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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

ELLEN MARICONDA,

Plaintiff and Appellant,

v.

RODOLFO CHRISTOPHER GIL,

Defendant and Respondent.

B267861

(Los Angeles County  
Super. Ct. No. LF007943)

APPEAL from an order of the Superior Court of Los Angeles County. Virginia Keeny, Judge. Affirmed.

The Law Offices of Kent G. Mariconda and Kent G. Mariconda for Plaintiff and Appellant.

Joel S. Seidel for Defendant and Respondent.

In this dispute concerning custody and support of the parties' infant child, appellant Ellen Mariconda (Ellen)<sup>1</sup> appeals from the trial court's order granting respondent Rodolfo Christopher Gil's (Christopher's) motion to disqualify the child's maternal grandfather, Kent G. Mariconda (Mariconda) from representing Ellen as her attorney. We affirm the trial court's order.

## **BACKGROUND**

### **The underlying custody dispute**

On June 9, 2015, Ellen, in pro. per., filed a petition to establish parental relationship regarding her daughter, Cali Rose-Marie (Cali), born in February 2015, in case No. LF007938. On June 25, 2016, Christopher filed a request for an order seeking joint legal custody of Cali and visitation in case No. LF007943, with a hearing date of September 18, 2015.

On September 4, 2015, Ellen, now represented by her father, Mariconda, filed a responsive declaration to Christopher's request. Ellen did not consent to Christopher's custody request but instead sought sole legal and physical custody of Cali, child support, and payment of medical expenses for her and for Cali. Ellen also requested that Christopher undergo anger management therapy and counseling and that his visits with Cali be supervised by the Sheriff's Department. In support of her request, Ellen submitted several declarations, including a four-page declaration by her father, Mariconda. In his declaration, Mariconda stated his reasons why he did not believe Christopher should be granted visitation with Cali. Mariconda explained that he has known Christopher for five years, and that since Cali's

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<sup>1</sup> Because Ellen shares the same surname as her attorney, and because both parties filed separate petitions in the proceedings below, we refer to Ellen and Christopher by their first names to avoid confusion and intend no disrespect.

birth, he observed Christopher's verbal, emotional, and physical abuse towards Ellen.

On September 17, 2015, Ellen, in pro. per., filed a request for a domestic violence restraining order against Christopher in case No. PQ016956. On that same date, the trial court issued a temporary restraining order and set the matter for hearing on October 8, 2015. On September 18, 2015, the trial court reissued the temporary restraining order and set the matter for a hearing on October 16, 2015, to accommodate a scheduling conflict on the part of Mariconda, who was now acting as Ellen's counsel. Mariconda filed substitutions of attorney in case Nos. LF007938 and LF007943 on September 22, 2015.

### **Motion to disqualify**

On October 5, 2015, Christopher filed an ex parte request for an order disqualifying Mariconda from representing Ellen in case No. LF007943.<sup>2</sup> In support of his request, Christopher submitted his own declaration, in which he stated that during his five-year relationship with Ellen, he established a significant relationship with Mariconda, spending holidays at Mariconda's household, participating in family events and functions over the years, and living in Mariconda's home for a short period of time after Cali's birth. Christopher further stated that Mariconda was an active participant in shielding him from Cali and had made false allegations regarding Christopher's abusive conduct toward Ellen in the declaration Mariconda submitted on her behalf.

Ellen opposed the request to disqualify Mariconda. In support of her opposition, Ellen submitted a declaration stating that she understood the risks and potential conflicts in having Mariconda serve as both her counsel and as a potential witness in the case, and that she accepted those risks and consented to the

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<sup>2</sup> Case No. LF007943 was deemed to be related to, and effectively consolidated with, case Nos. LF007938 and PQ016956.

representation. Ellen further stated that Mariconda was representing her at no charge, that she could not afford to hire another attorney, that disqualification would cause her financial hardship, and that Christopher's motion to disqualify was intended to hurt her and her ability to be represented by counsel.

At the October 15, 2015 hearing on the motion, the trial court announced its tentative decision to grant the disqualification motion, based on Christopher's moving papers and by the court's holding in *Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197 (*Kennedy*). The trial court found that a potential conflict existed between Mariconda's role as the grandfather of the child and his ethical obligations to the court. The court further found that Christopher may have shared information with Mariconda, not formally in the capacity as an attorney, but with an expectation of confidentiality because Mariconda was a relative of the mother of his child.

