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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 07/28/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SHARON ARTHUR DOHERTY, an Arizona) No. 1 CA-SA 11-0150
resident,)
) DEPARTMENT A
Petitioner,)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
THE HONORABLE RICHARD L.) Rule 28, Arizona Rules
NOTHWEHR, Commissioner of the) of Civil Appellate Procedure)
SUPERIOR COURT OF THE STATE OF)
ARIZONA, in and for the County of)
MARICOPA,)
)
Respondent Commissioner,)
)
McCABE O'DONNELL, P.A., an)
Arizona law firm,)
)
Real Party in Interest.)
_____)

Special Action from the Superior Court in Maricopa County
Cause No. PB 2008-000345

The Honorable Richard L. Nothwehr, Commissioner

JURISDICTION ACCEPTED; RELIEF DENIED

Knapp & Roberts, P.C.
By David L. Abney

Scottsdale

and

Bivens & Associates, P.L.L.C.
By Kelly J. McDonald
Attorneys for Petitioner

Scottsdale

McCabe O'Donnell, P.A.
By Joseph I. McCabe
Clifford J. Roth
Attorneys for Respondents Real Parties in Interest

Phoenix

J O H N S E N, Judge

¶1 Petitioner Sharon Doherty is the widow of John Doherty. The Personal Representative of Mr. Doherty's estate and the Trustee of the John L. Doherty Living Trust have sued Petitioner, alleging financial exploitation and other claims. This special action petition asks that we vacate the superior court's order denying Petitioner's motion to disqualify McCabe O'Donnell, P.A., the law firm that represents the Personal Representative and the Trustee in the action against Petitioner.

¶2 We accept special jurisdiction of the petition because the Petitioner has no other equally plain, adequate and speedy remedy from the order. *See State ex rel. Romley v. Superior Court In and For County of Maricopa*, 181 Ariz. 378, 380, 891 P.2d 246, 248 (App. 1995); *Smart Indus. Corp., Mfg. v. Superior Court In and For County of Yuma*, 179 Ariz. 141, 142, 876 P.2d 1176, 1177 (App. 1994).

¶3 Petitioner's motion to disqualify alleged the McCabe firm had represented her in the same or substantially similar

matters and therefore could not represent the Personal Representative and the Trustee in their claims against her, pursuant to ER 1.9(a) of Rule 42 of the Rules of the Arizona Supreme Court. See *Foulke v. Knuck*, 162 Ariz. 517, 784 P.2d 723 (App. 1989).

¶4 An attorney-client relationship may exist without a retainer agreement and without payment of attorney's fees, and the existence of such a relationship may be implied by the parties' conduct. See *In re Petrie*, 154 Ariz. 295, 299, 742 P.2d 796, 800 (1987); *Foulke*, 162 Ariz. at 520, 784 P.2d at 726. The existence of an attorney-client relationship may be shown by evidence that the would-be client "sought and received advice and assistance from the attorney in matters pertinent to the legal profession." *Petrie*, 154 Ariz. at 299, 742 P.2d at 800; see *Foulke*, 162 Ariz. at 520, 784 P.2d at 726. The test is subjective, taking into account the nature of the services rendered, the circumstances under which any confidences are divulged, the client's belief and manifestations of intent. *Petrie*, 154 Ariz. at 299, 742 P.2d at 800; *Foulke*, 162 Ariz. at 520, 784 P.2d at 726. The relationship may arise when the would-be client reasonably relies on a lawyer to provide services and the lawyer, who reasonably should know of such reliance, does not inform the would-be client that the lawyer

will not represent him. See Restatement (Third) of Law Governing Lawyers § 14 cmt. e (2000).

¶15 The response to the petition argues we may not reverse the superior court's order because Petitioner has failed to provide us with a transcript of the two-day evidentiary hearing the court conducted on the motion to disqualify. In the absence of a transcript, we must presume the testimony offered at the hearing supports the court's conclusion. A *Tumbling-T Ranches v. Flood Control Dist. of Maricopa County*, 222 Ariz. 515, 543, ¶ 99, 217 P.3d 1220, 1248 (App. 2009); see *In re Property at 6757 S. Burcham Ave.*, 204 Ariz. 401, 405, ¶¶ 11, 12, 64 P.3d 843, 847 (App. 2003) (appellate court may not conclude superior court abused its discretion in the absence of a hearing transcript).

¶16 Petitioner relies on deposition testimony and affidavits to support her contention that she sought and obtained legal advice from lawyers at the McCabe firm. She also cites invoices reflecting communications between herself and the law firm, and she submitted an affidavit of an expert witness who concluded that by meeting with her, providing her legal advice and answering her questions about legal matters, the law firm established an attorney-client relationship with her.

¶17 The superior court heard testimony that lawyers at the McCabe firm advised Petitioner to obtain her own counsel and that she was represented by separate counsel. Responding to

Petitioner's contention that she spoke many times to McCabe lawyers about marital finance matters, a McCabe lawyer testified that Mr. Doherty asked him to work with Petitioner in support of Mr. Doherty's estate planning, meaning that the law firm would deliver information to the husband through his wife.

¶18 In denying Petitioner's motion to disqualify, the superior court specifically found Petitioner was not credible and that she "has selective memory and . . . is willing to revise history." The court concluded Petitioner's "disqualification claim is not based upon actual facts," and denied her motion because it found no attorney-client relationship existed between her and the McCabe firm.

¶19 Based on the record before us, we cannot conclude the superior court abused its discretion in denying Petitioner's motion. Accordingly, we deny relief.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICIA A. OROZCO, Judge

/s/
ANN A. SCOTT TIMMER, Judge