2010 WL 2091269 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

In the Matter of the Estate of Clarence R. WRIGHT, Jr., Deceased Carolyn W. Henthorn, Clarence R. Wright, III, and Raymond Earl Wright, Petitioners/Appellees,
v.
Carol WRIGHT, Personal Representative of the Estate of Clarence R. Wright, Jr., Respondent,
and
McAfee & Taft a Professional Corporation, Appellant.

No. 107,529.
April 22, 2010.

Appeal from District Court Order Granting Motion to Disqualify the Law Firm of McAfee & Taft as Counsel for Personal Representative
District Court of Canadian County the Honorable Edward C. Cunningham, District Judge

Brief of Appellant

John N. Hermes, OBA #4133, Kymala B. Carrier, OBA #17745, John D. Stiner, OBA #18148, McAfee & Taft, A Professional Corporation, Tenth Floor, Two Leadership Square, 211 North Robinson, Oklahoma City, OK 73101-7103, Telephone: (405) 235-9621, Facsimile: (405) 235-0439, Attorneys for Appellant.

i *INDEX

1** ***SUMMARY OF THE RECORD

This is an appeal of an August 12, 2009 order (the "Order") disqualifying McAfee & Taft A Professional Corporation ("M&T") as counsel for the personal representative in a probate case styled *In the Matter of the Estate of Clarence R. Wright, Jr., Deceased*, Case No. PB-2008-33, District Court of Canadian County, State of Oklahoma (the "Probate"). A companion appeal before the Court, No. DF-107530, arose out of a related civil case styled *Mary Carol Wright, Trustee of the Clarence R. Wright, Jr. Revocable Trust vs. C.R. Wright, III, as Trustee of the trust created for the benefit of C.R. Wright, III, under irrevocable trust agreement dated July 17, 2003, et al*. (the "Note Case"), in which the District Court entered an order on the same date disqualifying M&T as counsel for the plaintiff, Mary Carol Wright, trustee of the Clarence R. Wright, Jr. Revocable Trust. The orders disqualifying M&T were entered following the conclusion of a consolidated hearing; however, the appeals were not consolidated because they did not meet the standards of Okla. S.Ct.R. 1.27(d). The allegations in both motions to disqualify were based upon M&T's representation of Clarence R. Wright, Jr. and his wife in connection with their estate planning. In light of the common facts and the consolidated hearing, both this brief and the brief filed in the appeal of the Note Case support the reversal of both orders filed in the District Court. Although the briefs are necessarily similar in many respects, each brief focuses more on the issues relating to the respective case on appeal.

Almost one year after the personal representative filed the Probate, the decedent's children moved to disqualify M&T. (Carolyn W. Henthorn, Raymond Earl Wright and Clarence R. Wright, Ill's Motion to Disqualify the Law Firm of McAfee & Taft.) This occurred on the eve of a hearing on the Personal Representative's motion to require trusts ***2** for which the children acted as successor trustees to contribute $1.7 million in estate taxes. (January 23, 2009 Order Continuing Hearing on Application for Payment of Estate Taxes). It was purely a litigation tactic.

The decedent, Clarence R. Wright, Jr., was a banker. He had three children: Carolyn W. Henthorn, Clarence R. Wright, III ("Randy") and Raymond Earl Wright (collectively, the "Children"). In 2003, while the **elder** Mr. Wright was married to Kathryn R. Wright, the Children's mother, he approached Gary Fuller at M&T about preparing an estate plan for him and his wife, with the primary goal of transferring ownership of the family bank to his children with minimum tax consequences.

M&T did not represent the Children. Instead, the Children, almost exclusively Randy, had contact with M&T in connection with their parents' estate planning. Mr. Wright instructed Gary Fuller that he would spending most of his time with his ailing wife and "that Randy was familiar with all his affairs, and that if [Mr. Fuller] needed information, contact Randy, he'll get them." (May 7, 2009 Tr. at 230:15-231:13; April 29, 2009 Tr. at 170:8-23). At the time, Randy was President and CEO of Yukon National Bank. (April 29, 2009 Tr. at 28:13-16). Rather than representing him, Mr. Fuller "used Randy as a source for information about Clarence and his mother in preparing these plans." (May 7, 2009 Tr. at 231:7-9). As Mr. Fuller stated, "I know of no involvement with our firm where they - we were representing the children in connection with anything." (*Id*. at 239:16-18).

After Mrs. Wright's death, Mr. Wright remarried. He married Mary Carol Wright, the personal representative of his estate in the Probate (the "Personal Representative"). (May 7, 2009 Tr. at 376:13-19). Following their marriage, M&T worked on Mr. Wright's and his new wife's estate planning matters. (Plaintiffs Trial Ex. 15 at CRWT00136-145). By the time of Mr. Wright's death, the Children disliked the Personal Representative, believing she ***3** had received inappropriate gifts from Mr. Wright and that she had signed a prenuptial agreement with their father. (*Id*. at 241:10-23; 380:1-10).

Mr. Wright died on December 7, 2007. (April 29, *2009* Tr. at 84:15-18). It was clear even before the Probate was filed that M&T would represent the Personal Representative and that issues between her and the Children would be litigated. In January 2008, the Personal Representative telephoned the Children's attorney, Dean Rinehart. She told him that M&T represented her but, in order to save money, asked him to file the Probate. Mr. Rinehart declined the request because he wanted to remain free to represent the Children given his awareness of the disputes between the parties. (May 7, 2009 Tr. at 344:19-345:20). Mr. Fuller also testified that in February 2008, before the Probate was filed, he was contacted by Randy Wright and, rather than discussing issues with him at that time, he first contacted the Children's attorney, Mr. Rinehart. (*Id*. at 240:13-241:9).

The Personal Representative, represented by M&T, filed the Probate on February 25, 2008. (Petition for Probate). She then invited the Children to a meeting at M&T's offices a week later on March 4, 2008. They attended, accompanied by their lawyers, Dean Rinehart and Roger Rinehart (April 29, 2009 Tr. at 146:8-24). Dean Rinehart confirmed that prior to this meeting he had become aware of "a lot of things that happened in the last few weeks and months that did not seem appropriate" involving the Personal Representative, including the alleged end of life transfers. (May 7, 2009 Tr. at 344:4-18). At the meeting, Gary Fuller advised the Children that he represented the Personal Representative in her capacity as such and as the trustee of the Clarence R. Wright, Jr. Revocable Trust. (*Id*. at 211:10-212:7; 367:9-18).

The Children and the Personal Representative confirmed that a divisive tone arose at the meeting and persisted thereafter. (*Id*. at 368:12-15; 369:10-19; 380:1-10). In fact, Dean ***4** Rinehart entered an appearance on behalf of the Children in the Probate only a few weeks later on March 20, 2008. (Entry of Appearance). Another meeting occurred at M&T on May 5, 2008, at which the Children again appeared with their lawyers. (April 29, 2009 Tr. at 89:22-90:8).

