Filed 6/21/19 Trottier v. Morgan Stanley Smith Barney, LLC CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RYAN PETER TROTTIER,
Executor of the Estate of
MARY ANNE TROTTIER,

Appellant,

v.

MORGAN STANLEY SMITH
BARNEY, LLC, et al.,

Respondents.

B287643

(Los Angeles County
Super. Ct. No. BS170178)

APPEAL from orders of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

Catanzarite Law Corporation, Tim J. O'Keefe, Nicole M. Catanzarite-Woodward and Kenneth J. Catanzarite for Appellant.

Keesal, Young & Logan, Peter R. Boutin and Christopher A. Stecher for Respondents.

Appellant Ryan Peter Trottier (appellant), as Executor of the Estate of Mary Anne Trottier (Trottier), initiated an arbitration proceeding against Respondents Morgan Stanley Smith Barney, LLC, and Steven E. Crawford (collectively Morgan) under the supervision of the Financial Industry Regulatory Authority (FINRA). Trottier, appellant's grandmother, was the victim of financial elder abuse committed by a third party. In his statement of claim in the arbitration, appellant alleged (among other things) that Morgan aided and abetted the financial elder abuse of Trottier by honoring the checks she made payable to her abuser and selling securities to cover them, when Morgan knew or reasonably should have known that Trottier was being victimized. A divided panel of three arbitrators awarded appellant $396,623 in compensatory damages.

Appellant petitioned the superior court to confirm the award, and Morgan petitioned to vacate the award. In its petition, Morgan argued that the trial court must vacate the award under Code of Civil Procedure sections 1286.2, subdivision (a)(6),[1] based on the lead arbitrator's failure to disclose his recent involvement as a Probate Volunteer Panel (PVP) attorney for an elderly victim of alleged financial abuse in a conservancy proceeding. The trial court agreed, granted the petition to vacate the arbitration award, and denied appellant's petition to confirm the award.

---

[1] All section citations are to the Code of Civil Procedure.

We affirm the trial court's order.[2] We conclude that a person aware of all the facts might reasonably entertain a doubt whether the arbitrator would be able to be impartial in adjudicating appellant's claims against Morgan. (See *Haworth v. Superior Cour*t (2010) 50 Cal.4th 372, 393-394 (*Haworth*); see also § 1281.9, subd. (a)(1), incorporating by reference § 170.1, subd. (a)(6)(A)(iii).) Our decision is based on the very unusual circumstances of this case. First, as PVP counsel in the conservancy proceeding, the arbitrator accused the proposed conservatee's privately retained attorney of aiding the perpetration of financial elder abuse by advocating the proposed conservatee's wishes regarding the distribution of her property to her alleged abuser. This allegation is analogous to appellant's accusations that Morgan aided and abetted financial elder abuse of Trottier by following her directions and honoring her checks payable to her abuser. Second, as PVP counsel, the arbitrator became personally embroiled in the conservancy proceeding, going so far as to recommend that the court should consider barring the proposed conservatee's privately retained attorney from representing her. Instead, the court found the proposed conservatee competent to retain counsel, and relieved the arbitrator as PVP counsel. Third, as PVP counsel the arbitrator made the unusual

---

[2] The trial court also cited a second ground for vacating the arbitration award: appellant's failure to comply with a discovery order and the lead arbitrator's denial of Morgan's request for a continuance to obtain compliance. (See § 1286.2, subd. (a)(5) [parties' rights substantially prejudiced by arbitrator's refusal to postpone the hearing].) Because we resolve the case based on the lead arbitrator's failure of disclosure, we do not discuss the other ground on which the award was vacated.

recommendation that the court direct the Sheriff's Department to pursue criminal charges against anyone "suspected" of engaging in financial elder abuse of the proposed conservatee. Based on their interactions with the proposed conservatee concerning her financial decisions, he accused the privately retained attorney, as well as the buyers of the proposed conservatee's property and their attorney, of aiding or engaging in financial elder abuse, and, thus, his recommendation presumably included possibly pursing criminal charges against them. Fourth, the conservancy proceeding was recent: the arbitrator's representation of the proposed conservatee ended less than a year before his first disclosure statement in the instant arbitration.

