[Cite as *Fordeley v. Fordeley*, 2015-Ohio-2610.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

CHRISTINA FORDELEY,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-T-0079**
- vs -	:	
MARK FORDELEY, et al.,	:	
Defendant-Appellant.	:	

Appeal from the Trumbull County Court of Common Pleas, Juvenile Division, Case No. 12 DR 330.

Judgment: Reversed and remanded.

Matthew C. Giannini, 1040 South Commons Place, #200, Youngstown, OH 44514, and *Louis E. Katz*, 70 McKinley Way West, Poland, OH 44514 (For Plaintiff-Appellee).

Frank R. Bodor, 157 Porter Street, N.E., Warren, OH 44481 (For Defendant-Appellant).

Michael R. Babyak, 1075 Susan Road, Ravenna, OH 44266 (Guardian ad litem).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final judgment in a divorce proceeding before the Trumbull County Court of Common Pleas, Domestic Relations Division. Appellant, Mark Fordeley, contests the trial court's disqualification of his trial counsel, Attorney Frank R. Bodor, maintaining that the disqualification was unjustified because appellee, Christina Fordeley, failed to show that Attorney Bodor would be a necessary witness.

For the following reasons, disqualification was improper.

{¶2} The parties were married for approximately twenty years and had six children. The parties signed a prenuptial agreement that, according to appellant, precluded appellee from acquiring an ownership interest in any property appellant owned before the marriage or acquired during the marriage.

{¶3} Approximately three years after marrying, the Ohio Department of Transportation filed an eminent domain action relating to three parcels that were owned either by appellant solely or by appellant and his father. Appellant had obtained his ownership interest to two parcels before the marriage. His interest in the third parcel was acquired during the marriage.

{¶4} In its complaint, the Ohio Department of Transportation named appellee, appellant, and his father as defendants. Appellant hired Attorney Bodor to represent him and appellee. In answering the complaint, Attorney Bodor did not include any denial concerning whether appellee had any ownership interest in any of the parcels. Furthermore, appellee signed a verification for the answer, in which she was listed as a "landowner."

{¶5} During the pendency of the eminent domain action, Attorney Bodor never spoke to appellee regarding whether she had an ownership interest in any of the parcels. Ultimately, the action was settled without any determination as to whether she had an interest in the parcels.

{¶6} More than ten years after the eminent domain proceeding, Attorney Bodor represented appellant in a misdemeanor criminal action. Except for attending the final hearing, appellee did not have any connection to that action. After the hearing, Attorney

Bodor and the couple ate lunch at a local restaurant, during which Attorney Bodor and appellee had a casual conversation about child rearing. As part of their conversation, appellee discussed some of the difficulties she faced in taking her six children to various functions.

{¶7} The parties' divorce proceeding was filed in August 2012. At the outset of the case, appellant asked Attorney Bodor to represent him, but Bodor initially refused on the basis that his schedule did not permit it. Over the first twenty months the case was pending, appellant hired two different attorneys to represent him. When his relationship with the second attorney ended, appellant again asked Attorney Bodor to take on the case. This time, Bodor agreed to represent him.

{¶8} On June 17, 2014, an evidentiary hearing was scheduled on whether the prenuptial agreement was valid and enforceable. At the beginning of the proceeding, appellee moved to disqualify Attorney Bodor. As the primary basis for the motion, appellee asserted that Bodor had a conflict of interest because, in addition to representing her during the eminent domain action, Bodor had espoused a position in that action concerning her ownership of the subject land which contradicted the argument he was advancing in relation to enforcement of the prenuptial agreement. She further contended that Bodor could not represent appellant because Bodor was likely to be called to testify about the nature of her ownership rights in the parcels.

{¶9} Initially, the trial court ordered the parties to submit written briefs regarding the "disqualification" issue. After the briefs were filed, though, the trial court contacted the Supreme Court of Ohio for guidance as to the proper procedure for disposing of the motion. As a result, the court held an evidentiary hearing on the matter, during which

appellee testified on her own behalf and called appellant on cross-examination.

{¶10} In its judgment granting the motion to disqualify, the trial court first found that appellee did not establish that she told Attorney Bodor any confidential information during either the eminent domain case or their "child rearing" conversation following the criminal action; accordingly, there was no conflict of interest that would prejudice her in the divorce proceeding. However, the court still found disqualification was justified because Attorney Bodor was likely to be called as a witness in relation to property rights. Specifically, the trial court held that Bodor's proposed testimony would be both admissible and necessary for showing the extent of appellee's ownership interest.

{¶11} In appealing the disqualification ruling, appellant raises two assignments of error for review:

{¶12} "[1.] The trial court erred and abused its discretion in failing to apply the proper standard set forth in Professional Conduct Rule 3.7(A), which bases disqualification of an attorney as an advocate at a trial in which the lawyer is 'likely' to be called as a necessary witness and not the 'possibility' of his being called as a necessary witness.