The Probate grew increasingly contentious. The Personal Representative received little cooperation from the Children. She was locked out of locations where information was stored and denied access to individuals who could provide information (May 7, 2009 Tr. at 380:15-381:18). On June 16, 2008, the Personal Representative filed a motion to require the Children to turn over certain books and records. (Motion for Parties to Turn Over Books, Records and Property). On August 18, 2008, the Children responded. (Response to the Motion of Carol Wright to Turn Over Books, Records, and Property). Then, in September 2008, the Children filed a motion to require the Personal Representative to provide an inventory and issued numerous subpoenas to third parties. (Motion for Personal Representative Carol Wright to Provide an Inventory; Inventory and Appraisement; Personal Representative's Objection to Third Party Subpoenas Duces Tecum). Despite now claiming that M&T had represented them as far back as 2003, in none of their filings did the Children allege a conflict of interest.

The origin of the instant appeal can be traced to two events. First, after having notified the Children the month before of her intent to do so, on October 28, 2008, the Personal Representative filed an application in the Probate to require the Children, in their capacities as trustees of certain trusts entitled the Clarence R. Wright, Jr. GST Exemption Q-Tip Trust (the "Q-Tip Trust") and the Clarence R. Wright, Jr. Marital Trust (the "Marital Trust"), to cause those trusts to pay their share of the estate taxes, totaling more than $1.7 million (the "Estate Tax Motion")(Application for Payment of Estate Taxes by Nonprobate ***5** Beneficiaries). The Children had attempted to preempt the Estate Tax Motion by filing a petition on October 14, 2008 in which they asked for a declaration of how much the Q-Tip Trust and the Marital Trust owed. The Children alleged no conflict of interest. (Petition).

The respondents named in the Estate Tax Motion were "Clarence R. Wright, III, Raymond E. Wright and Carolyn W. Henthorn, as successor trustees of the Clarence R. Wright, Jr. GST Exemption Q-Tip Trust and the Clarence R. Wright, Jr. Marital Trust." The plaintiffs identified in the Petition were identical. (Petition). The issue of the Q-Tip Trust and the Marital Trust's obligation to contribute a portion of the estate taxes due on Clarence R. Wright, Jr.'s estate was, at the time the Children filed the Motion to Disqualify, and still is the crux of the dispute in the Probate, a fact made clear in the Children's later motion filed August 4, 2009 in which they asked the District Court to require disgorgement of M&T's attorney fees. (May 7, 2009 Tr. at 216:22-222:16; Motion for Reimbursement of Attorney Fees Collected by the Law Firm of McAfee & Taft). The dispute appears to be over the *amount* owed by these trusts, rather than their *liability* for the estate taxes, because the Children, in their capacities as trustees

of those trusts, contended they needed additional information to verify the amount. (Petition at ¶ 30(c) and (d) and Prayer for Relief).

On December 8, 2008, the Children filed a response to the Estate Tax Motion. (Carolyn W. Henthorn, Raymond Earl Wright and Clarence R. Wright, Ill's Response to Application for Payment of Estate Taxes by Nonprobate Beneficiaries). Again, the Children did not allege any conflict of interest.

The second event occurred a few days later, on December 11, 2008, when the Personal Representative, this time in her capacity as Trustee of the Clarence R. Wright, Jr. Revocable Trust, filed a petition against the Children in their capacity of trustees of various ***6** other trusts to recover on a promissory note owed to the Clarence R. Wright, Jr. Revocable Trust (the Note Case).

On January 16, 2009, a Notice of Hearing was issued, setting the Estate Tax Motion for hearing on January 22, 2009. (Notice of Hearing--Application for Payment of Estate Taxes by Nonprobate Beneficiaries). After having litigated for almost a year, the Children were on the eve of a hearing. If the relief requested were granted, the District Court would have required trusts of which the Children were trustees to pay more than $1.7 million to the estate. On January 21, 2009, the Children filed an objection to the Notice of Hearing and obtained an Order a few days later continuing the hearing until February 27, 2009 (Objection to Notice of Hearing on Application for Payment of Estate Taxes by Nonprobate Beneficiaries; Order Continuing Hearing on Application for Payment of Estate Taxes by Nonprobate Beneficiaries).

Having secured a postponement of the hearing on the Estate Tax Motion and having filed an answer, counterclaims as well as a third-party claim against the Personal Representative in her individual capacity in the Note Case, the Children filed a Motion to Disqualify M&T as the Personal Representative's counsel (the "Motion to Disqualify") on Feb. 12, 2009. (Carolyn W. Henthorn, Raymond Earl Wright and Clarence R. Wright, Ill's Motion to Disqualify the Law Firm of McAfee & Taft). A week prior to this, they filed a Motion to Disqualify M&T from representing her in her capacity as trustee of the Clarence R. Wright Revocable Trust in the Note Case. All this occurred only a few weeks before the hearing on the Estate Tax Motion was set to occur.

The District Court stayed both cases and conducted a consolidated hearing on the Motions to Disqualify in the Probate and the Note Case, which occurred on April 29, May 7, and June 17, 2009. (April 29, 2009 Tr.; May 7, 2009 Tr. and June 17, 2009 Tr.). The Court ***7** announced its ruling on July 22, 2009. (July 22, 2009 Tr.). The ruling was followed by an Order filed August 12, 2009 (the "Order"), in which the District Court disqualified M&T from representing the Personal Representative. This appeal followed. A separate order was entered the same day in the Note Case, giving rise to the companion appeal, No. DF-107530.

ARGUMENT AND AUTHORITIES

The District Court held that M&T's representation of the Personal Representative created a conflict of interest necessitating disqualification. (Order at ¶¶ 1-2). As demonstrated in its oral ruling, the District Court erred by finding (i) that the need for M&T witnesses *other than trial counsel* to testify required disqualification (*Id*. at 10:1-12; 11:25-13:2; 13:22-14:12; 14:18-23 (ii) that a conflict of interest existed, apparently based upon nothing more than its finding that the Children had provided "personal information" to M&T that was somehow material to the issues in the Probate (*Id*. at 8:4-6; 10:24-11:4; 13:11-21); and (iii) that the Children had not waived their right, if any, to move to disqualify M&T after waiting almost a year after the Probate was filed and only seeking M&T's disqualification on the eve of the hearing on the Estate Tax Motion (*Id*. at 5:19-6:4). [1]

***8** *STANDARD OF REVIEW*

An order granting a motion to disqualify counsel is a final order subject to appellate review. *Arkansas Valley State Bank v. Phillips*, 2007 OK 78, ¶ 8, 171 P.3d 899. The Court reviews the District Court's findings of fact to determine whether they were clearly erroneous, and examines the District Court's application of Oklahoma's ethical standards *de novo*. *Id*. The test is whether real harm to the integrity of the judicial process is likely to result if counsel is not disqualified, *Id*. at ¶ 25.

