

Not Reported in Cal.Rptr.3d, 2004 WL 2030228 (Cal.App. 4 Dist.)
Nonpublished/Noncitable (Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
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California Rules of Court, rule 8.1115, restricts citation of unpublished opinions in California courts.

Court of Appeal, Fourth District, Division 3, California.
FARMERS & MERCHANTS TRUST COMPANY,
 Petitioner,
 v.
 The SUPERIOR COURT of Orange County, Respondent;
 Fay Blix, Real Party in Interest.

No. G032264.
 (Super.Ct.No. A183979).
 Sept. 10, 2004.

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County. Marjorie Laird Carter, Judge. Petition granted.

Copenbarger & Associates, Paul D. Copenbarger, Edward E. Kim; Dunn **Koes**, Pamela E. Dunn and Daniel J. **Koes**, for Petitioner.

No appearance for Respondent.

Fay Blix, in pro. per., for Real Party in Interest.

Casey & Richards, Wayne J. Casey; King & Parret, Charles W. Parret and Lawrence M. Burck for First American Trust Company as Amicus Curiae.

OPINION

RYLAARSDAM, J.

*1 The probate court issued an order disqualifying Paul D. Copenbarger and the law firm of Copenbarger and Associates (collectively Copenbarger) from representing petitioner Farmers & Merchants Trust Company (F & M) or Kent

McNaughton (Kent) in related conservatorship and trust proceedings. F & M filed a notice of appeal from the order and sought writs of supersedeas to stay further proceedings in the trial court pending resolution of this and another related appeal. We issued an order staying the proceedings and ordered F & M to file a brief in the form of a petition for a writ of mandate. We now grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Violet McNaughton created the Violet McNaughton Family Trust (family trust) which included the majority of her assets. She appointed herself as the family trust's initial trustee, but provided that any successor be a "corporate Trustee." Kent is Violet McNaughton's sole surviving child.

In 1997, unrelated third parties attempted to place Violet McNaughton under a conservatorship. She retained Copenbarger to successfully oppose that effort. However, the next year she submitted to establishment of a conservatorship. (Case No. A183979.) Initially, Kent served as the conservator of both her person and the estate. He retained Copenbarger to represent him in the conservatorship proceeding. Real party in interest, Fay Blix (Blix), served as Violet McNaughton's guardian ad litem.

According to Blix's disqualification motion, Kent resigned as the conservator of his mother's estate in 2000, after questions arose concerning his handling of the estate. He remained the conservator of her person. The opposition to the motion alleges the "Court accepted a settlement between all parties [] regarding [Kent's] accounting of the estate ... during his tenure as Conservator of the estate..." (Capitalization omitted.) Wendy Osterholt succeeded Kent as the conservator of Violet McNaughton's estate.

Between March 1999 and December 2002,

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amicus curiae First American Trust Company (First American) served as the trustee of the family trust. During its term as trustee, First American issued monthly account statements. At some point, Kent retained Copenbarger to represent him as a beneficiary in the proceeding concerning the family trust. (Case No. A212767.) Both the conservatorship and trust matters were heard before the same trial judge.

In 2002, litigation erupted between the respective representatives of the conservatorship and trust. Osterholt filed petitions seeking to amend the trust provisions and to remove First American as trustee. First American filed a petition seeking settlement of accounting of the trust assets between March 1999 and August 2002. Kent, appearing as a beneficiary and as the former conservator of the estate, filed objections to First American's accounting and the fees charged for both its services and the services of its attorneys. Osterholt subsequently joined in this objection.

*2 The court held a hearing on these matters in December and took them under submission. First American, as trustee of the family trust, and Osterholt, as conservator of Violet McNaughton's estate, resigned their respective positions effective December 31. In January 2003, the court approved First American's accounting. It overruled Kent's objections, finding he failed to object when serving as conservator of the estate and now lacked standing to do so.

The court appointed F & M as both the successor trustee of the family trust and conservator of Violet McNaughton's estate. Initially, F & M retained the law firm of Price, Crooke & Gary to represent it. However, on February 27, F & M substituted Copenbarger as its attorney as both trustee of the family trust and as conservator of Violet McNaughton's estate. Shortly thereafter, F & M appealed several of the court's January rulings in the trust proceeding, including the order overruling Kent's objections to First American's accountings.

Blix moved to disqualify Copenbarger from

serving "as counsel of record" for F & M, as both the trustee and conservator of Violet McNaughton's estate, and for Kent. She argued Copenbarger's "concurrent representation of a Successor Trustee and Successor Conservator of the Estate and of a Trust Beneficiary and former Conservator of the Estate constitutes an irreconcilable conflict of interest." The motion claimed a potential conflict existed concerning F & M's need to monitor Kent's compliance with the settlement reached upon his removal as conservator of the estate. She also cited "Copenbarger's dual representation of [F & M] as Trustee ... and Kent McNaughton as a primary beneficiary of the Trust," and the need to pursue "an objective, independent investigation of [Kent's] actions as Conservator of the Estate while at the same time assisting [Kent] in preparing a defense to a claim of a breach of fiduciary duty arising from those very same actions."