The trial court stated that it had weighed the impact of disqualification on Ellen and considered both the financial burden it would impose and that it would prevent her from having counsel of her choice to represent her in the case. The court concluded, however, that in light of the policy issues discussed in *Kennedy*, it was inappropriate "to have someone so intimately involved representing one of the parents in a hotly contested custody dispute."

After hearing argument from the parties, the trial court granted the motion to disqualify. The court made clear that Mariconda could not appear on Ellen's behalf, including at depositions, but that he could advise Ellen and assist her in the case, including propounding and responding to discovery. The court then continued all remaining matters to November 10, 2015, to allow Ellen to obtain new counsel.

### **Subsequent proceedings**

The trial court heard the parties' respective requests for custody orders and Ellen's request for a restraining order on November 10 and 12, 2015. Mariconda was called as a witness and testified during those proceedings.

At the conclusion of the hearing, the trial court found both Mariconda's testimony and Ellen's testimony to be credible and Christopher's testimony to be not "fully truthful." The court granted Ellen's request for a restraining order against Christopher and included Cali as a protected person under the order. The trial court ordered that Christopher should not have either joint legal, joint physical, or sole legal or physical custody of Cali, and that his visits with Cali should be monitored. The court further ordered Christopher to attend weekly therapy to address anger management issues and ordered Ellen to attend weekly therapy to address depression and anxiety. This appeal followed.

## **DISCUSSION**

### **I. Mootness**

Christopher contends the trial court's orders at the November 12, 2015 hearing granting Ellen sole legal and physical custody of Cali and a protective order against him in favor of Ellen and Cali, requiring him to attend anger management therapy, and according him monitored visitation rendered the instant appeal moot.

The appeal is not moot, as the family law case between the parties has not been terminated or dismissed, and Ellen challenges the trial court's ruling prohibiting Mariconda from representing her in that case. We therefore address the arguments raised in this appeal.

## II. Standard of review

An order granting or denying a disqualification motion is reviewed for abuse of discretion.<sup>3</sup> (*Kennedy, supra*, 201 Cal.App.4th at p. 1203.) Under that standard, “[t]he trial court’s ruling is presumed correct [citation] and reversal is permissible ‘only when there is no reasonable basis for the trial court’s decision.’ [Citation.] We accept as correct all of the [trial] court’s express or implied findings that are supported by substantial evidence. [Citation.]” (*Ibid.*)

## III. Applicable legal standards

When ruling on a disqualification motion, the trial court must indicate on the record that it has considered all appropriate factors and must give its factual findings in support of the required balancing process. (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 582 (*Smith, Smith & Kring*); *Lyle v. Superior Court* (1981) 122 Cal.App.3d 470, 482-483 (*Lyle*).)

“The important right to counsel of one’s choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]” (*Speedee Oil Change Systems, supra*, 20 Cal.4th at p. 1145.) “Depending on the circumstances, a disqualification motion may involve such considerations as a client’s right to chosen counsel, an attorney’s interest in representing a client, the financial burden on a client to replace

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<sup>3</sup> Ellen’s argument that de novo review applies is unpersuasive given well established case authority holding that abuse of discretion is the applicable standard for reviewing an order granting or denying a motion for disqualification. (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144; *Federal Home Loan Mortgage Corp. v. La Conchita Ranch Co.* (1998) 68 Cal.App.4th 856, 860; *Kennedy, supra*, 201 Cal.App.4th at p. 1203.)

disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion.” (*Ibid.*) “The paramount concern is the preservation of public trust in the scrupulous administration of justice and the integrity of the bar. [Citations.]” (*Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 705.)

A disqualification motion may be based on an attorney’s dual roles as an advocate and a witness. “The ‘advocate-witness rule,’ which prohibits an attorney from acting both as an advocate and a witness in the same proceeding, has long been a tenet of ethics in the American legal system.” (*Kennedy, supra*, 201 Cal.App.4th at p. 1208.) “Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.” (*People v. Donaldson* (2001) 93 Cal.App.4th 916, 927-928 (*Donaldson*)).

In some cases, “[c]ombining the roles of advocate and witness can prejudice the opposing party’ and confers on the opposing party ‘proper objection where the combination of roles may prejudice that party’s rights in the litigation.’ [Citation.] ‘A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as

an analysis of the proof.’ [Citation.]” (*Donaldson, supra*, 93 Cal.App.4th at p. 929.)

