[Cite as *In re Guardianship of Carney*, 2021-Ohio-1819.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

IN RE GUARDIANSHIP OF JAMES M. CARNEY, JR.	:	
	:	No. 110034
[Appeal by James M. Carney, Jr.]	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 27, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Probate Division
Case No. 2o2oGRD25o356

Appearances:

Winter | Trimacco Co., L.P.A., Richard C. Alkire, and Dean Nieding; Mollohan Legal Group, and Bryan S. Mollohan; Schraff Thomas Law, L.L.C., John P. Thomas, and Andrew J. Santoli, *for respondent-appellant* James M. Carney, Jr.

Thomas M. Horwitz, Co., L.P.A., and Thomas M. Horwitz, *for applicant-appellee* James M. Carney, III.

EILEEN T. GALLAGHER, J.:

{¶ 1} Defendant-appellant, James M. Carney, Jr. ("Appellant"), appeals a probate court order disqualifying Attorney Joseph D. Carney ("Joseph") from

representing him in guardianship proceedings. Appellant claims the following errors:

> 1. The probate court abused its discretion and therefore committed reversible error by nullifying Ward Carney's statutory right to independent counsel of his choice and disqualifying said counsel without holding any type of hearing or reviewing any evidence concerning the necessity and admissibility of the purported testimony of counsel.
>
> 2. The probate court abused its discretion and therefore committed reversible error in granting the motion to disqualify counsel independently selected and retained by Ward Carney under the witness advocate rule, Prof. Cond. R. 3.7(a), when the movant failed to establish (1) that the proposed testimony of counsel was admissible and necessary, and (2) the proposed testimony would somehow prejudice Ward Carney.
>
> 3. The probate court abused its discretion and therefore committed reversible error in holding Ward Carney would not sustain substantial hardship if denied his statutory right to have his lifelong friend, family member and business partner represent him in guardianship proceedings.
>
> 4. The probate court abused its discretion and therefore committed reversible error when it strayed from the precedent of the Eighth District Court of Appeals and considered arguments that have nothing to do with admissibility or necessity in disqualifying counsel under the witness advocate rule, Prof. Cond. R. 3.7(a).
>
> 5. The probate court abused its discretion and therefore committed reversible error in using Prof. Cond. R. 3.7 as the basis to disqualify counsel where there will be no jury trial and where the court, not a jury, will decide the factual issues in dispute

{¶ 2} We find no merit to the appeal and affirm the trial court's judgment.

I. Facts and Procedural History

{¶ 3} In August 2019, Appellant, a wealthy businessman, executed a durable power of attorney ("POA") appointing his son, James M. Carney III ("Carney III"),

as his lawful attorney-in-fact. The POA contained a guardianship provision providing that Carney III, as Appellant's attorney-in-fact, was nominated and authorized to apply for appointment to serve as Appellant's guardian in the event a guardianship were necessary. The POA further provided that Carney III was authorized to retain counsel and attorneys on Appellant's behalf to represent Appellant "in all actions and proceeding[s] in state and federal court * * * ."

{¶ 4} In December 2019, Appellant was diagnosed with dementia and was admitted to the memory care unit at the Symphony at Olmsted Falls nursing home. On January 31, 2020, Appellant had an altercation with another resident of the nursing home and was admitted to a locked psychiatric unit at Southwest General Hospital. Three days later, on February 3, 2020, Joseph, who is Appellant's cousin, and Joseph's sister, Jeanne Carney Hagan ("Jeanne"), came to the locked psychiatric unit and presented Appellant with a limited power of attorney ("LPOA") nominating Jeanne as his limited attorney-in-fact. Joseph notarized the LPOA, but no other witnesses signed the document, and neither Carney III nor Appellant's attorney, Bryan S. Mollohan, were notified of it.

{¶ 5} The terms of the LPOA revoke certain aspects of prior powers of attorney. It also contains the following guardianship provision:

> In the event a guardianship * * * may be needed of me, I desire that Jeanne Carney Hagan be among those considered for this situation and I hereby nominate her * * * to apply for appointment * * * as my guardian * * * . If she is opposed by my son Jamie Carney, (James M. Carney III), I state that I prefer her in such a situation.

