

**Supreme Court of the State of New York  
Appellate Division: Second Judicial Department**

D35650  
C/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - June 22, 2012

WILLIAM F. MASTRO, A.P.J.  
PETER B. SKELOS  
ANITA R. FLORIO  
L. PRISCILLA HALL, JJ.

---

2012-02352

DECISION & ORDER

In the Matter of Gordon T. Madris, appellant, v Rosana  
S. Oliviera, respondent.  
(Proceeding No. 1)

In the Matter of Rosana S. Oliviera, respondent, v Gordon  
T. Madris, appellant.  
(Proceeding No. 2)

(Docket Nos. V-8044-11, V-8154-11)

---

Wisselman, Harounian & Associates, P.C., Great Neck, N.Y. (Jacqueline Harounian  
of counsel), for appellant.

Roberta Nancy Kaufman, Floral Park, N.Y., for respondent.

Barbara H. Kopman, Westbury, N.Y., attorney for the child.

In two related child custody proceedings pursuant to Family Court Act article 6, the  
father appeals, by permission, from so much of an order of the Family Court, Nassau County  
(Eisman, J.), dated February 15, 2012, as granted the mother's motion to disqualify the father's  
attorney and the attorney's law firm from appearing in the action.

ORDERED that the order is reversed insofar as appealed from, on the law, on the  
facts, and in the exercise of discretion, with costs, and the mother's motion to disqualify the father's  
attorney and the attorney's law firm from appearing in the action is denied.

July 25, 2012

Page 1.

MATTER OF MADRIS v OLIVIERA  
MATTER OF OLIVIERA v MADRIS

In the course of this Family Court Act article 6 proceeding, the father and the subject child allegedly experienced difficulty communicating with the caseworker assigned by the Nassau County Department of Social Services (hereinafter the DSS) to complete the court-ordered investigation. The father's attorney wrote to the caseworker's supervisor to alert her to the problem and to ask that she interview the parties to ensure that a complete and accurate report was produced for the court, and sent copies of the letter to the attorneys for the mother and the child.

The mother moved to disqualify the father's attorney and the attorney's law firm on the basis that the attorney had violated Rules of Professional Conduct (22 NYCRR 1200.0) Rule 4.2 by engaging in improper ex parte communications with the child and with the DSS. The court granted the motion and disqualified the father's attorney and her firm. The father appeals, and we reverse the order insofar as appealed from.

It is well established that

“A party's entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted. While the right to choose one's counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties' substantive rights, thus requiring any restrictions to be carefully scrutinized. The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination”

(*Gulino v Gulino*, 35 AD3d 812, 812 [internal citations omitted]; see *Lipschitz v Stein*, 65 AD3d 573, 576; *Matter of Brian R.*, 48 AD3d 575, 576; *Matter of Marvin Q.*, 45 AD3d 852, 853; *Aryeh v Aryeh*, 14 AD3d 634; *Campolongo v Campolongo*, 2 AD3d 476; *Olmoz v Town of Fishkill*, 258 AD2d 447). Whether to disqualify an attorney is a matter which lies within the sound discretion of the court (see *Bentvena v Edelman*, 47 AD3d 651; *Matter of Marvin Q.*, 45 AD3d at 853; *Aryeh v Aryeh*, 14 AD3d at 634; *Campolongo v Campolongo*, 2 AD3d at 476; *Gulino v Gulino*, 35 AD3d at 812).

Rule 4.2 of the Rules of Professional Conduct (22 NYCRR 1200.0) provides that an attorney may not communicate with a represented party regarding the subject of the representation (subsection a) or permit his or her client to do so (subsection b) unless opposing counsel has consented or the communication is authorized by law. Although a violation of the rule against ex parte communications will support a motion seeking an attorney's disqualification, including situations where the party is a child (see *Matter of Brian R.*, 48 AD3d at 576; *Matter of Marvin Q.*, 45 AD3d at 853; *Campolongo v Campolongo*, 2 AD3d at 476; see also *Matter of Carey v Carey*, 13 AD3d 1011, 1012), conclusory assertions of conduct violating a disciplinary rule will not suffice to support disqualification (see *Olmoz v Town of Fishkill*, 258 AD2d at 448).

Here, the court improperly placed the burden on the father rather than on the mother (i.e., on the opponent of disqualification rather than on the movant) and failed to consider the

evidence in the light most favorable to the nonmoving party (*see Lipschitz v Stein*, 65 AD3d at 576; *Matter of Marvin Q.*, 45 AD3d at 853; *Gulino v Gulino*, 35 AD3d 812; *Aryeh v Aryeh*, 14 AD3d at 634; *Campolongo v Campolongo*, 2 AD3d at 476; *Olmoz v Town of Fishkill*, 258 AD2d at 447; *see also Matter of Brian R.*, 48 AD3d at 576). Contrary to the mother’s conclusory assertions, there was no evidence that the father or his attorney improperly questioned the subject child regarding his interactions with the caseworker assigned to conduct the court-ordered investigation. Because there was no violation of Rule 4.2(b) of the Rules of Professional Conduct (22 NYCRR 1200.0), there was no basis for disqualification of the father’s attorney due to communications with the subject child (*compare Matter of Brian R.*, 48 AD3d at 576; *Matter of Marvin Q.*, 45 AD3d at 853; *Campolongo v Campolongo*, 2 AD3d at 476).

The court also misapprehended the role of the DSS where it has merely been assigned as the agency to complete a court-ordered investigation. “An entity cannot claim a blanket protection from ex parte interviews by taking the position that house counsel is responsible for all future legal matters affecting that entity” (*Schmidt v State of New York*, 181 Misc 2d 499, 504, *affd* 279 AD2d 62, citing ABA Comm on Ethics and Prof Responsibility Formal Op 95-396[1995]). Similarly, “if a governmental party were always considered to be represented by counsel for purposes of [the rule against ex parte communications], the free exchange of information between the public and the government would be greatly inhibited” (*Schmidt v State of New York*, 279 AD2d 62, 65 [citations and internal quotation marks omitted]). Because the DSS was not a represented party within the meaning of Rule 4.2(a) of the Rules of Professional Conduct (22 NYCRR 1200.0), the court erred in disqualifying the father’s attorney and the attorney’s law firm on this basis as well.

MASTRO, A.P.J., SKELOS, FLORIO and HALL, JJ., concur.

ENTER:



Aprilanne Agostino  
Clerk of the Court