There are exceptions to the advocate witness rule. “[T]he State Bar [of California] has adopted a rule of professional conduct that prohibits, with few exceptions, a lawyer from acting as both advocate and witness [citation].” (*Donaldson, supra*, 93 Cal.App.4th at p. 927, citing rule 5-210.) Rule 5-210 of the Rules of Professional Conduct states in relevant part:

“A member shall not act as an advocate before a jury which will hear testimony from the member unless:

“(A) The testimony relates to an uncontested matter;  
or

“(B) The testimony relates to the nature and value of legal services rendered in the case; or

“(C) The member has the informed, written consent of the client. . . .”

Even if an advocate-witness has obtained the informed written consent of the client, the trial court may exercise its discretion to disqualify counsel when there is a convincing demonstration of detriment to the opponent or to the integrity of the judicial process. (*Smith, Smith & Kring, supra*, 60 Cal.App.4th at p. 579.)

#### **IV. *Kennedy***

In granting the disqualification motion, the trial court in the instant case relied on *Kennedy, supra*, 201 Cal.App.4th 1197, a case that is factually very similar to this one. *Kennedy* involved review of an order granting a mother’s request to disqualify the paternal grandfather from representing the father in a child custody and support action. (*Id.* at p. 1200.) The court in



*Kennedy* articulated several reasons for disqualifying the paternal grandfather.

First, the court found that disqualification was appropriate under the advocate-witness rule, as articulated in rule 3.7 of the Model Rules of Professional Conduct of the American Bar Association (ABA Model Rules). (*Kennedy, supra*, 201 Cal.App.4th at p. 1208.) ABA Model Rules, rule 3.7 provides in relevant part: “(a) A lawyer shall not act as advocate at trial in which the lawyer 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) disqualification of the lawyer would work substantial hardship on the client.”

The court in *Kennedy* noted that although rule 5-210, California’s version of the advocate witness rule, is limited to jury trials, the California Rules of Professional Conduct explicitly state that “[t]he prohibition of certain conduct in these rules is not exclusive” (Rules Prof. Conduct, rule 1-100(A)), and that the ABA Model Rules may serve as a collateral source of guidance on attorney conduct in California when there is no conflict with California public policy. (*Kennedy, supra*, 201 Cal.App.4th at p. 1210, citing *Donaldson, supra*, 93 Cal.App.4th at p. 928.)

The court in *Kennedy* found no California-based policy reason against applying the more stringent prohibition imposed by the ABA Model Rules to the facts before it. The court explained that “[d]ecades ago, the California Supreme Court firmly embraced the ethical prohibition against an attorney taking on the roles of advocate and witness: ‘An attorney who attempts to be both advocate and witness impairs his credibility as witness and diminishes his effectiveness as advocate.’ [Citation.] More recently, our Supreme Court declared that where it becomes likely that an attorney will testify as a material

witness, he should “resolve any doubt in favor of preserving the integrity of his testimony and against his continued participation as trial counsel.” [Citation.]” (*Kennedy, supra*, 201 Cal.App.4th at pp. 1210-1211.) The court observed that “[t]he wisdom of the advocate-witness prohibition is vividly exemplified in this family law dispute, where it is probable that [counsel] may not only provide important testimony affecting the outcome, but actually represent his son in an adversarial role against the mother of his grandson. Under no judicially tolerable circumstance can [counsel] effectively perform such multiple, awkward and conflicting duties.” (*Id.* at p. 1211.)

The *Kennedy* court reasoned that disqualification was appropriate because “the multiple and interconnected family entanglements present here result in a strong appearance of impropriety and undermine the integrity of the judicial system.” (*Kennedy, supra*, 201 Cal.App.4th at p. 1211.) The court explained that “family law matters deserve particular attention when it comes to maintaining high standards in ethics. Family law cases delve into the most intimate and personal of human affairs and therefore should receive careful scrutiny when potential ethical conflicts arise. “Matters of domestic relations are of the utmost importance to the parties involved and also to the people of the State of California.” [Citations.] “This is especially so where the custody of a minor child is involved. Such children are the future citizens of this state and it is impossible to exercise too much care in the selection of the persons who are to care for and guide them during their period of infancy. It is likewise extremely important that they be provided with the best surroundings of which the circumstances permit.” [Citation.] ¶ A family court’s function is to make delicate decisions that promote the child’s best interest. [Citation.] This process could be severely disrupted in a situation where the child’s grandfather

might well argue for reducing the mother's time with her child, where counsel could wind up both litigating and testifying about what goes on in his household, and where [counsel's] self-interest could skew the legal advice he gives to his own son.” (*Id.* at p. 1212.)