{¶ 6} On February 14, 2020, Carney III filed an application for guardianship of his father on the recommendation of Dr. Catherine Lee ("Dr. Lee"), a neuropsychologist at University Hospitals. In a report dated December 23, 2019, Dr. Lee diagnosed Appellant with dementia and stated that the "extent of [Appellant's] difficulties and limited insight indicated the need for full-time supervision * * * ." A court investigator also submitted a report dated February 27, 2020, indicating that Appellant was mentally impaired due to both mental and physical illness or disability. The investigator's report stated that Appellant was incapable of taking proper care of himself and his property.

{¶ 7} Jeanne filed an application for guardianship of Appellant on March 5, 2020, claiming she had been nominated by Appellant to act as his guardian in the LPOA. Carney III objected to the nomination of Jeanne for appointment as guardian, arguing that Appellant was not competent to execute the LPOA and that Appellant's execution of the LPOA was the result of the undue influence of Jeanne and Joseph. Joseph is an attorney, and the objection asserted that Appellant's execution of the LPOA resulted from Joseph's violation of Prof.Cond.R. 4.2 and other rules of professional conduct.

{¶ 8} On March 3, 2020, Attorney Bryan S. Mollohan ("Mollohan") filed a notice of appearance on behalf of Appellant. One day later, on March 4, 2020, Attorneys John P. Thomas ("Thomas") and Andrew J. Santoli ("Santoli") entered appearances on behalf of Appellant. Carney III subsequently filed a notice of termination of representation of Attorneys Thomas and Santoli, arguing that as

Appellant's attorney-in-fact, Carney III was authorized to retain counsel on Appellant's behalf and he did not retain Thomas or Santoli to represent Appellant. Carney III explained that Mollohan had a longstanding attorney-client relationship with Appellant spanning 15 years and that Mollohan was the only attorney retained to represent Appellant. Carney III filed the notice of termination of Attorneys Thomas and Santoli after Mollohan asked them to withdraw, but they refused. In an affidavit submitted in support of the notice of termination, Carney III averred that after he filed his application for appointment of guardian, Joseph and Jeanne brought Thomas and Santoli to the nursing home where Appellant was a resident and instructed Appellant to retain them to represent him in the guardianship proceedings. (Carney III aff. ¶ 12, attached to notice of termination of representation of attorneys John P. Thomas and Andrew J. Santoli.)

{¶ 9} After Carney III filed his objection to the nomination of Jeanne as guardian, Joseph filed a motion to intervene in the guardianship proceedings as an interested party, claiming that he had a "unique personal stake in this litigation." (Motion to intervene p. 4.) Joseph asserted that he had a special interest in the litigation to defend his professional reputation, which was allegedly jeopardized by Carney III's allegations that Joseph violated professional rules of conduct and used undue influence to cause Appellant to execute the LPOA that nominated Jeanne as his preferred guardian.

{¶ 10} The probate court denied Joseph's motion to intervene, finding that his personal interests in his "professional and ethical concerns are not an actual

interest in the guardianship proceedings." The probate court also found that Joseph's interest in the health, safety, and welfare of Appellant are adequately represented by Jeanne.

{¶ 11} After the trial court denied Joseph's motion to intervene, Joseph filed a notice of appearance as counsel for Appellant. Carney III filed a motion to disqualify Joseph from representing Appellant, arguing that Joseph is disqualified from representing Appellant pursuant to the witness-advocate rule set forth in Prof. Cond.R. 3.7, which prohibits a lawyer from acting as an advocate at trial if the lawyer is likely to be a necessary witness. Carney III further asserted that Appellant would not be prejudiced by the disqualification since his interests are adequately represented by three other attorneys from two separate firms.

