

**IN RE DISQUALIFICATION OF FLOYD.**

**IN RE J.C.**

**AND**

**IN RE G.C.**

**[Cite as *In re Disqualification of Floyd*, 166 Ohio St.3d 1252, 2022-Ohio-919.]**

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

(No. 21-AP-163—Decided February 10, 2022.)

ON AFFIDAVIT OF DISQUALIFICATION in Cuyahoga County Court of Common Pleas, Juvenile Division, Case Nos. CU 16101850 and CU 16101851.

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**O’CONNOR, C.J.**

{¶ 1} Jay F. Crook, counsel for the mother, has filed an affidavit and a supplemental affidavit pursuant to R.C. 2701.03 and Article IV, Section 5(C) of the Ohio Constitution seeking to disqualify Judge Alison L. Floyd from the above-referenced custody cases. This is the second affidavit of disqualification that the mother or her attorneys have filed against Judge Floyd. The first affidavit was denied in an entry dated April 19, 2021. *See In re Disqualification of Floyd*, 164 Ohio St.3d 1242, 2021-Ohio-2820, 173 N.E.3d 529.

{¶ 2} Mr. Crook claims that Judge Floyd must be removed for the following reasons: (1) the judge predetermined a custody and visitation issue, (2) the judge failed to comply with orders from the Eighth District Court of Appeals, (3) the judge has failed to control her docket, leading to delays in the underlying cases, (4) the judge has shown contempt toward the mother and Mr. Crook, (5) the judge’s actions have, when taken together, violated the mother’s due-process rights, and (6)

the judge engaged in an impermissible ex parte communication with the father and the father's counsel on December 28, 2021, before the judge's interview of the parties' children.

{¶ 3} Judge Floyd submitted responses to Mr. Crook's affidavits and denies any bias against him or the mother. The judge also addressed each of Mr. Crook's allegations.

{¶ 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. 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. In addition, it is well settled that "[i]n the absence of extraordinary circumstances, an affidavit of disqualification should not be used to disqualify a judge after lengthy proceedings have taken place in the case." *In re Disqualification of Pepple*, 47 Ohio St.3d 606, 607, 546 N.E.2d 1298 (1989).

{¶ 5} Mr. Crook has not established that Judge Floyd has hostile feelings toward the mother or that the judge has formed a fixed anticipatory judgment on any issue in the underlying cases. Nor has Mr. Crook set forth a compelling argument for disqualifying Judge Floyd to avoid an appearance of partiality. And

considering Judge Floyd’s significant and lengthy involvement in the underlying cases, Mr. Crook has not alleged facts that would rise to the level of extraordinary circumstances warranting Judge Floyd’s removal at this stage of the litigation.

{¶ 6} For example, if Mr. Crook believes that Judge Floyd has refused to comply with orders from the court of appeals, he must litigate those issues in the mother’s pending appeal. It is outside the scope of this matter to determine whether Judge Floyd has complied with the Eighth District’s remand orders or to review alleged due-process violations. *See In re Disqualification of D’Apolito*, 152 Ohio St.3d 1261, 2017-Ohio-9432, 98 N.E.3d 281, ¶ 6 (“this is not the appropriate forum to determine whether [the judge’s actions] violated any of [the defendant’s] constitutional or statutory rights”).

{¶ 7} Similarly, Mr. Crook has not established that Judge Floyd has animosity toward the mother or has predetermined any issue. It is not unusual for a judge to become impatient with the parties in a contentious custody case or to make a few unnecessary comments in moments of frustration. Typically, those comments do not lead to disqualification. *See, e.g., In re Disqualification of Yarbrough*, 157 Ohio St.3d 1228, 2019-Ohio-4450, 134 N.E.3d 1233, ¶ 6 (“Even if Judge Yarbrough made a few isolated and unnecessary comments in moments of frustration, the record does not establish that he should be removed for bias, especially considering the tone and content of the judge’s response”). Here, Judge Floyd denies making some of the comments that Mr. Crook attributes to her, and the record does not otherwise indicate that the judge has expressed hostility toward the mother in a manner that warrants disqualification.

{¶ 8} “An alleged ex parte communication constitutes grounds for disqualification when there is ‘proof that the communication \* \* \* addressed substantive matters in the pending case.’ ” (Ellipsis sic.) *In re Disqualification of Forsthoefel*, 135 Ohio St.3d 1316, 2013-Ohio-2292, 989 N.E.2d 62, ¶ 7, quoting *In re Disqualification of Calabrese*, 100 Ohio St.3d 1224, 2002-Ohio-7475, 798

N.E.2d 10, ¶ 2. “The allegations must be substantiated and consist of something more than hearsay or speculation.” *Id.* Mr. Crook has failed to establish that Judge Floyd’s recent communication with the father involved substantive matters about the underlying custody cases. Moreover, it appears that the mother could have attended the portion of the proceeding attended by the father but she chose not to do so. “[A litigant’s] failure to appear does not transform [a] hearing into an improper ‘ex parte hearing,’ nor does [the judge’s] decision to proceed with the hearing, despite [the litigant’s] absence, evince any bias on the judge’s part.” *In re Disqualification of Corrigan*, 144 Ohio St.3d 1261, 2016-Ohio-179, 45 N.E.3d 1010, ¶ 5.

{¶ 9} Finally, the delays in the underlying cases are concerning. “Lengthy 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. But based on his affidavits, Mr. Crook has not demonstrated that the delays were solely caused by Judge Floyd or were the product of judicial bias. Nor has Mr. Crook proved that Judge Floyd’s actions have been so egregious that she must be removed for neglecting her judicial duties—especially considering the judge’s significant involvement in the cases and the fact that she presided over a three-day hearing in 2021. *See In re Disqualification of Collier-Williams*, 150 Ohio St.3d 1286, 2017-Ohio-5718, 83 N.E.3d 928, ¶ 7-8. Judge Floyd, however, should resolve the remaining pending issues as expeditiously as possible.

{¶ 10} The affidavits of disqualification are denied.