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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of LINGYUN and JACEK
CHYCZEWSKI.

LINGYUN CHYCZEWSKI,

Respondent,

v.

JACEK CHYCZEWSKI,

Respondent;

JOHN CHAKMAK,

Appellant.

G050620

(Super. Ct. No. 11D003110)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, James L. Waltz, Judge. Affirmed.

Buxbaum & Chakmak and John Chakmak for Appellant.

No appearance for Respondent Lingyun Chyczewski.

No appearance for Respondent Jacek Chyczewski.

I. INTRODUCTION

It's a wonder we don't see more of this kind of case. A spouse whose businesses have, over the years, been represented by a given attorney wants to have that same attorney represent him or her in divorce proceedings against a spouse who claims a community property interest in those businesses. Is the business attorney disqualified from representing what family lawyers call the "in-spouse"? Yes, at least where there is substantial evidence of a community interest in the businesses. A business attorney's loyalty must be to the business, not its controlling spouse in a dissolution action.

II. FACTS

Jacek, usually known as "Jack," and Lingyun Chyczewski were married in December 2001, and separated a little more than 10 years later, in January 2011.¹ There are no children of the marriage. According to Lingyun, the couple had a business relationship for four years prior to the marriage. We note in that regard that Jack established a Chinese corporation, Sparkstone Beijing, in 1996.

There is no dispute that prior to the marriage Jack owned several stone supply and importation businesses, the main one being a California corporation called Jolanta Tile. Jolanta is a subchapter S corporation, started in 1990 and incorporated in California in 1991. In addition to Jolanta, at the time of the 2001 marriage, Jack owned another California entity, Sparkstone Ltd., and three foreign corporations, Sparkstone Beijing, Sparkstone Lanzhou, and Sparkstone Ghana. During the marriage another five business entities were established, all domestic California LLCs. Altogether, by the time of separation in 2011, we count nine separate business entities which are part of – and we choose our words carefully here – the marital estate. It is possible there was a 10th entity, Star International Beijing, but there is only a tiny offhand reference to it in the

¹ The parties are referred in the trial papers as Jack and Lingyun and we follow suit. As is customary in family law proceedings, we refer to the parties by their first names, not out of disrespect, but to avoid confusion. (See *Rubenstein v. Rubenstein* (2000) 81 Cal.App.4th 1131, 1136, fn. 1.)

record not otherwise developed. To be as neutral as possible, we will refer to these business entities collectively as the “Chyczewski entities,” or the “Chyczewski businesses.” We list all the business entities in the marital estate in the margin, including the year they were established.²

Jack contends that all the Chyczewski entities, foreign or domestic, are without a community component. Lingyun, on the other hand, says they are “community businesses.” Lingyun also claims to have been employed in the Chinese or “wholesale end” of the Chyczewski businesses. Her job entailed building up relationships with Chinese vendors in China in order to obtain imported tile and stone.

In contentiously litigated, high-asset divorces, there is often a period of intense skirmishing at the beginning of the case as each side fights for the high ground from which to wage its campaign pending the final battle at trial. This case is no exception. Lingyun filed her petition for dissolution in May 2011. Less than three months later, on July 19, Lingyun sought an ex parte order to have the accounts of the six domestic businesses frozen, in order to prevent Jack from allegedly diverting business assets. She accused Jack of deliberately building up over \$650,000 in debt to various Chinese suppliers as a way of shifting assets to America where he could secrete them.³ She also referred to at least two lawsuits instituted in the Beijing People’s Court where

² Here’s our effort to compile a list from the record we have. Our shorthand names for each corporation attempt to reflect the domestic or foreign nature of the business. The date is the date that, according to Jack, each entity was established:

First, the six California entities:

(1) Jolanta Tile, a California corporation (*Jolanta*). 1990.
(2) Sparkstone LLC. (*Sparkstone California*) Originally established in 2001 as an Ltd., made into an LLC in 2006.

(3) Anastone Quarry and Sculpture LLC (*Anastone California*). 2006.

(4) JLC, LLC. (*JLC California*). 2004.

(5) Winheim, LLC (*Winheim California*). 2002.

(6) HGMJ, LLC (*HGMJ California*). 2004.