Under these circumstances, we conclude that this is the rare case contemplated by *Haworth, supra,* 50 Cal.4th at pages 394-395—one in which the arbitrator should have understood that despite the differences in the parties, facts, and issues between the two proceedings, a reasonable person aware of all the facts could conclude that he might be biased against Morgan. Thus, the arbitrator was obliged to disclose his participation in the conservancy proceeding, and his failure to do so requires that the arbitration award be vacated. (*Id.* at p. 381; § 1286.2, subd. (a)(6)(A).)

BACKGROUND

Appellant's FINRA Statement of Claim Against Morgan

Trottier died on August 14, 2014. Before her death, she was retired and had a retirement investment account with Morgan. In his statement of claim in the FINRA arbitration, appellant alleged that in late 2009 through late 2010, Trottier was the victim of elder abuse committed by a third party, Adam M. Margaros ("Margaros").[3] In September 2013, following his guilty plea to violating Penal Code section 368, subdivision (d), Margaros was sentenced to three years in prison.[4]

---

[3] An "elder" is defined as "any person residing in this state, 65 years of age or older." (Welf. & Inst. Code, § 15610.27.) Welfare and Institutions Code section 15610.30, subdivision (a) defines "'[f]inancial abuse' of an elder or dependent adult" as occurring "when a person or entity does any of the following:
"(1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
"(2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.
"(3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70."

[4] In relevant part, Penal Code section 368, subdivision (d)(1), provides in relevant part: "A person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, . . . with respect to the property or personal identifying information of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable . . . by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, or by both that fine and imprisonment, when the moneys, labor, goods, services, or real or personal

According to the statement of claim, the evidence in the criminal case against Margaros showed that Trottier was suffering from paranoid delusions that her neighbors were spying on her. During 2009-2010, Margaros, who owned two home-security companies, took advantage of Trotter's delusions to induce her to buy an elaborate, unneeded home security system. She paid by writing a series of checks totaling more than $300,000 drawn on her Morgan account. To cover the checks, Morgan sold securities in Trottier's account, and charged fees to cover the outstanding checks and overdrafts. On August 31, 2009, the account had a balance of more than $394,000; as of July 31, 2010, it had a balance of less than $115,000.

At the preliminary hearing in the criminal case, Dr. Bonnie Olsen, a clinical psychologist, testified that she assessed Trottier on December 21, 2010. She determined that Trotter's cognitive functioning was impaired for executive decision making, and that her mental vulnerability would be apparent to anyone dealing with her in business transactions.

Respondent Steven Crawford, a general securities representative with Morgan, was Trottier's financial adviser. From November 2009 through July 2010, Trottier communicated with Crawford several times by telephone. At the preliminary hearing, Trottier testified that Crawford asked her "why [are you] taking all that money out?" Trottier responded that it was for a security system, and explained about her neighbors. Crawford told her, "I think you are getting

---

property taken or obtained is of a value exceeding nine hundred fifty dollars ($950)."

taken." Trottier told him that she was paying what it cost. Crawford replied, "that's a lot of money for a security system even with the extras."

In late 2015, appellant, as executor of Trottier's estate, commenced the FINRA arbitration against Morgan. Appellant alleged that Morgan knew, or reasonably should have known, that Trottier was a victim of elder abuse, and was obligated to halt the transactions and contact law enforcement.[5] He alleged claims for breach of fiduciary

