[Cite as *Champoir v. Champoir*, 2019-Ohio-2235.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MICHELLE CHAMPOIR, :

Plaintiff-Appellant, :

No. 107754

v. :

DOUGLAS CHAMPOIR, :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: June 6, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Domestic Relations Division Case No. DR-06-308972

Appearances:

Polito, Rodstrom & Burke, L.L.P., and Joseph T. Burke; and Stephen E.S. Daray, *for appellant*.

Dworken & Bernstein Co., L.P.A., Anna M. Parise, and Lydia Chiro, *for appellee*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Plaintiff-appellant, Michelle Champoir ("appellant"), brings the instant appeal challenging the trial court's ruling granting defendant-appellee's Douglas Champoir ("appellee"), motion to disqualify appellant's counsel. After a thorough

review of the record and law, this court reverses the trial court's judgment and remands the matter for further proceedings consistent with this opinion.

I. Factual and Procedural History

{¶ 2} Appellant brings the instant appeal from a domestic relations matter, Cuyahoga D.R. No. DR-06-308972. In that action, the parties were divorced in June 2006.

{¶ 3} On March 16, 2018, appellee filed a motion to modify child support. Appellee sought to modify the trial court's previous support order entered on December 20, 2007. In his motion to modify, appellee asserts that a significant change in circumstances has occurred since the trial court's previous support order. A hearing on appellee's motion to modify child support was scheduled for June 20, 2018.

{¶ 4} On the morning of the June 20, 2018 hearing, appellee filed his motion to disqualify appellant's counsel, Joseph Burke ("Burke"). It appears from the record that the hearing on appellee's motion to modify was canceled. It also appears from the record that prior to the June 20, 2018 hearing, on Monday, June 18, 2018, appellee's counsel sent Burke an email requesting that he voluntarily withdraw from the matter on the basis that appellee may call Burke as a witness to testify in support of his motion to modify. Burke responded and declined to withdraw from the matter.

{¶ 5} In his motion to disqualify, appellee sought to have Burke disqualified on the same basis — that appellee may call Burke as a witness. In his motion to

modify, appellee is seeking a downward deviation in his monthly child support order and anticipates calling Burke to testify as to appellant's and Burke's shared living expenses. Burke is married to appellant, and the couple have been married for ten years.

{¶ 6} On June 28, 2018, appellant filed a brief in opposition to appellee's motion to disqualify. On September 24, 2018, in an effort to expedite the trial court's ruling on the motion to disqualify, appellee filed a "motion for order" on his previously filed motion to disqualify. Thereafter, the trial court issued a judgment entry on October 2, 2018, granting appellee's motion to disqualify. It appears from the record that the trial court did not hold a hearing on the motion to disqualify.

{¶ 7} In its October 2, 2018 judgment entry granting appellee's motion to disqualify, the trial court concluded that Burke was a necessary witness and therefore subject to disqualification under Prof.Cond.R. 3.7.

{¶ 8} It is from the October 2, 2018 judgment entry that appellant brings the instant appeal, assigning two errors for our review.

I. The trial court erred by disqualifying [Burke].

II. The trial court erred by disqualifying [Burke's law firm].

II. Law and Analysis

A. Final, Appealable Order

{¶ 9} As an initial matter, appellee argues that the trial court's judgment entry granting his motion to disqualify is not a final, appealable order, and thus, argues that this court does not have jurisdiction over the instant appeal.

{¶ 10} Ohio's courts of appeals have jurisdiction "to review and affirm, modify, or reverse final orders." Ohio Constitution, Article IV, Section 3(B)(2). However, the Ohio Supreme Court long ago addressed this precise issue and "held that a decision *granting* a motion to disqualify opposing counsel is a final, appealable order that a party deprived of counsel can appeal immediately." (Emphasis sic.) *Wilhelm-Kissinger v. Kissinger*, 129 Ohio St.3d 90, 2011-Ohio-2317, 950 N.E.2d 516, ¶ 8, citing *Russell v. Mercy Hosp.*, 15 Ohio St.3d 37, 39, 472 N.E.2d 695 (1984). The Ohio Supreme Court more specifically added that "in the civil context, the grant of a motion to disqualify counsel * * * constitutes a final appealable order under R.C. 2505.02." *Russell* at 39.

{¶ 11} Moreover, this court has very recently addressed this precise issue.