{¶13} "[2.] The trial court committed prejudicial error and abused its discretion by ordering the disqualification of appellant's legal counsel holding that he may be called as a witness in the case and his testimony is admissible and necessary."

{¶14} In her brief, prior to addressing the substance of the assignments, appellee raises a preliminary question as to immediate appealability. In arguing that this appeal must be dismissed for lack of jurisdiction, appellee submits that a pretrial disqualification decision is governed by R.C. 2505.02(B)(2), which provides that a ruling

will be considered a final order when it affects a substantial right and in a special proceeding. However, a review of the relevant case law demonstrates that, although the "special proceeding" standard was once employed to determine the finality of disqualification decisions, *see Russell v. Mercy Hosp.*, 15 Ohio St.3d 37 (1984), the Ohio Supreme Court now applies a different standard due to a change in the governing statute.

{¶15} In *State v. Chambliss*, 128 Ohio St.3d 507, 2011-Ohio-1785, syllabus, the Supreme Court stated that "[a] pretrial ruling removing a criminal defendant's retained counsel of choice is a final order subject to immediate appeal." In its examination of the issue, the *Chambliss* court applied R.C. 2505.02(B)(4), which provides:

{¶16} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶17} "* * *

{¶18} "(4) An order that grants or denies a provisional remedy and to which both of the following apply:

{¶19} "(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

{¶20} "(b) The appealing party would not be allowed a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action."

{¶21} In *Chambliss*, there was no dispute that the disqualification of counsel is a provisional remedy, and that a judgment granting disqualification determines the action

with respect to the provisional remedy; thus, the Supreme Court's analysis focused on whether an immediate appeal was the only means to ensure the defendant an effective remedy. *Id*. at ¶16. Citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006), the *Chambliss* court noted that, since different attorneys will often pursue different legal strategies regarding many aspects of a criminal case, it will be difficult to determine at the end of the action whether the erroneous disqualification of counsel was prejudicial. *Id*. at ¶18-20. As a result, an erroneous disqualification is considered a structural error which entitles the criminal defendant to an automatic reversal of his conviction. *Id*. For this reason, the *Chambliss* court ultimately held that a pretrial disqualification order must be immediately appealable because it is the only way to ensure a meaningful appellate remedy. *Id*. at ¶22.

{¶22} Although the Supreme Court has not applied R.C. 2505.02(B)(4) to a civil pretrial disqualification order, it has still generally held that such an order is immediately appealable. *See Kala v. Aluminum Smelting & Refining Co., Inc.*, 81 Ohio St.3d 1, 3 (1998), in which the court concluded that the disqualification of civil appellate counsel is appealable to the Supreme Court prior to the end of the appellate process. Moreover, while not citing either *Chambliss* or R.C. 2505.02(B)(4), recent appellate opinions have held that the pretrial disqualification of civil counsel is immediately appealable. *See McCormick v. Maiden*, 6th Dist. Erie No. E-12-072, 2014-Ohio-1896, ¶8; *Holbrook v. Benson*, 5th Dist. Stark No. 2013CA00045, 2013-Ohio-5307, ¶9.

{¶23} Notwithstanding the inherent differences between criminal and civil legal representation, the *Chambliss* analysis under R.C. 2505.02(B)(4) should be applied to the appealed judgment. First, given that a proceeding to decide a motion to disqualify is

separate and distinct from the main civil case, it constitutes a provisional remedy under R.C. 2505.02(A)(3). Second, the decision granting a motion to disqualify civil counsel decides the provisional remedy and prevents any judgment on the issue in favor of the non-moving party. Third, in light of the fact that the representation of a civil client usually involves multiple judgment calls, it will typically be difficult to demonstrate at the conclusion of the entire case that an erroneous decision to disqualify counsel was prejudicial to the party. Hence, the non-moving party will be denied a meaningful and effective remedy unless an immediate appeal is allowed. For this reason, this court has jurisdiction to review the merits of the trial court's decision to disqualify Attorney Bodor as counsel for appellant in the divorce action.

{¶24} Under his first assignment, appellant contends that the trial court failed to apply the proper standard for determining whether Attorney Bodor must be disqualified on the basis that he could be a witness in the underlying case. According to appellant, instead of deciding whether it was "likely" that Bodor would be called as a witness, the court mistakenly determined whether it was "possible" Bodor would testify.

{¶25} "Trial courts have the 'inherent power to disqualify an attorney from acting as counsel in a case when the attorney cannot or will not comply with the Code of Professional Responsibility and when such action is necessary to protect the dignity and authority of the court.' *Horen v. City of Toledo Public School Dist.*, 174 Ohio App.3d 317, 2007-Ohio-6883, * * *, ¶21 (6th Dist.). 'However, because of the potential use of the advocate-witness rule for abuse, disqualification "is a drastic measure which should not be imposed unless absolutely necessary."' *Waliszewski v. Caravona Builders, Inc.*, 127 Ohio App.3d 429, 433, * * * (9th Dist.1998), quoting *Spivey v. Bender*, 77 Ohio

App.3d 17, 22, * * * (6th Dist.1991). *See, also, A.B.B. Sanitec West, Inc. v. Weinstein*, 8th Dist. Cuyahoga No. 88258, 2007-Ohio-2116, ¶12 (applying the current Rules of Professional Conduct). It is therefore important for the trial court to follow the proper procedures in determining whether disqualification is necessary. *Brown v. Spectrum Networks, Inc.*, 180 Ohio App.3d 99, 2008-Ohio-6687, * * *, ¶11 (1st Dist.) citing *Kala v. Aluminum Smelting & Refining Co., Inc.*, 81 Ohio St.3d 1, 6, * * * (1998)." *Holbrook*, 2013-Ohio-5307, at ¶10.

{¶26} The advocate-witness rule is set forth in Prof.Cond.R. 3.7, which provides, in pertinent part:

{¶27} "(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:

{¶28} "(1) the testimony relates to an uncontested issue;

{¶29} "(2) the testimony relates to the nature and value of legal services rendered in the case;

{¶30} "(3) the disqualification of the lawyer would work *substantial* hardship on the client." (Emphasis in original.)

{¶31} "When 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. *Baldonado v. Tackett*, 6th Dist. Wood No. WD-08-079, 2009-Ohio-4411, ¶20. The burden of proving disqualification necessarily falls upon the moving party. *Id*. The burden of proving one of the exceptions to Prof.Cond.R. 3.7 applies is upon the attorney seeking to claim the

exception. *Id*." *McCormick*, 2014-Ohio-1896, at ¶11.

{¶32} As noted above, Prof.Cond.R. 3.7(a) expressly provides that an attorney cannot be disqualified under the advocate-witness rule unless it is "likely" that he will be called to testify. In claiming that the trial court did not follow this standard in this case, appellant notes that, in framing the nature of the issue before it under the second part of the motion to disqualify, the trial court made reference to the "possibility' that Attorney Bodor would be called to testify. However, after quoting Prof.Cond.R. 3.7 in its written judgment, the trial court cited case law which specifically requires a factual finding that the attorney will "likely" be a necessary witness before disqualification can be ordered. Furthermore, our review of the judgment indicates that the trial court did not employ the word "possibility" again. Hence, the language of the judgment supports the conclusion that the trial court used the word "possibility" as a means to describe the nature of the issue before it, and that the proper standard was employed in deciding the final merits of the issue. For this reason, appellant's first assignment is not well-taken.

{¶33} Appellant's next assignment challenges the substance of the trial court's determination that Attorney Bodor's disqualification was warranted under Prof.Cond.R. 3.7(a). Essentially, he maintains that the evidence before the trial court did not support a finding that Bodor's proposed testimony was necessary for purposes of resolving the issue as to the extent of appellee's ownership rights in the disputed property. He states that, even if Bodor could provide testimony regarding the pleadings that were filed in the eminent domain action, that testimony would merely be redundant because the identical information can be obtained from the pleadings themselves and other documents.

{¶34} After reviewing the entire record, this court concludes that the substance

of appellant's "necessary" argument need not be addressed to properly dispose of this appeal. This is because the record demonstrates that the evidence before the trial court was deficient in one significant respect. That is, no evidence was presented as to what the actual substance of Attorney Bodor's testimony would be if he were called to testify.

{¶35} In *Williams v. White*, 11th Dist. Portage No. 2001-P-0072, 2002-Ohio-2120, the plaintiff in a legal malpractice case moved to disqualify an attorney as counsel on the basis that the attorney would be called as a witness. On appeal from the trial court's granting the motion, this court reviewed the record and concluded that, although the attorney had been deposed by the plaintiff, there was nothing in the record to establish that the trial court was given the opportunity to review the deposition prior to making its ruling: "[t]herefore, there is no evidence in the record of the substance of Attorney White's proposed testimony from which the trial court could adequately determine that disqualification was necessary." *Id*. at ¶21. On this ground alone, we reversed the disqualification order. *See, also, Hall v. Tucker*, 169 Ohio App.3d 520, 2006-Ohio-5895, ¶19 (4th Dist.).

{¶36} In this case, there is nothing in the record to indicate that Attorney Bodor was deposed prior to the evidentiary hearing on the motion to disqualify. Furthermore, appellee never called Bodor to testify at the evidentiary hearing for the limited purpose of establishing the substance of his proposed testimony as to the nature of appellee's ownership rights. Near the conclusion of the evidentiary hearing, Attorney Boder stated that appellant was willing to stipulate that appellee has a dower interest in the parcels. But the trial court itself rejected the factual stipulation. If a dower right is the only issue, the stipulation makes the issue uncontested and, therefore, not one for disqualification.

{¶37} Given these circumstances, the trial court could not make a proper ruling as to whether the proposed testimony was "likely" or "necessary." As appellee had the burden of proof on those issues, her motion to disqualify should have been denied. Accordingly, disqualification is improper. Appellant's second assignment is well-taken and this matter is reversed and remanded.

TIMOTHY P. CANNON, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.