

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 22, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 2015AP2311
2016AP270**

Cir. Ct. No. 2012PR55

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 2015AP2311

IN THE MATTER OF THE ELEONORA I. HOELZEL REVOCABLE TRUST:

DENNIS HOELZEL,

APPELLANT,

V.

**ELEONORA I. HOELZEL REVOCABLE TRUST, THOMAS HOELZEL AND
DOUGLAS D. HAHN,**

RESPONDENTS.

No. 2016AP270

IN THE MATTER OF THE ELEONORA I. HOELZEL REVOCABLE TRUST:

DENNIS HOELZEL,

APPELLANT,

V.

**ELEONORA I. HOELZEL REVOCABLE TRUST, THOMAS HOELZEL AND
MENN LAW FIRM, LTD.,**

RESPONDENTS.

APPEALS from orders of the circuit court for Calumet County:
JEFFREY S. FROEHLICH, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. These consolidated appeals stem from an action for the closing of the Eleonora I. Hoelzel Revocable Trust (the Trust). Co-trustee Dennis Hoelzel¹ appeals two orders. One order confirmed the appointment of the law firm of Block, Seymour, Chudacoff, Samson & Liebzeit, S.C. (Block Seymour), as attorneys for the Trust and ordered the Trust to pay Block Seymour’s attorneys’ fees. The second ordered that Dennis’s share of the Trust’s distribution, which would go to a trust established for his benefit (the Dennis Trust), should pay the fees for his attorney, and, if funds were insufficient, a mortgage would be placed against the real property distributed from the Trust to the Dennis Trust.

¶2 Dennis asserts that the Trust should not compensate Block Seymour for the entirety of its representation of the Trust because, he alleges, the firm initially represented his brother, Thomas Hoelzel, a beneficiary and the other co-

¹ In his Notices of Appeal, Dennis calls himself a “Beneficiary and Co-Trustee.” He does not hold a beneficial interest himself, however; that interest belongs to a trust established for his benefit. When we refer to “Dennis,” we mean Dennis in his capacity as co-trustee.

trustee, posing a conflict of interest. Dennis also contends the circuit court erred by ordering the Trust to pay his, Dennis's, attorney's fees from his share of the Trust and potentially awarding a mortgage against the real property the Trust would be distributing to the Dennis Trust. We disagree with Dennis and observe that the mortgage issue has become moot. We affirm the orders.

¶3 Dennis and Thomas are Eleonora's sons. Eleonora engaged the McCarty Law Firm for her estate-planning affairs and established the Trust in 2002. The Trust provided that Thomas would serve as successor trustee upon her death; an amendment named Thomas and Dennis successor co-trustees. Upon Eleonora's death, the Trust's assets were to be distributed first to her specific bequests and the remainder split equally between Thomas and the Dennis Trust.²

¶4 Eleonora died in 2005. McCarty continued to handle Trust matters. The bulk of the Trust corpus was real estate. It comprised two parcels of mostly vacant land, except for Eleonora's farmhouse. Liens affected some of the property. Wrapping up the Trust required sale or other disposition of the real estate and satisfying the liens. With the then sluggish real estate market, Dennis and Thomas could not agree about selling the land and farmhouse. As a result, there were insufficient cash assets to timely make Eleonora's specific bequests to churches, grandchildren, and great-grandchildren.

² The original Trust document provided that upon Eleonora's death, the share for Dennis "shall be retained by the trustee, to be administered and distributed" according to several specific instructions, including that "[a]t no time shall Dennis obtain a vested interest in trust income and principal."

¶5 In 2010, dissatisfied with the lack of progress in closing the Trust, Thomas contacted Block Seymour attorney Bruce Chudacoff. The McCarty lawyer resigned and Chudacoff took over representation of the Trust.

¶6 In August 2012, Dennis, acting pro se, petitioned the court to evaluate the Trust to perform and carry out Eleonora's wishes, to evenly distribute the remainder between him and Thomas, and then to dissolve the Trust.

