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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

Estate of ELIZABETH HOULT
FONTAINE, Deceased.

JENNIFER HOULT,

Petitioner and Appellant,

v.

JASON FONTAINE,

Objector and Respondent.

G049595

(Super. Ct. No. 30-2013-00625456)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Monica L. Scheetz, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Jennifer Hoult, in pro. per., for Petitioner and Appellant.

Law Office of John K. York and Celinda Tabucchi for Objector and Respondent.

* * *

This appeal stems from the tragic December 14, 2009, murder-suicide shootings by Bonnie Hoult,¹ which killed Bonnie, her daughter Elizabeth Hoult Fontaine, and the two young daughters of Elizabeth and her estranged husband Jason Fontaine. Elizabeth's cousin Jennifer Hoult petitioned for probate of Elizabeth's will and to be appointed administrator of Elizabeth's estate (the Estate). Jason objected to Jennifer's petition and filed his own petition for probate of Elizabeth's will and for appointment of a different administrator. Jennifer moved to disqualify Jason's attorneys on grounds they improperly simultaneously represented Jason in his alleged efforts to (1) *attack* the Estate in civil actions, and (2) control the selection of the administrator authorized to *defend* the Estate against Jason's attacks.

The court denied Jennifer's disqualification motion. We affirm the court's ruling.²

FACTS AND PROCEDURAL HISTORY³

In 2006, Elizabeth obtained a \$2 million Met Life life insurance policy, naming Jason the primary beneficiary. On January 17, 2008, Elizabeth's and Jason's daughter

¹ For brevity and to avoid confusion, we refer to the Fontaines and the Hoult's individually in this opinion by their first names. We mean no disrespect.

² The order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(6) and *Meehan v. Hopps* (1955) 45 Cal.2d 213, 215.

³ We disregard those facts recited in Jennifer's opening brief which refer to the record in a prior appeal not in this same case or not incorporated in the designation of record for this appeal. (Cal. Rules of Court, rule 8.147(b)(1).) We disregard the statement of facts in Jason's respondent's brief because it includes no record references. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246.) The first paragraph of our factual and procedural recitation is taken from the court's minute order denying Jennifer's disqualification motion.

Catherine allegedly reported that Jason was sexually abusing her. On January 23, 2008, Elizabeth changed her primary beneficiary to Bonnie, purportedly in response to Jason's threats to kill Elizabeth. In December 2008, Elizabeth filed for divorce. In June 2009, Elizabeth obtained a State Farm life insurance policy in the amount of \$2 million, naming Bonnie the primary beneficiary and Jennifer the contingent beneficiary. In December 2009, Elizabeth died as a result of the tragic murder-suicide shootings. In early 2013, Jennifer and Jason filed competing petitions for probate of Elizabeth's will and for letters of administration for the Estate. The court approved Jennifer's petition and denied Jason's competing petition, but Jason appealed from the court's order. We reversed the court's order and remanded the matter for an evidentiary hearing. (*Hoult v. Fontaine* (June 25, 2014, G048590) [nonpub. opn.])

Jennifer moved for disqualification of Jason's counsel "on the grounds that Celinda Tabucchi and John York have repeatedly violated Rule [of Professional] Conduct 3-310(C) . . . by engaging in prohibited simultaneous representation of adverse interests, namely representing [Jason's] civil actions attacking the [Estate] while simultaneously representing [Jason's] attempt to control the selection of the legal representative who will have authority to defend [the Estate], his adversary, against his attacks."

In her amended memorandum of points and authorities, Jennifer alleged: "Since 2008, Tabucchi and York have represented [Jason] as adversary of Elizabeth and her Estate. [Citation.] They now represent [Jason's] State Farm Action, Lexus Action, Deposition Notice, and Appeal. [Citation.] The State Farm Action seeks to rewrite Elizabeth's Met Life Policy and State Farm Policy to benefit [Jason] by removing Elizabeth's designated beneficiaries from the policies and naming [Jason] her beneficiary in their places, in violation of Elizabeth's clear contractual intent. [Citation.] The Lexus Action seeks to invalidate Elizabeth's Lexus Contract to divest Bonnie's Estate of the benefit of her bargain and to unjustly enrich [Jason] [Citation.] [Jason's]

Deposition Notice seeks to obtain Elizabeth’s privileged lawyer-client communication from the Dissolution Action in which he was her adversary. [Citation.] [Jason’s] Appeal resulted in a stay on Jennifer’s appointment as the Administrator of this Estate . . . , rendering the Estate unrepresented and thus unable to defend itself against [Jason’s] pending trial on the Lexus Action” (Fn. omitted.)

The court denied Jennifer’s disqualification motion because Jason was never appointed the Estate’s personal representative and therefore his counsel had “never been in the position of representing [him] in the role of administrator of the estate while also representing [him] as a creditor or adversary of the estate.”

DISCUSSION

Jennifer contends Jason’s counsel simultaneously represented him (1) in his attacks on Elizabeth’s contracts, and (2) in his efforts to prevent Jennifer from being appointed as the Estate’s personal representative and to thereby divest the Estate of its ability to exercise its right to defend against his attacks. She argues it “is a question of first impression whether an attorney may permissibly simultaneously represent legal attacks against a decedent while also representing attacks on that decedent’s estate’s ability to exercise its constitutional right to respond.”⁴

⁴ Jennifer also argues Jason’s counsel simultaneously represented him in his dual roles as administrator of Bonnie’s estate and as a plaintiff against Bonnie’s estate. The contention has no place in this appeal concerning Elizabeth’s will and estate. Jennifer made the same argument in her appeal from orders made in the probate of Bonnie’s estate, including the denial of Jennifer’s disqualification motion in that proceeding. We affirmed the order denying Jennifer’s disqualification motion in a nonpublished opinion, concluding that Jennifer lacked standing to seek the disqualification of Jason’s counsel. (*Hoult v. Fontaine* (July 30, 2015, G049302) [nonpub. opn.])

