

**IN RE DISQUALIFICATION OF TYACK AND BRUNNER.**

**THE STATE EX REL. DUNN v. FRANKLIN COUNTY COURT OF COMMON PLEAS.**

**[Cite as *In re Disqualification of Tyack and Brunner*, 151 Ohio St.3d 1204,  
2017-Ohio-7428.]**

*Judges—Affidavits of disqualification—R.C. 2501.13 and 2701.03—Affiant failed  
to demonstrate bias or prejudice—Disqualification denied.*

(No. 17-AP-052—Decided June 30, 2017.)

ON AFFIDAVIT OF DISQUALIFICATION in Tenth District Court of Appeals Case No.  
14AP-819.

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**O’CONNOR, C.J.**

{¶ 1} M. David Burton, counsel for relator Catherine P. Dunn, has filed an affidavit with the clerk of this court under R.C. 2501.13 and 2701.03 seeking to disqualify Judge G. Gary Tyack and Judge Jennifer Brunner from presiding over any proceedings in the above-referenced case in the Tenth District Court of Appeals.

**Background**

{¶ 2} In 2014, Ms. Dunn filed the underlying action in the Tenth District seeking a writ of prohibition to prevent then common pleas court Judge Timothy Horton and his magistrate from taking any action on pending motions in Ms. Dunn’s dismissed replevin case. Ms. Dunn argued that because she had dismissed her case, the common pleas court lacked jurisdiction to decide the motions. In January 2017, a Tenth District magistrate issued a decision recommending that the court of appeals dismiss Ms. Dunn’s prohibition complaint. *See In re Disqualification of Tenth Dist. Court of Appeals*, 150 Ohio St.3d 1203, 2017-Ohio-1434, 78 N.E.3d 882, ¶ 6-7.

{¶ 3} In February 2017, Mr. Burton filed an affidavit of disqualification seeking to remove the entire bench of Tenth District judges from ruling on the magistrate’s recommendation. Mr. Burton argued that an appearance of impropriety would exist if any of the appellate judges decided the case because Judge Horton—a named respondent in Ms. Dunn’s complaint—had since become a Tenth District judge. Mr. Burton asserted that an objective observer might reasonably question the ability of any Tenth District judge to impartially decide a case involving a judicial colleague. *Id.* at ¶ 3.

{¶ 4} Mr. Burton’s affidavit was denied in an entry dated March 10, 2017. The entry acknowledged that judges have been disqualified from cases involving judicial colleagues as named parties and from cases that require the court to assess the professional competency or credibility of a judicial colleague. *Id.* at ¶ 6-8. But given that (1) Ms. Dunn named Judge Horton as a respondent in her prohibition case in his official judicial capacity as a common pleas court judge, (2) he no longer served on the common pleas court bench, and (3) Mr. Burton failed to explain how resolution of Ms. Dunn’s prohibition case would require any assessment of Judge Horton’s credibility, competency, or professionalism, the entry concluded that there was no reason to question the ability of the appellate judges to impartially decide Ms. Dunn’s case. *Id.* at ¶ 7-9.

{¶ 5} In May 2017, the Tenth District assigned the underlying case to a three-judge panel. Mr. Burton thereafter filed a second affidavit of disqualification against two of the assigned judges: Judge Tyack and Judge Brunner. Mr. Burton alleges that both judges violated the Code of Judicial Conduct by appearing at Judge Horton’s unrelated criminal sentencing. Mr. Burton also alleges that because of Judge Tyack’s and Judge Brunner’s close relationship with Judge Horton, an objective observer might reasonably question their ability to impartially decide the prohibition case.

{¶ 6} Judge Tyack and Judge Brunner responded in writing to the affidavit, requesting that it be denied.

**Merits of the affidavit of disqualification**

{¶ 7} As an initial matter, it is well established that an affidavit of disqualification is not the appropriate forum to determine whether a judge has complied with the Code of Judicial Conduct. *In re Disqualification of Burge*, 142 Ohio St.3d 57, 2014-Ohio-5871, 28 N.E.3d 48, ¶ 4. Rather, the issue here is narrow and limited to determining whether a judge in a pending case has a bias, prejudice, or other disqualifying interest mandating the judge's removal.

{¶ 8} Mr. Burton has failed to establish that Judge Tyack's or Judge Brunner's disqualification is necessary. Even accepting that Judge Tyack and Judge Brunner may have a closer relationship with Judge Horton than some of their judicial colleagues, Judge Horton is not sufficiently connected to Ms. Dunn's prohibition case to create any appearance of impropriety for the judges. The current issue before the court of appeals is a legal one: whether the common pleas court has jurisdiction to decide the pending motions in Ms. Dunn's dismissed replevin case. *See In re Disqualification of Tenth Dist.*, 150 Ohio St.3d 1203, 2017-Ohio-1434, 78 N.E.3d 882, at ¶ 9. Any decision from the court of appeals will affect Judge Horton's successor on the common pleas bench—not Judge Horton, either personally or professionally. And just as he failed to do in his previous affidavit, Mr. Burton has once again failed to explain how ruling on the magistrate's decision would require any assessment of Judge Horton's credibility, competency, or professionalism that could somehow create a conflict for Judge Tyack or Judge Brunner. The reasons for denying Mr. Burton's previous affidavit apply equally here.

{¶ 9} "A judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling to overcome these presumptions." *In re Disqualification of George*, 100 Ohio St.3d 1241, 2003-Ohio-

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5489, 798 N.E.2d 23, ¶ 5. Those presumptions have not been overcome in this case.

{¶ 10} The affidavit of disqualification is therefore denied. The case may proceed before Judge Tyack and Judge Brunner.

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