¶7 Between September 2012 and September 2015, Dennis objected eight times to Chudacoff representing the Trust, alleging that Chudacoff represented Thomas individually and advocated positions that favored Thomas over him.³ As evidence of the claimed alliance between Chudacoff and Thomas, Dennis cited two September 2010 letters Chudacoff wrote. One, to a McCarty lawyer began, "I have been engaged by Tom Hoelzel to represent him in his capacity of trustee of the Eleonora I. Hoelzel trusts." The other, to Thomas, addressed matters pertaining to the Trust and offered options about satisfying the overdue specific bequests. One option put the choice of when to sell the property in the Trust in Thomas's, not Dennis's, hands.

¶8 Dennis also disagreed with the handling of Trust distributions, taking the position that they should go to him personally. Chudacoff and Thomas maintained that fidelity to Eleonora's wishes required such distributions go to the Dennis Trust to be managed by that trust's trustee.⁴ Dennis took that stance as

³ Dennis engaged Attorney Douglas Hahn of the Menn Law Firm in December 2012.

⁴ In June 2013, the court approved the removal of Thomas as trustee of the Dennis Trust and the appointment of a successor trustee that Dennis selected.

further proof of Chudacoff's preferential treatment of Thomas's interests, pointing to a December 2012 email from Chudacoff in which Chudacoff cautioned Dennis that if he continued to ignore the Trust's language, Chudacoff would ask the court to remove him as a trustee for acting contrary to its terms.

¶9 Chudacoff consistently responded that he represented only the Trust and "[did] not represent Tom individually in any way." Time and again, the court found that Chudacoff/Block Seymour⁵ represented the Trust, not Thomas personally, and that Chudacoff's and Thomas's positions on Trust matters just happened to coincide, at one point telling Dennis, "[I]t's a dead horse. Stop beating it."

¶10 Dennis also repeatedly asserted that, because in his view Chudacoff advocated Thomas's interest, it was unfair for the Trust to pay Chudacoff's fees, as it essentially made him, Dennis, bear fifty percent of those fees. He argued that either Thomas should be responsible for Chudacoff's fees and he should be responsible for Hahn's, or both Chudacoff and Hahn should be paid from the Trust. The court once more rejected Dennis's position that Chudacoff ever represented Thomas individually.

¶11 Thomas and Dennis remained at loggerheads over the representation and land-disposition issues, as well as how to divide, between Thomas and the Dennis Trust, the land that remained in the Trust. At a June 2013 hearing, the court chastised the brothers that they were "two grown men that are acting like

⁵ Chudacoff retired in 2015. The court approved Block Seymour attorney Harvey Samson's petition to represent the Trust. Dennis objected to Samson on the same basis that he had objected to Chudacoff's representation—that Samson served Thomas's interests.

children” such that “nothing is getting done.” It gave them a “friendly warning”: resolve to work together or “I suspect you will no longer be co-trustees.” Nonetheless, a year later, Dennis again pressed his demand that the court recognize Chudacoff as Thomas’s, not the Trust’s, attorney.

¶12 In September 2014, Thomas retained Attorney Roy Fine to represent him individually. A month later, observing that the brothers’ mutual stubbornness contributed to the escalating attorneys’ fees, the court ruled that Thomas was responsible for Fine’s fees, Dennis was responsible for Hahn’s fees, and Chudacoff’s fees would be paid by the Trust.

¶13 How to divide the land between the co-trustees was back on the table at a March 2015 hearing. Chudacoff told the court that the brothers’ inability, or refusal, to agree on anything led to attorneys’ fees so far of nearly \$25,000 for him, \$9,000 for Fine, and a “substantial” amount for Hahn. Chudacoff and Hahn requested that, for Hahn’s fees, a lien be placed on the property distributed to the Dennis Trust.