> An order "'granting a motion to disqualify opposing counsel is a final appealable order'" under R.C. 2505.02[.] *Grimes v. Oviatt*, 8th Dist. Cuyahoga No. 104491, 2017-Ohio-1174, ¶ 37, quoting *Wilhelm-Kissinger* [at] ¶ 10; *see also Russell* []. "[A]n order granting disqualification immediately and definitely affects the party it deprives of chosen counsel * * * [and] it typically imposes a permanent effect because it is unlikely to be reconsidered as a trial progresses." (Citations omitted.) *Wilhelm-Kissinger* at ¶ 9-10.

Podor v. Harlow, 8th Dist. Cuyahoga No. 106442, 2018-Ohio-4110, ¶ 10.

{¶ 12} Therefore, contrary to appellee's argument, the trial court's judgment entry *granting* his motion to disqualify is a final, appealable order and this court has jurisdiction over the instant appeal.

B. Motion to Disqualify Burke

{¶ 13} In her first assignment of error, appellant argues that the trial court erred in disqualifying Burke.

{¶ 14} First, we note that "[d]isqualification of an attorney is a drastic measure that should not be taken unless absolutely necessary." *Gonzalez-Estrada v. Glancy*, 2017-Ohio-538, 85 N.E.3d 273, ¶ 10 (8th Dist.), citing *Brown v. Spectrum Networks, Inc.*, 180 Ohio App.3d 99, 2008-Ohio-6687, 904 N.E.2d 576, ¶ 11 (1st Dist.), citing *A.B.B. Sanitec W., Inc. v. Weinsten*, 8th Dist. Cuyahoga No. 88258, 2007-Ohio-2116, ¶ 18.

{¶ 15} This court reviews a trial court's decision to disqualify a party's counsel under an abuse of discretion standard. *155 N. High, Ltd. v. Cincinnati Ins. Co.*, 72 Ohio St.3d 423, 426, 650 N.E.2d 869 (1995). An abuse of discretion suggests that the trial court's attitude in reaching its decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 16} The individual roles of an advocate and a witness are unavoidably conflicting. *Amos v. Cohen*, 156 Ohio App.3d 492, 495, 2004-Ohio-1265, 806 N.E.2d 1014 (1st Dist.), citing *Mentor Lagoons, Inc. v. Rubin*, 31 Ohio St.3d 256, 257, 510 N.E.2d 379 (1987). As such, "it is generally inappropriate for a trial attorney

to testify on behalf of [a] client." *Id.* at ¶ 7. For these reasons, motions to disqualify counsel brought pursuant to the advocate-witness rule, as it is known, "should be viewed with disfavor because of their potential to interfere with a defendant's right to choose his [or her] own counsel and their 'strong potential for abuse.'" *A.B.B. Sanitec W., Inc.* at ¶ 12, quoting *United States v. Poulsen*, S.D.Ohio No. CR2-06-129, 2007 U.S. Dist. LEXIS 27933 (Apr. 16, 2007). A court must therefore remain cognizant of the competing public interests of requiring professional conduct by an attorney and of permitting a party to retain the counsel of his or her choice. *Id.*

{¶ 17} This court has previously looked to Prof.Cond.R. 3.7 for guidance on the advocate-witness rule.[1] *See Lytle v. Mathew*, 2017-Ohio-1447, 89 N.E.3d 199 (8th Dist.); *Gonzalez-Estrada*, 2017-Ohio-538, 85 N.E.3d 273. Pursuant to Prof.Cond.R. 3.7(a)(3) and pertinent to the instant matter, "[a] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless * * * the disqualification of the lawyer would work substantial hardship on the client." "A necessary witness under Prof.Cond.R. 3.7 is one whose testimony must be admissible and unobtainable through other trial witnesses." *Gonzalez-Estrada* at ¶ 12, citing *King v. Pattison*, 5th Dist. Muskingum No. CT2013-0010, 2013-Ohio-4665, citing *Popa Land Co., Ltd. v. Fragnoli*, 9th Dist. Medina No. 08CA0062-M, 2009-Ohio-1299, ¶ 15.

[1] There are exceptions enumerated within this rule, however, none are applicable to our analysis.

{¶ 18} In *Lytle,* this court examined the official comments to Prof.Cond.R. 3.7(a)(3), which

> recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client.

Lytle at ¶ 15.

{¶ 19} In addition, the Ninth District has also noted that

> "[t]estimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and availability of other evidence. * * * A party's mere declaration of an intention to call opposing counsel as a witness is an insufficient basis for disqualification even if that counsel could give relevant testimony."

