2014 IL App (2d) 140029-U

No. 2-14-0029

Order filed March 25, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF STACEY VAN PEENEN, Petitioner-Appellant, and CURTIS VAN PEENEN, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of DuPage County. No. 12-D-1275 Honorable Brian R. McKillip, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in granting the husband's motion to disqualify the wife's attorney.

¶ 2 Stacey Van Peenen appeals the trial court's granting of Curtis Van Peenen's petition to disqualify her attorney. The disqualification took place mid-divorce proceedings, as Stacey wished to change her counsel after the performance of certain discovery procedure but before trial. Stacey petitioned this court for leave to appeal, pursuant to Illinois Supreme Court Rule 306(a)(7) (eff. Feb. 16, 2011). We granted leave, and the parties have chosen to stand on their

previously submitted petitions and supporting record. For the reasons that follow, we affirm the trial court's ruling.

¶ 3 I. BACKGROUND

¶ 4 In 2012, Stacey filed a petition for dissolution of marriage. She was initially represented by Esp, Kreuzer, Cores, LLP. Curtis sought counsel at The Stogsdill Law Firm, PC. He partook in a consultation, for which he paid $300, but he ultimately chose not to retain the firm.

¶ 5 In November 2013, The Stogsdill Law Firm, on behalf of Stacey, filed a motion for substitution of attorney. Curtis filed an objection and moved to disqualify the firm. Curtis, citing Rule 1.10(b) of the Illinois Rules of Professional Conduct, argued that the firm could not represent Stacey, because it had previously had an attorney-client relationship with him. Rule 1.10(b) states:

> "(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
>
> (2) any lawyer remaining in the firm has information protected by 1.6 and 1.9(c) that is material to the matter." Ill. S. Ct. Rs. Prof'l Conduct R. 1.10(b) (eff. Jan. 1, 2010).

¶ 6 In December 2013, the trial court conducted a hearing on the motion to disqualify. Curtis was the only witness, and Stacey did not call any witnesses. Curtis testified that, in May or June of 2012, he made an appointment for a consultation with The Stogsdill Law Firm. He was looking for a firm to represent him in his impending divorce. He paid $300 for the consultation,

and he met primarily with attorney Nick Galasso. However, the consultation lasted over one hour, and he met with two other attorneys as well. One female attorney was introduced but only stayed in the room for 5 minutes. Another male attorney stayed in the room for 15 minutes. Curtis could not remember the names of either of these attorneys. Curtis discussed matters related to his divorce, including child support and custody, emails pertaining to Stacey's alleged infidelity, and an upcoming job opportunity. In considering whether to take the job, Curtis had to consider his current disability status. Both Galasso and the other male attorney provided advice on the job opportunity. Both Galasso and the other male attorney reviewed the emails, provided advice on the emails, and kept a copy of the emails. Both attorneys took notes as Curtis spoke. Curtis believed these matters to be confidential.

¶ 7 In response, Stacey submitted 10 affidavits from attorneys who were employed at the Stogsdill firm at the time in question. Galasso, who had since left the firm, attested that he met with Curtis alone. No other attorney was present. He did not share any information from the consultation with any other lawyer. Nine additional attorneys, who currently worked at the firm, including William Stogsdill, also submitted affidavits. Each of the attorneys attested that he did not participate in the consultation and that he had no knowledge of what occurred in the consultation. Each attested that he did not communicate with Galasso's female secretary about what occurred in the consultation. However, none of the affidavits contained a statement that every attorney then at the firm submitted an affidavit. None of the affidavits contained a statement that there were no female attorneys at the firm. Nevertheless, Curtis now seems to concede these points.

¶ 8 During argument, the trial court asked: "We're missing part two [of Rule 1.10(b) concerning lawyers remaining in the firm who obtained protected information]. I mean, do you

agree?" Curtis, through his attorney, stated that he did not agree. He reminded the judge that he met with two other attorneys aside from Galasso. The court stated it would take judicial notice that no female attorney worked at the firm. It would now consider whether another male attorney, in addition to Galasso, was present. The court took the matter under advisement.

