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Summary of Liapis v. Second Judicial Dist. Ct., 128 Nev. Adv. Op. 39

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Liapis v. Second Judicial Dist. Ct., 128 Nev. Adv. Op. 39 (August 9, 2012)¹

PROFESSIONAL RESPONSIBILITY— CONFLICTS OF INTEREST
FAMILY LAW - DIVORCE

Summary

An interlocutory writ of mandamus from a district court order disqualifying an attorney from representing his father in his parents' divorce case.

Disposition/Outcome

An attorney can represent one of his or her parents in his parents' divorce proceeding and is not automatically disqualified for doing so. Such representation does not violate the appearance of impropriety rule because no such rule exists in Nevada. A moving party also lacks standing to bring such a suit if the attorney is not the moving party's attorney, unless he or she can establish a confidential or fiduciary relationship. Such a relationship is not presumed and must be established as a matter of fact. Finally, disqualification is not appropriate during the pretrial phase of the proceedings if the attorney is a potential witness.

Factual and Procedural History

Real party in interest, Marie Liapis, filed a Complaint for Divorce. Theodore Liapis filed an Answer in proper person but later retained the couple's son, Mark Liapis, as his attorney. Marie filed a Motion to Disqualify Mark as Theodore's attorney. She stated three grounds for dismissal: (1) Mark's representation of Theodore and his pecuniary interest created the appearance of impropriety; (2) even though Mark had never represented Marie, there was an inherent conflict of interest because Mark could not zealously represent Theodore as Mark still professed his love for both his parents; (3) Mark was a potential witness in the case.

Theodore responded that Marie's boilerplate objections were insufficient to require Mark's disqualification and that Mark had no pecuniary interest in the estate. Theodore further argued that no conflict of interest existed as Mark had never represented Marie, and Theodore had waived any issue of conflict through informed consent. Finally, Theodore argued that Nevada law allows for potential witnesses to serve as counsel during the pretrial phase of the proceedings.²

The district court acknowledged the question of the appearance of impropriety but made no ruling on the issue. Instead, it referred to RPC 1.7, which governs concurrent conflicts of interest and found that Mark would not be able to provide diligent representation if he represented his father in court. Further, the court applied RPC 3.7 and found that the exclusion of Mark would not work a substantial hardship on Theodore. Therefore, Mark could only serve as a

¹ By Rami Hernandez.

² *DiMartino v. Dist. Ct.*, 119 Nev. 119, 121-122, 66 P.3d 945, 946-47 (2003).

witness in the case if he were disqualified as the attorney of record. The district court, therefore, disqualified Mark. The Petition for a Writ of Mandamus followed thereafter.

Discussion

Justice Hardesty wrote the unanimous opinion of the Court sitting in a three-justice panel. The questions before the Court were (1) whether representation by the child of the parties represents the appearance of impropriety; (2) whether a non-client has the standing to claim the concurrent-conflict-of-interest rule (RPC 1.7); and (3) whether an attorney can be disqualified during the pretrial phase of a proceeding because he is a potential witness.

I. Standard for writ relief

A writ of mandamus is only granted if no plain, speedy, and adequate legal remedy exists.³ The Court has previously indicated that a writ of mandamus is an appropriate way to challenge district court orders disqualifying attorneys.⁴

II. Mark's representation of Theodore did not create a disqualifying appearance of impropriety

Although the district court did not address the issue of the appearance of impropriety, Marie opposed writ relief under Canon 9 of the Model Code of Professional Responsibility adopted by the ABA, which states that a lawyer should avoid “even the appearance of professional impropriety.” Marie argued that Mark could not avoid the appearance of impropriety because he is the son of opposing litigants and is a potential future heir to the marital estate.

The Court rejected Marie's arguments. First, the older ABA Model's Code has since been replaced by the ABA's Rules of Professional Conduct, which expressly eliminated the “appearance of impropriety standard.”⁵ Notably, Nevada adopted the Model Rules of Professional Conduct in 1986 as SCR 150-203.5 and has since renumbered its own rules to track the numbering of the ABA Rules. Further, Nevada expressly refused to adopt Canon 9 of the Model Code.⁶ Instead, the Court found that the appearance of impropriety rule only applies to public lawyers, and only if the appearance is so extreme as to undermine public trust and confidence in the judicial system.⁷ That situation did not exist in the present case. Generally, a mere appearance of impropriety does not by itself warrant a lawyer's disqualification.⁸

³ *Millen v. Dist. Ct.*, 122 Nev. 1245, 1250, 148 P.3d 694, 698 (2006); see NEV. REV. STAT. 34.160.

⁴ *Millen*, 122 Nev. at 1251, 148 P.3d at 698; see also *Nevada Yellow Cab Corp. v. Dist. Ct.*, 124, Nev. 44, 49, 152 P.3d, 737, 740 (2007).

⁵ *In re 7677 East Berry Ave. Associates, L.P.*, 419 B.R. 833, 845 (Bankr. D. Colo. 2009); see also *MJK Family v. Corp. Eagle Management Services*, 67 F. Supp. 2d 584, 593 (E.D. Mich. 2009); *In re Wheatfield Business Park LLC*, 286 B.R. 412, 431 (Bankr. C.D. Cal. 2002).

⁶ *Brown v. Dist. Ct.*, 116 Nev. 1200, 1204 n. 4, 14 P.3d 1266, 1269 n. 4 (2000).