However, motions to disqualify counsel for failure to comply with the Rules of Professional Conduct are not to be used as procedural weapons. *Id*. at ¶ 13. This Court has held "[t]he right to the assistance of legal counsel includes the right to be represented by a legal practitioner of one's own choosing." *Towne v. Hubbard*, 2000 OK 30, ¶ 14, 3 P.3d 154. Indeed, the barrier a party must surmount to secure the disqualification of his opponent's counsel is high. *Hayes v. Central States Orthopedic Specialists, Inc*., 2002 OK 30, ¶ 9, 51 P.3d 562. The Children did not meet their burden.

PROPOSITION I: THE DISTRICT COURT ERRED IN HOLDING THAT THE FACT THAT M&T WITNESSES OTHER THAN TRIAL COUNSEL WOULD BE REQUIRED TO TESTIFY IN THE PROBATE WARRANTED DISQUALIFICATION.

The District Court held that "McAfee & Taft attorneys are necessary witnesses concerning many of the issues that are central to this matter, also necessitating disqualification." (Order at ¶ 2). In repeatedly discussing it, the District Court made clear at the July 22, 2009 announcement of its ruling that this finding served as one of if not *the* primary basis for its decision. (July 22, 2009 Tr. at 10:1-12; 11:25-13:2; 13:22-14:12; 14:18-23).

***9** This finding, which was erroneous as a matter of law, was not grounds for disqualification. Rule 3.7(b) of the Oklahoma Rules of Professional Conduct, 5 O.S. Ch. 1., App. 3-A (2001), states:

> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 3.7(b) *specifically allows* M&T to act as trial counsel in the Probate. Neither Mr. Hermes nor Ms. Carrier, the Personal Representative's trial counsel from M&T, would be likely to testify as witnesses. In fact, the Children's counsel identified by name the M&T witnesses he expected would testify as "Gary Fuller, Susan Shields, Spencer Haines, Natalie Ramsey, Christin Adkins." (June 17, 2009 Tr. at 461:21-462:6). This is specifically permitted by the Rules of Professional Conduct. *See e.g.*, *In re Estate of Gory*, 570 So.2d 1381, 1383 (Fla. Ct. App. 1990)("Where one lawyer in the firm is called as a witness another lawyer in the firm may act as an advocate").

Under Rule 3.7(b), M&T would only be precluded from representation of the Personal Representative if one of the conflict of interest provisions relating to present and former clients contained in Rule 1.7 and 1.9 were violated. As demonstrated below, these rules were not violated.

PROPOSITION II: NO CONFLICT OF INTEREST EXISTED WITH REGARD TO M&T'S REPRESENTATION OF THE PERSONAL REPRESENTATIVE.

The District Court found the existence of a "conflict of interest which necessitates [M&T's] disqualification in this matter," (Order at ¶ 1). This finding was clearly erroneous. The evidence was insufficient to demonstrate that an attorney-client relationship ever existed between the Children and M&T, and certainly not in their capacities as successor trustees of ***10** the Q-Tip Trust and the Marital Trust. Even if there had been such a relationship at some point, the Children did not present sufficient evidence to demonstrate that such representation was the same or substantially related to the matters involved in the Probate (i.e., the Estate Tax Motion) nor that they had provided confidential information to M&T material to the Probate so that disqualification under Rule 1.9 was warranted.

Instead, the evidentiary basis for the Children's argument was based primarily upon one of the Children, Randy Wright, stating conclusorily and repeatedly during the hearing that M&T had represented him and his siblings. However, if a putative client were able to establish, as a matter of law, the existence of an attorney-client relationship based upon nothing more than his or her saying one existed, this would effectively reinstate the "appearance of impropriety" test rejected in *Arkansas Valley State*

Bank v. Phillips, 2007 OK 78, ¶ 9, 171 P.3d 899 and "disqualification would become little more than a question of subjective judgment by the former client." *Id*. at ¶ 20.

This Court has recognized that an attorney-client relationship rests on contract. *State ex rel. Okla. Bar Ass'n v. Green*, 1997 OK 39, ¶ 19, 936 P.2d 947. Courts in other jurisdictions adopting the contract approach have held that an alleged client's subjective beliefs are insufficient to create such a relationship. *See Iron Workers Local 25 Pension Fund v. Watson Wyatt & Co.*, Nos. 04-CV-40243 and 07-CV-12368, 2009 WL 3698562 at * 7 (E.D. Mich. Nov. 4, 2009)("An attorney-client relationship cannot be created unilaterally; a putative client's unilateral or subjective belief is not sufficient to create the relationship"); *Span Enterprises v. Wood*, 274 S.W.3d 854, 858 (Tex. Civ. App. 2008)("We must determine whether a[n] [attorney client relationship] can be implied using an objective standard, looking at what the parties said and did, and we do not consider their unstated, subjective beliefs"). Even to the extent the Court has indicated, *in dicta*, that a client's subjective belief ***11** could serve as the basis for an attorney-client relationship, that belief still has to be "reasonable." *State exrel. Okla. Bar Ass'n v. Rouse*, 1998 OK 56, ¶ 9, 961 P.2d 204 (noting that neither party disagreed with the proposition). To the extent the Children said they believed an attorney-client relationship once existed, that belief was unreasonable. In fact, the Court should reaffirm its contract-based approach for determining the existence of attorney-client relationships and apply an objective standard, rather than relying, as the District Court apparently did, upon the Children's alleged beliefs.

Mr. Fuller, of M&T, testified that he "did not consider the kids a client. They're the object of the property being transferred here. It's Clarence's estate plan. They didn't have anything to do with it." (May 7, 2009 Tr. at 230:5-8). Mr. Fuller went on to state "I know of no involvement with our firm where they - we were representing the children in connection with anything." *(Id*. at 239:16-18). Even the Children's lawyer could recall no instance in which Mr. Fuller advised him that M&T represented the Children. (*Id*. at 342:25-343:3). In fact, the Children's lawyer also agreed that under similar circumstances, when he prepares wills on behalf of clients, he represents the testator, rather than the beneficiaries. (Id. at 355:5-15).

The Children offered no real evidence of the existence of an attorney-client relationship between them & M&T. Rather, they attempted to overwhelm the District Court with instances *of contact they had had over the years with M&T to assist with their parents' estate plan*. None of these contacts created an attorney-client relationship.

The Children also alleged they provided M&T on a few occasions with personal financial information such as tax returns and financial statements, the instances of which are described more specifically below. Other than one document used by attorney Marion ***12** Bauman in 2003 in the application for change of control of the bank stock [2] (Plaintiff's Ex. 17), the Children did not introduce any such financial documents into evidence, although they had the right to seal the documents. [3] (April 29, 2009 Tr. at 51:9-52:4). At no point did the Children tie the information allegedly provided to the issues surrounding the defendant trusts' liability for estate taxes in the Probate.