Next, the foreign entities:

(7) Sparkstone Beijing (*Sparkstone Beijing*). 1996

(8) Sparkstone Lanzhou (*Sparkstone Lanzhou*). 1999.

(9) Sparkstone Ghana (*Sparkstone Ghana*). 2000.

³ The three foreign Sparkstone entities, Beijing, Lanzhou and Ghana, had been closed by this point.

Chinese vendors were suing one of the foreign entities, Sparkstone Beijing, for unpaid goods. The trial court granted the request, forcing Jack to obtain Lingyun's consent for further business expenditures.

Just after the July 19 hearing, the attorney representing Jack in the divorce, John Chakmak of Buxbaum and Chakmak, sent an email to Lingyun's attorney seeking modification of the court's order so as to allow Jack to manage the business, and inveighing against the need to obtain Lingyun's approval for every little business expenditure. In passing, attorney Chakmak mentioned he had known Jack for over 15 years.

Chakmak sent a more formal communication to Lingyun's attorney on August 31, 2011, which is significant in showing the nature of the management squabbles that had developed between the parties to that point. In the letter, Chakmak asserted that Jack not only had no money to pay the Chinese vendors, but in fact *shouldn't* pay them. Apparently referring to the corporate status of the Chinese entities, he argued that neither Jack nor Lingyun had "personal liability for the debts of the Chinese companies" and even if they did, a Chinese creditor would have difficulties suing in California. He even argued that fiduciary duty *precluded* the domestic companies from bailing out the Chinese entities: "Given the precarious financial condition of the parties and the fact that the debts of the Chinese companies are not their personal obligations, it would probably be a breach of fiduciary duty to pay those debts. Money paid to creditors of the Chinese companies is money that the parties will not receive." In the same letter Attorney Chakmak recognized that Lingyun had "managed and controlled" three Chinese companies because she, after all, could speak Chinese.

In addressing the problem of unpaid Chinese creditors, the August letter adumbrated a future battle to be commenced in December when Lingyun filed an order to show cause (OSC) for the appointment of a receiver for the six domestic entities. Her request was based, among other things, on allegations of the dissipation of assets and the

abandonment of the Chinese end of the business, leaving Chinese creditors unpaid. In support of the request, Lingyun submitted a translated statement from a former Sparkstone Beijing employee named Jia who said her life had been threatened as the result of Sparkstone Beijing's unpaid debts.

In response, Jack contended it was *Lingyun* who mismanaged the Chinese operations, including, for example, giving management jobs to her brothers, who then botched the necessary fumigation required for a certain shipment. He also submitted a declaration from a forensic accountant making the point that what might have appeared a \$280,000 diversion reflected merely "intercompany sales from Sparkstone to Jolanta." Jack further asserted that Lingyun was withholding information about the precise nature of the vendor demands coming from China.

Lingyun's receiver request, as well as some other matters (such as interim spousal support and discovery) ultimately went off calendar. But before they went off, she filed a motion to disqualify Chakmak. While her motion was filed in August 2013, it was not heard until June 2014 because the trial judge who had been supervising the case retired in April 2014. In her supporting declaration on the disqualification motion, Lingyun recounted her work for the various foreign Chyczewski entities in the business. She was "Chief Executive Officer" of Jolanta's "Beijing office," and vice-president of Sparkstone Lanzhou, and Sparkstone Ghana.

The disqualification motion recounted that John Chakmak had represented Jolanta in at least four lawsuits over the course of the period 2003 to 2009,⁴ and had worked on documents in something called the "China Freight suit" that took place in China. Lingyun also presented evidence Attorney Chakmak was currently the agent for service of process for three Chyczewski entities, Jolanta, Anastone California, and

⁴ The four lawsuits are: one construction defect suit (the Gallipeo action from 2003) one vendor suing Jolanta (the Nedlloyd action of 2004), one case of Jolanta suing on a warranty claim (the Gwin action of 2008) and one action where Jolanta was apparently suing someone who owed it money (the Elliff action of 2008).

Sparkstone California, and submitted Chakmak's bills for work for all three companies. Lingyun said she had not been "previously aware of the conflict of interest presented by Mr. Chakmak's representation," but she became aware when Jack had sent mails requesting he "be retained to represent our businesses on current litigation." She then consulted her attorney about the request and "became aware of the conflict of interest that is present."