¶ 9 On December 9, 2013, the trial court granted the motion to disqualify in a written order. The court stated that it had "no doubt" that an attorney-client relationship formed between Curtis and Galasso, not only because of the $300 fee, but also because of the nature of the conversations regarding child support, custody, and job opportunities. "Most significantly," the male attorney (whose name Curtis could not recall) gave Curtis advice on an upcoming job offer. The court realized that Curtis's testimony was somewhat compromised by his statement that a female attorney was present. Still, the court found that, under the circumstances, Rule 1.10(b) prevented The Stogsdill Law Firm from representing Stacey in the remainder of the divorce proceedings.

¶ 10 Stacey moved to reconsider. Her primary argument attacked Curtis's credibility. The trial court responded to the credibility argument as follows:

> "I did consider the affidavits of the attorneys from [T]he Stogsdill Law Firm.
>
> I also considered seriously the testimony of [Curtis].
>
> At least with respect to factual matters, I did not believe that [Curtis] was lying with respect to the female attorney, but rather incorrect.
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> *** I do take into account the fact that going through a divorce in which custody is being challenged is a significant event in an individual's life. It doesn't happen very often, and memories like that can be burned into his brain much, much deeper than the memory of an attorney, who might be called in for 15 minutes, 1 day, 18 months ago,

which is why I think I put so much more weight on [Curtis's] testimony as to what occurred that morning."

¶ 11 Stacey also presented a *new* challenge to the court's finding that a remaining member of the firm had obtained protected information. She argued that, even if the material may have been protected at one point, it was no longer protected because the information has since come out in pretrial proceedings. Stacey argued that, during the 18 months of divorce proceedings that took place before she sought representation from The Stogsdill Law Firm, much of the allegedly privileged information was disclosed. For example, the parties underwent custody evaluations, the appointment of a guardian *ad litem* (GAL), and submitted financial affidavits. Stacey argued that information concerning Stacey's infidelity was in the custody report, but she did not submit a copy of the report and it is not in the record. In Stacey's view, the information was no longer confidential.

¶ 12 The trial court rejected the new argument, stating simply that Curtis made disclosures that would be material to the present litigation. The court denied the motion to reconsider. This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Stacey appeals the disqualification of The Stogsdill Law Firm. The disqualification of an attorney may be necessary where the opposing party has already formed an attorney-client relationship with that attorney. See, *e.g.*, *King v. King*, 52 Ill. App. 3d 749,752-53 (1977). At the same time, the disqualification of an attorney is a drastic measure, because it destroys an attorney-client relationship and prevents a party from proceeding with the counsel of his or her choosing. *In re Marriage of Stephenson*, 2011 IL App. (2d) 101214, ¶ 19. The trial court should grant a motion to disqualify only when absolutely necessary. *Id*. The party seeking

disqualification of an attorney carries a heavy burden of proof, and he or she must show that the motion for disqualification is not being brought as a tactical weapon to gain undue advantage in the litigation. *Id.* A trial court's decision to grant a motion to disqualify an attorney will not be disturbed absent an abuse of discretion. *Id.* ¶ 20. A trial court abuses its discretion when no reasonable person would agree with its ruling. *Id.*

¶ 15 Here, the trial court found that Rule 1.10(b) of the Rules of Professional Conduct required the disqualification of The Stogsdill Law Firm. Again, that rule states:

> "(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
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> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
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> (2) any lawyer remaining in the firm has information protected by 1.6 and 1.9(c) that is material to the matter." Ill. S. Ct. Rs. Prof'l Conduct R. 1.10(b) (eff. Jan. 1, 2010).