{¶ 12} The probate court granted the motion to disqualify Joseph. (Judgment entry dated Sept. 17, 2020.) The court found that Joseph would have significant, admissible testimony relative to the competing applications for guardianship. In its journal entry, the court explained, in relevant part:

> [S]hould the Respondent be found incompetent, a great contention is the Limited Power of Attorney signed by the Respondent on February 3, 2020[,] while the Respondent was in the psychiatric unit, which states that in the event a guardianship is needed for the Respondent, he nominates Jeanne Carney Hagen to serve as Guardian. Additionally, the Limited Power of Attorney states that " * * * if she [Jeanne] is opposed by my son Jamie Carney, (James M. Carney III) I state that I prefer her in such a situation." The Court finds that while some matters may potentially be protected by the attorney-client privilege, Joseph Carney will have admissible evidence surrounding the Limited Power of Attorney that is relevant to the Court when considering who should be named as Guardian. Such testimony will include, at the very least, the mental competency and capacity of the

> proposed Ward to execute the legal document on February 3, 2020. As which applicant should be named as Guardian is relevant and significant in the pending proceeding. Joseph Carney will have admissible evidence that will assist the Court in understanding the Respondent's intent and wishes[,] which no other witness can provide to the Court.

(Judgment entry dated Sept. 17, 2020.)

{¶ 13} The probate court further noted its "grave concern that upon the Motion to Intervene being denied, Joseph Carney proceeded to file a Notice of Appearance claiming to represent Respondent * * * ." The probate court observed that after Carney III sought disqualification of Joseph, "Joseph proceeded to obtain the Respondent's signature in an engagement letter and filed a subsequent Notice of Appearance with the court on September 1, 2020."

{¶ 14} In his memorandum in opposition to motion to disqualify, Joseph explained why he believed he should represent Appellant. The memorandum states, in relevant part:

> It is essential that Joseph be permitted to assist in his cousin's defense. If disqualified, Joseph would return to the status of an outsider, and he cannot be as effective in helping his cousin because he likely will not be able to view what is presented as "confidential" information, including medical and financial information to which he is entitled as counsel to Jim Jr.

The probate court found this argument "disingenuous." The court's judgment entry states, in relevant part:

> It is clear to this Court that Joseph Carney continues his attempts to gain medical and financial information of the Respondent for his personal gain in an effort to clear his name and professional reputation. Even more concerning to the Court is that Joseph Carney, in an attempt to formalize and secure his representation of the Respondent, had the

> Respondent sign an engagement letter during the pendency of the Guardianship proceeding and despite the Statement of Expert Evaluations and medical statements that have been filed with the Court.
>
> This Court must protect the Respondent personally and financially. Attorney Joseph Carney has shown that he is biased against Applicant James M. Carney III for personal motives and that his interests will not best serve the Respondent, as he wants to further his own agenda. * * *
>
> The court finds that prior to Joseph Carney's Notice of Representation, Respondent was represented by attorneys Bryan S. Mollohan and John P. Thomas, and the Court finds that the Respondent is adequately represented by the aforementioned attorneys. By allowing Joseph Carney to remain as counsel will increase attorney fees, duplicate any and all discovery conducted in the matter, and postpone the disposition of the Guardianship matter.

(Judgment entry dated Sept. 27, 2020.)

{¶ 15} Although Appellant never opposed the disqualification of Joseph, he now, through new counsel who did not represent him in the probate court, appeals the trial court's judgment granting the disqualification.[1]

II. Law and Analysis

A. Standard of Review

{¶ 16} Under R.C. 2111.02(C)(7)(a), an alleged incompetent has the right to be represented by independent counsel of his choice. Disqualification is a drastic measure that interferes with an alleged incompetent's right to choose his counsel

[1] An order disqualifying an attorney from representing a client in a civil case is a final, appealable order pursuant to R.C. 2505.02(B)(4). *Douglass v. Priddy*, 11th Dist. Geauga No. 2013-G-3172, 2014-Ohio-2881, ¶15, citing *Westfall v. Cross*, 144 Ohio App.3d 211, 218-219, 759 N.E.2d 881 (7th Dist.2001).

and, therefore, should not be imposed unless absolutely necessary. *Kala v. Aluminum Smelting & Refining Co.*, 81 Ohio St.3d 1, 5, 688 N.E.2d 258 (1998).