In opposition to the motion, Jack argued Jolanta is completely Jack's separate property, there is no community interest in it at all, and the four lawsuits in which Chakmak represented Jolanta were mere collection matters. He also said that while Lingyun might have received some glorified titles in the management of the foreign businesses, *he* was always in charge since Lingyun never had authority to act without his direction. He also argued that Chakmak's involvement in the China Freight action had been limited to notarizing and certifying "documents in California so they could be presented to a Chinese court."

As noted, the precipitant of the disqualification motion seems to have been a request by Jack to Lingyun that Chakmak represent Jolanta in a lawsuit brought against Jolanta and Sparkstone California by Amco Insurance Company. (This appears to be the "current litigation" to which Lingyun referred in her disqualification motion.) Lingyun objected to that formal request, so Chakmak did not represent Jolanta in the suit brought by Amco. That allowed Chakmak to say, in a responsive declaration filed in opposition to the disqualification motion, that he had never represented "any party to the Amco lawsuit." Even so, the same responsive declaration admitted that Jack had "consulted" Chakmak about the suit. According to Chakmak's declaration, the bills that Lingyun had presented in her papers were the product of those consultations. Chakmak's declaration also asserted that Lingyun "has admitted she has always known of my alleged role as the attorney for the community businesses." Jack himself declared Lingyun was aware of the

four lawsuits from the 2000's in which Chakmak represented Jolanta, because he told her about them.

The trial court heard the disqualification motion in June 2014. The tentative decision proposed to grant the disqualification motion, merely citing the “substantial relationship” test involving prior representation of a client by an attorney now representing a client adverse to the former client. After oral argument, the trial court issued a more detailed formal minute order granting the motion. On the issue of delay, the judge wrote: “The court accepts the Petitioner/Wife’s representation she filed the motion soon after discovering the conflict and otherwise the length of the cited delay in bringing this motion for recusal does not diminish the conflict.” On August 25, 2014, Chakmak’s law firm filed a notice of appeal from the order, ostensibly as a “claimant.”

III. DISCUSSION

A. *The Appeal*

Buxbaum and Chakmak style themselves claimants in this appeal. But the record reflects no order joining the law firm of Buxbaum & Chakmak to this dissolution as a claimant. And to qualify for joinder as a claimant in a family law proceeding, the law firm would have to have been adjudged as having “an interest in the proceeding” (Fam. Code, § 2021.5) However, *A.I. Credit Corp., Inc. v. Aguilar & Sebastinelli* (2003) 113 Cal.App.4th 1072, 1077, held that “Disqualified attorneys themselves have standing to challenge orders disqualifying them.”⁶ So we proceed to the merits of what is, at least ostensibly, Chakmak’s appeal.⁷

⁵ All undesignated statutory references in this opinion are to the Family Code.

⁶ The theory appears to be that both the parties and their lawyers are before the court as a matter of the court’s inherent power. (See *Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 9.)

⁷ Even if the Chakmak firm doesn’t have standing to appeal its own disqualification – and it has an obvious economic interest in the disqualification order – we would still consider the merits of this appeal. It is pretty obvious from the opening brief that, in substance, Buxbaum and Chakmak are acting as surrogates for *Jack*, who is the truly aggrieved party. Jack, after all, had to find and pay for new divorce counsel because of the order.

B. Evidence of Community Property Interest

Unlike attorney disqualification matters in corporate law, there is an uncertainty factor in family law reminiscent of chickens and eggs: How can the court know *in advance* that a given business is at least part community property so as to make that firm's business lawyer the lawyer for both spouses? An analogy may be drawn to the law of preliminary injunctions. When faced with a request for a preliminary injunction, a trial court doesn't *know* whether the party seeking an injunction will ultimately prevail on the merits or not. The court must work with an incomplete and truncated record and make an educated prediction of the future of the litigation. Accordingly, its decision is tested on an abuse of discretion standard based on the evidence presented to it.⁸ And that is how we will evaluate this trial court's decision.

