

IN RE DISQUALIFICATION OF GALLAGHER.

IN RE GUARDIANSHIP OF BARATH.

**[Cite as *In re Disqualification of Gallagher*, 173 Ohio St.3d 1201,
2023-Ohio-2977.]**

Judges—Affidavits of disqualification—R.C. 2101.39—R.C. 2101.39 does not limit the standing it confers to counsel of record in case from which an attorney is seeking judge’s disqualification—Affiant is a “party’s counsel” for purposes of filing an affidavit of disqualification under R.C. 2101.39—Affiant failed to demonstrate bias, prejudice, or an appearance of impropriety—Disqualification denied.

(No. 23-AP-046—Decided June 16, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Cuyahoga County Court of Common
Pleas, Probate Division, Case No. 2020GRD256745.

KENNEDY, C.J.

{¶ 1} Robin Christine Kunikis avers that she represents Mary Barath, the ward in a guardianship proceeding. Kunikis has filed an affidavit of disqualification pursuant to R.C. 2101.39 seeking to disqualify Judge Laura J. Gallagher of the Cuyahoga County Court of Common Pleas, Probate Division, from presiding over Barath’s guardianship case.

{¶ 2} This matter presents the threshold question whether Kunikis has standing to seek Judge Gallagher’s disqualification. R.C. 2101.39 permits “any party to the proceeding or the party’s counsel” to seek disqualification of the judge in a probate case. As explained in more detail below, Kunikis has demonstrated that she represents Barath in this disqualification matter and is a “party’s counsel”

for purposes of filing an affidavit of disqualification under R.C. 2101.39. Therefore, Kunikis has standing to file the affidavit of disqualification.

{¶ 3} Turning to the arguments raised in Kunikis’s affidavit of disqualification, she argues that Judge Gallagher should be disqualified because she has violated the Code of Judicial Conduct and has mishandled the guardianship case. Those issues, however, are not appropriate for a disqualification proceeding. Because Kunikis has failed to establish that Judge Gallagher cannot be impartial and open-minded in the guardianship case, the affidavit of disqualification is denied.

Factual Background

Barath is declared incompetent

{¶ 4} On December 22, 2020, attorney Elizabeth Goodwin filed an application for appointment of a guardian for Barath, who was then 80 years old. Goodwin alleged that Barath was incompetent, and she supported the application with a statement of expert evaluation. A probate-court investigator visited Barath and filed a report concluding that a guardianship was necessary because Barath had been diagnosed with dementia and breast cancer and it was “questionable” whether she was able to follow through with her cancer treatment.

{¶ 5} A magistrate presided over hearings on January 21 and February 11, 2021. Based on the transcripts of those hearings, it does not appear that the magistrate swore in any witness to testify under oath. He heard from an Adult Protective Services case worker, Goodwin, and Barath. Barath was not represented by counsel and repeatedly stated that she did not need a guardian, that she was taking care of herself, and that she had not missed medical appointments.

{¶ 6} On February 12, 2021, the magistrate issued a decision finding Barath incompetent and determining that Goodwin was a suitable person to serve as Barath’s guardian. Barath did not timely file objections to the decision of the magistrate. On February 18, an attorney entered an appearance on Barath’s behalf,

but the attorney withdrew less than two weeks later. On March 8, Judge Gallagher adopted the decision of the magistrate as a final judgment and ordered Goodwin to serve as guardian of the person and estate of Barath.

Barath objects to the guardianship

{¶ 7} Six weeks later, on April 22, 2021, Barath sent a handwritten letter to Judge Gallagher contesting the guardianship. The court docketed the letter as objections to the decision of the magistrate, and Judge Gallagher dismissed the filing, finding that it was not timely, had not been served on the guardian, and failed to otherwise comply with Civ.R. 53. Judge Gallagher's entry noted that pursuant to R.C. 2111.49(C), Barath was entitled to a guardianship-review hearing 120 days after the date of the guardian's appointment and that Barath could be represented by counsel at that hearing.

