

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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CHRISTINE L. SCOTT and DANIEL R. COBB,

APPELLANTS,

v.

LORRAINE J. SCOTT,

RESPONDENT

COURT OF APPEALS  
DIVISION II  
11 APR 13 AM 11:20  
STATE OF WASHINGTON  
BY   
DEPUTY

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Appeal from the Superior Court of Grays Harbor County

The Honorable Dave Edwards, Judge

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BRIEF OF APPELLANTS

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## **I. ASSIGNMENTS OF ERROR**

### **FIRST ASSIGNMENT OF ERROR**

The trial court abused its discretion by disqualifying appellant's attorney from actions which were out of its jurisdiction.

### **SECOND ASSIGNMENT OF ERROR**

The trial court abused its discretion and violated the appellant's procedural due process rights by disqualifying appellant's attorney on grounds that were not stated in the moving party's "Motion for Disqualification of Attorney."

### **THIRD ASSIGNMENT OF ERROR**

The trial court abused its discretion by disqualifying an attorney from representing clients in a guardianship action because he had a personal conflict of interest and alleged ethical violations in a matter, aside from the parties, was unrelated in facts and law to the case before him.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1 Did the trial court abused its discretion by disqualifying appellant's attorney from actions which were out of its jurisdiction?.

2. Did the trial court abuse its discretion and violate the appellants' procedural due process rights by disqualifying appellant's attorney on grounds that were not included in the moving party's "Motion for Disqualification of Attorney?"

3. Did the trial court abuse its discretion by disqualifying an attorney from representing clients here because he had a personal

conflict of interest and alleged ethical violations in another matter which, aside from the parties, was unrelated to the present action?

### **III. STATEMENT OF THE CASE**

This appeal is taken from an interlocutory order of Judge Dave Edwards in Guardianship of Sean Cobb, Grays Harbor Co. Cause # 10-4-00044-9. A Motion Granting Discretionary Review was granted on December 10, 2010. Judge Edward's order granted Ms. Lorraine Scott's motion to disqualify Mark Didrickson, the attorney for Christine Scott and Dan Cobb. Lorraine Scott, Christine Scott, and Dan Cobb are siblings of Sean Cobb. Lorraine Scott is Sean Cobb's guardian.

Sean Raymond Cobb is a 43-old man with developmental disabilities. Following a contested trial on February 11, 2010 in Clark County Superior Court( #09-4-00700-5), Judge Robert Lewis appointed Lorraine Scott to be his limited guardian on February 19, 2010. In addition to the appointment of Ms. Scott, Judge Lewis transferred the case to Grays Harbor County, where Mr. Cobb would be residing with Ms. Scott. The cause number for Mr. Cobb's Grays Harbor Co. guardianship case is #10-4-00044-9. Following entry of the final orders and a CR 59 motion, Christine Scott and Daniel Cobb filed a Notice of Appeal of the Clark County guardianship proceedings with Division II of the Washington Court of Appeals on April 9, 2010. The appellate cause number is # 40598-9-II. Christine Scott and Daniel Cobb also filed a CR 60 motion to vacate the guardianship orders, first with the Grays Harbor Superior Court and then with the Clark County

Superior Court, which under RCW 4.72.010 appears to have jurisdiction over the CR 60 motion, notwithstanding the change of venue to Grays Harbor County. <sup>1</sup> Mark Didrickson was the attorney of record for Christine Scott and Daniel Cobb in the appeal and in post-trial proceedings in both the Clark County Superior Court and in the Grays Harbor Superior Court.

On August 4, 2010, Lorraine Scott, pro se and in her capacity as Sean Cobb's guardian, filed a motion in Grays Harbor Superior Court (#10-4-00044-9) to disqualify Mark Didrickson as attorney on grounds that he would be a necessary witness at a future trial and thus his participation as an advocate would violate Rule for Professional Conduct 3.7. CP 1. Attorney Didrickson responded that 1) no trial or other evidentiary proceedings were pending, 2) such proceedings would never occur unless the appeal succeeded or a party filed a action to modify the guardianship, and 3) in the absence of evidentiary proceedings of some kind, any issues related to testimony by an attorney of record was moot. <sup>2</sup>

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<sup>1</sup> After filing of the appeal, it became apparent to attorney Didrickson that the guardianship order should be vacated as void under CR 60(b)(5) for failure to join the Veterans' Administration as a necessary party. Sean Cobb receives a small disability benefit from the Veterans' Administration through his father, a World War II Navy veteran. The VA is a statutory party in any guardianship actions involving recipients of VA benefits. RCW 11.88.160; RCW 73.36.020. The VA was not joined in the Clark County guardianship proceedings or given notice of the proceedings.