¶ 16 Stacey concedes that Curtis had an attorney-client relationship with Galasso: "By virtue of *Newton* [*i.e.*, *In re Marriage of Newton,* 2011 IL App. (1st) 090683], it can be established that Galasso would in fact be prohibited from representing [Stacey] because he had interviewed personally with [Curtis]." She also concedes that the matter for which she now seeks representation from the firm is the same or substantially related to that in which Galasso represented Curtis. However, she argues that the trial court erred by allowing general principles of "attorney fidelity" to trump the plain language of Rule 1.10(b). Stacey's introductory "statement of the issues" lists four points, but she does not carry these points into the main

argument portion of her brief. We characterize her argument as a two-part challenge to the second prong of Rule 1.10(b). These challenges are: (1) Curtis's testimony is not credible, particularly Curtis's statement that another male attorney who remains at the firm was present during discussions and gained access to the protected information; and (2) the retained materials in question have, at this point, come out in pretrial discovery procedure such as the child custody evaluations and financial affidavits; therefore, they are no longer "protected information." For the reasons that follow, we disagree that the trial court let general principles of attorney fidelity trump the plain language of Rule 1.10(b).

¶ 17 Stacey's first argument is a direct challenge to the trial court's credibility determination. Stacey notes that Curtis could not name an attorney other than Galasso, that Curtis falsely testified to meeting with a female attorney, and that even the court stated: "We're missing part two [concerning lawyers remaining in the firm]." Stacey reminds this court that Curtis had the burden of establishing that the firm should be disqualified and that, particularly in the face of the 10 affidavits submitted by attorneys from the firm indicating that no other attorney was present with Galasso, Curtis did not meet that burden.

¶ 18 Where there is conflicting testimony, the trial court is in a better position than a court of review to observe the demeanor of the witnesses, judge their credibility, and determine the weight the testimony should receive. *Sohaey v. Van Cura*, 240 Ill. App. 3d 266, 293 (1992). We will not substitute our judgment as to the credibility of the witnesses for that of the trial court unless the trial court's findings are against the manifest weight of the evidence. *In re Marriage of Homan*, 126 Ill. App. 3d 133, 137 (1984). A decision is against the manifest weight of the evidence only where the opposite result is clearly evident or the determination is unreasonable,

arbitrary, and not based on the evidence presented. *In re S.R.*, 326 Ill. App. 3d 356, 360-61 (2001).

¶ 19 Here, we cannot say the trial court's credibility determination was against the manifest weight of the evidence. True, Curtis's testimony directly conflicted with the affidavit of Galasso, who stated that no other attorney participated in the consultation. And, Curtis's testimony was weakened by his obviously false claim that a female attorney was present. However, it is the role of the trial court to resolve these discrepancies. In its written ruling, the court acknowledged that Curtis's testimony was somewhat compromised by his assertion that a female attorney was present. At the motion-to-reconsider hearing, the court further explained its credibility determination, again, stating:

> "I did consider the affidavits of the attorneys from [T]he Stogsdill Law Firm.
>
> I also considered seriously the testimony of [Curtis].
>
> At least with respect to factual matters, I did not believe that [Curtis] was lying with respect to the female attorney, but rather incorrect.
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> *** I do take into account the fact that going through a divorce in which custody is being challenged is a significant event in an individual's life. It doesn't happen very often, and memories like that can be burned into his brain much, much deeper than the memory of an attorney, who might be called in for 15 minutes, 1 day, 18 months ago, which is why I think I put so much more weight on [Curtis's] testimony as to what occurred that morning."

¶ 20 Stacey takes out of context the court's statement that "we're missing part two." The court made that statement as a prompt for Curtis to explain why that viewpoint was wrong. Curtis then explained that at least one other male attorney aside from Galasso was present at the

consultation. Curtis provided details concerning his conversation with the other male attorney. He stated that the other male attorney advised him about a job opportunity and that the other male attorney accepted a copy of an email concerning Stacey's infidelity. Stacey implicitly asserts that the court unreasonably favored the memory of one person (Curtis) against the memory of ten people (the ten attorneys who presented affidavits). However, it is not as extreme as that. It is really the memory of one person (Curtis) against the memory of two people (Galasso and the one other male attorney who was present). The eight other attorneys did, in the court's view, accurately report that they were not present in the consultation. The court expressly found that Curtis was truthful. We will not disturb this finding.