---

[5] He relied on certain rules governing Morgan's financial activities (New York Stock Exchange Rule 405 and National Association of Securities Dealers Rule 2310), as well Welfare and Institutions Code section 15630.1, subdivision (d)(1), under which (in relevant part) Morgan was a mandated reporter of suspected financial elder abuse. That provision states in relevant part: "Any mandated reporter of suspected financial abuse of an elder . . . who has direct contact with the elder . . . or who reviews or approves the elder or dependent adult's financial documents, records, or transactions, in connection with providing financial services with respect to an elder . . . , and who, within the scope of his or her employment or professional practice, has observed or has knowledge of an incident, that is directly related to the transaction or matter that is within that scope of employment or professional practice, that reasonably appears to be financial abuse, or who reasonably suspects that abuse, based solely on the information before him or her at the time of reviewing or approving the document, record, or transaction in the case of mandated reporters who do not have direct contact with the elder or dependent adult, shall report the known or suspected instance of financial abuse by telephone or through a confidential Internet reporting tool, as authorized pursuant to Section 15658, immediately, or as soon as practicably possible. If reported by telephone, a written report shall be sent, or an Internet report shall be made through the confidential Internet reporting tool established in Section 15658, within two working days to the local adult protective services agency or the local law enforcement agency." (Welf. & Inst. Code, § 15630.1, subd. (d)(1).)

duty, aiding and abetting financial elder abuse, negligence, breach of contract, and breach of the covenant of good faith and fair dealing.

Lead Arbitrator's Disclosure

The parties agreed to submit the case to FINRA arbitration before a panel of three arbitrators to be selected by the parties. FINRA rule 12405, subdivision (a), requires any prospective arbitrator to "make a reasonable effort to learn of, and [to] disclose to the Director, any circumstances which might preclude the arbitrator from rendering an objective and impartial determination in the proceeding." The duty to disclose is ongoing. Under FINRA rule 12405, subdivision (c), the Director provides the parties to the arbitration the disclosure information provided by the prospective arbitrator. The duty to disclose as construed by the FINRA (according to the FINRA Arbitrator's Disclosure page and instructions to prospective arbitrators) includes the duty to disclose "any relationship, experience and background information that may affect—or even appear to affect—the arbitrator's ability to be impartial and the parties' belief that the arbitrator will be able to render a fair decision."

In the instant case, the parties were provided with the disclosure statements of the list of potential arbitrators from which they could choose the panel of three to hear the case. The disclosure form covered a wide range of background information. In his initial disclosure statement executed on March 17, 2016, in response to questions regarding "Subject Matter Disclosures," prospective arbitrator Michael

Harrison (who was later selected as the lead arbitrator) checked "No" to the question: "Have you, your spouse, or an immediate family member been involved in a dispute involving the same or similar subject matter as the arbitration?" After being selected to the arbitration panel, Harrison filed five disclosure updates that, as relevant to the failure to disclose that is at issue on appeal, provided no additional information.

Arbitration Hearing

The arbitration hearing was held before the three selected arbitrators (including Harrison as lead arbitrator) from March 28 to March 31, 2017. The panel split on the outcome: two arbitrators (including Harrison) found Morgan liable and awarded damages of $396,623 (they did not file a statement of decision explaining their reasoning). The third arbitrator filed a lengthy written dissent.

Petitions to Confirm and Vacate

Appellant filed a petition to confirm the arbitration award, and Morgan filed a petition to vacate. As here relevant, Morgan argued that the arbitration award should be vacated under section 1286.2, subdivision (a)(6) based on Harrison's failure to disclose his recent participation in a conservancy proceeding involving allegations of elder abuse.

The evidence produced in Morgan's petition to vacate established the following. The conservancy proceeding involved proposed conservatee Terry La Voie (La Voie). It was initiated on May 13, 2014,

by a petition for a temporary conservatorship. La Voie lived in and owned a multi-unit apartment building. The petition alleged that she had been victimized by a 22-year-old man, Koby, purporting to be her boyfriend, including writing a check to him which (by forgery) he increased to $34,000. She had also bought him a Mercedes, and placed $1 million into a joint account with him.

On May 14, 2014, the superior court appointed Harrison to act as PVP counsel for La Voie. (See Prob. Code, § 1470, subd. (a) ["The court may appoint private legal counsel for . . . a proposed conservatee in any proceeding under this division if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests"].)

