

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of
ASOKA HERATH and LALANIE
HERATH.

ASOKA HERATH,

Respondent,

v.

LALANIE HERATH,

Appellant.

B238292

(Los Angeles County
Super. Ct. No. PD041132)

APPEAL from an order of the Superior Court of Los Angeles County. R. Carlton Seaver, Judge. Affirmed

Vorzimer Masserman, Dean E. Masserman, and David A. Randall for Appellant.

David S. Delnero for Respondent.

Lalanie Herath appeals from the trial court's order denying her motion to disqualify opposing counsel in this marital dissolution action. We affirm.

BACKGROUND

On May 11, 2006, Asoka Herath filed a petition to dissolve his marriage to Lalanie Herath.¹ The record reflects that Asoka and Lalanie own a day care center for young children.

On August 30, 2011, Asoka had open heart surgery.² On September 27, 2011, the Department of Social Services initiated proceedings to revoke the day care center's license on the basis of various alleged statutory violations. Asoka and Lalanie retained consultants Robert and Patricia O'Connor to represent and assist them in those proceedings. (All subsequent references to "O'Connor" are to Robert O'Connor.)

O'Connor wished to meet with Asoka and Lalanie at the day care center in the morning of Saturday, October 1, 2011. O'Connor tried to telephone Asoka on September 30 but was unable to reach him. O'Connor then telephoned Asoka's attorney, David Delnero, and eventually learned that Asoka was not feeling well enough to attend the meeting the following morning. Delnero has represented Asoka since April 2006.

The O'Connors arrived at the day care center at approximately 9:45 a.m. on October 1, 2011. The day care center was having an "open house" that morning, and Lalanie began giving the O'Connors a tour of the facility while also attending to other guests.

Delnero arrived at approximately 10:00 a.m. and joined the O'Connors on their tour. Lalanie introduced him to the O'Connors as "David" and said he was an attorney, but she did not say that he represented Asoka. Later, after Delnero left, Lalanie told O'Connor that Delnero was Asoka's lawyer.

¹ Because the parties share a last name, we will refer to them by their first names to avoid confusion. No disrespect is intended.

² Our summary of the facts is drawn from the declarations and other documents in the record. We will describe any relevant factual disputes, but many of the material facts are undisputed.

According to Delnero, he was never alone with Lalanie, never asked her any questions, and never asked for a tour of the facility. According to Lalanie, Delnero asked for a tour and “asked questions and was treated as a prospective parent would be treated touring the facility.” She also testified that she was alone with him for 10 to 15 minutes. All witnesses appear to agree that Delnero was at the facility for approximately 20 to 30 minutes. O’Connor does not recall seeing Delnero alone with Lalani or hearing Delnero ask Lalanie any questions.

On October 5, 2011, Lalanie moved to disqualify Delnero on the basis of “gross ethical misconduct” because, in the course of his contact with her at the day care center on October 1, 2011, he communicated with her outside the presence of her attorney and without her attorney’s consent. Asoka filed written opposition, including declarations by O’Connor and Delnero. Lalanie, Delnero, and O’Connor all testified at the hearing on the motion.

The trial court denied the motion. The court stated that a case cited by Lalanie explained that ruling on a motion to disqualify counsel requires the court to engage in a “cautious balancing of competing interest[s].” The court determined that Delnero’s conduct was “not egregious” and that Asoka had “not had the opportunity to take advantage of [Delnero’s conduct] in some unpleasant way.” The court concluded that Delnero’s “offense is modest compared to the incredible downside of disqualifying counsel” and accordingly denied the motion. Lalanie timely appealed. An order denying a motion to disqualify counsel is appealable. (*Apple Computer, Inc. v. Superior Court* (2005) 126 Cal.App.4th 1253, 1263-1364.)

DISCUSSION

“We review a trial court’s ruling on a disqualification motion for abuse of discretion, and we accept as correct all express or implied findings that are supported by substantial evidence. . . . ‘However, the trial court’s discretion is limited by the applicable legal principles. . . . Thus, where there are no material disputed factual issues, the appellate court reviews the trial court’s determination as a question of law. . . . [A] disqualification motion involves concerns that justify careful review of the trial

court's exercise of discretion.” (*Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, 601.)

Lalanie first argues that “[d]e novo review is appropriate in this matter because there are no material facts in dispute.” We disagree, because some of the material facts are disputed. It is undisputed that Delnero had contact with Lalanie outside the presence of her attorney and without her attorney's consent, but the nature and extent of that contact—whether Delnero was ever alone with Lalanie, whether he asked her any questions, and what she told him—are disputed. Lalanie does not contend that contact between a lawyer and an opposing party outside the presence of the opposing party's lawyer and without that lawyer's consent must *always* result in disqualification, regardless of how minor the infraction and how grave the detriment of retaining substitute counsel. The nature and extent of Delnero's contact with Lalanie are therefore material, because they partly determine the gravity of Delnero's offense. We accordingly reject Lalanie's argument that there are no material factual disputes and that the trial court's order is consequently subject to de novo review. We therefore review the order for abuse of discretion.

Lalanie's only remaining argument is that the trial court abused its discretion because its order is not supported by substantial evidence. We are not persuaded.

Lalanie argues that no evidence supports the trial court's determination that Asoka would suffer severe detriment (“incredible downside”) if the motion were granted. We disagree. Delnero's declaration reflects that he has represented Asoka in this matter since April 2006 and that the case was set for trial by July 2008. It was reasonable for the trial court to infer that a replacement attorney would require a substantial amount of time to learn the facts, analyze the legal issues, and develop the arguments in order to duplicate the familiarity with the case that Delnero has acquired during five years of representation and trial preparation. Substantial evidence therefore supports the trial court's finding that Asoka would suffer severe detriment if the disqualification order were granted.

The trial court determined that Delnero's conduct was “not egregious,” that it had not conferred a significant tactical advantage upon Asoka, and that disqualification of

Delnero would cause severe detriment to Asoka. All of those determinations were supported by substantial evidence, namely, Delnero's declaration and testimony, according to which Delnero (1) has represented Asoka in this matter since 2006 and (2) merely received a tour of the day care center from Lalanie in much the same manner as any other guest attending the open house. Combined with the effect of a party's right to counsel of choice and an attorney's financial interest in representing a client (*Bell v. 20th Century Insurance Company* (1989) 212 Cal.App.3d 194, 197-198), both of which weigh against disqualification, the trial court's determinations amply supported the denial of Lalanie's motion to disqualify Delnero. The trial court did not abuse its discretion.

DISPOSITION

The order is affirmed. Respondent shall recover his costs of appeal.

NOT TO BE PUBLISHED.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.

JOHNSON, J.