

IN RE DISQUALIFICATION OF SEARCY.

GROOMS-ROETTING v. ROETTING.

**[Cite as *In re Disqualification of Searcy*, 169 Ohio St.3d 1221,
2022-Ohio-4430.]**

*Judges—Affidavits of disqualification—R.C. 2701.03—Underlying case is closed,
and affiant waived most of his objections to judge’s participation by failing
to file affidavit earlier—Disqualification denied.*

(No. 22-AP-100—Decided September 23, 2022.)

ON AFFIDAVIT OF DISQUALIFICATION in Hamilton County Court of Common
Pleas, Domestic Relations Division, Case No. DR1401091.

O’CONNOR, C.J.

{¶ 1} Michael P. Roetting, the defendant and father of the minor children, has filed an affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Amy L. Searcy from the above-referenced custody matter.

{¶ 2} Mr. Roetting avers that for several reasons, Judge Searcy is prejudiced against him and his girlfriend and has allowed that prejudice to affect the judge’s decisions in the underlying case. Judge Searcy submitted a response to the affidavit and denies any bias against Mr. Roetting. For the reasons explained below, no basis has been established to order the disqualification of Judge Searcy.

{¶ 3} First, under R.C. 2701.03(A), the chief justice’s statutory authority to order disqualification of judges extends only to those matters in which “a proceeding [is] pending before the court.” Thus, “the chief justice cannot rule on an affidavit of disqualification when * * * nothing is pending before the * * * court.” *In re Disqualification of Hayes*, 135 Ohio St.3d 1221, 2012-Ohio-6306,

985 N.E.2d 501, ¶ 6; *see also In re Disqualification of Grossmann*, 74 Ohio St.3d 1254, 1255, 657 N.E.2d 1356 (1994) (R.C. 2701.03(A)’s “language clearly limits the authority of the Chief Justice in determining the existence of interest, bias, prejudice, or disqualification to matters pending before the court”). According to Judge Searcy, the underlying case is closed: she issued a decision in June 2022, none of the parties filed a timely appeal, and there are no remaining issues pending before her. Mr. Roetting acknowledges that no hearings are pending but points to a line in Judge Searcy’s June 2022 decision providing that after the guardian ad litem (“GAL”) submits his statement of services, “the Court will decide how to divide the total GAL fees between the parties.” Judge Searcy, Mr. Roetting alleges, has not yet issued a decision on the GAL’s fees.

{¶ 4} However, there is no indication in this record that the GAL has submitted a statement of services. Judge Searcy’s assertion that nothing is currently pending before her appears to be correct. Accordingly, there is no statutory or practical basis to disqualify the judge from a seemingly closed case. *See, e.g., In re Disqualification of Kubilus*, 155 Ohio St.3d 1210, 2018-Ohio-5412, 120 N.E.3d 5, ¶ 3 (no authority to order a judge’s removal from closed traffic cases); *In re Disqualification of Sweeney*, 159 Ohio St.3d 1209, 2020-Ohio-1545, 148 N.E.3d 601, ¶ 2 (no authority to order a judge’s disqualification from an inactive case); *In re Disqualification of Selvaggio*, 156 Ohio St.3d 1301, 2019-Ohio-1826, 128 N.E.3d 264, ¶ 4 (the chief justice will not “decide an affidavit of disqualification based merely on the possibility of a remand from the court of appeals”).

{¶ 5} Second, even if the issue of the GAL’s fees were pending before Judge Searcy, Mr. Roetting waived most of his objections to the judge’s participation by not filing his affidavit earlier. 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). The affiant has the burden to demonstrate that the affidavit is timely filed. *In re Disqualification of Capper*, 134 Ohio St.3d 1271, 2012-Ohio-6287, 984 N.E.2d 1082, ¶ 11. Here, the record shows that during a November 2021 pretrial conference, Judge Searcy disclosed that she knew Mr. Roetting’s girlfriend and the judge offered to recuse herself if any of the parties requested her to do so. The parties’ attorneys, however, did not pursue the judge’s recusal.

{¶ 6} Mr. Roetting has not sufficiently explained why he waited until August 2022 to file his affidavit of disqualification even though he knew of the judge’s alleged conflict as early as November 2021. The fact that Mr. Roetting filed his affidavit after the court ruled against him suggests that the judge’s adverse June 2022 decision—not any alleged bias based on the judge’s personal connections to the underlying case—prompted the disqualification request. Just as “ ‘[a] party should not be permitted to participate in an action or proceedings to the extent that he is able to ascertain the attitude of the judge toward important aspects of his case and then avoid an adverse ruling by belatedly raising the issue of disqualification,’ ” *In re Disqualification of Murphy*, 36 Ohio St.3d 605, 606, 522 N.E.2d 459 (1988), quoting Annotation, *Waiver or Loss of Right to Disqualify Judge by Participation in Proceedings—Modern State Criminal Cases*, 27 A.L.R.4th 597, 605 (1984), a party may not wait until receiving an adverse decision before seeking a judge’s removal. See *In re Disqualification of Froelich, Donovan, and Welbaum*, 143 Ohio St.3d 1266, 2015-Ohio-3423, 39 N.E.3d 522, ¶ 5. Mr. Roetting waived his objections to Judge Searcy’s participation by not raising them earlier.

{¶ 7} Finally, even if Mr. Roetting had not waived his objections, he has failed to establish that disqualification is warranted at this stage of the litigation. “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 Swenski*, 160 Ohio St.3d 1274, 2020-Ohio-3850, 158 N.E.3d 628, ¶ 4, quoting *In re Disqualification of Celebrezze*, 94 Ohio St.3d 1228, 1229, 763 N.E.2d 598 (2001). Judge Searcy presided over a two-day trial in February and March 2022 and issued a final decision in June. Based on this record, the only issue that may potentially come before Judge Searcy is how to divide the GAL fees. Considering Judge Searcy’s significant and lengthy involvement with these parties—and the judge’s response to the allegations in Mr. Roetting’s affidavit—he has not established facts that would rise to the level of extraordinary circumstances warranting Judge Searcy’s removal from deciding the GAL-fees issue. *See, e.g., In re Disqualification of Wallace*, 165 Ohio St.3d 1254, 2021-Ohio-2732, 179 N.E.3d 128, ¶ 6.

{¶ 8} The affidavit of disqualification is denied.