¶14 Dennis once again voiced his view that—at least initially—Chudacoff represented Thomas, so Thomas, not the Trust, should pay Chudacoff’s fees up to the time Thomas retained Fine. Fine responded that, if anyone, Dennis should pay a portion of Chudacoff’s fees because it was Dennis’s conduct that mired down the proceedings. The court stated:

[F]or the reasons that The Court’s placed on the record on numerous occasions in the past, Mr. Chudacoff is the [T]rust attorney. I, again, have seen the paperwork [the 2010 letters and 2012 email] that was filed early on, but The Court agrees that the actions that Mr. Chudacoff has taken over the years have been on behalf of the [T]rust.

The problem that Dennis Hoelzel seems to have is that anyone that disagrees with him or takes a position contrary to what he thinks needs to be done is an advocate for someone else. He can't just say that he's wrong and not be part of some grand conspiracy, in his mind.

So The Court is going to order that Mr. Chudacoff's fees be paid out of the [T]rust's assets. The Court also agrees with the position that Dennis Hoelzel has been responsible for a great deal of the attorney's fees that have been racked up in this case over the last couple of years because of things that he's done and things that he's refused to do on numerous occasions.

¶15 Hahn moved to withdraw from representing Dennis and asked the court to issue a mortgage against land in the Dennis Trust to secure any ultimately unpaid fees. The court granted the motion.

¶16 The court entered two orders after hearings on the substance of each. As is relevant to this appeal, the September 29, 2015 order ordered that Block Seymour, specifically, Samson, would remain as attorney(s) for the Trust unless the co-trustees agreed upon a neutral third attorney; that Thomas and Dennis would be responsible for Fine's and Hahn's attorney's fees, respectively; and that the Trust would be responsible for Block Seymour's fees.

¶17 The November 6, 2015 order, as relevant here, ordered Hahn's fees and expenses to be paid from the Dennis Trust's share of the Trust's final distribution; approved Hahn's \$28,868.09 billings unless Dennis filed a written objection within thirty days of the October 22 hearing; and, if the Dennis Trust's share of the final Trust distribution was insufficient to pay Hahn's fees and expenses, granted a mortgage to Menn Law against the real property the Dennis Trust would receive from the Trust. Dennis did not timely object.

¶18 Dennis appeals from the two orders. The Trust is affected by, and thus only responds to, the issues raised in the September 29 order. Menn Law responds only to the fee and mortgage issue in the November 6 order.

¶19 Dennis once again argues that the court should have removed Block Seymour, as Chudacoff's alleged conflict of interest "permeated and contaminated" the proceedings. He contends that, at a minimum, the circuit court should have held an evidentiary hearing to examine whether to disqualify the firm.

¶20 "Circuit court decisions on motions to disqualify attorneys are reviewed under the erroneous exercise of discretion standard." *Guerrero v. Cavey*, 2000 WI App 203, ¶19, 238 Wis. 2d 449, 617 N.W.2d 849. An appellate court will not reverse a circuit court's discretionary decision "[w]here the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is consistent with applicable law and one a reasonable judge could reach." *Marten Transp. Ltd. v. Hartford Specialty Co.*, 194 Wis. 2d 1, 13, 533 N.W.2d 452 (1995).

¶21 Supreme Court Rule 20:1.9 guides a circuit court in determining a motion to disqualify counsel based on the attorney's duty to a former client. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶11, 333 Wis. 2d 402, 797 N.W.2d 789. The circuit court must determine whether: (1) there was an attorney/client relationship between counsel and the former client and, if so, whether it is over; (2) the former and subsequent representations involve the same or substantially related matters; (3) the interests of the subsequent client are materially adverse to those of the former; and (4) the former client consented to the new representation. *Id.* We accept the circuit court's findings of fact unless they are clearly erroneous but review de novo the legal issue of whether, on those

facts, an actual conflict exists. *State v. Kalk*, 2000 WI App 62, ¶13, 234 Wis. 2d 98, 608 N.W.2d 428.

¶22 The circuit court found that there never was an attorney/client relationship between Chudacoff and Thomas, that, read in context and in their entirety, the letters, email, and hearing transcripts make plain that Chudacoff's actions and recommendations were taken and made with the Trust's best interests in mind, and that the fact that Chudacoff's views coincided with Thomas's was happenstance, not an effort to spite Dennis. The findings are not clearly erroneous.