In *Cadle Co. v. Ginsberg*, 802 A.2d 137 (Conn.App. 2002), the holder of a promissory note sued the maker to recover. The maker moved to disqualify the holder's counsel, alleging that it was former client of the attorney and had provided financial information to the attorney in connection with the prior representation. However, the trial court denied the motion and the appeals court affirmed. The maker contended the financial information could be used to determine whether to seek a prejudgment remedy or that it might assist in collection efforts. However, it was unable to point to specific financial information provided. *Id*. at 151. The *Cadle* court held that the trial court correctly denied the motion "absent specific evidence as to the financial information disclosed in the [prior representation] and its likely effect on the present trial." *Id*. at 152.

Similarly, in the instant case, not only did M&T never represent the Children, they never submitted the financial information allegedly provided to M&T into evidence (with one outdated exception), never explained what specific information was contained in the documentation allegedly provided, nor - more importantly - did they show how their own ***13** personal financial information could be used to the disadvantage of the trusts for which they served as trustees or to their own disadvantage.

1. The Educational Trusts.

First, the Children argued that M&T represented *them* in 2003 in the reformation of educational trusts created by their *parents*, Clarence R. Wright and Kathryn R. Wright, for the **elder** Wrights' *grandchildren*. (April 29, 2009 Tr. at 32:10-23). Only one of the Children, Randy Wright (*Id*. at 27:13-14), even dealt with M&T. (*Id*. at 34:17-24). The Children offered minimal documentary evidence. Plaintiffs Exhibit 2 consisted of a July 23, 2003 fax from Randy Wright to M&T attaching a couple of the educational trust agreements. Plaintiff's Exhibit 1 consisted of a response fax from Christin Adkins of M&T on July 28, 2003, enclosing the reformation action pleadings. In the response, Ms. Adkins reflected Randy Wright's role as facilitator in the process, noting "Thanks for all your help" (Plaintiff's Exhs. 1 and 2). These reflected no legal advice sought by or given to the Children.

Plaintiff's Exhibit 3 was a memorandum from M&T to the **elder** Wrights, of which Randy Wright was also a recipient, outlining the tax implications *to the **elder** Wrights* of the educational trusts and their reformation. As made clear in the first sentence, the **elder** Wrights were grantors and co-trustees of these educational trusts. Plaintiff's Exhibit 4 was a letter to Randy Wright from Natalie Ramsey, an associate at M&T, enclosing reformation orders. While the courtesy transmittal letter to Randy Wright stated "It was a pleasure to have assisted you and your family in this transaction," Mr. Wright testified that "the only thing Natalie Ramsey did" was to obtain the court's signature on the reformation orders. (April 29, 2009 Tr. at 44:10-21). The verbiage in the transmittal letter was insufficient to ***14** create an attorney-client relationship with the Children after the representation of their parents was completed.

The educational trusts were created and funded by the Children's *parents*. The Children's *parents* paid M&T. (*Id*. at 121:20-122:2; May 7, 2009 Tr. at 359:10-23). The Children admitted that the work M&T did was to maximize the gift tax exclusion for the Children's *parents* (April 29, 2009 Tr. at 122:7-123:11 and 124:23-125:1; May 7, 2009 Tr. at 364:25-13), a fact confirmed by Christin Adkins, the former M&T attorney who worked on the reformation. (May 7, 2009 Tr. at 296:17-297:14).

No evidence was presented of work performed by M&T after July 2003 relating to the educational trusts. Rule 1.9 was not violated. 5 O.S. Ch. 1, App. 3-A, Rule 1.9(a) states "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." As for what constitutes "the same or a substantially related matter," Comment 3 states "Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."

As made clear above, M&T never represented the Children in connection with M&T's reformation of the educational trusts. There was certainly no relationship created with the Children in their capacities as successor trustees of the Q-Tip and Marital Trusts, the only issues germane to the Probate. Even if one *had* been created, Randy Wright admitted that neither the Probate Case nor the Note Case implicated the educational trusts. ***15** (April 29, 2009 Tr. at 149:9-150:5). Therefore, M&T's reformation of the educational trusts in 2003 was not the "same or substantially related to" the Estate Tax Motion in the Probate.

In addition, M&T did not acquire confidential information from the Children material to the Probate as a result of its work on the educational trusts so that Rule 1.9(c)(1), which relates to the use of information previously provided, was violated. Randy Wright testified that all he provided to M&T in connection with the educational trusts were some financial statements and tax returns in 2003, which he conceded may have even predated 2003. (*Id*. at 40:11-25; 150:6-151:13). Carolyn Henthorn also testified she provided tax and financial records in 2003 in connection with the reformation of the educational trusts. (May 7, 2009 Tr. at 363:8-364:24). These records were not introduced into evidence despite the Children's ability to seal court documents. [4] (April 29, 2009 Tr. at 51:9-52:4). At no point did the Children tie the alleged provision of their own personal tax and financial information seven years ago to the issues surrounding the estate tax liability of completely different trusts in the Probate. In fact, Comment No. 3 to Rule 1.9 states "Information acquired in a prior representation may have been rendered obsolete by

the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related." Moreover, the Children's personal financial information would be completely irrelevant to the liability of the Q-Tip and Marital Trust's for estate taxes in the Probate and could not be used to the disadvantage of those trusts when determining the amount of estate taxes they owed.

***16 2. The Clarence R. Wright, Jr. Revocable Trust and the Kathryn R. Wright Revocable Trust.**

Second, the Children argued that they were M&T's clients because M&T drafted the amended and restated the Clarence R. Wright, Jr. Revocable Trust and the amended and restated Kathryn R. Wright Revocable Trust in 2003. (April 29, 2009 Tr. at 45:3-46:5). Like the educational trusts, these trusts were created by the Children's *parents*. (May 7, 2009 Tr. at 359:24-360:8). In fact, the Children admitted that their basis for saying that M&T represented them in connection with these trusts was their status as beneficiaries. (April 29, 2009 Tr. at 108:14-109:19).

Randy Wright, to the extent he had contact with M&T regarding these amendments, served as a representative of his father. In fact, he referred to himself as a "point person" as his father wanted to spend more time with his ailing wife. (April 29, 2009 Tr. at 45:3-46:22). Randy Wright testified that his involvement as a coordinator for his parents started in "May or June of '03 when we worked with McAfee & Taft, I worked with McAfee & Taft, all the way to October '03." (*Id*. at 46:23-47:6). Indeed, Mr. Fuller testified that his contacts with Randy Wright were all part of implementing the **elder** Mr. Wright's estate plan. (May 7, 2009 Tr. at 230:15-231:13).

