronas also

questioned D.A. concerning events that took place while D.A. and A.A. were living in appellant's home. Hunter also testified that the prosecutor in appellant's criminal case, Frank Spryszak, told her that D.A. could be called as a witness against appellant.

{¶ 5} Toledo Police Detective Elizabeth Kantura testified that she interviewed D.A. for more than an hour in August 2011, and, in her opinion, D.A. is a potential witness in the criminal case. Kantura stated that she based her opinion on information that D.A. may have witnessed appellant's verbal abuse of other children in her care and that appellant's adopted daughter, a victim in the criminal case, M.M., shared confidences with D.A.

{¶ 6} D.A. testified in chambers that Baronas, Rowell, and Julie Miller came to see her at Hunter's home on September 27, 2011. D.A. stated that she spoke to Rowell for about ten minutes on that day, and that he did not ask her about the criminal case. D.A. also testified that Baronas asked her questions about what she saw and heard while she was living with appellant. When asked if her conversation with Baronas had to do with what she knew about the pending criminal case, D.A. responded "Yes." D.A. also stated that she had not met with Rowell since September 2011.

{¶ 7} The second part of the bifurcated hearing was held on April 16, 2012. On that date Jeremy Young, LCCS staff attorney, testified that he was assigned as the LCCS attorney on appellant's criminal case in early 2012. Young stated that he met with Hunter, D.A., Miller and Spryszak on November 15, 2011, at which time he became aware that D.A. was a potential witness in the criminal case. Young also stated that he

met with D.A. and Hunter in January 2012, to help ease D.A.'s fears about testifying against appellant. Young stated that, in his opinion, Baronas' dual roles as appellant's counsel and GAL for D.A. placed D.A. in a "situation that was inappropriate" and that caused the child to experience undue stress.

{¶ 8} On cross-examination, Young testified that he was involved in a prior juvenile case in which LCCS charged appellant with neglect/dependency in regard to her two adopted children. Young said that he filed a conflict of interest motion in that case because Baronas represented appellant and acted as GAL for A.A. in that proceeding, and also in a permanent custody proceeding involving A.A. and D.A. Young stated that the fact pattern in both the juvenile proceeding and the criminal case against appellant were virtually identical. He further stated that the conflict motion in the juvenile case was withdrawn after an agreement was reached between appellant and LCCS.

{¶ 9} After Young testified, Lisa Hunter was called back to the stand. Hunter testified that she attended a meeting between herself, D.A. and Young on January 9, 2012, which was held so that D.A. could ask questions because the child was nervous. At the close of the testimony, the trial court ordered each party to submit post-hearing briefs in lieu of closing arguments.

{¶ 10} On July 30, 2012, the trial court issued an opinion and judgment entry in which it found that Baronas' relationship to D.A. and appellant presents an issue of "successive [legal] representation." As such, Baronas would be in a position to cross-examine D.A., who is listed as a potential witness at appellant's criminal trial. The trial

court concluded that this scenario may result in intimidation of D.A. and may also exert pressure on D.A. to “tailor her testimony to what she perceived Attorney Baronas would want.” The trial court concluded by disqualifying Attorney Baronas as appellant’s counsel.

{¶ 11} In making its decision, the trial court addressed each of the arguments made by appellant. First, the trial court stated that appellant’s attempt to “waive” any potential conflicts in this case is irrelevant because, while appellant is free to waive any conflict on her own behalf, she “cannot waive the conflict’s impact on D.A.” In response to appellant’s argument that this court allowed Baronas to represent her even though termination proceedings were brought against the parents of D.A. and A.A. in juvenile court,¹ the trial court stated that no conflict existed in the juvenile case because Baronas was retained by appellant in this criminal matter after that case was resolved. The trial court further stated that, while appellant correctly asserts that she generally has the right to retained counsel of her choice, that choice “is limited by actual and potential conflict-of-interest. *State v. Dillman*, 70 Ohio App.3d 616, 621, 591 N.E.2d 849 (6th Dist.1990) [citation omitted].”

{¶ 12} In response to appellant’s argument that the conflict issue is best raised in a separate grievance proceeding, the trial court stated that where, as here, “the successive representation causes an attorney to act in a manner which implicates the code of

¹ *In re D.A., A.A.*, 6th Dist. No. L-11-1197 (Feb. 21, 2012).