{¶ 8} On May 20—before the 120-day period expired—Barath filed her first complaint about the performance of her guardian. Judge Gallagher dismissed the complaint as premature but again advised Barath that she could file a written request for a guardianship-review hearing after the 120-day period had passed.

{¶ 9} On June 25, Barath filed a request for a review of her guardianship and a request for appointment of an attorney. The probate court scheduled a guardianship-review hearing for August 16.

{¶ 10} On July 22, Judge Gallagher appointed counsel for Barath. About a week later, Barath filed two more pro se complaints about her guardian's performance.

{¶ 11} On August 16, because a new attorney had filed a notice of appearance on Barath's behalf, the review hearing did not go forward. On August 26, Barath's court-appointed counsel moved to withdraw, and about two weeks later, Barath's newly retained counsel also moved to withdraw.

{¶ 12} The court rescheduled the guardianship-review hearing for November 22, 2021. On the date of the hearing, Barath failed to appear and filed a

motion for a continuance afterwards. Despite Barath’s absence, Judge Gallagher held the hearing and heard from Goodwin. Judge Gallagher thereafter issued a judgment entry dismissing Barath’s July 2021 complaints against Goodwin and continuing the guardianship. The judge also denied Barath’s motion for a continuance as moot, finding that she had filed the motion several hours after the hearing.

{¶ 13} Approximately six months later, on May 23 and May 24, 2022, Barath filed two more complaints against Goodwin. A new attorney entered an appearance on Barath’s behalf, and Judge Gallagher scheduled a guardianship-review hearing for July 26. Barath and her counsel appeared for the July 26 review hearing, during which Barath agreed to undergo another independent evaluation.

{¶ 14} About two months later, Barath underwent the evaluation, and on September 19, 2022, the doctor who had evaluated her issued a report concluding that the guardianship should continue. In a judgment entry issued in March 2023, Judge Gallagher acknowledged that she had not issued a separate judgment entry addressing each of Barath’s complaints. The judge stated in the entry, however, that the medical evaluation essentially resolved Barath’s May 2022 guardianship complaints.

Barath is removed from her home

{¶ 15} According to Kunikis, on November 22, 2022, Goodwin initiated a separate ex parte mental-illness proceeding in the probate court pursuant to R.C. 5122.11. The pleadings in that case are not part of the record in this affidavit-of-disqualification proceeding, and Kunikis claims that the probate court did not make a record of the ex parte hearing. Kunikis asserts that Goodwin argued to a magistrate that Barath posed a substantial risk of harm to herself and that she needed mental-health treatment. Kunikis alleges that local police forcibly removed Barath from her home and took her to a hospital for a psychiatric evaluation “based on *ex parte* statements by the court’s guardian to the court’s magistrate” (emphasis

omitted). Kunikis also alleges that after a week in the hospital, Goodwin moved Barath to the memory-care unit of a nursing home, even though the court had never held an evidentiary hearing to determine that such “radical confinement and restrictions” were necessary. Barath continues to reside in the memory-care unit of the nursing home.

Kunikis enters a notice of substitution in the guardianship case

{¶ 16} On December 22, 2022, Kunikis entered a notice of substitution of counsel in Barath’s guardianship case. On January 9, 2023, Goodwin filed a motion to enter into a fee agreement for an attorney to represent her in her capacity as guardian. On January 19, Judge Gallagher granted Goodwin’s motion—without a hearing—and authorized her to expend funds for an attorney.

{¶ 17} On February 9, Kunikis filed a 97-page motion for a temporary restraining order, preliminary injunction, and permanent injunction. Kunikis alleged wide-ranging misconduct against Goodwin, including that she had violated her guardianship duties, neglected Barath’s medical needs, failed to keep Barath apprised of her finances, and engaged in self-dealing. Kunikis also alleged that the nursing home had deprived Barath of her civil rights, failed to provide her with appropriate treatment, and subjected her to unsanitary conditions. In addition, Kunikis alleged that Judge Gallagher, as superior guardian, had failed to appropriately oversee Goodwin. Kunikis requested immediate termination of the guardianship and Barath’s release from the nursing home. Around the same time, Kunikis filed several other motions in the guardianship case on Barath’s behalf.