F & M opposed the motion, in part asserting that "[p]rior to being retained by F & M, [Copenbarger] submitted full written disclosures to both F & M and [Kent] regarding the potential conflicts [of] interest presented by the proposed representation of F & M by [Copenbarger]" (capitalization omitted), and both clients "completed waivers acknowledging the potential conflicts disclosed ... and granting their respective consents to the concurrent representation." The opposition included copies of Copenbarger's potential conflicts letter and the waivers signed by Kent and F & M's president as exhibits.

The trial court granted the motion. While it found the waivers signed by petitioner and Kent "sufficient," it concluded "[i]n this situation, ... there is conflict that cannot be waived," and disqualified Copenbarger "from representing either [F & M] or Kent ... in any further proceedings relating to the Conservatorship of the Person of Violet McNaughton, the Conservatorship of the Estate of Violet McNaughton, and/or the McNaughton Family Trust."

DISCUSSION

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*3 Blix moved to disqualify Copenbarger based on the firm's simultaneous representation of F & M and Kent, parties she claimed held conflicting interests in the outcome of the litigation. While F & M challenges the trial court's disqualification of it on several grounds, we agree with its first contention; Blix lacked standing to file the disqualification motion.

Rule 3-310(C) of the Rules of Professional Conduct declares, "A member shall not, without the informed written consent of each client: [¶] (1) 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; or [¶] (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter." The parties do not cite us to any cases concerning whether an attorney may simultaneously represent a conservatee or trust and a beneficiary or other party to the proceeding. The limited case authority involving the analogous situation of litigation arising in the handling of a decedent's estate suggests there is no general prohibition against concurrent representation, but rather turns on the circumstances of a particular case. (*Estate of Healy* (1902) 137 Cal. 474, 477-478; *Jones v. Lamont* (1897) 118 Cal. 499, 503-504; *Vivitar Corp. v. Broidy* (1983) 143 Cal.App.3d 878, 882-885.)

Nonetheless, " '[b]efore an attorney may be disqualified from representing a party in litigation because his representation of that party is adverse to the interest of a current or former client, it must first be established that the party seeking the attorney's disqualification was or is "represented" by the attorney in a manner giving rise to an attorney-client relationship. [Citations.]' [Citation.] The burden is on the party seeking disqualification to establish the attorney-client relationship. [Citation.]" (*Koo v. Rubio's Restaurants, Inc.* (2003) 109 Cal.App.4th

719, 729; see also *Hicks v. Drew* (1897) 117 Cal. 305, 307; *Strasbourg Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, 1403-1405.)

Copenbarger briefly represented Violet McNaughton in a prior unsuccessful attempt to place her under a conservatorship, but Blix did not base her motion on the existence of that relationship. Rather, Blix cited Copenbarger's concurrent representation of F & M and Kent. But "[s]tanding arises from a breach of the duty of confidentiality owed to the complaining party" (*DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 832), and "a lawyer owes no general duty of confidentiality to nonclients. [Citations.]" (*Ibid.*)

As F & M contends, the conflicts at issue are merely potential, not actual, and the court found Copenbarger properly advised both parties of these potential conflicts and obtained valid waivers of them from each client. While Blix expresses concern for the appearance of impropriety arising from Copenbarger's representation of both F & M and Kent, a mere appearance of impropriety cannot support disqualification of counsel. (*Derivi Construction & Architecture, Inc. v. Wong* (2004) 118 Cal.App.4th 1268, 1274; *Addam v. Superior Court* (2004) 116 Cal.App.4th 368, 372.)

*4 A court's authority to disqualify counsel is a function of its inherent power to control the judicial proceedings before it in furtherance of justice. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145; Code Civ. Proc., § 128, subd. (a)(5).) But "[t]he trial court's exercise of this discretion is limited by the applicable legal principles and is subject to reversal when there is no reasonable basis for the action. [Citations.]' [Citation.]" (*DCH Health Services Corp. v. Waite, supra*, 95 Cal.App.4th at p. 832.) Given the absence of any current attorney-client relationship between Copenbarger and either Blix or McNaughton, plus the full and complete waivers executed by F & M and Kent, we conclude respondent erred in granting the motion to disquali-

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fy Copenbarger in this case.

DISPOSITION

The petition is granted. The parties shall bear their own costs on appeal.

WE CONCUR: SILLS, P.J., and MOORE, J.

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