In a Report and Recommendation to the court filed June 19, 2014, Harrison stated that he had spoken with several relevant witnesses: La Voie's former estate planning attorney, her new attorney, several of La Voie's friends and associates, her new property manager, her CPA, her physician, her sister, her private banker, and one of the proposed conservators and his attorney. Based on his investigation, Harrison reported that La Voie initially wanted to give away all her property to Koby (whom Harrison described as a personal assistant), which would result in a substantial tax bill. She had already given him more than $100,000. He opined that her wish to give all her property away and incur a substantial tax bill was "indicative of not being able to plan rationally" in her self-interest. Harrison persuaded her to give Koby

the property upon her death, and she signed estate-planning documents to do so, drafted by her attorney, who had been selected by Koby. Harrison criticized the lawyer for having a conflict of interest, and proposed to the court that it either order new estate planning documents to be created with the assistance of another attorney, or assume control of La Voie's trust.

In a later Report and Recommendation filed March 20, 2015, Harrison reported that the first conservatorship petition had been withdrawn because the petitioners could not afford to continue with it, and a second, brought by different petitioners, had been filed. Harrison had spoken with several relevant witnesses, including the Los Angeles County Sheriff investigators assigned to the criminal case against Koby, who expected charges (apparently related to his forging the $34,000 check) to be filed soon.

Harrison's report detailed his unusual and acrimonious involvement in the case. As he reported: "Usually I meet with a proposed conservatee only once. I met with [La Voie] on three occasions, and spoke with her (alone and with Koby), Koby (alone), and with [La Voie's] family members, with her physician, banker, friends, business associates, former tenants, the Los Angeles County Sheriff investigators assigned to the criminal case against Koby, and others."

He discussed his dispute with the lawyer privately retained by La Voie to draft new estate planning documents. The attorney had challenged Harrison's qualifications as a PVP attorney, and had alleged in a writ petition that Harrison had violated his attorney client

privilege with La Voie. Harrison was offended by the accusations, and defended himself at length, in strong rhetoric. "It is preposterous to suggest that I pre-planned my first two visits to include both [La Voie] and Koby in order to avoid confidentiality issues. How or why would I know to do that in advance of ever meeting Terry? In 20 years of service as a PVP attorney, I've never asked to include another person except in the few cases where the proposed conservatees spoke a language I'm not familiar with or with speech impairments which made them difficult for me to understand."

Harrison accused Koby of filing a perjurious declaration, and suggested that "someone" (presumably the attorney) had suborned perjury. He noted: "After heated arguments by [La Voie's attorney, the probate court] found that I did not breach any duty of confidentiality. The first PVP report I prepared on June 17, 2014, was submitted with [La Voie's] full cooperation and knowledge, in order to avoid a conservatorship. Nothing in the report was confidential, and any claims six months after the fact that I breached Terry's confidences are false and baseless."

Harrison also accused La Voie's new attorney of having a conflict of interest in violation of his ethical duties. He recognized that the attorney was following La Voie's wishes, but as characterized by Harrison, the attorney "argued [to the court] on behalf of the perpetrator [Koby] who committed forgery and elder financial abuse against his client, the victim." Harrison characterized as "specious" the attorney's argument that a PVP attorney was not needed, because La

Voie had retained her own counsel: "Compare his billing with the bills of any PVP attorney, and ask if proclaiming only [La Voie's] wishes does anything to 'protect the person's [La Voie's] interests" under Probate Code section 1470, subdivision (a). Harrison recommended that the court bar the attorney from representing La Voie. Harrison also accused the court-appointed probate investigator of providing misleading information inconsistent with information relevant witnesses told Harrison.

Harrison was convinced that La Voie was being victimized. He reported that "after hip replacement surgery in 2010, [La Voie] almost died . . . , suffered hallucinations, and didn't pass the psychological evaluations at Cedars Sinai." He had been told that she had been the victim of elder abuse more than once (including by a "Brazilian swindler who stole a couple of hundred thousand dollars"). He was extremely concerned because since his last report, La Voie had sold her building to the owners of adjacent property for $7 million (he had been told that the property might be worth anywhere from $18 to $25 million). Harrison characterized the transaction as "elder financial abuse" by the buyers and their attorney. Harrison recommended that the court "should consider barring" La Voie's privately retained attorney from representing her or Koby, and asserted that the attorney "should not be allowed to argue on behalf of both of them." He further recommended that the court "should consider rescinding the sale of the property," and that the court "should direct the Sheriff's Department to proceed with

elder abuse and forgery actions they may wish to pursue against Koby and anyone else suspected of elder abuse against Terry."