Mr. Fuller confirmed that he prepared the Kathryn R. Wright Revocable Trust and represented her. (May 7, 2009 Tr. at 215:2-12). After his mother passed away on October 10, 2003, [5] Randy Wright testified that he and another of the Children, Raymond Earl Wright, or "Ray," became trustees of her trust. (April 29, 2009 Tr. at 47:17-24). This was incorrect as the Children's father became trustee of the Q-Tip Trust and the Marital Trust ***17** after she died in 2003. Randy and Raymond Wright did not become trustees until after their *father's* death in late 2007. (May 7, 2009 Tr. at 215:13-15; April 29, 2009 Tr. at 47:25-48:2; June 17, 2009 Tr. at 428:10-13).

The Children presented no evidence of any further involvement of M&T with the Kathryn R. Wright Revocable Trust after 2003 until early 2008 after death of Mr. Wright. At the March 4, 2008 meeting (which the Children attended with their attorneys), Mr. Fuller explained that M&T was preparing the estate tax return for Clarence R. Wright, Jr. and, that the Q-Tip Trust and the Marital Trust created under the Kathryn R. Wright Revocable Trust were taxable in Mr. Wright's estate and therefore responsible for some of the taxes. (June 17, 2009 Tr. at 428:10-429:9). Despite saying he was represented by M&T, Randy Wright testified that the Children had written M&T to ask for "explanations" relating to whether certain assets were includable in their father's estate but "we never have received an answer to [it]." (June 17, 2009 Tr. at 433:3-21).

Randy Wright testified that the Personal Representative brought a lawsuit against the Kathryn R. Wright Revocable Trust to recover estate taxes. (June 17, 2009 Tr. at 430:9-21). This is also correct. In truth, the Children were successor trustees and beneficiaries of the Q-Tip Trust and the Marital Trust created under the Kathryn R. Wright Revocable Trust upon Kathryn Wright's death. (May 8, 2008 Memo at § 2(b), Plaintiffs Exh. 13). These two trusts benefited the **elder** Mr. Wright during his lifetime and, therefore, had to be included in his estate tax return. Upon his death, the Children became trustees and beneficiaries of separate trusts for each of the Children, which were funded by the assets of the Q-Tip Trust and Marital Deduction Trust. (May 7.2009 Tr. at 216:22-217:9; 233:14-234:10; Plaintiff's Exh. 13 at 2; Application for Payment of Estate Taxes by NonProbate Beneficiaries filed October 20, 2008; Petition).

***18** In sum, the Children contend that a conflict exists because: (i) M&T represented their parents as *settlors* in the amendments of their trusts in mid-2003; and (ii) several years later, at the end of 2007, two of the Children became *trustees* of a QTIP and marital deduction trust created under their mother's revocable trust agreement; and (iii) M&T represents the Personal Representative of their father's estate in the Probate who seeks the payment of estate taxes from the *corpus* of each of those trusts. Put simply, this is far too attenuated a set of circumstances to give rise to an attorney-client relationship between M&T

and the Children in their capacities as trustees of the QTIP and Marital Deduction Trusts created under their mother's trust. M&T had done no work relating to any of these trusts since drafting the amended and restated Kathryn R. Wright Revocable Trust in 2003. There certainly was no attorney-client relationship between M&T and the Children as successor trustees.

In addition, all financial information relating to the issue of the QTIP and Marital Deduction Trusts' liability for estate taxes was part of Mr. Wright's estate and necessary for the preparation of his estate tax return. The Children admit that it was the Personal Representative's duty to marshal information and prepare the estate tax return. (June 17, 2009 Tr., at 431:13-432:8; Petition at ¶ 15). All of M&T's contact with the Children as successor trustees has been since the Children were represented by counsel. (Entry of Appearance). To the extent the Children allege they provided their own *personal* financial information, again, this information would not be material to the issue of the *QTIP and marital deduction trusts'* liability to their father's estate for estate taxes. (*Id*. at 432:3-24).

3. The Family Trusts.

M&T drafted the Clarence R. Wright Jr. Family Trusts (the "Family Trusts"). (April 29, 2009 Tr. at 49:9-17). Mr. Fuller confirmed that Clarence Wright, Jr. was the settlor. ***19** (May 1, 2009 Tr. at 207:8-11). The Children admitted that their *parents*, not they, were the grantors or settlors. (April 29, 2009 Tr. at 111:4-112:20; June 17, 2009 Tr. at 435:23-436:9). The Children also admitted that at the time the Family Trusts were drafted, they were not even doing personal estate planning. (April 29, 2009 Tr. at 109:25-110:18). Instead, their dealings with M&T at the time were with regard to their *parents'* estate planning. *(Id*. at 110:12-18).

Randy Wright and attorney Dean Rinehart served as trustees of the three Family Trusts upon their creation. (April 29, 2009 at 49:21-50:9; June 17, 2009 Tr. at 423:23-424). Gary Fuller, the attorney at M&T who actually prepared the trusts (May *1*, 2009 Tr. at 207:8-9), testified that his communications with these individuals consisted only of "discussions explaining the trust, what its objectives were, what it was designed to achieve, its role in the sense of wealth transfer planning that Clarence Wright, Jr. was undertaking." *(Id*. at 208:2-15). The death of Clarence Wright, Jr. triggered a change of the trustees of the Family Trusts. Upon Mr. Wright's death, attorney Dean Rinehart was no longer a trustee of the Family Trusts. Instead, each of the Children became a co-trustee with Randy of their own separate trust. Randy served as co-trustee of all of them for purposes of voting the IBO Shares. *(Id*. at 209:2-17). Mr. Fuller could not recall having advised any of the Children as to their role as trustees of those trusts. (*Id*. at 209:23-210:2).

A primary basis for the Children's assertion that M&T represented them was a memorandum (Plaintiff's Exh. 13) drafted by Gary Fuller on May 8, 2008, which was several years after his work on the Family Trusts and months after the **elder** Mr. Wright had passed away. Mr. Fuller drafted this memorandum after the meetings at which he advised the Children that he represented Ms. Wright in her capacity as Personal Representative. In fact, the memorandum described the trusts "*relevant to the estate tax returns of Clarence R.* ***20** *Wright, Jr."* (May 7, 2009 Tr. at 231:14-232:1; Plaintiff's Exh. 13)(emphasis added). This memorandum was informational, was provided to the Children and their attorneys who had entered appearances on their behalf in the Probate, and summarized the existing trusts that were relevant to the *Children's father's* estate taxes.

There is no basis for a finding that M&T represented the Children in their capacities as trustees of the Family Trusts. *Even if it had, the Family Trusts are not parties to nor being asked to contribute any share of estate taxes in the Probate*. Therefore, the Probate does not involve the same or a substantially related matter.

