

IN RE DISQUALIFICATION OF MACKEY.

IN RE ESTATE OF WILSON.

[Cite as *In re Disqualification of Mackey*, 167 Ohio St.3d 1249,
2022-Ohio-2267.]

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

(No. 22-AP-055—Decided June 3, 2022.)

ON AFFIDAVITS OF DISQUALIFICATION in Franklin County Court of Common
Pleas, Probate Division, Case No. 563322.

O’CONNOR, C.J.

{¶ 1} Attorney Susan Wasserman and her client, Elizabeth Koeberer, have filed affidavits pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Jeffrey D. Mackey from the above-referenced probate matter.

{¶ 2} The affiants claim that Judge Mackey is biased and prejudiced against Ms. Wasserman and that the judge’s prejudice has affected his handling of the underlying case. As evidence, one or both of the affiants allege the following: Judge Mackey insulted Ms. Wasserman in two prior cases; a magistrate unfairly shortened Ms. Koeberer’s response time to a recent motion, which hampered her ability to prepare for a hearing; Ms. Wasserman supported the judge’s opponent in the 2020 election; Judge Mackey delayed the underlying case and Ms. Wasserman’s other cases; and the probate court’s continuation of certain COVID-19 pandemic policies has resulted in confusion for attorneys, a decrease in collaboration between attorneys and court staff, and a backlog of cases.

{¶ 3} Judge Mackey submitted a response to the affidavits and denies any bias or hostility against either affiant. He also provided context for some of his comments regarding Ms. Wasserman in a prior case and explained the delays in the underlying matter.

{¶ 4} 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, 132 N.E.2d 191 (1956), paragraph four of the syllabus. “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.

{¶ 5} The affiants have not established that Judge Mackey has hostile feelings toward either of them or that the judge has formed a fixed anticipatory judgment on any issue in the underlying case. Nor have the affiants set forth a compelling argument for disqualifying Judge Mackey to avoid an appearance of partiality. The affiants provided transcripts of hearings for two prior cases involving Ms. Wasserman. Those transcripts, however, do not show that Judge Mackey has animosity toward Ms. Wasserman to such an extent that a disinterested observer might reasonably question his ability to evaluate fairly and objectively Ms. Koeberer’s legal interests or Ms. Wasserman’s work as an attorney. *See In re*

Disqualification of Hoover, 113 Ohio St.3d 1233, 2006-Ohio-7234, 863 N.E.2d 634, ¶ 8 (disqualifying a judge from all of an attorney’s cases when the judge held a fixed and longstanding resentment against the attorney, which would have caused a reasonable and objective observer to question whether the judge could sit fairly and impartially on cases involving that attorney).

{¶ 6} Further, a magistrate’s decision to shorten Ms. Koeberer’s response time to a motion is not evidence of judicial bias, and regardless, if affiants believed that the magistrate was prejudiced against them, their remedy was to seek the magistrate’s removal with the trial court. *See In re Disqualification of Gill*, 162 Ohio St.3d 1206, 2021-Ohio-112, 166 N.E.3d 36, ¶ 2. In general, a trial judge will not be disqualified based on a magistrate’s conduct—especially when the affiants failed to seek the magistrate’s removal. Similarly, that Ms. Wasserman supported Judge Mackey’s opponent in the 2020 election is not cause for assigning a new judge to Ms. Wasserman’s cases. Under longstanding Ohio precedent, it is not reasonable to question a judge’s impartiality based solely on counsel’s contribution to a judge’s election campaign or the campaign committee of the judge’s opponent. *See, e.g., In re Disqualification of Cleary*, 77 Ohio St.3d 1246, 1247, 674 N.E.2d 357 (1996) (“the fact that a party or lawyer in a pending case campaigned for or against the judge is not grounds for disqualification”). There may be circumstances in which counsel’s participation in a judicial election *may* require judicial disqualification. The ability of a judge to serve fairly and impartially in those situations is determined on a case-by-case basis. *In re Disqualification of Breaux*, 150 Ohio St.3d 1305, 2017-Ohio-7374, 84 N.E.3d 1038, ¶ 10. The record here, however, does not create any inference of an appearance of impropriety.

{¶ 7} In addition, a judge’s alleged failure to provide timely rulings on motions is not a concern that generally can be addressed through an affidavit of disqualification. *In re Disqualification of Eyster*, 105 Ohio St.3d 1246, 2004-Ohio-7350, 826 N.E.2d 304, ¶ 4. Although “[l]engthy delays diminish confidence in the

legal system and are especially injurious when they profoundly affect the lives of those before the court,” *In re Disqualification of Yarbrough*, 160 Ohio St.3d 1244, 2020-Ohio-4439, 155 N.E.3d 963, ¶ 5, the affiants here have not established that the delays were caused solely by Judge Mackey or were the product of judicial bias. Finally, Ms. Wasserman’s concerns about the negative consequences of the probate court’s continuing the COVID-19 pandemic policies are not issues that can be addressed in a disqualification proceeding. *See, e.g., In re Disqualification of Mallory*, 165 Ohio St.3d 1282, 2021-Ohio-3572, 180 N.E.3d 1182, ¶ 8 (“An affidavit of disqualification * * * is not a tool to determine whether a judge has complied with the pandemic policies of his or her courthouse; nor is it a mechanism for punishing judges who allegedly fail to comply with those policies”).

{¶ 8} The affidavits of disqualification are denied. The case may proceed before Judge Mackey.