<sup>2</sup> Attorney Didrickson's response, filed on August 9, 2010, was omitted from the Designation of Clerk's Papers and is not part of

Following a continuance, Lorraine Scott replicated her initial pleadings with a second Motion to Disqualify filed on August 23, 2010. CP 15-84. On this occasion, however, Ms. Scott attached a 3-page "Declaration" to the Motion. CP 16-18. In the conclusion to this document, Lorraine Scott stated that

Mark Didrickson, by his own admission, owes the Estate of Carmen Cobb money, therefore owes Sean Cobb (heir of the estate of Carmen Cobb) money. Although he has paid a portion of his debt to the estate, he made that first payment on the debt several years after he borrowed the funds from Carmen Cobb's trust account, and unfortunately after her death. He has admitted to borrowing more money to the Estate of Carmen Cobb, but at this time has not paid the rest of the debt. I consider Mark's behavior in this case to be unprofessional and highly suspect. Because Mark Didrickson owes Sean Cobb money and will be called as a witness, at trial or for deposition in the upcoming guardianship appeal/vacate cases. I feel that he should remove himself as counsel for Christine Scott and Daniel Cobb.

CP 18.<sup>3</sup> On September 17, 2010, Attorney Didrickson filed a response to these new allegations and also objected to them on grounds that 1) the new allegations were not made under penalty of perjury and 2) that Lorraine Scott had herself financially victimized Carmen Cobb

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the appellate file. Appellants will file a motion under RAP 9.10 to add this document to the record.

<sup>3</sup> While Ms. Scott labeled her statement as a "Declaration," it was not submitted in the form approved by GR 13 in that it omitted any certification or declaration that her statement was made under penalty of perjury.

and was therefore approaching the court with “unclean hands.” CP 85-97.

The trial court granted Lorraine Scott’s motion to disqualify attorney Didrickson. However, his decision was not based on RPC 3.7, but instead derived from Lorraine Scott’s collateral allegations of improper financial dealings between Attorney Didrickson and Sean Cobb’s deceased mother, Carmen Cobb. RP 1-3. Judge Edwards drafted a hand-written “Order Disqualifying Counsel” and entered it immediately after the hearing. The Order did not include findings and conclusions stating his particular grounds for disqualifying attorney Didrickson. The order not only disqualified Attorney Didrickson from participation in the action through which Lorraine Scott brought her disqualification motion (Guardianship of Sean Cobb, Grays Harbor Co. # 10-4-00044-9) but also from “representing any party in this action, or any other action in the State of Washington, pertaining to the estate of Carmen Cobb or the guardianship of Sean Cobb.” CP 127. The scope of the Order, therefore, included Attorney Didrickson’s representation of Christine Scott and Daniel Cobb in the Clark County guardianship action and in the appellate case before Division II of the Court of Appeals. Because either the CR 60 motion in Clark County or the appeal before Division II of the Court of Appeals could overturn the results of the February, 2010 guardianship trial, the impact of Judge Edwards’ order was to halt, at least for the time being, these actions against Lorraine Scott.

Attorney Didrickson filed a handwritten CR 59 Motion for Reconsideration immediately after September 20, 2010 hearing, dealing solely with the over-breadth of the disqualification. CP 128-129. On September 28, 2010, Attorney Didrickson filed an amended CR 59 motion which, in addition to over-breadth, cited CR 52 issues with the absence of findings and conclusions and abuse of discretion by the court for reaching beyond the grounds for action cited by the moving party (RPC 3.7) to disqualify the attorney. 131-138. Also on September 28, 2010, Judge Edwards denied Attorney Didrickson's amended CR 59 motion . CP 139. Attorney Didrickson filed a Notice of Discretionary Review of the Order Disqualifying Counsel on October 11, 2010. CP 139-142.

#### IV. LAW AND ARGUMENT

- A. The trial court abused its discretion by disqualifying appellant's attorney from actions which were out of its jurisdiction.