Akron v. Carter, 190 Ohio App.3d 420, 2010-Ohio-5462, 942 N.E.2d 409, ¶ 20 (9th Dist.), quoting *Puritas Metal Prods. v. Cole*, 9th Dist. Lorain Nos. 07CA009255, 07CA009257, and 07CA009259, 2008-Ohio-4653, ¶ 34.

{¶ 20} In the instant matter, appellant argues that Burke is not a necessary witness because the testimony that appellee seeks to obtain from Burke can be obtained from another witness — appellant. To this end, appellant asserts that she is able to testify to any and all of her and Burke's shared living expenses. Furthermore, appellant argues that any testimony provided by Burke as to the shared living expenses will be cumulative and, thus, not necessarily admissible. In this regard, we agree.

{¶ 21} In appellee's motion to disqualify, appellee specifically argued that because Burke is appellant's spouse, resides with appellant, and shares living expenses with appellant, his testimony will be necessary and relevant to appellee's motion to modify. On appeal, appellee similarly argues that "[b]ecause [Burke] is the spouse of [a]ppellant, resides with [a]ppellant, contributes to the household income, shares living expenses of [a]ppellant, and even resides in the same household as the parties' minor child, his testimony is relevant and necessary." Appellee further argues that Burke's "testimony cannot be obtained by another source."

{¶ 22} We do not agree with appellee that simply because Burke resides with appellant and contributes to the household income that his testimony would therefore be relevant and necessary. Although it is true that Burke's testimony cannot be obtained from another source, we fail to see how it is relevant to our present inquiry. Indeed, the threshold inquiry is whether Burke's testimony would be admissible, and whether or not such testimony would be unobtainable through other trial witnesses. *See Gonzalez-Estrada*, 2017-Ohio-538, 85 N.E.3d 273, at ¶ 12. Therefore, we must first determine whether Burke's testimony would be admissible.

{¶ 23} In considering whether or not Burke's testimony would be admissible, we must examine the mechanics of a motion to modify a child support order. Such a motion to modify is primarily governed by R.C. 3119.79, which provides in part:

> (C) If the court determines that the amount of child support required to be paid under the child support order should be changed due to a substantial change of circumstances that was not contemplated at the

> time of the issuance of the original child support order or the last modification of the child support order, the court shall modify the amount of child support required to be paid under the child support order to comply with the schedule and the applicable worksheet through the line establishing the actual annual obligation, unless the court determines that the amount calculated pursuant to the basic child support schedule and pursuant to the applicable worksheet would be unjust or inappropriate and would not be in the best interest of the child and enters in the journal the figure, determination, and findings specified in section 3119.22 of the Revised Code.

Thus, the mechanics of a motion to modify nearly exclusively pertain to the worksheet itself.

{¶ 24} Furthermore, this court has previously noted that

> [u]nder R.C. 3119.79(A), "[w]hen considering a motion to modify a child support order, the trial court must recalculate the amount of support required to be paid pursuant to the statutory child support guideline schedule and the applicable worksheet using the parties' updated financial information." *Bonner v. Bonner*, 3d Dist. Union No. 14-05-26, 2005-Ohio-6173, ¶ 10. Further, "[a] deviation of ten percent in the amount to be paid between the original support order and the recalculated amount under the current circumstances is deemed to be a 'change of circumstances substantial enough to require a modification of the child support amount.'" *Id*., quoting R.C. 3119.79(A).

Baxter v. Thomas, 8th Dist. Cuyahoga No. 101186, 2015-Ohio-2148, ¶ 22. Therefore, in considering a motion to modify, a trial court is required to consider the income of the parties, i.e., the income of appellant and appellee.

{¶ 25} However, a trial court may also consider the factors set forth in R.C. 3119.23 to determine if it should grant a deviation from the original support order. Although R.C. 3119.23 lists several factors, of particular importance to the instant matter is (H), which states that "[b]enefits that either parent receives from remarriage or shared living expenses with another person." From the plain reading

of this subsection, it appears that appellee would need to establish that appellant herself is receiving a benefit as a result of her remarriage or shared living expenses with Burke, which can be achieved through appellant's own testimony. Although this same testimony could be achieved by Burke, because the testimony can be elicited from appellant, Burke's testimony is not necessary.