{¶ 17} Nevertheless, a trial court has wide discretion when considering motions to disqualify counsel. *Carr v. Acacia Country Club Co.*, 8th Dist. Cuyahoga No. 91292, 2009-Ohio-628, ¶ 18. Therefore, a trial court's decision on whether to grant a motion to disqualify will not be disturbed absent an abuse of discretion. *Id.*, citing *155 N. High, Ltd. v. Cincinnati Ins. Co.*, 72 Ohio St.3d 423, 426, 650 N.E.2d 869 (1995).

{¶ 18} "A court abuses its discretion when a legal rule entrusts a decision to a judge's discretion and the judge's exercise of that discretion is outside of the legally permissible range of choices." *State v. Hackett*, Slip Opinion No. 2020-Ohio-6699, ¶ 19. An abuse of discretion may be found where a trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, 892 N.E.2d 454, ¶ 15 (8th Dist.). When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Vannucci v. Schneider*, 2018-Ohio-1294, 110 N.E.3d 716, ¶ 22 (8th Dist.).

B. Disqualification without a Hearing

{¶ 19} In the first assignment of error, Appellant argues the probate court erred in disqualifying Joseph without holding an evidentiary hearing. In the second assignment of error, Appellant argues the probate court erred in granting the motion to disqualify under the witness-advocate rule because Carney III failed to establish

that Joseph's testimony was admissible and necessary. And, in the third assignment of error, Appellant argues the trial court erred in finding that Appellant would not sustain a substantial hardship if Joseph were not permitted to represent him in the guardianship proceedings. We discuss these assigned errors together because they are interrelated.

{¶ 20} As a preliminary matter, we again note that Appellant never opposed the motion for disqualification even though he was represented by three other attorneys apart from Joseph. And there is no evidence in the record that Appellant knowingly and voluntarily retained Joseph to represent him. To the contrary, by failing to respond to Carney III's requests for admissions, the evidence shows that Appellant did not consent to Joseph's representation and that Joseph was never properly retained by Appellant to represent him in the guardianship proceedings.

{¶ 21} Under Civ.R. 36(A), requests for admissions are self-executing; if a party fails to respond to a request or an admission, the matter is automatically deemed admitted and no further action is required by the party requesting it. *Riddick v. Taylor*, 2018-Ohio-171, 105 N.E.3d 446, ¶ 22 (8th Dist.), citing *Smallwood v. Shiflet*, 8th Dist. Cuyahoga No. 103853, 2016-Ohio-7887, ¶ 18. In other words, "where a party fails to respond to requests of admissions within the time provided under Civ.R. 36, the requested admissions become 'facts of record which the court must recognize.'" *LVNV Funding, LLC v. Takats*, 6th Dist. Lucas No. L-14-1129, 2015-Ohio-3082, ¶ 14.

{¶ 22} Carney III propounded requests for admissions, including the following, which were deemed admitted:

> Request No. 1: Admit that Attorneys Bryan S. Mollohan, John P. Thomas, and Andrew J. Santoli are the only attorneys you authorized to represent you from January 1, 2020 to the present.
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> * * *
>
> Request No. 2: Admit that Attorneys Bryan S. Mollohan, John P. Thomas, and Andrew J. Santoli are the only attorneys you authorized to represent your interests from January 1, 2020 to the present.
>
> * * *
>
> Request No. 3: Admit that from July 1, 2019 to December 31, 2019, you did not request Joe Carney to prepare any legal documents for you to sign.
>
> * * *
>
> Request No. 4: Admit that from January 1, 2020 to February 13, 2020, you did not request Joe Carney to prepare legal documents for you to sign.
>
> * * *
>
> Request No. 5: Admit that from February 14, 2020 to the present, you did not request Joe Carney to prepare legal documents for you to sign.
>
> * * *

Thus, based on these admissions, Appellant never retained Joseph to represent him.