Attorney disqualification is reviewed under an abuse of discretion standard. State v. Schmitt, 124 Wn.App. 662, 666 102 P.3d 856, 858 (Div. 2, 2004). An abuse of discretion occurs when a judicial decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Freeman and Freeman, 169 Wn.2d 664, 671, 239 P.3d 557, 560 (2010). A Superior Court judge has no authority to rule upon cases pending in counties outside his or her own county or district, except by agreement of the parties. RCW 2.08.190. In this case, where there was no agreement of the parties, the trial court had no authority to act in matters pending in courts outside

of Grays Harbor County. Likewise, a Superior Court judge lacks subject matter jurisdiction over an appeal. See Wash. Const. art. IV, § 4.<sup>4</sup> Notwithstanding the statutory and constitutional limitations, the trial court's order purported to disqualify Attorney Didrickson from "from representing any party in this action, or any other action in the State of Washington, pertaining to the estate of Carmen Cobb or the guardianship of Sean Cobb." CP 127. In crafting this order, the trial court implicitly asserted an authority to disqualify counsel from representing his clients (Christine Scott and Daniel Cobb) in matters in Clark County and in Division II of the Court of Appeals in which he was the attorney of record. By reaching into matters pending in other jurisdictions which were prohibited by RCW 2.08.190 in the case of Clark County (CR 60 motion) and by subject matter jurisdiction under Art. IV, § 4 (appeal of Clark County Guardianship orders), the

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<sup>4</sup> "The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers, **and appellate jurisdiction in all actions and proceedings**, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars (\$200) unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state or any judge thereof." Wash. Const. art. IV, § 4 (emphasis added).

trial court adopted “untenable” grounds to reach its decision. Therefore, it abused its discretion in disqualifying counsel from “representing any party in this action, or any other action in the State of Washington, pertaining to the estate of Carmen Cobb or the guardianship of Sean Cobb.” The court’s judgment, to the extent that it purports to affect cases pending outside of Grays Harbor County, should be reversed for abuse of discretion.

- B. The trial court abused its discretion and violated the appellants’ procedural due process rights by disqualifying appellant’s attorney on grounds that were not included in the moving party’s “Motion for Disqualification of Attorney.”

A court abuses its discretion by considering matters which are not properly before the court. See, e.g., In re Long and Fregeau, 158 Wn.App. 919, 928-929, 244 P.3d 26, 31 (Div. 3, 2010). Under CR 7(b)(1), every motion must specify the grounds and relief sought “with particularity” and courts may not consider grounds not stated in the motion. CR 7(b)(1); Orsi v. Aetna Ins. Co., 41 Wn.App. 233, 247, 703 P.2d 1053, 1061 (Div. 3, 1985); See also Davis v. Bendix Corp., 82 Wn.App. 267, 271, 917 P.2d 586, 589 (Wash.App. Div. 1 1996)CR 7(b). Since disqualification of an attorney is a remedy that should only be applied in “compelling circumstances,” Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co., 124 Wn.2d 789, 812, 881 P.2d 1020, 1033 (1994), it is even more important to apply the general “particularity” requirement to the present case as a matter of judicial policy. A “virtual” statement of a motion, a quasi-motion, or constructive notice of a disqualification issue should not be sufficient

to constitute an actual motion for disqualification. Under CR 7(b), a non-moving party in a disqualification matter should have a right to rely on the specific contents of a motion - the "four corners," to borrow a phrase from contract practice- to ascertain the opposing party's arguments and then build his own case. While CR 7(b)(1) has apparently never been interpreted on constitutional grounds, its terms and interpretation in Orsi and Davis seemingly touch on procedural due process rights to notice. U.S. Const. amend XIV, § 1; see also Pamelin Industries, Inc. v. Sheen-U. S. A., Inc., 95 Wn.2d 398, 622 P.2d 1270 (1981).<sup>5</sup> As a matter of fairness, once a motion is set forth, the court should rule on the specific grounds stated in a motion, but only those grounds.<sup>6</sup>

In the present case, Lorraine Scott made the same motion twice with suitable particularity, namely that Attorney Didrickson should be disqualified as a potential trial witness. CP 14; CP 15. Instead of ruling on that issue, however, the court reached into her tossed salad

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<sup>5</sup> "The purpose of a motion under the Civil Rules is to give the other party notice of the relief sought. CR 7(b)(1) requires that a motion "shall state with particularity the grounds therefor, and shall set forth the relief sought."" Pamelin, 95 Wn.2d at 402, 622 P.2d at 1273.