We doubt that Jennifer has standing to seek the disqualification of Jason’s counsel in the probate of the Estate. She never had an attorney-client relationship with Jason’s counsel, nor did she ever have any other confidential relationship with them. The circumstances in which a nonclient has standing to seek the disqualification of opposing counsel are exceedingly rare. (See, e.g., *Acacia Patents Acquisition, LLC v. Superior Court* (2015) 234 Cal.App.4th 1091.) But it is unnecessary to address the third-party standing issue in this case because it is easily resolved on the merits. There is simply no basis to disqualify Jason’s counsel from representing him in connection with the probate of the Estate.

Although a party’s standing to seek the disqualification of opposing counsel is a legal issue which we would independently review (*Great Lakes Construction, Inc. v. Burman* (2010) 186 Cal.App.4th 1347, 1354), we review the merits of a trial court’s decision on a disqualification motion for abuse of discretion. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 159.) We determine whether substantial evidence supports the court’s factual findings and independently review the court’s conclusions of law. (*Ibid.*) A “disposition that rests on an error of law constitutes an abuse of discretion.” (*Ibid.*) “The trial court’s ‘application of the law to the facts is reversible only if arbitrary and capricious.’” (*Ibid.*)

Relying on *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284, footnote 3, Jennifer urges this court to “hold that *per se* disqualification of an attorney and her firm is mandated when an attorney engages in this form of simultaneous representation.” Footnote 3 of *Flatt* states: “The paradigmatic instance of such prohibited dual representation — one roundly condemned by courts and commentators alike — occurs where the attorney represents clients whose interests are *directly* adverse *in the same litigation.*” (*Ibid.*)

Because Jason was never appointed administrator of the Estate, he has not held dual roles with directly adverse interests in this case. Consequently, his attorneys have not engaged in dual representation prohibited under footnote 3 of *Flatt v. Superior Court, supra*, 9 Cal.4th at page 284.

Nonetheless, Jennifer contends Jason’s counsel should be disqualified, because they allegedly improperly interfered with, or blocked, the Estate’s ability to defend itself against Jason’s attacks. She argues an attorney has no right “to select her opponent’s legal representative,” to “control[] her opponent’s representation,” and to thereby “create[] a non-adversary proceeding”

But the actions of which Jennifer complains — i.e., that Jason objected to Jennifer’s petition to administer the Estate, and filed his own competing petition to have Elizabeth’s father administer the Estate, and that his counsel represented him in doing so — are expressly authorized under Probate Code section 8004. Under subdivision (a) of that section, the appointment of a personal representative may be contested and the contestant may petition for the appointment of another person as the representative.

But Jennifer contends an attorney may not represent a *creditor* of an estate in taking such actions. She argues: “[A]n attorney cannot lawfully *first* represent a creditor’s legal attacks on the decedent, and *then*, while litigating those attacks, simultaneously represent the creditor’s Petition for Letters of Administration, because this enables the attorney to simultaneously control representation on both sides of the action.”

Jennifer is wrong. Petitioning for the appointment of an administrator of the Estate is simply not the same as representing that administrator if and when appointed. And Jason’s counsel never represented the administrator of the Estate. Under the Probate Code, any “interested person” (including a creditor) may petition for appointment of an estate’s representative. (Prob. Code, §§ 8000, subd. (a)(1), 48, subd. (a)(1) [“interested person” includes “creditor”].) Jason did not sue the Estate in either the State Farm Action

or the so-called Lexus action. By representing Jason in filing his statutorily authorized petition, Tabucchi and York did not engage in improper dual representation.

Further, although Jennifer complains that Jason has taken action against the Estate during a time when the Estate had no representative, and then “deprived” the Estate of representation, her assertion is not borne out by the record. Jennifer has not cited *any* action Jason has taken against the Estate. The Estate was not sued in either the State Farm Action or the so-called Lexus action. We discern nothing in the record suggesting even remotely that Jason (or his counsel) did anything whatsoever to deprive the Estate of representation. Jason’s counsel simply represented Jason in advancing his interests. That’s what lawyers are obligated to do.

The court did not abuse its discretion by denying Jennifer’s disqualification motion.⁵

⁵ Jennifer advised the court at oral argument that in the event we disagreed with her analysis and affirmed the order, she would have an “obligation” to report our dereliction of duty to the Commission on Judicial Performance. This announcement also followed the last substantive paragraph in her reply brief, wherein she asserted that we “should refer [Jason’s counsel’s] misconduct (a) to the California Bar with a recommendation for disbarment pursuant to, *inter alia*, Business and Prof. Code §6100 and §6104, and (b) to the Orange County District Attorney for prosecution for, *inter alia*, felonious conspiracy, obstruction, and perjury. Failure to take these corrective actions will announce to the public that the Orange County Court of Appeal protects lawbreaking attorneys and judges at the expense of litigants and the law.” Needless to say, we have decided this case based on the facts and the law. By filing this opinion, we most assuredly do not protect “lawbreaking attorneys and judges”

DISPOSITION

The order is affirmed. Jason shall recover his costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.