{¶ 23} Appellant nevertheless asserts the trial court should have held a hearing before disqualifying Joseph. Assuming arguendo that Appellant retained Joseph as his counsel, the Ohio Supreme Court "has never held a court must hold an evidentiary hearing on every motion for disqualification." *Reo v. Univ. Hosps.*

Health Sys., 11th Dist. Lake No. 2018-L-110, 2019-Ohio-1411, ¶ 29, citing *Dayton Bar Assn. v. Parisi*, 131 Ohio St.3d 345, 2012-Ohio-879, 965 N.E.2d 268, ¶15. "The only instance in which the Supreme Court of Ohio has held an in-person 'evidentiary hearing' is required involved the disqualification of an attorney who left one firm and joined a firm representing an opposing party." *Id.*, citing *Dayton Bar Assn.* at ¶ 15.

{¶ 24} In *Reo*, the Eleventh District affirmed an order disqualifying an attorney from representing his spouse in a civil action because the attorney was a necessary witness per Prof.Cond.R. 3.7. As previously stated, Prof.Cond.R. 3.7 prohibits a lawyer from acting as an advocate at trial if the lawyer is likely to be a necessary witness. The Eleventh District affirmed the disqualification in *Reo* even though the trial court did not hold an evidentiary hearing and determined the issues on the parties' written submissions. *Id.* at ¶ 26-27. The *Reo* court explained that so long as a trial court has sufficient evidence to consider the required factors for disqualification, an evidentiary hearing is generally unnecessary. *Id.* at ¶ 30-31. *See also Landzberg v. 10630 Berea Road, Inc.*, 8th Dist. Cuyahoga No. 79574, 2002 Ohio App. LEXIS 1085 (Mar. 14, 2002), citing *Univ. Carnegie Med. Partners Assn. v. Weiss & Kramer, Inc.*, 8th Dist. Cuyahoga No. 65422, 1994 Ohio App. LEXIS 2690 (June 23, 1994) ("an oral hearing is not required" where "the trial court had before it sufficient evidence to determine that the exceptions * * * do not apply"); *Smith v. Smith*, 8th Dist. Cuyahoga Nos. 107205 and 107373, 2019-Ohio-990, ¶ 26 (evidentiary hearing unnecessary to disqualify husband's attorney where record

demonstrated he also represented the guardian ad litem in her own divorce proceedings.); *Tabbaa v. Raslan*, 8th Dist. Cuyahoga No. 97055, 2012-Ohio-367, ¶ 18, quoting *Holmer v. Holmer*, 3d Dist. Seneca No. 13-07-28, 2008-Ohio-3228, ¶ 25 (a trial court "'is not required to hold a hearing on every motion to disqualify counsel on the basis of a conflict of interest.'").

{¶ 25} The *Reo* court explained that

> while a trial court is required to hold a hearing to consider whether a lawyer should be disqualified under Prof.Cond. R. 3.7, no particular type of hearing is required. * * * Instead, it must be clear that the trial court had sufficient evidence before it to make the necessary determinations under Prof. Cond.R. 3.7.

Id. at ¶ 34, citing *Brown v. Spectrum Networks, Inc.*, 180 Ohio App.3d 99, 2008-Ohio-6687, 904 N.E.2d 576, ¶ 18 (1st Dist.).

{¶ 26} The Eleventh District concluded that the trial court had sufficient evidence on which to grant the motion to disqualify without an evidentiary hearing because the defendant's motion to disqualify contained a detailed memorandum describing with particularity the grounds upon which the motion was brought, an analysis of each element under Prof.Cond.R. 3.7(a), and a legal argument with authorities. The Reos' brief in opposition asserted an opposing legal argument with authorities and, after the magistrate issued a recommendation disqualifying counsel, the Reos filed a detailed motion to set aside the magistrate's decision.

{¶ 27} Under Prof.Cond.R. 3.7(a), an attorney is prohibited from acting as an advocate in a proceeding if the attorney is likely to be a necessary witness unless (1) the testimony relates to an uncontested issue, (2) the testimony relates to the nature

and value of legal services rendered in the case, or (3) the disqualification of the lawyer would work substantial hardship on the client.