4. The IBO Shares.

Fourth, the primary asset of the Family Trusts consists of certain stock in International Bancshares of Oklahoma ("IBO"), which in turn owns Yukon National Bank. (Plaintiff's Exh. 13 at ¶ 1(a)(iii)). There was a transfer pursuant to a July 24, 2003 Purchase and Sale Agreement of the IBO Shares to the Family Trusts *from* the Clarence R. Wright, Jr. Revocable Trust. (April 29, 2009

Tr. at 56:13-57:4; Purchase and Sale Agreement, Plaintiff's Exh. 5). The parties to the Purchase and Sale Agreement were the Clarence R. Wright, Jr. Revocable Trust and the Family Trusts. (*Id*. at 57:13-22). Randy Wright and Mr. Rinehart signed as trustees on behalf of the Family Trusts. (*Id*. at 58:2-6).

M&T represented Clarence R. Wright, Jr. and no on else in this transaction as demonstrated in the opinion letter issued solely to him in connection with the transfer. (December 29, 2003 Opinion Letter, Defendant's Exh. 8). The letter, directed only to the **elder** Mr. Wright, stated "*You* have requested our opinion . . . (*Id*. at p.1)[emphasis added], and closed with "This opinion is rendered solely for *your* benefit in connection with the transactions above. This opinion may not be used *or relied upon by any other person . . .*" (*Id*. at p.10)(emphasisadded).

***21** Mr. Fuller confirmed that he represented the Children's father in this transaction. (April 29, 2009 Tr. at 184:8-21). Contrary to the Children's representation that M&T represented them, Mr. Fuller made clear that his explanation of the transaction to them was done at their father's request. (*Id*. at 184:23-185:3; 186:22-187:5). In fact, Randy eventually admitted upon cross-examination that his father had told M&T that when Randy spoke he was speaking on behalf of his father and mother. [6] (*Id*. at 116:25-118:19)

Mr. Fuller wrote Randy Wright to inform him of some discrepancies in the original Purchase and Sale Agreement and enclosed substituted pages. (Aug. 11, 2003 Ltr., Plaintiff's Exh. 6). Mr. Fuller also forwarded to Randy the documentation necessary to close the transfer of the IBO Shares, along with requests that the documentation be executed by the trustees of the Family Trusts. (Oct. 7, 2003 Memorandum, Plaintiff's Exh. 7). However, Mr. Fuller's correspondence was with Randy Wright was because "Randy was handling the mechanics" (*Id*. at 187:10-188:17) and "facilitating getting things done." (*Id*. at 189:24-191:6). Indeed, as reflected in Plaintiff's Exhibits 6 and 7, the instructions given to Mr. Wright were how to get the transaction documentation signed and completed. (*Id*. at 191:7-14). As the party signing the documents on behalf of the Family Trusts, of course he would receive the documents he needed to sign.

M&T represented the Children's father. No attorney-client relationship existed between M&T and the Children. Even if one had, the only confidential information allegedly provided to M&T was financial statements and tax returns of the Children. (April 29, 2009 Tr. at 62:1-19). In connection with the stock transfer, certain of Randy's ***22** information *had* to be filed with the Federal Reserved in connection with the change of control application described below. In truth, the information was sent to M&T not by the Children, but rather by the bank's lawyer. (See Financial Information, Plaintiff's Exh. 17; May 7, 2009 Tr. at 302:22-25; 305:2-306:12). None of this has the slightest relevance to the Estate Tax Motion.

5. The Change of Control Application.

The Children argued that M&T represented them in 2003 in obtaining approval by the Federal Reserve of a change of control application. (April 29, 2009 Tr. at 65:19-25; 66:20-23). Another attorney, Marion Bauman, represented the bank, (*Id*. at 192:1-16), which is confirmed by a review of the correspondence between Messrs. Fuller and Bauman. (Correspondence, Plaintiff's Exh. 8). Included in Plaintiff's Exhibit 8 is a July 25, 2003 letter from Mr. Fuller to Mr. Bauman regarding "Clarence R. Wright, Jr." Only the **elder** Mr. Wright was copied on the letter. *(Id.)*. The same was true for a letter written that day to the individual who appraised the ISBO stock. *(Id.)*. The only correspondence addressed to Randy Wright came from the individual who performed the appraisal and Mr. Bauman. *(Id.)*. Randy Wright again confirmed his role as "point person" for his father in this transaction, stating "he was involved because they were selling the stock, but at that time I was doing it all because he was staying out at the farm, the residence, with my mother the majority of the time." (April 29, 2009 Tr. at 69:9-70:6).

With regard to "confidential information," the file for the change of control application had "July 2003 balance sheets for Randy Wright and Dean Rinehart," who were the trustees of the Family Trust at the time. However, no tax returns were included. (May 7, 2009 Tr. at 248:1-17; 310:20-22; 312:21-25). Again, the information was actually sent to M&T by the bank's lawyer, Mr. Bauman. (See Financial Information, Plaintiff's Exh. 17; ***23** May 7, 2009 Tr. at 305:5-306:12). The change of control application, put simply, had nothing whatsoever to do with the Estate Tax Motion.

6. The Peoples Bank Acquisition.

The Children argued that M&T represented someone, although it is not clear exactly whom, with regard to an acquisition of Peoples Bank by Yukon National Bank in 2004. (April 29, 2009 Tr. at 70:14-19; 71:3-6). However, the Children admitted that the shares at issue were not owned by the probate estate. (*Id*. at 75:15-17). Indeed, the only confidential information the Children could identify that was provided consisted of material that was confidential to the *banks. (Id*. at 75:18-76:5). Mr. Fuller confirmed that he did no work regarding the acquisition. (May 7, 2009 Tr. at 212:14-19). This alleged transaction is a red herring identified to add window dressing to make it appear that M&T represented the Children.

7. The Voting Trust Agreement

The Children also contended that M&T did some work drafting a voting trust agreement with regard to the IBO Shares. (April 29, 2009 Tr. at 76:16-77:20; Plaintiffs' Exhs. 9 and 10). Mr. Fuller confirmed that M&T prepared the voting trust agreement and that it was done on behalf of Clarence Wright, Jr. in connection with his estate planning. (May 7, 2009 Tr. at 212:20-214:21). M&T did so "because of a tax problem that [M&T] identified that was a problem for *Clarence." (Id*. at 239:19-23)(emphasis added). Again, the Children admitted that the IBO Shares were not part of the Probate. (April 29, 2009 Tr. at 79:12-21; 152:15-18). This has no connection with the Estate Tax Motion.

8. The 2004 Informational Meeting.

The Children contend that they, along with their father, met with M&T attorney Christin Adkins in May 2004 to discuss, according to them, "what we wanted to do farther ***24** down the road." (*Id*. at 79:22-80:13). Ms. Adkins gave them some pamphlets. (*Id*. at 80:14-81:16; Plaintiff's Exh. 12). However, the Children's counsel admitted at the hearing that the Children "did not go forward" (*Id*. at 83:5-6) with estate planning, which the Children later confirmed. (*Id*. at 128:12-15; May 7, 2009 Tr. at 360:9-26). Ms. Adkins also confirmed this. (May 7, 2009 Tr. at 298:10-15). While the Children's counsel contended that "information was provided as a result of this meeting that was confidential" (*Id*. at 83:6-8), the Children admitted that it consisted of "financial information," i.e. tax returns, which M&T had *already* received. (*Id*. at 80:18-25; 83:21-25). Again, this meeting had nothing to do with the Estate Tax Motion.

9. The March 4, 2008 and May 5, 2008 Meetings with the Children and Their Counsel.

Following Clarence Wright, Jr.'s death on December 7, 2007, the Personal Representative had an obligation to keep the estate's beneficiaries informed. Her attorney at M&T, Gary Fuller, met with the Children and their counsel on March 4, 2008. (May 7, 2009 Tr. at 261:14-19; April 29, 2009 Tr. at 84:19-85:6). Rather than a situation in which the Children solicited legal advice, the *Personal Representative* invited the Children to the meeting and provided them with an agenda prepared by Mr. Fuller. (*Id*. at 85:8-13; May 7, 2009 Tr. at 378:25-379:11; Defendants' Exh. 4). In fact, the Children recall that Mr. Fuller advised them he was representing Carol as the trustee of the Clarence R. Wright, Jr. Revocable Trust and as personal representative of the estate. (April 29, 2009 Tr. at 86:3-9; May 7, 2009 Tr. at 211:6-21; 212:4-7; 367:9-18). At this point, some disagreement arose over matters, including the IBO Shares transaction. Notably, Randy Wright believed that the estate of his father would continue to pay income taxes on dividends from the IBO Shares after his death, although M&T had issued an opinion letter to the **elder** Mr. Wright ***25** that made clear this was not the case. (April 29, 2009 Tr. at 87:10-24; May 7, 2009 Tr. at 244:6-18 and 256:22-257:9; Dec. 29, 2003 Ltr. at 4, Defendants' Exh. 8). The Children brought along attorneys Dean Rinehart and Roger Rinehart, the same attorneys who subsequently represented them in the Probate. (*Id*. at 135:11-136:17). As reflected on the agenda for the meeting, "sources of funds for payment of estate taxes" were discussed as well as the contentious issue of the end of life transfers made by Mr. Wright, the last item on the agenda. (March 4, 2008 Agenda, Defendants' Exh. 4; May 7,

2009 Tr. at 250:13-251:25). The sources for payment of the estate taxes included the Q-Tip Trust and the Marital Trust. (May 7, 2009 Tr. at 249:15-250:2).

A later meeting occurred on May 5, 2008. (*Id*. at 89:22-93:23). Again, the Children's lawyers were present. (April 29, 2009 Tr. at 89:22-90:8). Mr. Fuller explained that the Children wanted further explanation of how the various trusts operated. (May 7, 2009 Tr. at 253:21-254:17). A few days later, he provided a memorandum outlining "the various trusts *relevant to the estate tax returns of Clarence R. Wright, Jr.*" (May 8, 2008 Memo, Plaintiff's Exh. 13).

M&T never represented the Children individually or in their capacity as trustees of the Q-Tip or Marital Trust. The only confidential information allegedly given to M&T by the Children consisted of financial statements and tax returns. (*Id*. at 128:20-130:3; May 7, 2009 Tr. at 363:8-364:6). The Children could not testify whether the financial statements and tax returns provided were for 2003 or for years prior to that. (April 29, 2009 Tr. at 150:6-151:13). Updated information was not sent to M&T after that time. (*Id*. at 131:3-9). The Children never paid M&T. (*Id*. at 131:10-12; May 7, 2009 Tr. at 240:7-9). Instead, bills went directly to the Children's father and he paid them. (April 29, 2009 Tr. at 131:13-23; May 7, 2009 Tr. at 373:9-14). It was also the Children's father who initially called ***26** M&T to represent him. (April 29, 2009 Tr. at 170:8-23). No testimony was even offered by one of the Children - Raymond Earl Wright. Carolyn Henthorn admitted she never personally asked M&T to do any work for her. (May 7, 2009 Tr. at 362:21-3). Put simply, no conflict of interest ever existed. M&T did not represent the Children and, even if such a relationship once existed, the past representation had nothing to with the Estate Tax Motion.

PROPOSITION III: THE CHILDREN WAIVED THEIR RIGHT, IF ANY, TO OBJECT TO M&T'S REPRESENTATION OF THE PERSONAL REPRESENTATIVE.

The District Court erred in rejecting the Personal Representative's defense to the Motion to Disqualify, which made clear that under *Hayes v. Central States Orthopedic Specialists, Inc.*, 2002 OK 30, 51 P.3d 562, the Children waived their right, if any, to move to disqualify M&T by waiting almost a year after the Personal Representative, through M&T, initiated the Probate before filing their Motion to Disqualify on February 12, 2009. (April 29, 2009 Tr. at 20:22-21:2; Personal Representative's May 13, 2009 Supplement to Response to Motion to Disqualify; Order at 5:19-6:4).

In *Hayes*, the Court reversed the trial court's order disqualifying the defendant's counsel after the plaintiff waited eight months after learning of the facts underlying its motion to disqualify before it filed its motion. The Court further found that requiring a disqualification of the defendant's counsel would work a substantially greater hardship on the defendant than allowing counsel to remain. *Id. at* ¶ 14.

In this case, the Personal Representative, through M&T, filed the Probate on February 25, 2008. (Petition). The Children's own counsel identified a meeting a week later as the moment the Children allegedly first realized that M&T did not represent them, stating "it became pretty clear to them at that point in time that McAfee was starting to take sides, ***27** that McAfee was not acting in the best interests of Ray, Randy, and Carolyn, that McAfee & Taft was only acting in the best interests of Mary [Carol] Wright, both as personal representative of Clarence's estate and as trustee of his trust." (April 29, 2009 Tr. at 15:3-20). Indeed, Mr. Fuller confirmed that the issue of liability for estate taxes was discussed at the March 4, 2008 meeting. (May 7, 2009 Tr. at 248:18-250:6; Defendants' Exh. 4). Mr. Fuller also advised the Children at the meeting that he represented the Personal Representative in her capacity as such and as the trustee of the Clarence R. Wright, Jr. Revocable Trust. (*Id*. at 211:10-212:7).

The Children admitted the March 4, 2008 meeting was "contentious." (June 17, 2009 Tr. at 441:3-9). The Children also admitted that they and the Personal Representative "were not always on the same page" thereafter. (June 17, 2009 Tr. at 446:5-13). Indeed, after the meeting, the Children "thought it would be proper" to retain Dean Rinehart to represent their interests in the Probate. (April 29, 2009 Tr. at 137:8-138:2). Mr. Rinehart entered an appearance two weeks later, on March 20, 2008. (Entry of Appearance).

A couple of months later, Randy Wright, one of the Children, asked the Personal Representative for a meeting with Gary Fuller of M&T. (May 7, 2009 Tr. at 382:2-24). A meeting occurred on May 5, 2008 and, again, the Children's counsel was present. (April 29, 2009 Tr. at 144:20-146:24). The Children admitted that the Rineharts represented them in the probate action by this time. (June 17, 2009 Tr. at 438:4-440:19). The same issues that existed at the March 4, 2008 meeting still existed. (May 7, 2009 Tr. at 255:10-12). Specifically with regard to the instant appeal, the problems associated with the Q-Tip Trust and the Marital Trust were again discussed. (*Id*. at 253:1-254:20).

The Children also recognized that M&T represented the Personal Representative when she filed a motion to require them to turn over certain books and records of the estate ***28** on June 16, 2008. (June 17, 2009 Tr. at 443:16-444:17; Personal Representative's Motion for Parties to Turn Over Books, Records and Property). On August 18, 2008, the Children responded. (Response of Carolyn W. Henthorn, Raymond Earl Wright and Clarence R. Wright, III to the Motion of Carol Wright to Turn Over Books, Records, and Property). Then, on September 9, 2008, the Children filed a motion to require the Personal Representative to provide an inventory. (Motion of Carolyn W. Henthorn, Raymond Earl Wright and Clarence R. Wright for Personal Representative Carol Wright to Provide an Inventory of the Estate). In none of these did the Children allege a conflict of interest.

According to the Children, on September 5, 2008, the Personal Representative notified them that the Q-Tip Trust and Marital Trust owed a share of the estate taxes. (Petition at ¶ 19). The Children then filed their Petition against the Personal Representative, asking the Court to declare how much the trusts owed on October 14, 2008. *(Id.)*. On October 28, 2008, the Personal Representative filed the Estate Tax Motion in the Probate to require the Children, in their capacities as trustees of certain trusts entitled the Clarence R. Wright, Jr. GST Exemption Q-Tip Trust (the "Q-Tip Trust") and the Clarence R. Wright, Jr. Marital Trust (the "Marital Trust"), to pay those trusts' share of the estate taxes, which totaled more than $1.7 million. (Application for Payment of Estate Taxes by Nonprobate Beneficiaries). On December 4, 2008, the Children filed their response to the Estate Tax Motion. (Carolyn W. Henthorn, Raymond Earl Wright and Clarence R. Wright, III Response to the Application for Payment of Estate Taxes by Nonprobate Beneficiaries). No mention was made in any of the Children's filings of any alleged conflict of interest.

On January 16, 2009, a Notice of Hearing was issued, setting the Estate Tax Motion for hearing on January 22, 2009. (Notice of Hearing--Application for Payment of Estate Taxes by Nonprobate Beneficiaries). If the relief were granted, the District Court would ***29** have required trusts of which the Children were trustees and beneficiaries to pay more than $1,7 million to the estate. On January 21, 2009, the Children filed an objection to the Notice of Hearing and obtained an Order continuing the hearing until February 27, 2009 (Objection to Notice of Hearing on Application for Payment of Estate Taxes by Nonprobate Beneficiaries; Order Continuing Hearing on Application for Payment of Estate Taxes by Nonprobate Beneficiaries). Having delayed the hearing on the Estate Tax Motion, the Children filed their Motion to Disqualify M&T as the Personal Representative's counsel (the "Motion to Disqualify") on Feb. 12, 2009. (Carolyn W. Henthorn, Raymond Earl Wright and Clarence R. Wright, Ill's Motion to Disqualify the Law Firm of McAfee & Taft).

The Children knew of the estate tax issues as early as March 4, 2008, 11 months before they filed the Motion to Disqualify, and that M&T represented the Personal Representative and did not represent their interests. They promptly secured their own counsel in the Probate and filed and responded to adversarial motions. By September 5, 2008, they knew the amount of the Q-Tip Trust's and the Marital Trust's share of the estate taxes. Yet, they waited another 5 months before filing the Motion to Disqualify.

The Personal Representative testified that retention of new counsel would require "extensive unnecessary time for a new legal team to come in and it would be extremely expensive for the trust." (May 7, 2009 Tr. at 381:19-24). There is no doubt that the complexity of the issues involved in the Probate and preparation of the estate tax return worked a hardship on the Personal Representative when she was required to obtain new counsel. The Probate has been on file for more than 2 years. The Motion to Disqualify was a litigation tactic intended to delay the payment of estate taxes. The egregious nature of this type of tactic should not be compounded by affirming the Order. The Children waived their rights, if any even existed, to move to disqualify M&T.

30 *CONCLUSION

For the reasons stated above, McAfee & Taft A Professional Corporation requests that this Court enter an Order reversing the August 12, 2009 Order.

Footnotes

1 The District Court appears to have based its ruling, at least in part, on findings of fact that are contrary to the evidence. For example, the Court cited that M&T had 35 to 40 "meetings with the Wright family" in 2003 and that Mr. Wright only "attended maybe three to five of those meetings." (July 22, 2009 Tr. at 7:3-15). Actually, the Children's lawyer that he saw "35 to 40 *contacts* with Randy" and only five with Mr. Wright. (May 7, 2009 Tr. at 228:8-11.) Mr. Fuller explained that most contacts were with Randy because he was providing information and documents on behalf of his father, but that Mr. Wright was present for the important planning meetings. (*Id*. at 227:13-229:10.) The Court also noted that M&T and the Children are "starting up more trusts when the animosity comes in." (July 22, 2009 Tr. at 10:9-15). Actually, it appears the Court was referencing trusts that were automatically created upon the deaths of the Children's parents under the *existing* trust agreements. (Plaintiff's Ex. 13 at 2-4). M&T was not drafting additional trust agreements.

2 Randy admitted that he had not provided any updated financial information to M&T since July 2003. (April 29, 2009 Tr. at 131:3-6).

3 Other than the one document mentioned in footnote 2 above, M&T does not believe any of the Children's confidential information was ever provided. However, even if it was provided, the *Children's* financial information is not relevant to the issues in the Probate or the Note Case.

4 *See* Footnote 3, *supra*.

5 M&T did not handle the probate of Kathryn R. Wright's estate. (May 7, 2009 Tr. at 217:18-20; April 29, 2009 Tr. at 114:2-24; Nov. 17, 2003 Notice to Creditors, Defendant's Exh. 2).

6 The District Court acknowledged this arrangement: "It is undisputed, however, that Clarence Wright gave the complete authority to Randy Wright to act on his behalf, to make decisions concerning the various relationships and to prepare the documentation to get their intent, which was the original reason for the hiring of the law firm, carried out."

End of Document