

[Cite as *Fried v. Abraitis*, 2016-Ohio-934.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103070

**ADAM FRIED, FIDUCIARY OF THE ESTATE OF
VLADA SOFIJA STANCIKAITE ABRAITIS**

PLAINTIFF-APPELLEE

vs.

SARUNAS V. ABRAITIS, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Probate Court Division
Case No. 2015ADV203909

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

RELEASED AND JOURNALIZED: March 10, 2016

ATTORNEY FOR APPELLANT

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ATTORNEYS FOR APPELLEES

**ADAM FRIED, SUCCESSOR ADMINISTRATOR OF THE ESTATE OF
STANCIKAITE ABRAITIS**

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**FOR VIVIAN ABRAITIS-NEWCOMER, PERSONAL REPRESENTATIVE OF
THE ESTATE OF VYTAUTUS T. ABRAITIS**

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Appellant, Sarunas V. Abraitis (“Sarunas”), appeals the trial court’s decision to disqualify his attorney, Catherine M. Brady (“attorney Brady”), from representing him in the concealment of assets proceeding pending in the Cuyahoga County Probate Court. For the reasons that follow, we reverse and remand.

{¶2} In 2011, Sarunas opened an estate in the probate court for his mother, Vlada Sofia Stancikaite Abraitis, and was appointed executor. Sarunas, as executor for the estate, retained the services of attorney Brady to assist in the administration. Throughout the administration of the estate, including the filing of the inventory and partial accountings, both Sarunas and attorney Brady signed the documents filed with the probate court.

{¶3} As the administration proceeded, questions arose regarding certain assets listed in the estate’s inventory — specifically, an investment account at Stifel Nicolaus. In September 2014, the probate court set a hearing on its sua sponte motion to remove Sarunas as executor for the estate. Following the hearing, the probate court removed Sarunas as executor, and appointed attorney Adam Fried (“attorney Fried”) as successor administrator to the estate. This court recently upheld the trial court’s decision removing Sarunas as executor. *In re Estate of Abraitis*, 8th Dist. Cuyahoga No. 102403, 2015-Ohio-4077.

{¶4} While the appeal was pending in this court, a complaint for concealment of assets was filed on January 9, 2015 by attorney Fried, as successor administrator, against

Sarunas and Vivian Abraitis-Newcomer, as personal representatives of the estate of Vytautas T. Abraitis.¹ The complaint alleged that Sarunas, while acting as executor, concealed estate assets, specifically, the Stifel account, with a date of death value of \$523,518.46. Sarunas, through his counsel, attorney Brady, filed his answer to the complaint denying that he concealed any assets from the estate.

{¶5} In March 2015, attorney Fried moved to disqualify attorney Brady as legal counsel for Sarunas. He alleged that attorney Brady's representation is a conflict of interest that violates Rule 1.9 of the Rules of Professional Conduct ("Prof.Cond.R.") because she acquired confidential information when she represented the estate as to its administration that is substantially related to the subject of the concealment action. Attorney Fried further alleged that because of attorney Brady's involvement in Sarunas's administration of the estate, she could become a necessary witness to the proceedings.

{¶6} Sarunas opposed the motion, contending that attorney Fried lacked standing to seek his counsel's disqualification on the basis of a conflict of interest because attorney Brady did not represent the Estate or the decedent; she only represented Sarunas, as the executor for the estate of Vlada.

{¶7} In granting attorney Fried's motion to disqualify, the probate court concluded:

The Court finds that Attorney Brady represented Defendant Abraitis in his capacity as Executor of the Estate of Vlada Sofija Stancikaite Abraitis.

¹Vivian Abraitis-Newcomer, as personal representative of the estate of Vytautas T. Abraitis, was named as a defendant in the concealment proceeding because Vytautas was a surviving son at the time of the decedent's death and is an heir-at-law. No allegation of misconduct was alleged against Vytautas or his estate.