{¶ 28} "'A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony and availability of other evidence.'" *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. Thus, the court must determine whether the attorney's testimony is material and relevant to the litigation and whether the attorney's testimony could be obtained elsewhere. *Carter* at ¶ 20. If the testimony is necessary and admissible, the court must then determine if one of the exceptions under Prof.Cond.R. 3.7(a) applies.

{¶ 29} In a guardianship proceeding, the probate court must decide whether the alleged incompetent needs a guardian, and if so, who should be appointed as the guardian. The probate court in this case must decide between two competing applications for guardianship; one filed by Appellant's son and the other by his cousin, Jeanne. If Appellant is determined to be incompetent, the probate court will then have to ascertain whether he was competent when he signed the LPOA while he was in the locked psychiatric unit at University Hospitals on February 3, 2020, because the LPOA nominates Jeanne to serve as Appellant's guardian.

{¶ 30} Joseph notarized the LPOA executed by Appellant on February 3, 2020. He is, therefore, a key eyewitness with personal knowledge regarding Appellant's mental competency on that day. Indeed, Joseph stated in his proposed

reply brief in support of his motion to intervene that because he did not have access to Appellant's medical records he could only "rely on his own assessment made as an attorney * * *." (Reply to applicant James M. Carney III's response to Joseph Carney's motion to intervene p. 3.) The term "assessment" could only refer to Joseph's assessment of Appellant's mental competence, and Joseph is the only witness qualified to testify as to his assessment of Appellant's mental capacity. No other witnesses, except maybe Jeanne, were present when Appellant signed the LPOA. Since Jeanne is not an attorney, Joseph is also the only qualified witness who can testify as to whether he advised Appellant that the LPOA could negatively impact the POA he previously executed that named his son, Carney III, attorney-in-fact, and nominated his son to guardian, if necessary. Therefore, Joseph is, a necessary fact witness in the guardianship proceedings.

{¶ 31} Indeed, Joseph admitted he was a necessary witness when he asserted:

> [I]t is essential to [Appellant's] health, safety, happiness, and continued autonomy that his story is truthfully told, and all relevant facts and developments are recounted and considered and Joseph D. Carney is in a unique position to do so. It is essential to Joseph D. Carney's long-standing relationship with and love for his cousin, that he step-in and provide details and information relevant to determining if guardianship is appropriate. He will also present information relevant to who the court may wish to consider as a guardian and which person will respect and remain faithful to the wishes and desires of [Appellant].

([Proposed] Motion of intervenor Joseph D. Carney to file reply brief instanter and [Proposed] reply brief p. 3.) Therefore, by his own admission, Joseph's testimony is relevant and necessary to the probate court's guardianship decision.

{¶ 32} Having determined that Joseph is a necessary witness, we now consider whether any of the exceptions to the witness-advocate rule set forth in Prof.Cond.R. 3.7(a) are applicable. Under Prof.Cond.R. 3.7(a), an attorney may continue to act as an advocate in a proceeding even though the attorney is likely to be a necessary witness if (1) the testimony relates to an uncontested issue, (2) the testimony relates to the nature and value of legal services rendered in the case, or (3) the disqualification of the lawyer would work substantial hardship on the client.

{¶ 33} Joseph's testimony is not related to the nature or value of legal services rendered. Joseph's testimony relates to Appellant's mental competency, which is a contested issue. Jeanne and Joseph contend that Appellant was competent when he executed the LPOA on February 3, 2020. Citing several reports of medical experts and the probate court's investigator, Carney III asserts that he was not competent on that day and that his continued incompetency necessitates the appointment of a guardian. Therefore, as previously explained, Joseph's testimony regarding his assessment of Appellant's competency on February 3, 2020, is a contested factual issue.

{¶ 34} Moreover, Joseph's disqualification will not work a substantial hardship on Appellant. Establishing substantial hardship for purposes of avoiding disqualification "requires more than a showing of financial hardship or long-time

familiarity with the case. There must be some proof of specialized expertise." *155 N. High v. Cincinnati Ins. Co.*, 72 Ohio St.3d at 429, 650 N.E.2d 869.[2] And, the disqualified attorney bears the burden of proving that his client will suffer substantial hardship as a result of the disqualification. *Id.* There is nothing in the record demonstrating that Joseph offers expertise beyond that already provided by Appellant's three other lawyers of record. Therefore, Appellant has not suffered any hardship as a result of Joseph's disqualification.