First, four of the entities involved – Anastone California, JLC California, Winheim California, and HGMJ California – were established during the marriage. Under the great community property presumption in California law – property acquired during marriage while domiciled in California is presumed to be community property – those properties are presumptively community. (§ 760.) Jack made no effort in his opposition to the disqualification motion to rebut the community presumption by tracing the funds that were used to establish those businesses to separate property (e.g., a segregated bank account that existed prior to marriage). So, for the moment, we must assume at least four of the Chyczewski entities are community property.⁹

⁸ As our Supreme Court said in *Butt v. State of California* (1992) (*Butt*) 4 Cal.4th 668, 678, footnote 8: “The abuse-of-discretion standard acknowledges that the propriety of preliminary relief turns upon *difficult estimates and predictions* from a record which is *necessarily truncated and incomplete*. . . . The evidence on which the trial court was forced to act may thus be significantly different from that which would be available after a trial on the merits.” (Italics added.)

⁹ Sparkstone California was first established as an Ltd. prior to the marriage but converted into an LLC during it. The conversion, by itself, did not transmute its initially separate character. (*In re Marriage of Koester* (1999) 73 Cal.App.4th 1032 [no transmutation of separate property sole proprietorship into community property corporation merely because owner spouse incorporated business during marriage].)

Second, the other Chyczewski entities are susceptible of being adjudged as including in their value community interests as well. The record shows that both Jack and Lingyun worked in Chyczewski entity businesses during the marriage. And whatever Lingyun's actual authority over the Chinese entities, even Jack acknowledged they could not have functioned without Lingyun, whose ability to speak Chinese facilitated the ability of the domestic companies to obtain stone, tile and sculptures imported from China.

On this record we are unable to exclude from the realm of potential outcomes in this litigation a determination that community efforts caused the Chyczewski businesses, considered in the aggregate, to increase in value from the date of the 2001 marriage to the date of the 2011 separation. Therefore we cannot exclude the possibility there is a substantial community component to the Chyczewski entities.

There are two approaches, commonly called the *Pereira* and *Van Camp* formulas, used to ascertain that portion of the growth of one spouse's community property which is attributable to community efforts. (See generally *Pereira v. Pereira* (1909) 156 Cal. 1 [first allocate fair return to separate property investment in business, the balance of the growth is community] and *Van Camp v. Van Camp* (1921) 53 Cal.App. 17 [first ascertain reasonable value of community services, the balance is separate property].) Jack presented no evidence in the face of the disqualification motion that would necessarily compel a court to exclude either from a *Pereira* or *Van Camp* calculation.¹⁰

And third, given that four of the business entities are presumptively community, and there were substantial community efforts on behalf of all the entities

¹⁰ At this stage of the litigation, we offer no opinion as to which approach might be the more appropriate. We don't even know if there was any growth in the Chyczewski stone empire 2001 versus 2011 to require attribution to separate and community components. (Cf. *Beam v. Bank of America* (1971) 6 Cal.3d 12, 18-20 [using *Pereira* approach, there was insufficient growth in estate to find any separate property component].) But as we said, in such preliminary matters, courts must do what we can based on necessarily incomplete records. (See *Butt, supra*, 4 Cal.4th at p. 678, fn. 8.)

during the marriage, there is also the possibility community funds were commingled or otherwise transferred around during the marriage. The forensic accountant's declaration, for example, recognized there were substantial inter-company sales. And Lingyun's early declaration about Jack's strategy of not paying Chinese creditors in order to conserve domestic liquidity gives rise to a reasonable inference that the assets held by the various Chyczewski entities could be manipulated like peas under shells.

Thus on this record, the trial judge was within his discretion to predicate disqualification on the assumption that when attorney Jack Chakmak was acting on Jolanta's behalf, he was also acting on Lingyun's behalf.

C. Substantial Relationship

But that's only half the analysis. The next question is whether, as the trial court also ruled, there was a "substantial relationship" between Chakmak's work for Jolanta and Chakmak's continuing representation of Jack in Jack's divorce. It is significant here that the first California decision to articulate the "substantial relationship" test, *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483,¹¹ involved a former corporate general counsel who wanted to represent a party who had obtained an agency deal with the corporation during his tenure as general counsel. Even though there was no evidence counsel possessed any confidential information about the earlier agency agreement, the court premised disqualification on the fact that during his tenure he and his subordinates "were involved in matters bearing a substantial relationship to issues in the current litigation." (*Id.* at p. 490.)