The Court further finds that a review of the Estate filed reflects that Attorney Brady signed every document filed by Executor Abraitis as Attorney for Sarunas Abraitis as Executor of the Estate, including inventories and accountings.

The Court further finds that Attorney Brady acquired information as counsel for the Executor of the Estate as to administration of that Estate that is substantially related to the Estate's claim that Defendant Abraitis has concealed Estate Assets. The Court finds that Brady's continued representation of Sarunas Abraitis in this matter is contrary to the interests of the Estate and contrary to her former representation of Abraitis as Executor. The Court further finds that Attorney Brady may become a necessary witness to this action.

{¶8} Abraitis appeals from this decision, raising two assignments of error. In his first assignment of error, Abraitis contends that the trial court abused its discretion in granting attorney Fried's motion to disqualify counsel.

{¶9} ““The Ohio Supreme Court exercises exclusive jurisdiction over the admission of lawyers to practice law in Ohio and over the discipline of such lawyers.”” *Carr v. Acacia Country Club Co.*, 8th Dist. Cuyahoga No. 91292, 2009-Ohio-628, ¶ 14, quoting *Horen v. Bd. of Edn.*, 174 Ohio App.3d 317, 2007-Ohio-6883, 882 N.E.2d 14, ¶ 21 (6th Dist.), citing *Mentor Lagoons, Inc. v. Rubin*, 31 Ohio St.3d 256, 259, 510 N.E.2d 379 (1987).

{¶10} Despite this exclusive jurisdiction, ““lower courts have a duty to ensure that the attorneys who practice before it do not violate the disciplinary rules and those courts have the inherent power to disqualify an attorney from acting as counsel in a case where the attorney cannot or will not comply with the Code of Professional Responsibility and such action is necessary to protect the dignity and authority of the court.”” *Id.* at ¶ 15,

quoting *Horen* at *id.*, citing former Canon 3(B)(3) of the Code of Judicial Conduct; *Mentor Lagoons* at *id.*

{¶11} The trial court has the inherent authority to supervise members of the bar appearing before it, and this necessarily includes the power to disqualify counsel in specific cases. *Royal Indemnity Co. v. J.C. Penney Co.*, 27 Ohio St.3d 31, 33-34, 501 N.E.2d 617 (1986); *Mentor Lagoons* at 259. The trial court has wide discretion in the consideration of motions to disqualify counsel. *Royal Indemnity*. The determination of the trial court will not be reversed upon appeal in the absence of an abuse of discretion. *Centimark Corp. v. Browning Sprinkler Service, Inc.*, 85 Ohio App.3d 485, 487, 620 N.E.2d 134 (8th Dist.1993). An “abuse of discretion” is more than an error of law or judgment; it implies the court’s attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983). A decision is unreasonable if there is no sound reasoning process that would support the decision. *Centimark*.

{¶12} In determining whether to disqualify a party’s attorney based on a conflict of interest, Ohio courts have applied the *Dana* test. See *Stanley v. Bobeck*, 8th Dist. Cuyahoga No. 92630, 2009-Ohio-5696, ¶ 13. In *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 889 (6th Cir.1990), the Sixth Circuit put forth a three-part test for the disqualification of counsel, stating that the court should determine whether: (1) a past attorney-client relationship existed between the party seeking disqualification and the attorney it seeks to disqualify; (2) the subject matter of those

relationships is substantially related; and (3) the attorney acquired confidential information from the party seeking disqualification. The moving party bears the burden of demonstrating the need to disqualify counsel. *Centimark* at 489.

{¶13} On appeal, Sarunas only challenges the first prong of the *Dana* test — a past attorney-client relationship existed between the party seeking disqualification and the attorney it seeks to disqualify. Sarunas claims that attorney Fried, as successor administrator of the estate, lacked standing to bring the motion to disqualify counsel because no past attorney-client relationship existed. Sarunas asserts that attorney Brady did not have an attorney-client relationship with the estate or the decedent, but rather only with Sarunas as executor of the estate. We agree.