Professional Responsibility,² the court should act to prevent actual or potential conflict of interest. *In re Smith*, 11th Dist. Nos. 2005-A-0048 and 2005-A-0056, 2007-Ohio-893, ¶ 64. “ Finally, as to appellant’s claim that D.A. may not be called as a witness at her criminal trial, the trial court found that, to date, “the State has indicated, in as clear a manner as it is able at this juncture, to use D.A. as a witness.”

{¶ 13} After considering the parties’ arguments and the law, the trial court found “sufficient evidence of serious potential conflict to warrant disqualifying Attorney Baronas in this case.” A notice of appeal was filed in this court on August 2, 2012.

{¶ 14} On appeal, appellant sets forth the following as her sole assignment of error:

The trial court abused its discretion in disqualifying defendant’s retained counsel from representing the defendant.

{¶ 15} In support of her assignment of error, appellant acknowledges that her retained counsel intends to call D.A. as a witness in appellant’s criminal trial. However,

² Ohio Prof.Cond.R. 1.7 states, in relevant part, that:

(a) A lawyer’s acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) 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, a former client, or third person or by the lawyer’s own personal interests.

* * *

appellant states that D.A. will testify, at most, to “verbal abuse” by appellant. Appellant argues that such testimony will not be legally sufficient to prove the charges against appellant, i.e., felony child endangering. Therefore, since the value of D.A.’s testimony is “insignificant or scarce” compared to the state’s burden at trial, her attorney should not be disqualified. In further support, appellant argues that there is no danger that Baronas will breach any of D.A.’s confidences in order to represent appellant, nor is it reasonable to assume that D.A. would be “intimidated” into conforming her testimony to “please her former guardian.”

{¶ 16} Generally, a trial court has wide discretion in the consideration of a motion to disqualify counsel. *Spivey v. Bender*, 77 Ohio App.3d 17, 22, 601 N.E.2d 56 (6th Dist.1991). An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 276 (1983). In addition, a trial court has great latitude in supervising the practice and conduct of attorneys who appear before it. *Columbus Credit Co. v. Evans*, 82 Ohio App.3d 798, 803, 613 N.E.2d 671 (10th Dist.1992), citing *Royal Indemn. Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 34-35, 501 N.E.2d 617 (1986).

{¶ 17} “The most common basis for trial court disqualification of an attorney is due to an actual or potential conflict of interest.” *In re Smith*, 11th Dist. Nos. 2005-A-0048, 2005-A-0056, 2007-Ohio-893, ¶ 64. The standard to be applied on appeal is whether “the factual contexts of the representations are similar or related.” *Id.* at ¶ 65.

(Other citation omitted.) “Disqualification is appropriate when an attorney accepts employment in a case involving a former client where there is a substantial relationship between the existing controversy and the prior representation.” *Id.* at ¶ 66, citing *Morford v. Morford*, 85 Ohio App.3d 50, 57, 619 N.E.2d 71 (4th Dist.1993).

{¶ 18} In this case, it is undisputed that Attorney Baronas served as the court-appointed GAL for both D.A. and her brother, A.A., in termination proceedings brought against their parents in juvenile court. Although Baronas was removed as GAL for D.A. in June 2011, she continued to serve in that capacity for A.A. It is also undisputed that, on September 27, 2011, Baronas spoke to both D.A. and A.A. at the home of Julie Hunter, their new foster care provider. D.A. reported that Baronas questioned her regarding events that took place between appellant and two other foster children during the time that she lived in appellant’s home. Detective Kantura testified that D.A. met the criteria for being used as a witness against appellant at her criminal trial.

{¶ 19} This court has reviewed the entire record that was before the trial court, which includes the court’s well-reasoned opinion and judgment entry summarized above. Upon consideration of the foregoing, we agree with the trial court that there is sufficient evidence of a serious potential conflict to warrant the disqualification of Baronas as appellant’s defense counsel in criminal case No. CR0201102258. Accordingly, we find that the trial court did not abuse its discretion, and appellant’s assignment of error is not well-taken.

{¶ 20} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

Thomas J. Osowik, J.

James D. Jensen, J.
CONCUR.

JUDGE

JUDGE

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