Despite the recommendations in his March 2015 report, on May 21, 2015, the probate court ruled that La Voie had the capacity to retain her own private attorney, and discharged Harrison as PVP counsel.

Trial Court's Ruling

After extensive argument, the superior court took the competing petitions under submission. It later issued a written ruling, concluding that Harrison's failure to disclose his participation in the La Voie conservancy proceeding violated the disclosure requirement of section 1281.9, subdivision (a)(1), requiring that the award be vacated.

DISCUSSION

Appellant contends that the trial court erred in vacating the arbitration award based on Harrison's failure to disclose the La Voie conservancy proceeding. He contends that, reasonably viewed, the evidence showed that Harrison remained objective in the La Voie proceedings, and that those proceedings were not so similar to the instant arbitration as to suggest Harrison would not remain fair and impartial. We disagree. We conclude that a person aware of all the facts of Harrison's conduct in the La Voie conservancy could reasonably entertain a doubt whether Harrison would able to be impartial in deciding appellant's claims against Morgan. Our review of the trial court's ruling is de novo. (*Haworth, supra,* 50 Cal.4th at p. 381.)

“The [California] statutory scheme, in seeking to ensure that a neutral arbitrator serves as an impartial decision maker, requires the arbitrator to disclose to the parties any grounds for disqualification. Within 10 days of receiving notice of his or her nomination to serve as a neutral arbitrator, the proposed arbitrator is required, generally, to ‘disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.’ (§ 1281.9, subd. (a).) Based upon these disclosures, the parties are afforded an opportunity to disqualify the proposed neutral arbitrator. (§ 1281.9, subds. (b), (d).) If an arbitrator ‘failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware,’ the trial court must vacate the arbitration award. (§ 1286.2, subd. (a)(6)(A).)” (*Haworth, supra,* 50 Cal.4th at p. 381.)

As explained in *Haworth,* “An arbitrator’s duty to disclose arises under the same circumstances that give rise to a judge’s duty to recuse, that is, if ‘[f]or any reason . . . [¶] . . . [¶] . . . [a] person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.’ (§ 170.1, subd. (a)(6)(A)(iii).) . . . [¶] ‘Impartiality’ entails the ‘absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind.’ [Citation.] In the context of judicial recusal, ‘[p]otential bias and prejudice must clearly be established by an objective standard.’ [Citations.] ‘Judges, like all human beings, have widely varying experiences and backgrounds. Except perhaps in extreme

circumstances, those not directly related to the case or the parties do not disqualify them.' [Citation.] [¶] In interpreting a comparable provision of the federal law requiring recusal of a judge when his or her 'impartiality might reasonably be questioned' [citation], federal courts have stated that the appearance-of-partiality 'standard "must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice."' [Citations.] 'The "reasonable person" is not someone who is "hypersensitive or unduly suspicious," but rather is a "well-informed, thoughtful observer."' [Citation.] '[T]he partisan litigant emotionally involved in the controversy underlying the lawsuit is not the disinterested objective observer whose doubts concerning the judge's impartiality provide the governing standard.' [Citations.] [¶] 'An impression of possible bias in the arbitration context means that one could reasonably form a belief that an arbitrator was biased for or against a party for a particular reason.' [Citation.]" (*Haworth, supra,* 50 Cal.4th at pp. 388-389.)

Haworth recognized that "[t]here are many reasons why a party might, reasonably or unreasonably, prefer not to have a particular arbitrator hear his or her case—including the arbitrator's prior experience, competence, and attitudes and viewpoints on a variety of matters. The disclosure requirements, however, are intended only to ensure the impartiality of the neutral arbitrator. [Citation.] They are not intended to mandate disclosure of all matters that a party might

wish to consider in deciding whether to oppose or accept the selection of an arbitrator." (*Haworth, supra*, 50 Cal.4th at p. 393.)

In reviewing the relevant record de novo, we take seriously the Supreme Court's admonitions in *Haworth*: the standard of disclosure cannot be so broad as to presume recusal based on mere unsubstantiated suggestions of personal bias or prejudice; it must focus on the doubts about impartiality held by the reasonable, well-informed, thoughtful person, not the partisan litigant emotionally involved in the case; and it is not designed to mandate disclosure of all prior experience, competence, attitudes and viewpoints on all matters that might concern a party in choosing an arbitrator, but only to ensure the arbitrator's impartiality in deciding the dispute at hand. At bottom, there must be a basis to form a reasonable doubt whether, for a particular, articulated reason supported by the evidence, the arbitrator could be impartial. (*Haworth, supra*, 50 Cal.4th at p. 393.) And that basis must be based on all the facts, not just selected facts. (See *Betz v. Pankow* (1995) 31 Cal.App.4th 1503, 1511-1512.) Here, reviewing the instant record de novo, we conclude that Morgan demonstrated such a basis.

Appellant's statement of claim was quite clear as to Morgan's alleged misconduct: it alleged that Morgan knew, or reasonably should have known, that Trottier was the victim of financial elder abuse. It alleged that in following Trottier's directions and honoring her checks (selling securities in the process and reducing the balance of her account), Morgan violated its legal and fiduciary obligations to Trottier.

The statement of claim went so far as to allege that Morgan aided and abetted the financial elder abuse of which Margaros was convicted.

Given these allegations, a reasonable person aware of all the facts of Harrison's involvement in the La Voie conservancy proceeding could form a doubt whether he could be fair to Morgan. First, the circumstances of the two cases disclose marked similarities. True, the instant case concerned claims of civil liability (as well as different parties and facts) based on alleged financial elder abuse not directly raised in the La Voie conservancy proceeding. Yet, looking at all the facts, troubling analogies are evident.

During the La Voie conservancy proceeding, Harrison became convinced that La Voie was the victim of financial elder abuse. He accused the attorney she had retained to represent her in the conservancy proceeding of violating his fiduciary obligations to La Voie, just as in the instant case appellant accused Morgan violating its fiduciary obligations to Trottier. Harrison accused La Voie's attorney of aiding Koby in committing financial elder abuse against La Voie ("[h]e argued on behalf of the perpetrator who committed forgery and elder financial abuse against his client, the victim"), just as appellant accused Morgan of aiding and abetting Maganos' financial elder abuse against Trottier ("[i]n spite of their fiduciary obligations to Ms. Trottier . . . MORGAN . . . intentionally and/or recklessly aided and abetted Margaros in committing the violations against . . . Trottier"). Harrisons's accusations against La Voie's attorney were based on the attorney following La Voie's instructions regarding the distribution of

her property, when he knew or should have known she was not competent to make financial decisions. Harrison asserted that the attorney "has repeatedly argued that a PVP attorney is not necessary in this case because it is a waste of money and [La Voie] is already represented by him. This argument is specious. Compare his billing with the bills of any PVP attorney, and ask if proclaiming only her [La Voie's] wishes does anything to 'protect the person's interests' (§ 1470(a) of the Probate Code." In the instant case, appellant's claims against Morgan were similarly based on Morgan's following Trottier's instructions when Morgan knew or should have known Trottier was not competent to make financial decisions regarding the distributions from her account. Appellant alleged that "MORGAN . . . knew, or in the exercise of reasonable care should have known, that the violations by Margaros were occurring[, and] MORGAN . . . nevertheless knowingly encouraged, assisted and participated in the violations, and ratified the abuse by his/its/their own misconduct").

Besides these similarities, Harrison's conduct in his representation of La Voie in the conservancy proceeding, as reflected in his reports to the court, was quite unusual. This was not a typical conservancy proceeding. As Harrison noted, the extent of his investigation was atypical (although he would usually meet with a proposed conservatee only once, he met with La Voie three times; he also did extensive investigation, talking to Koby, La Voie's family members, "her physician, banker, friends, business associates, former tenants, the Los Angeles County Sheriff investigators assigned to the

criminal case against Koby, and others"). He became personally embroiled in the case, offended that his judgment might be questioned. He called "preposterous" the allegations that he violated La Voie's confidentiality; he accused Koby of filing a perjurious declaration; and he made a thinly veiled accusation that La Voie's attorney suborned it. He went so far as to recommend that the court consider barring Trottier's retained attorney from representing her, and called "specious" the argument that PVP counsel was not required to ensure Trottier's protection from financial elder abuse by others. Despite his recommendations, the probate court concluded that Trottier was competent to retain counsel, relieved Harrison as her PVP attorney, and allowed her privately retained lawyer to continue to represent her.

Besides accusing the attorney of aiding Koby's financial abuse of Trottier, he also accused the buyers of Trottier's building and their attorney of engaging in financial elder abuse. Further, he made the highly unusual[6] recommendation that the probate court "direct the Sheriff's Department to proceed with elder abuse and forgery actions they may wish to pursue against Koby and anyone else suspected of elder abuse against Terry." Given that he had accused La Voie's private counsel, the buyers of La Voie's property, and the buyers' attorney of aiding or committing financial elder abuse, it is reasonable to infer that

---

[6] Under the separation of powers doctrine, the executive branch has the exclusive authority to direct the filing of criminal charges; judicial authority commences on the filing of charges. (See *People v. Superior Court* (*Felmann*) (1976) 59 Cal.App.3d 270.)

these people were included in his reference to "anyone else suspected of elder abuse."

Finally, Harrison's participation in the La Voie conservancy proceeding was quite recent in comparison to the instant arbitration. (See *Betz v. Pankow, supra,* 31 Cal.App.4th at p. 1511 [grounds for disqualification must be viewed in context of whether a reasonable person *at the present time* would have a doubt of partiality].) He was appointed as PVP counsel in May 2014, and was relieved in May 2015, less than a year before his first disclosure statement in the FINRA arbitration in March 2016. Thus, it cannot be said that any bias arising from the La Voie conservancy proceeding had evaporated with the lapse of significant time.

In our independent review, we conclude that this record discloses "extreme circumstances . . . not directly related to the case" (*Haworth, supra,* 50 Cal.4th at p. 389) that demonstrate a specific reason to doubt whether Harrison could be fair to Morgan in the instant arbitration. A reasonable person aware of all the facts of Harrison's conduct in the La Voie conservancy proceeding could reasonably conclude that Harrison was overzealous and personally embroiled in this very atypical conservancy proceeding. His overzealousness and embroilment were capped by his unusual recommendation that the court consider barring La Voie's privately retained attorney from representing her (a recommendation the probate court not only rejected, but in response to which it relieved Harrison as PVP counsel), and by the even more unusual recommendation that the probate court direct the Sheriff's

Department to pursue charges "against Koby and anyone else suspected of elder abuse," presumably including those Harrison identified (La Voie's privately retained attorney, the buyers of her property, and the buyers' attorney). This conduct reasonably suggested that he might be biased against a Morgan, which was alleged to have aided and abetted financial elder abuse of Trottier under circumstances with significant analogies to Harrison's perception of the La Voie conservancy proceedings.

Appellant's arguments as to why disclosure was not required fail to consider all the facts of Harrison's conduct, and the inferences a reasonable person might draw from those facts. In cannot be said that Harrison demonstrated objective impartiality in the La Voie proceeding. To the contrary, as we have explained, his conduct was marked by overzealousness, acrimony, and questionable recommendations; ultimately, he was relived as PVP counsel despite arguing that it was "specious" to suggest that his presence was not needed to protect La Voie against financial elder abuse.

Relying on *Benjamin, Weill & Mazer v. Kors* (2011) 195 Cal.App.4th 40 (*Kors*) and *Baxter v. Bock* (2016) 247 Cal.App.4th 775 (*Baxter*), appellants contend that Harrison was not obligated to disclose his participation in the La Voie proceeding because: (1) his representation of La Voie ended before the arbitration, (2) La Voie was not a client in the same position as the parties to the instant arbitration, and (3) most importantly, Harrison had no financial self-interest that would suggest a motive to rule against Morgan.

With respect to appellant's first two points, as we have already explained, that Harrison's representation of La Voie ended before the arbitration, and that the La Voie proceeding involved different parties and issues, did not relieve Harrison of his duty of disclosure. With respect to the third point, appellants misconstrue *Kors* and *Baxter*.

In *Kors*, the arbitration involved a fee dispute between a law firm and a former client. After the former client lost in the arbitration, she petitioned to vacate the arbitration award, arguing that the lead arbitrator had failed to disclose the nature of his legal practice representing attorneys and major law firms against claims of misconduct, including client fee disputes. The court of appeal held that the arbitrator violated his duty of disclosure under section 1281.9, subdivision (a)(6). It reasoned that "a reasonable person [could] doubt whether [the arbitrator's] dependence on business from lawyers and law firms sued by former clients would prevent him from taking the side of a client in a fee dispute with a former law firm, because doing so might 'put at risk' his ability to secure business from the lawyers and law firms whose business he solicits." (*Kors, supra*, 195 Cal.App.4th at p. 71.)

Baxter, supra, 247 Cal.App.4th 775 also involved an arbitration of an attorney fee dispute. After the arbitrator ruled in favor of the former client, the attorney sought to vacate the award for the arbitrator's failure to disclose his past history as an auditor in attorney fee disputes, and publications he authored discussing his views on improper billing practices. In response, the arbitrator submitted a declaration

describing the nature of his practice. The court of appeal held that the arbitrator had no duty to disclose the nature of his consulting practice under *Kors:* "The expertise of [the arbitrator's] firm was . . . in reviewing attorney bills, rather than in representing one side or the other in fee disputes. Because [the arbitrator] did not depend exclusively on business from legal clients or losing parties, the nature of his business created no particular economic incentive for him to rule" in a particular way. Further, "[t]he type of information [the attorney] contends [the arbitrator] was required to disclose—essentially, his experience in auditing attorney bills and his attitude toward proper methods of billing—is just the type of information that *Haworth* holds is *not* within the arbitrator's duty of disclosure: that is, 'the arbitrator's prior experience, competence, and attitudes and viewpoints on a variety of matters.' [Citation.]" (*Baxter*, *supra,* 247 Cal.App.4th at pp. 789, 791.)

Kors and *Baxter* do not suggest that absent a financial motive to rule against Morgan so as to not risk losing typical clients of his law practice, Harrison had no duty to disclose his participation in the La Voie conservancy proceeding. It is not the nature of Harrison's law practice and typical clients that suggested bias. It is that given the attitudes manifested by his extraordinary conduct in the La Voie proceeding, a reasonable person could doubt whether he could be fair to Morgan in the current arbitration. Further, unlike *Baxter*, in the instant case Harrison's failure to disclose did not relate to a supposed bias arising from the nature of his expertise in the subject matter of the

arbitration. There was no showing that Harrison had any expertise in matters involving financial elder abuse or applicable legal doctrines, or that the conduct we have described in the La Voie conservancy proceeding was a product of any such expertise.

We recognize, as cautioned in *Haworth, supra,* 50 Cal.4th at pages 394-395, that an "arbitrator cannot reasonably be expected to identify and disclose all events in the arbitrator's past, including those not connected to the parties, the facts, or the issues in controversy, that conceivably might cause a party to prefer another arbitrator. Such a broad interpretation of the appearance-of-partiality rule could subject arbitration awards to after-the-fact attacks by losing parties searching for potential disqualifying information only after an adverse decision has been made." The instant case is, however, the rare case contemplated by *Haworth*—one in which the arbitrator should have understood, despite the differences in parties, facts, and issues between the two proceedings, that the prior dispute in which he was involved created reasonable concerns about his ability to be impartial in the current arbitration. On the entire record, a reasonable person aware of all the facts could form the opinion that Harrison's conduct in the La Voie conservancy proceeding displayed a bias that would work to Morgan's detriment. For that reason, Harrison had a duty to disclose the La Voie conservancy proceeding. Because he did not, the arbitration award must be vacated. "If an arbitrator 'failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware,' the trial court must vacate the

arbitration award. (§ 1286.2, subd. (a)(6)(A).)" (*Haworth, supra,* 50 Cal.4th at p. 381.)

DISPOSITION

The orders appealed from are affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.