{¶14} The issue is whether an attorney retained by the fiduciary of an estate to assist in the administration of the estate represents the estate itself. Sarunas claims the attorney does not. In support, he cites to New York case law that provides that an attorney retained by an estate fiduciary for the performance of estate duties is the attorney for the fiduciary, not for the estate. *Estate of Mary F. Harris*, 2008 N.Y. Misc. LEXIS 5380 *4-5 (Aug. 27, 2008). *See also In re Public Admr. of Kings Cty.* 2 Misc.2d 65, 150 N.Y.S.2d 511 (Mar. 2, 1956); *Matter of Schrauth*, 292 N.Y.S. 925 (1937). This is also the law in Ohio.

{¶15} Sarunas, in his capacity as executor of the estate, retained attorney Brady to assist in the administration of the estate. This action is permissible under R.C. 2109.03, which authorizes, but does not require, a fiduciary in a probate estate to obtain the

services of counsel. The Ohio Supreme Court has explained that “R.C. 2109.03 provides that upon court appointment, the fiduciary has discretion to select counsel who will represent him during the administration of the estate. Under this statutory scheme, it is *important* to note that the attorney represents the fiduciary, *not* the estate.” (Emphasis added). *In re Deardoff*, 10 Ohio St.3d 108, 109, 461 N.E.2d 1292 (1984); *see also In re Estate of Usiak*, 172 Ohio App.3d 262, 2007-Ohio-3038, 874 N.E.2d 838, ¶ 34 (7th Dist.).

{¶16} Therefore, “when attorneys state they are appearing on behalf of the estate, such a statement is technically incorrect because the attorney is representing the personal representative.” *Estate of Mary F. Harris*, at *4-5; *see also* R.C. 5815.16 (an attorney who performs legal services for a fiduciary, has no duty or obligation to any third party to whom the fiduciary owes fiduciary obligations). Accordingly, when Sarunas was removed as executor of the estate, attorney Brady did not remain the “attorney of the estate;” rather, her legal services were also removed.

{¶17} Because attorney Brady did not represent the estate, the first prong of the *Dana* test cannot be satisfied. As such, Attorney Fried, as successor administrator to the estate, lacks standing to assert the conflict. *Morgan v. N. Coast Cable Co.*, 63 Ohio St.3d 156, 586 N.E.2d 88 (1992) (a stranger to the attorney-client relationship lacks standing to assert a conflict of interest).

{¶18} Additionally, the trial court’s decision to disqualify attorney Brady because she may be a witness to the proceedings is mere speculation at this time. In fact, attorney

Fried stated in his motion to disqualify that the decision whether attorney Brady's representation of Sarunas violates Prof.Cond.R. 3.7, is "premature." Nevertheless, he requested that the court disqualify attorney Brady under Prof.Cond.R. 3.7 because she could be a witness.

{¶19} Again, the burden of proving that disqualification is necessary falls upon the moving party. *Centimark*, 85 Ohio App.3d at 487, 620 N.E.2d 134. Notwithstanding the absence of any analysis or discussion of Prof.Cond.R. 3.7 by attorney Fried in his motion, the record does not support that the trial court considered the factors contained in Prof.Cond.R. 3.7. "When a trial court reviews a motion for disqualification under Prof.Cond.R. 3.7, the court must: (1) determine whether the attorney's testimony is admissible and, if so, (2) determine if disqualification is necessary and whether any of the exceptions to Prof.Cond.R. 3.7 are applicable." *McCormick v. Maiden*, 6th Dist. Erie No. E-12-072, 2014-Ohio-1896, ¶ 11, citing *Baldonado v. Tackett*, 6th Dist. Wood No. WD-08-079, 2009-Ohio-4411, ¶ 20.

{¶20} Accordingly, the trial court abused its discretion in granting attorney Fried's motion to disqualify attorney Brady as counsel for Sarunas in the concealment proceedings. Finding merit to Sarunas's first assignment of error, his second assignment of error contending that the trial court erred when it failed to hold a hearing is moot.

{¶21} Judgment reversed and remanded.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR