

IN RE DISQUALIFICATION OF STUCKI.

O'MALLEY v. O'MALLEY.

**[Cite as *In re Disqualification of Stucki*, 157 Ohio St.3d 1259,
2019-Ohio-4534.]**

*Judges—Affidavits of disqualification—R.C. 2701.03—Affiant's claims either fail
to demonstrate bias or prejudice or are waived—Disqualification denied.*

(No. 19-AP-075—Decided August 6, 2019.)

ON AFFIDAVIT OF DISQUALIFICATION in Cuyahoga County Court of Common
Pleas, Domestic Relations Division, Case No. DR-04-299141.

O'CONNOR, C.J.

{¶ 1} Defendant Patrick J. O'Malley has filed an affidavit with the clerk of this court pursuant to R.C. 2701.03 seeking to disqualify Judge David E. Stucki, a retired judge sitting by assignment, from presiding over any further proceedings in the above-referenced case. This is the second affidavit of disqualification that Mr. O'Malley has filed against Judge Stucki in this matter. His first affidavit was denied in an entry dated January 30, 2019. *See In re Disqualification of Stucki*, 156 Ohio St.3d 1236, 2019-Ohio-1624, 125 N.E.3d 963.

{¶ 2} Mr. O'Malley claims that Judge Stucki is biased against him based on the judge's conduct at a May 2, 2019 hearing and an April 1, 2016 hearing. Mr. O'Malley also claims that the judge exhibited bias in 2016 and 2018 rulings and in the judge's written response to Mr. O'Malley's prior affidavit of disqualification.

{¶ 3} Judge Stucki has responded to the pending affidavit and denies having or exhibiting any bias against Mr. O'Malley.

{¶ 4} For the reasons explained below, no basis has been established to order the disqualification of Judge Stucki.

{¶ 5} First, the judge’s conduct at the May 2, 2019 hearing does not require his removal. It is well-settled that “absent extraordinary circumstances, a judge will not be subject to disqualification after having presided over lengthy proceedings in a pending case.” *In re Disqualification of Celebrezze*, 94 Ohio St.3d 1228, 1229, 763 N.E.2d 598 (2001). Judge Stucki has now presided over this domestic-relations matter for nearly four years. The judge acknowledges that some of his language at the recent hearing may appear intemperate, and he regrets his choice of words. But the content and tone of the judge’s response to Mr. O’Malley’s present affidavit establishes that the judge does not harbor hostile feelings or animosity toward Mr. O’Malley. Given Judge Stucki’s significant and lengthy involvement in this case, the judge’s isolated comments at the recent hearing do not rise to the level of extraordinary circumstances mandating his removal. *See In re Disqualification of Martin*, 149 Ohio St.3d 1233, 2016-Ohio-8590, 75 N.E.3d 225, ¶ 6 (“Notwithstanding Judge Martin’s isolated comment in a moment of frustration, the content and tone of the judge’s response to Mr. Fischer’s affidavits of disqualification show that the judge is neither hostile toward nor biased against the defendants”).

{¶ 6} That being said, the record here suggests that Judge Stucki attempted to condition deferring a contempt sentence on Mr. O’Malley’s payment of the guardian ad litem’s *unbilled* fees. The guardian ad litem’s unbilled fees were not the subject of the motion for contempt on which the May 2, 2019 hearing was premised. When the guardian ad litem moves for payment of those fees, Judge Stucki should provide the parties with the opportunity to question the reasonableness and necessity of the fees—without the threat of jail time for failing to immediately pay them. *See, e.g.*, Loc.R. 35(E) of the Court of Common Pleas of Cuyahoga County, Domestic Relations Division. Until that time, Judge Stucki should not demand payment of those fees.

{¶ 7} Second, Mr. O’Malley has waived the right to object to Judge Stucki based on the judge’s conduct in 2016. It is well-established that an affidavit of disqualification must be filed “as soon as possible after the incident giving rise to the claim of bias and prejudice occurred,” and failure to do so may result in waiver of the objection, especially when “the facts underlying the objection have been known to the party for some time.” *In re Disqualification of O’Grady*, 77 Ohio St.3d 1240, 1241, 674 N.E.2d 353 (1996). If Mr. O’Malley believed that the judge’s 2016 conduct demonstrated bias, he should have filed his affidavit of disqualification at that time—or at least raised those allegations in his prior affidavit. Because nothing in the record justifies the delay, Mr. O’Malley has waived his right to seek disqualification of Judge Stucki based on allegations occurring in 2016. *See In re Disqualification of Ingraham*, 146 Ohio St.3d 1236, 2016-Ohio-3097, 54 N.E.3d 1254, ¶ 4 (an affiant’s failure to assert allegations in an original affidavit resulted in waiver of the allegations raised in a subsequent affidavit); *In re Disqualification of Sheward*, 136 Ohio St.3d 1262, 2013-Ohio-4244, 995 N.E.2d 1201, ¶ 5 (same).

{¶ 8} Finally, to the extent that Mr. O’Malley’s bias claims rest on his disagreement with Judge Stucki’s various rulings, a judge’s adverse rulings are generally insufficient grounds for disqualification. *See In re Disqualification of D’Apolito*, 139 Ohio St.3d 1230, 2014-Ohio-2153, 11 N.E.3d 279, ¶ 5.

{¶ 9} The affidavit of disqualification is denied.
