

IN RE DISQUALIFICATION OF HALLIDAY.

LYNCH v. WHITE.

**[Cite as *In re Disqualification of Halliday*, 166 Ohio St.3d 1228,
2021-Ohio-4481.]**

Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to demonstrate bias, prejudice, or an appearance of partiality—Nothing in record suggests that judge has type of close personal or professional relationship with defendant in underlying case that would cause an objective observer to question judge’s ability to remain impartial—Facts that judge reconsidered his initial decision to recuse himself and that judge initially stated that underlying case would be transferred to administrative judge do not suggest that judge can no longer impartially preside over underlying case—Disqualification denied.

(No. 21-AP-132—Decided October 20, 2021.)

ON AFFIDAVIT OF DISQUALIFICATION in Washington County Court of Common Pleas, General Division, Case No. 19-PT-137.

O’CONNOR, C.J.

{¶ 1} Christopher J. Regan, counsel for the plaintiff, has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge John M. Halliday from the above-referenced medical-malpractice case.

Background

{¶ 2} On August 31, 2021, Judge Halliday disclosed to the parties that his father, who died in 1988, was a physician specializing in obstetrics-gynecology and that his father knew the defendant, who specializes in the same area, in a

professional capacity. Judge Halliday also disclosed that the defendant had delivered the judge's eldest child more than 23 years ago and had delivered the children of the judge's bailiff. Mr. Regan and his client believed that Judge Halliday's relationship with the defendant created at least an appearance of bias and therefore requested Judge Halliday's recusal. Although Judge Halliday believed that he could fairly preside over the case, the judge agreed to recuse himself.

{¶ 3} According to Judge Halliday, after the August 31 hearing, he prepared an entry transferring the case to Administrative Judge Mark Kerenyi, the only other judge of the Washington County Court of Common Pleas, General Division. Judge Kerenyi did not believe that Judge Halliday had a conflict warranting recusal, and Judge Kerenyi did not sign or file the entry purporting to transfer the case to him. Judge Kerenyi and Judge Halliday both attended a September 22 telephonic conference with counsel in the underlying case during which the judges expressed their beliefs that Judge Halliday's recusal was not necessary. Judge Kerenyi instructed Mr. Regan to articulate in more detail the plaintiff's arguments supporting Judge Halliday's recusal or institute formal proceedings to disqualify him. Mr. Regan thereafter filed this affidavit of disqualification.

{¶ 4} In his affidavit, Mr. Regan argues that Judge Halliday's disqualification is warranted based on the judge's voluntary recusal and then his and Judge Kerenyi's joint retraction of the recusal. In Mr. Regan's words, "[t]he implication of bias that existed as of [Judge Halliday's] voluntary recusal on August 31st, 2021 is now amplified by his reconsideration of his decision." Mr. Regan further asserts that when a judge recuses himself, he may not transfer the case to a judge of his choosing. Therefore, the process by which Judge Halliday attempted to reassign the case to Judge Kerenyi, Mr. Regan argues, was improper and also evidence of an appearance of bias.

{¶ 5} Judge Halliday submitted a response to the affidavit and denies having any relationship with the defendant that requires the judge's removal. The

judge acknowledges that during the August 31 hearing, he agreed, “in retrospect perhaps too quickly,” to recuse himself, although he did not believe that he had a conflict. The judge further notes that he prepared an entry transferring the case to the administrative judge in accordance with applicable court rules. But that entry, Judge Halliday notes, was never signed by the administrative judge or filed. Judge Halliday believes that he can continue presiding fairly and impartially over the underlying case.

Timing of the affidavit

{¶ 6} R.C. 2701.03(B) requires that an affidavit of disqualification be filed “not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled.” “This statutory deadline may be set aside only ‘when compliance with the provision is impossible,’ such as when the alleged bias or prejudice occurs fewer than seven days before the hearing date or the case is scheduled or assigned to a judge within seven days of the next hearing.” *In re Disqualification of Gaul*, 147 Ohio St.3d 1219, 2016-Ohio-7034, 63 N.E.3d 1211, ¶ 3, quoting *In re Disqualification of Leskovyansky*, 88 Ohio St.3d 1210, 723 N.E.2d 1099 (1999). Here, Mr. Regan filed his affidavit of disqualification on September 27, 2021, two days before the next scheduled conference on September 29. He averred, however, that the September 29 conference was scheduled on September 22—that is, exactly seven days before the next scheduled hearing. Under these unique facts, Mr. Regan has sufficiently demonstrated that it was impossible to comply with the statutory filing deadline, and his affidavit was properly accepted for filing. *See In re Disqualification of Heiser*, 164 Ohio St.3d 1230, 2021-Ohio-628, 173 N.E.3d 520, ¶ 4-5.

Merits of the affidavit of disqualification

{¶ 7} In disqualification requests, “[t]he term ‘bias or prejudice’ ‘implies a hostile feeling or spirit of ill-will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on

the part of the judge, as contradistinguished from an open state of mind which will be governed by the law and the facts.’ ” *In re Disqualification of O’Neill*, 100 Ohio St.3d 1232, 2002-Ohio-7479, 798 N.E.2d 17, ¶ 14, quoting *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 469, 132 N.E.2d 191 (1956). “The proper test for determining whether a judge’s participation in a case presents an appearance of impropriety is * * * an objective one. A judge should step aside or be removed if a reasonable and objective observer would harbor serious doubts about the judge’s impartiality.” *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8. In addition, a “presumption of impartiality” is accorded all judges in affidavit-of-disqualification proceedings. *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7.

{¶ 8} For the reasons explained below, Mr. Regan has not established that Judge Halliday has hostile feelings toward Mr. Regan or his client, favors the defendant, or has formed a fixed anticipatory judgment on any issue in the underlying case. Nor has Mr. Regan set forth a compelling argument for disqualifying Judge Halliday to avoid an appearance of partiality.

The judge’s relationship with the defendant

{¶ 9} A judge should not remain assigned to a case in which his or her relationship with an attorney or party is “so close that an objective observer would harbor serious doubts about the judge’s ability to rule fairly and impartially.” *In re Disqualification of Wallace*, 158 Ohio St.3d 1231, 2019-Ohio-5452, 143 N.E.3d 544, ¶ 5. In general, “the more intimate the relationship between a judge and a person who is involved in a pending proceeding, the more acute is the concern that the judge may be tempted to depart from the expected judicial detachment or to reasonably appear to have done so.” *In re Disqualification of Shuff*, 117 Ohio St.3d 1230, 2004-Ohio-7355, 884 N.E.2d 1084, ¶ 6.

{¶ 10} Here, Judge Halliday’s father passed away 33 years ago; there is no allegation that the judge’s father and the defendant were particularly close or were partners in the same medical practice; the judge’s wife was a patient of the defendant’s more than 23 years ago; the judge states that he presently has no close personal or professional relationship with the defendant; and the judge notes that his bailiff has worked for the court for over 20 years and that the delivery of her children has never been an issue in prior cases involving the defendant. Without more, nothing in the record suggests that Judge Halliday has the type of close personal or professional relationship with the defendant that would cause an objective observer to question the judge’s ability to remain impartial.

The judge’s reconsideration of his initial recusal

{¶ 11} Judge Halliday’s reconsideration of his initial decision to recuse himself also does not warrant his removal. A similar claim arose in *In re Disqualification of Falkowski*, 164 Ohio St.3d 1215, 2021-Ohio-1665, 172 N.E.3d 1057, in which a judge interpreted an attorney’s objections as attacks on her integrity and therefore halted a trial and announced that she was recusing herself. However, the judge later issued an entry stating that she had acted in haste in declaring her recusal and that recusal was not warranted. In an ensuing affidavit of disqualification, the attorney argued, among other things, that the judge’s recusal and subsequent reentry into the case created an appearance of bias.

{¶ 12} The chief justice found that the judge’s continued participation would not create an appearance of impropriety, noting that the judge had not “journalized an entry recusing herself” and that another judge had not yet been assigned to the case. *Id.* at ¶ 7. Thus, the affiant had not established that the judge “was deprived of authority to preside over the matter after announcing her recusal.” *Id.*, citing *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. Franklin Nos. 11AP-64 and 11AP-282, 2011-Ohio-5616, ¶ 20 (“The assigned judge retains authority over a case until the recusal and transfer of a case to another judge is journalized

on the record”); *State v. Aderhold*, 9th Dist. Medina No. 07CA0047-M, 2008-Ohio-1772, ¶ 6-13 (a judge does not formally recuse until he issues a journal entry recusing himself); Flamm, *Judicial Disqualification*, Section 22.2, at 651 (2d Ed.2007, Supp.2016) (identifying decisions holding that as long as a case has not yet been transferred to another judge, a judge’s decision to recuse may be reconsidered or vacated, at least for a certain period of time); *United States v. Lauersen*, 348 F.3d 329, 338 (2d Cir.2003) (“There is no reason to prohibit a judge from reconsidering a recusal decision, at least in the absence of transfer of the case to another judge”). The chief justice further held that because the judge was under no obligation to initially recuse herself and later issued an entry thoroughly explaining why her recusal was not warranted, there was no reason to question the judge’s impartiality. *Id.* at ¶ 8.

{¶ 13} The same reasoning applies here. Judge Halliday was under no obligation to recuse himself based on his relationship with the defendant. The judge later recognized that he had acted in haste in doing so, and he and the administrative judge met with counsel to express their position that Judge Halliday’s recusal was not warranted. No entry of recusal, transfer, or reassignment was filed. Although this is an unusual set of circumstances, the objective observer, fully informed of all relevant facts in the record, would not harbor serious doubts about Judge Halliday’s impartiality or question the fairness or integrity of the proceedings.

The judge’s attempt to transfer the case to the administrative judge

{¶ 14} Mr. Regan is correct that “a disqualified or recused judge ordinarily should not select his or her successor.” *In re Disqualification of Kiger*, 156 Ohio St.3d 1232, 2019-Ohio-851, 125 N.E.3d 960, ¶ 6. But the Washington County Court of Common Pleas, General Division, is a two-judge court. In general, if one judge has a conflict, the administrative judge will assign the matter to the other judge. Such transfers should be by journal entry and recorded in the case file. *See* Loc.R. 8 of the Court of Common Pleas of Washington County, General Division,

available at <https://www.washingtongov.org/DocumentCenter/View/206/Rule-8-Assignment-of-Judges-and-Duty-Judge-PDF?bidId=> (accessed Nov. 24, 2021) [<https://perma.cc/LVT3-58SK>]. If the administrative judge reasonably believes that no judge of the court should hear the case, the administrative judge may request the assignment of a visiting judge. Sup.R. 36.019(B).

{¶ 15} Here, when Judge Halliday initially indicated he would recuse himself, he noted that the case would be transferred to Judge Kerenyi. But Judge Halliday later reconsidered, and no entry of recusal or transfer was filed. Based on this record, the fact that Judge Halliday had initially stated that the case would be transferred to Judge Kerenyi but later reconsidered does not suggest that Judge Halliday can no longer impartially preside over the underlying case.

{¶ 16} The affidavit of disqualification is denied. The case may proceed before Judge Halliday.