{¶ 26} Moreover, Burke's testimony in this regard would arguably be cumulative and not necessarily admissible. Under Evid.R. 403(B), a trial court may exclude evidence "if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

{¶ 27} Even assuming that Burke's testimony would not be cumulative, any additional testimony by Burke, i.e., his contributions to the household income and shared living expenses, would not be considered for purposes of modifying the support order. R.C. 3119.05(E) explicitly precludes consideration of a new spouse's income when computing income for purposes of a child support order. *Li v. Yang*, 8th Dist. Cuyahoga No. 96741, 2012-Ohio-2491, ¶ 38; *Quinn v. Paras*, 8th Dist. Cuyahoga No. 82529, 2003-Ohio-4952. R.C. 3119.05(E) states, "[w]hen the court or agency calculates the gross income of a parent, it shall not include any income earned by the spouse of that parent." *Quinn* at ¶ 45. In *Quinn*, this court held that benefits a former wife obtained through remarriage did not warrant a modification of former husband's child support obligations. *See also* R.C. 3119.05(E); R.C. 3119.23.

{¶ 28} Based on the above analysis, we find that the trial court abused its discretion in granting appellee's motion to disqualify. "A decision is unreasonable if there is no sound reasoning process that would support the decision." *Fried v. Abraitis*, 2016-Ohio-934, 61 N.E.3d 545, ¶ 11 (8th Dist.), citing *Centimark Corp. v. Brown Sprinkler Serv., Inc.*, 85 Ohio App.3d 485, 620 N.E.2d 134 (11th Dist.1993). Indeed, we find nothing within the record that would support the trial court's finding that Burke is a necessary witness to appellee's motion to modify.

{¶ 29} Additionally, we also find that the trial court erred by failing to conduct the proper analysis in its determination that Burke was a necessary witness. In its October 2, 2018 judgment entry granting appellee's motion to disqualify, the trial court concluded that "[appellee] intends to call [Burke] as a witness * * * to testify regarding living expenses. The Court finds that [Burke] is a necessary witness and subject to disqualification under [Prof.Cond.R. 3.7.]." The trial court failed to consider whether Burke's testimony was admissible, and if so, whether Burke's testimony could be obtainable from another witness. (Citations omitted.) *Gonzalez-Estrada*, 2017-Ohio-538, 85 N.E.3d 273, at ¶ 12. *Fordeley v. Fordeley*, 11th Dist. Trumbull No. 2014-T-0079, 2015-Ohio-2610, ¶ 31, quoting *McCormick v. Maiden*, 6th Dist. Erie No. E-12-072, 2014-Ohio-1896, ¶ 11 ("'[w]hen a trial court reviews a motion for disqualification under Prof.Cond.R. 3.7, the court must: (1) determine whether the attorney's testimony is admissible and, if so, (2) determine if disqualification is necessary and whether any of the exceptions to Prof.Cond.R. 3.7 are applicable.'").

{¶ 30} Accordingly, the trial court abused its discretion in granting appellee's motion to disqualify. Appellant's first assignment of error is sustained.

C. Motion to Disqualify Law Firm

{¶ 31} In her second assignment of error, appellant argues that the trial court erred when it disqualified Burke's law firm.

{¶ 32} In his June 20, 2018 motion to disqualify, appellee sought to have Burke disqualified as appellant's counsel and also sought to have Burke's law firm disqualified. In its October 2, 2018 judgment entry granting appellee's motion to disqualify, the trial court makes no mention of disqualifying the law firm. In fact, in its judgment entry, the trial court failed to explicitly rule on whether or not the law firm had been disqualified. The trial court simply granted appellee's motion to disqualify and noted that "[Burke] is disqualified from representing [appellant] in the pending Motion to Modify Child support."

{¶ 33} Therefore, to the extent that appellant argues in her second assignment of error that the trial court erred when it disqualified the law firm, this does not appear to be the rendition of the record before this court. Although the trial court granted appellee's motion to disqualify, the trial court did not disqualify the law firm. A trial court speaks through its journal entries. *See Kaine v. Marion Prison Warden*, 88 Ohio St.3d 454, 455, 727 N.E.2d 907 (2000). Nevertheless, based on our resolution of appellant's first assignment of error, appellant's second assignment of error is moot.

III. Conclusion

{¶ 34} The trial court abused its discretion in granting appellee's motion to disqualify appellant's counsel. Even assuming that Burke's testimony would not be cumulative, he was not a necessary witness. Lastly, the trial court erred in failing to undergo the proper analysis in determining whether or not Burke was a necessary witness.

{¶ 35} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion. Joseph Burke reinstated as appellant's counsel of record.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court, domestic relations division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN A. GALLAGHER, J., CONCURS;
PATRICIA ANN BLACKMON, P.J., CONCURS IN JUDGMENT ONLY