Read as a whole, the record supports a reasonable inference that Chakmak has acted as the Chyczewski entities' de facto general counsel for a good part of the 2000's. And more than that, it also supports a reasonable inference he *continues* to act as those entities' general counsel to the present. We therefore conclude there is a substantial

¹¹ The court imported the test from its widespread use in the federal courts. (See *Global Van Lines, supra*, 144 Cal.App.3d at p. 488, fn. 3.)

relationship between Chakmak's 2001-2011 work for the Chyczewski entities and his representation of Jack in this divorce. Chakmak *is* – present tense – the California agent for service of process for at least three of the domestic Chyczewski entities, including the jewel in the crown, Jolanta. That means he is the point of first contact for any incoming litigation. The record further shows the Chyczewski businesses, taken together, represent a sophisticated economic enterprise. Lingyun's early declaration in July 2011, asserted the businesses had \$10 million in inventory, and sales of \$300,000 to \$400,000 a month. As shown by the plea from former employee Jia, the Chyczewskis operated a factory in China. ("During the time I was working in Spark Stone factory, I was in charge of production as well as purchase of materials.")

No sophisticated businessperson operates a conglomerate of that magnitude *without* having regular recourse to legal counsel for advice. And yet in his opposition to the disqualification motion, Jack made no attempt to point to any counsel other than Chakmak who provided legal counsel to his businesses.

Our conclusion is confirmed by what Chakmak's declaration did not say. Conspicuously missing is a categorical statement he did not function as *Jack's corporate or business attorney* during the marriage, or was not the person to whom Jack had turned for corporate advice. Chakmak admitted that when Jolanta was sued by Amco Insurance, it was Chakmak to whom he immediately turned.

Chakmak's brief relies heavily on the absence of any indication he ever *directly* represented Lingyun or received any confidential information from her. But safeguarding confidences is not the sum total of disqualification law. There is also the attorney's duty of *loyalty*. Under the duty of loyalty, a state bar member shall not: "Accept representation of more than one client in a matter in which the interests of *the clients potentially conflict*; or [¶] (2) *Accept* or continue representation of *more than one client* in a matter in which the interests of the clients *actually conflict*[" (Rules Prof. Conduct, rule 3-310(C), italics added.)

The word “accept” indicates that it is not enough for the business attorney to ostensibly step off further business work for the business upon *beginning* to represent the business’s controlling spouse in a divorce. The relevant time frame is the status quo right before the representation adverse to the spouse of the controlling spouse. Moreover, refusal to accept representation at the beginning is necessary to prevent the easy circumvention of the duty of loyalty by the expedient of giving corporate advice under the guise of giving family law advice.

Woods v. Superior Court (1983) 149 Cal.App.3d 931 (*Woods*) speaks directly to a family business attorney’s inherent conflict in undertaking to represent one spouse in a dissolution proceeding. The key point from *Woods* is that the business attorney necessarily “in a very real sense *continues* to represent” the other spouse. (*Woods, supra*, 149 Cal.App.3d at p. 935.)

Chakmak argues that *Woods* is distinguishable on several grounds, and he is certainly correct that the facts in *Woods* are stronger than the facts before us now: The attorney in *Woods* had conversations with the wife, including her opinion of the fair market value of the home. She discussed issues of the economic liability of the businesses. The attorney even wrote the wife’s will. (*Woods, supra*, 149 Cal.App.3d at p. 933.)

But the prior contacts with the wife in *Woods* were independent of the fundamental core of the court’s opinion. That core was the court’s statement about the existence of an “ongoing family corporation” and the need for a corporate attorney to show “undivided loyalty to the corporation” and not “take sides in a serious dispute among its owners.” (*Woods, supra*, 149 Cal.App.3d at p. 935.)

Let us expand on *Woods* for a moment. High-asset litigated divorces too often devolve into a contest of poor-mouthing. While business owners tend in the normal course of things to overstate their assets and optimistically project future income, all of a sudden in a divorce everything gets flipped over. To minimize their exposure to claims

of community property division and spousal support, business owners suddenly develop a new found pessimism about their markets, assets, and future income. And the in-spouse's usual business attorney can play a major role in the process of painting such a bleak picture.

Just such a scenario played itself out in this court some 20 years ago in *Schnabel v. Superior Court* (1994) 30 Cal.App.4th 758 (*Schnabel*). Even though *Schnabel* did not directly involve a disqualification motion (because there the in-spouse did not use corporate counsel as divorce counsel), it is still highly instructive as to the case before us.