<sup>6</sup> Most CR7 decisions emphasize fairness to the moving party by finding motions in the substance of the moving party's submissions to the court instead of demanding technical perfection and adherence to specific forms. See, e.g., City of Kennewick v. Vandergriff, 45 Wn.App. 900, 728 P.2d 1071 (Div. 3 1986). The rule in Orsi and Davis, with their focus on "particularity," is the "flip-side" protecting the non-moving party's procedural due process rights once the contents of the motion are clear.

of a "Declaration" to adopt her allegations of unethical trust account irregularities and a conflict of interest by the attorney in another case, Estate of Carmen Cobb, Grays Harbor Co Cause # 09-4-00154-9. CP 127. Since "attorney-as-witness" was the only grounds cited in the moving party's motion as grounds for disqualification, the issue of disqualification for conflict of interest or other alleged misconduct was not presented in compliance with CR 7(b)(1) and therefore was not properly before the court. The court's consideration of facts unrelated to the actual motion (e.g., violation of RPC 3.7) constituted an abuse of discretion and arguably violated the appellants' basic due process right to adequate notice of the subject of the disqualification hearing. The court's judgment that the attorney should be disqualified due to alleged conflicts of interest and financial irregularities with non-parties persons should therefore be reversed.

- C. The trial court abused its discretion by disqualifying an attorney in a guardianship action because he had a personal conflict of interest and alleged ethical violations in another matter which, aside from the parties, was unrelated to the present action.

An abuse of discretion occurs when a judicial decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." Freeman, 169 Wn.2d at 671, 239 P.3d at 1061. The court stated that the attorney's representation of parties (Christine Scott and Daniel Cobb) in Guardianship of Sean Cobb, Grays Harbor Co. # 10-4-00044-9 created a conflict of interest with his previous representation of the personal representative (Daniel Cobb) in Estate of Carmen Cobb, Grays Harbor Co. #09-4-00154-9. Citing RPC 1.7,

“Conflict of Interest: Current Clients,” the court found that, because the attorney had received loans from the deceased which, in the opinion of the court, remained unpaid, a conflict existed between himself and the estate which consequently represented a significant risk that his representation of one or more clients will be materially limited by the client’s responsibilities to another client, or by a personal interest of the lawyer. RP 2.

In fact, the court’s application of RPC 1.7 was singularly inapt because the attorney had been disqualified from representing the personal representative in Estate of Carmen Cobb as of March 15, 2010, six months prior to the disqualification order in this hearing.<sup>7</sup> In other words, representation was not “concurrent” and disqualification under RPC 1.7 was untenable. With untenable grounds for his order, the court abused its discretion by disqualifying the attorney.

Leaving aside the over-lapping of possibly adverse clients, it is difficult to see how any outcome in the guardianship case could impair any party’s ability either to enforce the estate’s ability to collect any debt owed to it by the attorney or for any party to enforce his or her rights as an heir. The only conflict of interest, actual or potential, was between the attorney and the estate, and that was disposed of by disqualification of the attorney in the probate case. In the absence of

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<sup>7</sup> The disqualification order in Estate of Carmen Cobb was omitted from the Designation of Clerk’s Papers and is not in the appellate court file. The appellants will file a motion under RAP 9.10 to correct this omission.

a bona fide conflict between the attorney's former representation of the estate and his current representation of parties to the guardianship action, the court acted "unreasonably" and therefore abused its discretion.

Finally, the court excoriated the attorney for borrowing from his mother-in-law's funds held in his trust account in violation of RPC 1.15A. While unquestionably inappropriate, it is unclear that this violation of professional rules is any more pertinent to representation of parties to this guardianship action than to a DUII defense or a dissolution of marriage. To the extent that violation of RPC 1.15A influenced the court's decision to disqualify the attorney, the court appeared to act because the attorney was a "bad person" in general and not because of any specific "bad conduct" that could be related to the case at issue. As with its over-reaching to disqualify the attorney from representing his clients in other venues, the court here decided to supersede the jurisdiction of Washington State Bar Association and the Washington Supreme Court to discipline an attorney in his courtroom. Again, the court abused its discretion by proceeding on untenable grounds and his decision should be overturned.

#### **V. ATTORNEY FEES**

The appellants and their counsel are members of the same family and no fees are being charged for representation. The appellants submit, however, that the respondent should pay incidental costs such as filing fees, transcript fees, and costs associated with obtaining Clerk's Papers.

## VI. CONCLUSION

The trial court abused its discretion by extending the scope of its disqualification order to matters pending outside its statutory jurisdiction, by disqualifying the attorney on grounds not specifically stated in the respondent's motion, and for basing disqualification on an untenable and unreasonable interpretation of the Rules of Professional Responsibility as they relate to conflicts of interest and trust accounts. The court's order to disqualify Attorney Mark Didrickson from representing any parties in any action relating to the Guardianship of Sean Cobb or the Estate of Carmen Cobb because of conflicts of interest or trust account irregularities should therefore be reversed.

RESPECTFULLY SUBMITTED THIS 13th DAY OF APRIL 2011

  
\_\_\_\_\_  
Mark Didrickson, WSB #20349,  
Attorney for Appellant