¶ 21 Stacey's next argument is relatively novel. Again, she argues that the retained materials in question have, at this point, come out in pretrial discovery procedure such as the child custody evaluations and financial affidavits. Therefore, in Stacey's view, they are no longer "protected information." Stacey raised this argument for the first time at the hearing on the motion to reconsider. Prior to that, she had merely argued that Curtis never turned over protected information to begin with. When a trial court denies a motion to reconsider based on new matters, such as additional facts or *new arguments or legal theories* that were not presented during the course of the proceedings leading to the issuance of the order being challenged, we will not disturb the trial court's ruling unless it abused its discretion. *Muhammad v. Muhammad–Rahmah*, 363 Ill. App. 3d 407, 415 (2006).

¶ 22 Stacey does not cite case law that is directly on point.[1] However, she does point to relevant language in the rules. Rule 1.10(b) of the Rules of Professional Conduct describes

[1] Stacey cites *Stephenson*, 2011 IL App (2d) 101214, ¶ 36, which is distinguishable because the court in that case found no attorney-client relationship with the initial attorney. In

"protected information" as set forth in, *inter alia*, Rule 1.9(c). Rule 1.9(c) plainly states that "a firm [that] has formerly represented a client in a matter shall not thereafter *** use information relating to the representation to the disadvantage of the former client *except* *** *when the information has become generally known*." Ill. S. Ct. Rs. Prof'l Conduct R. 1.9(c) (eff. Jan. 1, 2010). Therefore, there is some support for Stacey's argument that, because information has come out in discovery, it is "generally known" and is, therefore, no longer protected. In theory, the argument has some legal merit.

¶ 23 In practice, however, Stacey has not pointed to sufficient facts in the record to convince us to reverse the trial court. We understand that Curtis bore the overall burden of proof before the trial court. However, where Stacey's argument at the motion to reconsider and on appeal is that an exception should apply to the trial court's findings, we expect her to have set forth a sufficient record. Stacey attaches a record showing that the custody evaluations have taken place and financial affidavits have been submitted. However, the record does not contain the evidence upon which the evaluators and the court relied (in entering any temporary orders). Therefore, we have no way of knowing what protected information was disclosed or if *all* the protected information was disclosed. This deficiency in the record must be resolved against Stacey, as the appellant "has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391–92 (1984). "Any doubts [that]

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our case, Stacey does not challenge the existence of an attorney-client relationship with Galasso, the initial attorney. Stacey also cites *In re Marriage of Hines*, 356 Ill. App. 3d 197, 199 (2005), which is distinguishable because, in the 10 years that had passed since one party's initial consultation, the issue before the court had changed. In our case, Stacey does not dispute that the issues before the court are the same.

may arise from the incompleteness of the record will be resolved against the appellant." *Id*. at 392. Because Stacey's argument lacks sufficient factual support, we will not address the argument further.

¶ 24 In sum, the trial court found Curtis credible, and Curtis stated that another male attorney was present in and provided advice at his initial consultation at The Stogsdill Law Firm. There was no suggestion that Curtis sought a consultation merely to preclude Stacey from utilizing the firm at a later date. It was Stacey who initiated the divorce proceedings while represented by the firm of Esp, Kreuzer, Cores, LLP. We cannot say that the trial court abused its discretion in disqualifying The Stogsdill Law Firm.

¶ 25 III. CONCLUSION

¶ 26 For the aforementioned reasons, we affirm the trial court's judgment.

¶ 27 Affirmed.