In *Schnabel*, we noted that a company in which there was a community interest was “actively aid[ing]” the husband in the dissolution of the husband’s marriage by such devices as freezing wages and not distributing earnings. (*Schnabel, supra*, 30 Cal.App.4th at p. 763.) This court took a dim view of corporate counsel taking sides in the divorce litigation. As Justice Sonenshine wrote, “If this dissolution action were a sporting event, it would be as if the management of Orange Container were not only rooting for Terry, but had suited up and joined his team.” (*Id.* at p. 764.)

In *Schnabel*, this court quoted a swath of text from *Woods* that is dispositive of the case before us. The italicization is ours now: “[H]usband contends that an attorney acting for a corporation represents *it*, its stockholders and its officers in their representative capacity and does not represent the officers personally. . . . Husband argues that [counsel] never really represented either spouse and therefore is not acting adverse to a client or former client by now representing husband against wife. Not so under the circumstances before us. *We believe [counsel] necessarily represents both husband’s and wife’s interests in his [or her] role as attorney for the family corporation.* A corporation’s *legal adviser* must refrain from taking part in controversies among shareholders as to its control, and when his [or her] opinion is sought he [or she] must give it without bias or prejudice. . . . [¶] We believe the fact that [counsel] continues to

represent wife's interest in *a family business which will be the focus of the marital dissolution is sufficient to disqualify [him or her] from representing husband. . . .*”
(*Schnabel, supra*, 30 Cal.App.4th at p. 763, fn. 5, some italics added, quoting *Woods, supra*, 149 Cal.App.3d at pp. 935-936, fn. omitted, brackets inserted by *Schnabel* court.)

The case before us provides a concrete example of such a conflict in regard to the problem of the payment of the Chinese creditors. Normally, ongoing businesses want to pay their suppliers and maintain good relations, particularly if those suppliers provide the main raw material for the business. But here Chakmak advocated that the Chyczewski entities should, in effect, burn their bridges to China by stiffing creditors. It is possible he would not have advocated such a strategy if his only concern was the long term good of the Chyczewski stone empire.

Since Chakmak did not refute the evidence giving rise to the inference he had acted – indeed continues to act – as Jack's corporate attorney – and therefore as attorney for entities in which Lingyun has an interest – the trial court certainly did not abuse its discretion in granting the disqualification motion.

D. *Waiver*

The final question we must deal with is whether, as a matter of law, Lingyun brought her disqualification motion so late into the litigation that the trial court abused its discretion in granting the motion. (See *Liberty National Enterprises, L.P. v. Chicago Title Ins. Co.* (2011) 194 Cal.App.4th 839 [25 months to bring disqualification motion held unreasonable, so it was within trial court's discretion to deny disqualification motion].) This is a closer issue than the disqualification motion per se, because there is no question Chakmak had done considerable work in the dissolution on Jack's behalf in the two years prior to Lingyun's disqualification motion, so we may reasonably assume the delay did cause Jack some prejudice.

But the trial court determined Lingyun brought her motion relatively promptly after becoming aware of the conflict. The trial court could have also taken into

account the relative leisure with which Jack responded to the disqualification motion. Lingyun filed her motion in August 2013, but Jack did nothing to advance the motion despite the supposedly horrendous consequences to him if the motion were eventually granted. Rather, he let the disqualification motion ride with a slew of other motions and OSC's until a new trial judge finally got to it in June of 2014. These factors, plus the strength of the "inviolable" nature of the duty of loyalty (see *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 288) which Chakmak was violating by having two masters, render the judge's decision within the bounds of reason.

We would add that Chakmak has further undercut any concern that the trial court abused its discretion by tarrying in seeking appellate relief. Instead of filing a petition for writ in this court, which would have prompted our immediate attention on the prejudice to Jack from the disqualification, Chakmak choose the option of an appeal, resulting in a delay of another year. All in all we cannot characterize the trial court's analysis as arbitrary or capricious. It may have been a close call, but the analysis of the court below seems sound.

IV. DISPOSITION

The disqualification order is affirmed. Since no respondent's brief has been filed, there are no costs on appeal to allocate.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.