¶23 An actual conflict did not exist. The record is replete with evidence supporting the court's findings—on at least four occasions—that Chudacoff always represented only the Trust and never represented Thomas individually. We thus need not proceed further with the *Foley-Ciccantelli* analysis to determine whether there existed an attorney/client relationship that would disqualify Chudacoff. An evidentiary hearing was not required.

¶24 Refusing to accept that the horse is dead, Dennis next asserts that, by failing to recognize Block Seymour's conflict of interest and to terminate its representation of the Trust, the court further erred by ordering the Trust to pay the firm's attorneys' fees. "We review a circuit court's decision regarding attorney fees for an erroneous exercise of discretion." *Franke v. Franke*, 2004 WI 8, ¶84, 268 Wis. 2d 360, 674 N.W.2d 832.

¶25 The court ruled, and properly so, that Chudacoff and then Samson were the attorneys for the Trust, not for Thomas. Once it so determined, ordering that Block Seymour's fees and costs be paid from the Trust, rather than by a co-

trustee, was an appropriate exercise of discretion. *See* WIS. STAT. § 701.1004(2) (2015-16).⁶

¶26 The final issue Dennis raises relates to the manner of payment of Hahn's/Menn Law's attorneys' fees. At the October 22 hearing, the court told Dennis he had thirty days to object to Hahn's \$28,868.09 fees and expenses or the amount would be approved. He did not timely object.⁷ The court thus granted Hahn's motion for an order that the sum be paid from any distribution the Trust otherwise would make to the Dennis Trust and that, if funds proved insufficient, the court place a mortgage against the real property in the Dennis Trust for the unpaid amount. Appended to the motion was an agreement (the Agreement), signed in December 2013 by Dennis, Hahn, and the Dennis Trust's post-Thomas trustee to pay Menn Law's fees and expenses. A handwritten "\$10,000" appears on the Agreement.

¶27 Dennis challenges the fees by arguing that the motion does not include a retainer agreement incorporating the requirements set forth in SCR 20:1.5(b)(1)—i.e., directing that the scope of the representation and the basis or rate of the fee and expenses for which the client is responsible must be communicated to the client in writing. He also asserts that the Agreement does not specifically grant a mortgage, that the \$10,000 written on the Agreement signified an "original intent ... to provide an initial amount of \$10,000," and that

⁶ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

⁷ On January 22, 2016, Dennis, represented by new counsel, filed a motion to reconsider Block Seymour's and Hahn's fees.

the fee-and-mortgage award improperly circumvents the State Bar of Wisconsin's Fee Arbitration Program.

¶28 First, at the October 22 hearing, Dennis asked only for additional time to review the Hahn's bill. He never did timely object to the fees, thus gutting the tardy challenge he advances here. If he decided on post-hearing reflection that he wanted to arbitrate the fees, he should have voiced his desire to do so within the allotted thirty days.

¶29 Second, he conspicuously does not assert that no retainer agreement exists. Menn Law responds that, had there been a proper objection to its fees being paid as set forth, it would have put the documentation into evidence at the hearing on the motion, making it part of the record.

¶30 Third, Dennis's point about the "original intent" of the \$10,000 "initial amount" is not clear and the record sheds no light on his meaning. We need not address undeveloped arguments, *see State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992), or consider one not raised below, *see State v. Gove*, 148 Wis. 2d 936, 940-41, 437 N.W.2d 218 (1989).

¶31 Lastly, the mortgage issue is moot. The Trust distributed land to the Dennis Trust in late January 2016, subject to the mortgage granted to Menn Law. The Dennis Trust sold the land a few weeks later and at closing paid the \$28,868.09 Menn Law debt. The mortgage is satisfied. There is no reason for us to address this moot issue. *See McFarland State Bank v. Sherry*, 2012 WI App 4, ¶8 & n.3, 338 Wis. 2d 462, 809 N.W.2d 58 (2011).

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