{¶ 35} The first, second, and third assignments of error are overruled.

C. Extraneous Arguments

{¶ 36} In the fourth assignment of error, Appellant argues the probate court abused its discretion by considering arguments that have nothing to do with the admissibility or necessity of disqualifying Joseph under the witness-advocate rule. He contends the court inappropriately considered Joseph's motives for representing Appellant and expressed concern over the fact that Joseph entered an appearance after the court denied his motion to intervene.

{¶ 37} The probate court was concerned that Joseph had a conflict of interest that required Joseph be disqualified for ethical reasons. Throughout the guardianship proceedings, Joseph endeavored to obtain Appellant's medical

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[2] Prof.Cond.R. 3.7 replaced former disciplinary rules DR 5-101(B) and 5-102(A) and (B) of the former Code of Professional Responsibility, effective February 1, 2007. *Brown v. Spectrum Networks, Inc.*, 180 Ohio App.3d 99, 2008-Ohio-6687, 904 N.E.2d 576, ¶ 13. Although *155 N. High* applied disciplinary rules of the former Code of Professional Responsibility, cases interpreting those rules are still relevant in determining whether disqualification will cause a substantial hardship to the client. *Reo*, 2019-Ohio-1411, 131 N.E.3d 986, at ¶ 21.

records and other discovery to defend his professional reputation. (*See, e.g.*, motion to intervene, for visitation, and for further relief p. 4.) If Joseph can establish that Appellant does not have dementia, then he would be exonerated of any claim that he unduly influenced Appellant to sign the LPOA. Joseph's interest in defending his professional license and reputation are at odds with Appellant's alleged need for a guardian. In its judgment granting disqualification, the probate court observed:

> Attorney Joseph Carney has shown that he is biased against Applicant James M. Carney III for personal motives and that his interests will not serve [Appellant], as he wants to further his own agenda. Further, the Court finds it disingenuous that Joseph Carney would approach [Appellant] to sign an engagement letter while the Guardianship proceeding is pending and in light of the Statement of Expert Evaluations and other medical statements that have been filed in this matter.

{¶ 38} In light of this conduct, the probate court reasonably concluded that Joseph's personal interest in exoneration would limit his ability to effectively represent Appellant's interests in the guardianship proceeding. We find no abuse of discretion in the trial court's consideration of these facts as an additional basis for disqualifying Joseph, especially since there is no evidence that Appellant knowingly and voluntarily retained Joseph's services in the first place.

{¶ 39} The fourth assignment of error is overruled.

D. Necessary Witness

{¶ 40} In the fifth assignment of error, Appellant argues the probate court abused its discretion in using Prof.Cond.R. 3.7 as the basis to disqualify Joseph where the court, rather than a jury, will decide the factual issues. He contends that

because Prof.Cond.R. 3.7 prohibits an attorney from acting as both an advocate and a witness "at trial" and the guardianship proceeding is not a trial proceeding, Prof.Cond.R. 3.7 is inapplicable.

{¶ 41} However, the term "trial" in the context of Prof.Cond.R. 3.7 applies to both jury trials and non-jury proceedings. The term "trial" is defined as "the formal examination before a competent tribunal of the matter in issue in a civil or criminal cause in order to determine such issue." Merriam-Webster.com dictionary, "trial" available at Merriam-Webster, https://www.merriam-webster.com/dictionary/Illegal (accessed Apr. 26, 2021). Nothing in Prof.Cond.R. 3.7 indicates that the rule only applies to jury trials.

{¶ 42} Therefore, the fifth assignment of error is overruled.

{¶ 43} Judgment affirmed.

It is ordered that appellee recover from appellant 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, probate 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.

EILEEN T. GALLAGHER, JUDGE

MARY J. BOYLE, A.J., and
ANITA LASTER MAYS, J., CONCUR