⁷ See *id.*; *Collier v. Legakes*, 98 Nev. 307, 310, 646 P.2d 1219, 1221 (1982).

⁸ *DCH Health Services Corp. v. Waite*, 115 Cal. Rptr. 2d 847, 850 (Ct. App. 2002).

III. Marie lacked standing to seek Mark's disqualification pursuant to RPC 1.7

RPC 1.7(a) prohibits a lawyer from representing a client if it involves a concurrent conflict of interest, but even if a conflict arises, the lawyer can continue to represent the client if (1) the lawyer reasonably believes he will be able to provide diligent representation to the client; (2) the representation is not prohibited by law; and (3) each client gives informed consent in writing.

Before determining whether or not Mark's representation of his father represents a conflict of interest, the Court first had to determine whether Marie had standing to seek disqualification. The general rule is that only a current or former client has standing to bring forward a motion to disqualify.⁹ Some courts have allowed non-clients to bring a motion to disqualify in limited instances. First, if the breach of ethics "so infects the litigation" that it impacts the moving party's interest in a just and lawful determination of his or her claims, the non-client may bring forward a motion to disqualify.¹⁰ Standing can also come from a breach of a duty of confidentiality to the moving party, regardless of whether a lawyer-client relationship previously existed.¹¹

Here, Marie simply alleged that Mark's love for his parents impacted his ability to represent Theodore, not Marie. Marie did not argue how Mark's representation of his father affected her legal interest. Therefore, she did not prove that some "specifically identifiable impropriety" occurred.¹² Further Mark's father provided informed written consent that waived the conflict in accordance with RPC 1.7(b)(4). Because the Nevada Rules of Professional Conduct allow an attorney to represent a family member, no ethical breach "infect[ed] the litigation."

In addition, Mark's relationship with his mother did not establish a confidential relationship.¹³ Although a fiduciary relationship may exist through a family relationship,¹⁴ a family relationship by itself does not create such a relationship unless supported by additional facts.¹⁵ Whether a parent-child fiduciary relationship exists is a matter of fact and not presumed as a matter of law.¹⁶ In *Brown*, the Court found that disqualification is not warranted absent proof of a reasonable probability the attorney acquired privileged, confidential information.¹⁷ Here, Marie offered no evidence that Mark acquired confidential information from her.

⁹ MODEL RULES OF PROF'L CONDUCT R. 1.7 annot.; see also *Great Lakes Const., Inc. v. Burman*, 114 Cal. Rptr. 301, 307 (Ct. App. 2010).

¹⁰ *Colyer v. Smith*, 50 F. Supp. 2d 966, 971-72 (C.D. Cal. 1999).

¹¹ *DCH Health Services*, 115 Cal. Rptr. 2d at 849.

¹² *Brown*, 166 Nev. at 1205, 14 P.3d at 1280.

¹³ See *U.S. v. Chestman*, 947 F.2d 551, 568 (2nd Cir. 1991); *Latty v. St. Joseph's Society*, 17 A.3d 155, 161 (Md. Ct. Spec. App. 2011); *Economopoulos v. Kolaitis*, 528 S.E. 2d 714, 718 (Va. 2000).

¹⁴ *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 338 (1995).

¹⁵ *Simpson v. Dailey*, 496 A.2d 126, 128 (R.I. 1985); *Texas Bank and Trust Co. v. Moore*, 595 S.W. 2d 502, 508 (Tex. 1980).

¹⁶ *Latty*, 17 A.3d at 161; see also *Dino v. Pelayo*, 51 Cal. Rptr. 3d 620, 624 (Ct. App. 2006).

¹⁷ 116 Nev. at 1202, 14 P.3d at 1267. Other courts have similarly refused to disqualify counsel on similar grounds. See *Addam v. Superior Ct.*, 10 Cal. Rptr. 3d 39, 42 (Ct. App. 2004); *DCH Health Services*, 115 Cal. Rptr. 2d at 850-51.

Finally, Marie did not establish that Mark had a disabling “pecuniary interest” in his couple’s estate. While children may have an expectation in acquiring their parents’ estate, no child has a pecuniary right to his or her parent’s estate.¹⁸ Even if Marie had proven a pecuniary interest, a pecuniary interest by itself does not create a confidential or fiduciary relationship requiring disqualification.

IV. Mark’s status as a potential witness during the pretrial phase did not warrant disqualification

The Court had previously ruled that RPC 3.7 does not disqualify an attorney entirely from the case; instead, the attorney is simply prohibited from appearing as trial counsel.¹⁹ He or she may still represent a client in the pretrial stage.²⁰ Here, the district court abused its discretion when it disqualified Mark as an attorney because the case had not reached the trial phase.

Conclusion

The Court granted the Writ of Mandamus and overturned the district court’s order. The Court found that the district court abused its discretion when it disqualified the husband’s attorney because he was the child of both parties.

¹⁸ See, e.g., *In re Estate of Melton*, 128 Nev. ___, ___, 272 P.3d 668, 677 (2012); NEV. REV. STAT. 133.170.

¹⁹ *DiMartino v. Distr. Ct.*, 119 Nev. 119, 121, 66 P.3d 945, 946 (2003).

²⁰ *Id.* at 121-22, 66 P.3 at 946-947.