The court in *Kennedy* also granted the motion to disqualify on the ground that the grandfather/counsel may have acquired confidential information about the mother and her family that could be used to her disadvantage in the custody dispute because counsel's law firm had previously represented the maternal grandfather in a divorce proceeding. The court concluded that because of the close relationship between the mother and the maternal grandfather, the similarity between the two cases, and the overlapping factual issues common to both, the mother and maternal grandfather “should be treated as a single unity for purposes of determining whether an ethical conflict exists.” (*Kennedy, supra*, 201 Cal.App.4th at pp. 1205, 1208.)

#### **V. No abuse of discretion**

We agree with the trial court's determination in the instant case that the policy concerns articulated in *Kennedy* apply with equal force here. Mariconda represented his daughter in a contested child custody dispute involving his own grandchild while simultaneously serving as a witness in the case. He submitted a declaration stating his reasons for opposing Christopher's request for visitation and subsequently testified at the combined hearing on custody, visitation, and a restraining order Ellen sought against Christopher. In the instant case, as in *Kennedy*, there were multiple, interconnected family entanglements in the context of a family law matter in which Mariconda acted as counsel for his daughter and as a witness seeking to limit contact between his grandchild and Christopher,

a former member of his own household. The trial court did not abuse its discretion by granting the motion to disqualify.

Ellen contends *Kennedy* is factually distinguishable because Mariconda never represented Christopher or any of his family members in any legal proceeding. The prior legal representation was not the only basis, however, for the *Kennedy* court's disqualification ruling. As discussed, the multiple, interconnected family entanglements in a contested family law matter involving custody of a minor child that influenced the court's decision in *Kennedy* are present in this case as well.

Ellen claims the advocate-witness rule should not disqualify Mariconda under California law because rule 5-210 of the Professional Rules of Conduct is expressly limited to representation at a jury trial and does not prohibit an attorney from acting as an advocate and testifying before a judge. The court in *Kennedy* addressed this issue in the context of a family law matter tried before a judge alone, and concluded that the advocate-witness's representation would “rob[] the trial of that appearance of fairness which should characterize every court hearing.” [Citations.]” (*Kennedy, supra*, 201 Cal.App.4th at p. 1210.) One authority has noted that “the risks to the fair administration of justice are likely to be no less evident when the attorney-witness issue arises in a nonjury trial” (Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2016) ¶ 1:175, p. 1-64) and that “*Kennedy* . . . sends a loud message to counsel in family law cases: If your testimony might be needed on an important aspect of the client's case (e.g., you have personal knowledge . . . about the parent-child interrelationships in a custody dispute), you *ought to decline representation*.” (Hogoboom & King, *supra*, at ¶ 1:176, p. 1-65.) Disqualification of an advocate-witness accordingly is not limited to jury trials but

may also occur in court proceedings before a judge alone.  
(*Kennedy, supra*, 201 Cal.App.4th at p. 1210.)

Ellen next contends that her informed written consent brings Mariconda's representation within the exception to the general prohibition against representation by an advocate-witness set forth in rule 5-210(C) of the Rules of Professional Conduct. A client's informed consent does not preclude disqualification, however, when there is "a convincing demonstration of detriment to the opponent or injury to the integrity of the judicial process." [Citations.] (*Smith, Smith & Kring, supra*, 60 Cal.App.4th at p. 579, citing *Lyle, supra*, 122 Cal.App.3d at p. 482.)

There is substantial evidence in the record to support the trial court's findings of detriment to Christopher and to the integrity of the judicial process. It is undisputed that Mariconda is Cali's grandfather and that he and Christopher developed a significant relationship with one another. Christopher submitted a declaration in which he stated that Mariconda has impeded his efforts to visit with Cali and falsely accused him of violent behavior. Mariconda submitted a witness declaration opposing Christopher's request for visitation. In that declaration, Mariconda described Christopher's violent outbursts and expressed concern for Cali's safety. Substantial evidence supports the trial court's findings of detriment to Christopher and injury to the judicial process.

Finally, Ellen argues that the trial court failed to balance the competing interests of the parties against her right to representation by an attorney of her choice. The record shows that the trial court undertook the requisite balancing of interests. In granting the motion to disqualify, the trial court stated: "The court has weighed the fact that this will pose a financial burden to [Ellen], and it does prevent her from having counsel of her

choice and selection to represent her in this case. Nonetheless, given some of the policy issues discussed in the Court of Appeal in the *Kennedy* matter, I think it is not appropriate to have someone so intimately involved representing one of the parents in a hotly contested custody dispute.”

The record discloses no abuse of discretion by the trial court.

### **DISPOSITION**

The order granting the motion for disqualification is affirmed. The parties shall bear their respective costs on appeal.

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\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, Acting P. J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
HOFFSTADT