IN RE DISQUALIFICATION OF HEISER.

IN RE Z.G.

[Cite as *In re Disqualification of Heiser*, 164 Ohio St.3d 1230, 2021-Ohio-628.]

Judges—Affidavits of disqualification—R.C. 2701.03—Affiant failed to demonstrate bias, prejudice, or appearance of impropriety—Disqualification denied.

(No. 21-AP-010—Decided February 1, 2021.)

ON AFFIDAVIT OF DISQUALIFICATION in Marion County Family Court Case No. 2021-DL-0009.

O'CONNOR, C.J.

{¶ 1} Joel M. Spitzer, counsel for the juvenile in the above-referenced delinquency matter, has filed an affidavit pursuant to R.C. 2701.03 seeking to disqualify Judge Larry N. Heiser from the case.

{¶ 2} Mr. Spitzer alleges that because of Judge Heiser's connections to the prosecutor's office, the judge has a conflict of interest that may give rise to an appearance of impropriety. Judge Heiser filed a response and a supplemental response to the affidavit in which he denies bias against either party and states that he is able to preside impartially over the matter.

{¶ 3} For the reasons explained below, Mr. Spitzer has failed to establish that Judge Heiser's disqualification is necessary.

Timing of the affidavit

{¶ 4} Under R.C. 2701.03(B), an affidavit of disqualification shall 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).

{¶ 5} Mr. Spitzer filed his affidavit one day before the January 27, 2021 arraignment. He notes, however, that the court held a detention hearing on January 22 and scheduled the arraignment for January 27 and a probable-cause hearing for February 2. Mr. Spitzer seeks to disqualify Judge Heiser from the February 2 hearing and all future proceedings. But he avers that it was impossible for him to timely file the affidavit before the February 2 hearing because he was not afforded a window of seven days without a hearing. Under these unique facts, Mr. Spitzer's affidavit was properly accepted for filing.

Merits of the affidavit of disqualification

{¶ 6} "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." (Ellipsis sic.) *In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8. "The reasonable observer is presumed to be fully informed of all the relevant facts in the record—not isolated facts divorced from their larger context." *In re Disqualification of Gall*, 135 Ohio St.3d 1283, 2013-Ohio-1319, 986 N.E.2d 1005, ¶ 6. In deciding a disqualification request, "[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-5489, 798 N.E.2d 23, ¶ 5.

The judge's relationship with the prosecuting attorney

{¶ 7} Mr. Spitzer first claims that Judge Heiser formerly shared office space with Marion County Prosecuting Attorney Raymond Grogan—whose office is prosecuting the underlying matter—and that their arrangement "created a friendship that is apparent today." In response, Judge Heiser admits that from 2009 to 2012—long before he took the bench in July 2020—he rented office space to Mr. Grogan. The judge also acknowledges that he considers Mr. Grogan a friend. Indeed, the judge states that several years ago, he became a godparent to Mr. Grogan's second child. But the judge further states that he has never vacationed, golfed, or shared other common recreational interests with Mr. Grogan. Although the judge has encountered Mr. Grogan at political-party events and bar functions, the judge notes that the Marion County bar is "exceptionally collegial" and that he considers many attorneys as friends. Judge Heiser believes that he has fairly presided over cases involving the prosecutor's office and affirms that he will continue to decide each case based only on the law and facts before him.

{¶ 8} Judge Heiser's business or professional relationship with Mr. Grogan, which ended nine years ago, does not support the judge's disqualification. "[I]t is well established that 'a prior professional relationship between a judge and an attorney will not be grounds for disqualification where that relationship ended some years ago.' " *In re Disqualification of Vercillo*, 137 Ohio St.3d 1237, 2013-Ohio-5763, 1 N.E.3d 414, ¶ 8, quoting *In re Disqualification of Ward*, 100 Ohio St.3d 1211, 798 N.E.2d 1 (2002) (disqualification denied when judge's professional relationship with an attorney appearing before him ended seven years prior).

{¶ 9} Judge Heiser's friendship with Mr. Grogan requires a deeper analysis. The chief justice has long held that "the mere existence of a friendship between a judge and an attorney * * * will not disqualify the judge from cases involving that attorney." *In re Disqualification of Bressler*, 81 Ohio St.3d 1215, 688 N.E.2d 517 (1997). "In today's legal culture, friendships among judges, lawyers, and former

colleagues are common, and a judge need not cut himself or herself off from the rest of the legal community." *In re Disqualification of Lynch*, 135 Ohio St.3d 1208, 2012-Ohio-6305, 985 N.E.2d 491, ¶ 6. "The reasonable person would conclude that the oaths and obligations of a judge are not so meaningless as to be overcome merely by friendship with a party's counsel." *Id.* at ¶ 10; *see also* Flamm, *Judicial Disqualification*, Section 8.2, at 197 (2d Ed.2007) ("It is generally agreed * * * that the mere fact that a judge happens to be friends with * * * an attorney * * * does not support a reasonable inference of judicial bias. This is so even when the friendship is a close one" [footnote omitted]).

{¶ 10} However, "a judge should not remain on a case in which his or her relationship with an attorney 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; *see also United States v. Murphy*, 768 F.2d 1518, 1536-1538 (7th Cir.1985) (an objective observer would have reasonably doubted the ability of a judge to impartially preside over a trial involving an attorney who had a close friendship with the judge, had previously vacationed with the judge, and had a vacation planned with the judge and his family immediately after completion of the trial); *In re Disqualification of Rastatter*, 127 Ohio St.3d 1215, 2009-Ohio-7205, 937 N.E.2d 1007 (disqualifying judge from a case in which a litigant was a friend of the judge's and had lifted weights with the judge on an almost daily basis); *Disciplinary Counsel v. Oldfield*, 140 Ohio St.3d 123, 2014-Ohio-2963, 16 N.E.3d 581 (disciplining a judge for failing to recuse herself from cases assigned to a public defender who was then temporarily living with the judge and riding with the judge to the courthouse each day; the judge was also a potential witness in a criminal case pending against the public defender).

{¶ 11} Considering that Judge Heiser is the godfather of one of Mr. Grogan's children and the other facts in the record, their personal relationship is

likely closer than the judge's social connections with many other attorneys appearing before him. But there is no allegation that the judge's relationship with Mr. Grogan has affected the judge's consideration of the issues in the underlying case or in any other case involving the prosecutor's office. Nor is there any evidence that Judge Heiser and Mr. Grogan are presently close personal friends or regularly socialize outside of bar-association or political functions. It is also relevant—although not controlling—that Mr. Grogan has no personal or financial interest in the cases his office prosecutes. *See, e.g.*, *Cheney v. United States Dist. Court for the Dist. of Columbia*, 541 U.S. 913, 916, 124 S.Ct. 1391, 158 L.Ed.2d 225 (2004) (memorandum of Scalia, J.) ("while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer" [emphasis sic]).

{¶ 12} "Judges are presumed to be capable of distinguishing their personal lives from their professional obligations." *Lynch*, 135 Ohio St.3d 1208, 2012-Ohio-6305, 985 N.E.2d 491, at ¶ 10. Mr. Spitzer has not submitted sufficient evidence or argument to overcome that presumption. Without more, a reasonable, well-informed observer would not harbor serious doubts about Judge Heiser's impartiality merely because Mr. Grogan appears as the prosecutor. *See, e.g.*, *Wallace* at ¶ 6-9 (permitting a judge to preside over a case involving an assistant prosecutor who shared a friendship with the judge and had contributed to the judge's campaign).

The judge's involvement and contribution to Mr. Grogan's campaign

{¶ 13} Mr. Spitzer next asserts that Judge Heiser volunteered for and was a "major donor" to Mr. Grogan's campaign for prosecuting attorney in 2018. In response, Judge Heiser acknowledges that prior to becoming a judge, he volunteered for and contributed $1,000 to Mr. Grogan's campaign for prosecutor.

But the judge also notes that when Mr. Grogan considered hiring the judge's son as an assistant prosecutor, Mr. Grogan returned the judge's contribution to avoid any appearance of impropriety. The judge also notes that he previously served on and contributed to several campaign committees supporting candidates for various local offices. But the judge states that since early 2020, he has been compliant with the restrictions in the Code of Judicial Conduct regarding political activity.

{¶ 14} The fact that Judge Heiser—over two years before becoming a judge—contributed to Mr. Grogan's campaign committee does not support the judge's removal. Affidavits of disqualification based on campaign issues are decided on a case-by-case basis. *In re Disqualification of Hurley*, 142 Ohio St.3d 1278, 2014-Ohio-5874, 33 N.E.3d 59, ¶ 7. Although there are exceptions, "the general rule is that a judge will not be disqualified 'merely because a party to or lawyer in the underlying case campaigned for or against the judge.' " *In re Disqualification of Swenski*, 155 Ohio St.3d 1300, 2018-Ohio-5430, 122 N.E.3d 186, ¶ 6, quoting *In re Disqualification of Celebrezze*, 74 Ohio St.3d 1231, 1232, 657 N.E.2d 1341 (1991); *see also* Jud.Cond.R. 2.11, Comment 1 ("A judge's knowledge that a lawyer, law firm, or litigant in a proceeding contributed to the judge's election campaign within the limits set forth in [Jud.Cond.R.] 4.4(J) and (K) * * * does not, in and of itself, disqualify the judge"). Under the same logic, it is not reasonable to question Judge Heiser's impartiality based on a $1,000 contribution to Mr. Grogan's campaign two years before he was a member of the judiciary. Many judges were involved in politics before taking the bench, but we presume that "judges are able to set aside any partisan interests once they have assumed judicial office and have taken an oath to decide cases on the facts and the law before them." *In re Disqualification of Bryant*, 117 Ohio St.3d 1251, 2006-Ohio-7227, 885 N.E.2d 246, ¶ 3.

The employment of the judge's son

{¶ 15} Mr. Spitzer also alleges that Judge Heiser's son serves as a Marion County assistant prosecutor. It is Mr. Spitzer's "understanding" that the judge's son helps Mr. Grogan in research and writing and "will be assisting in the prosecution in this matter." Judge Heiser admits that his son is an assistant prosecutor in Marion County. But the judge further states that his son has never appeared before him, that he does not discuss cases with his son, that he has no reason to believe that his son will be involved in the underlying matter, and that Mr. Spitzer's allegation is not based on any concrete information.

{¶ 16} Jud.Cond.R. 2.11(A)(2)(b) requires Judge Heiser's disqualification from any proceeding in which his son is acting as a lawyer. However, the fact that Judge Heiser shall not preside over cases prosecuted by his son does not necessarily mean that the judge is disqualified from cases involving other members of the prosecutor's office. *See, e.g.*, Board of Commissioners on Grievances and Discipline Opinion No. 87-024 (June 22, 1987). As explained by former chief justice Thomas Moyer in a disqualification matter with similar circumstances, "[w]here a judge is married to a prosecutor whose office is representing the state in a case before him or her, disqualification of the judge is not required, as long as the judge's spouse has neither entered an appearance in the case nor participated in the preparation or presentation of the case." *In re Disqualification of Carr*, 105 Ohio St.3d 1233, 2004-Ohio-7357, 826 N.E.2d 294, ¶ 17. Thus, "[a]s long as the government attorney whose conflict of interest prevents him or her from handling a particular matter is effectively screened from any participation in the case, other attorneys in the office can, in most circumstances, continue to handle the case." *Id.* at ¶ 15.

{¶ 17} Here, there is no evidence that Judge Heiser's son has had any involvement in the underlying matter. Mr. Spitzer's allegation is based on his unsubstantiated "understanding" of the internal workings of the prosecutor's office.

"Allegations that are based solely on hearsay, innuendo, and speculation * * * are insufficient to establish bias or prejudice." *In re Disqualification of Flanagan*, 127 Ohio St.3d 1236, 2009-Ohio-7199, 937 N.E.2d 1023, ¶ 4.

Conclusion

{¶ 18} For the reasons explained above, the affidavit of disqualification is denied. The case may proceed before Judge Heiser.

{¶ 19} Although it is unclear whether Judge Heiser disclosed any of the relationships that led to the affidavit of disqualification, the judge is nevertheless reminded of Comment 5 to Jud.Cond.R. 2.11, which provides that "[a] judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification." *See also* Board of Commissioners on Grievances and Discipline Opinion No. 87-024, at 2 (recommending that a judge disclose to all parties and lawyers in cases brought by the prosecutor's office that the judge's spouse was a staff member of that office).