{¶ 18} On February 21, Goodwin, through her counsel, moved to strike Kunikis’s motions and requested that the court sanction Kunikis for frivolous and unprofessional conduct. Goodwin argued that because Barath had been declared incompetent, she was unable to enter into any contracts, including independently retaining an attorney. Therefore, Goodwin claimed that Kunikis lacked authority to file the motions on Barath’s behalf.

{¶ 19} On March 7, Kunikis, on behalf of Barath, filed a motion to strike Goodwin's motion to strike, arguing that Barath had retained the right to be represented by independent counsel of her choice.

{¶ 20} On March 13, Judge Gallagher held a status conference. Kunikis asserts that Judge Gallagher failed to ensure that Barath was brought to court to participate in the status conference. During the conference, the judge interrogated Kunikis about her relationship with Barath. After the conference, Judge Gallagher issued several judgment entries denying or striking Kunikis's motions. Most significantly, the judge granted Goodwin's motion to strike Kunikis's motion for a temporary restraining order and for preliminary and permanent injunctions. In her judgment entry, Judge Gallagher noted that during the status conference, Kunikis said that a "third party" had contacted her about representing Barath and was paying her fees and that Kunikis had refused to disclose further information about the third party based on a claim of attorney-client privilege. Judge Gallagher found that Kunikis failed to demonstrate that Barath had retained her as counsel or that she had the authority to represent Barath in the guardianship case. The judge also found that Kunikis's motion violated Civ.R. 11 and R.C. 2323.51 and scheduled a sanctions hearing against her.

{¶ 21} Kunikis then filed this affidavit of disqualification.

Allegations and Response

{¶ 22} Kunikis argues that Judge Gallagher should be disqualified from the guardianship case on two bases. First, Kunikis alleges that the judge has violated Canons 1 and 2 of the Code of Judicial Conduct. Second, Kunikis asserts that a reasonable person, after reviewing the entirety of the guardianship proceedings, "would determine that there is an appearance of Judge Gallagher through her conduct, her agent, or agent[']s counse[l] suggest[ing] impropriety, bias, self-interest, loss of impartiality, a fixed anticipatory judgment on the issues, or 'confirmation bias.' "

{¶ 23} Judge Gallagher filed a response to the affidavit and argues that Kunikis lacks standing to seek the judge’s disqualification. The judge also detailed her handling of Barath’s guardianship case and denies any bias or prejudice for or against any party or counsel in the matter.

{¶ 24} Because the question of standing asks whether a litigant is entitled to have a court hear a controversy, the judge’s argument that Kunikis lacks standing to file an affidavit of disqualification is a threshold issue.

Standing

{¶ 25} “ ‘Standing’ is defined at its most basic as ‘a party’s right to make a legal claim or seek judicial enforcement of a duty or right.’ ” *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27, quoting *Black’s Law Dictionary* 1442 (8th Ed.2004). “ ‘The question of standing depends upon whether the party has alleged such a “personal stake in the outcome of the controversy” as to ensure that “the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” ’ ” *Id.*, quoting *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178-179, 298 N.E.2d 515 (1973), quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), and *Flast v. Cohen*, 392 U.S. 83, 101, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

{¶ 26} In addition, standing may be conferred by statute. *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 17. R.C. 2101.39 provides that “[i]f a probate judge allegedly has a bias or prejudice for or against a party or a party’s counsel in a proceeding pending before the judge, allegedly otherwise is interested in a proceeding pending before the judge, or allegedly is disqualified to preside in the proceeding[,] * * * *any party to the proceeding or the party’s counsel may file an affidavit of disqualification with the clerk*” of this court. (Emphasis added.) Former chief justices have “strictly enforced” this statutory language and have consistently found that “individuals who

do not qualify as a ‘party’ or ‘party’s counsel’ do not have standing to file an affidavit of disqualification.” *In re Disqualification of Grendell*, 137 Ohio St.3d 1220, 2013-Ohio-5243, 999 N.E.2d 681, ¶ 2, citing *In re Disqualification of Cleary*, 74 Ohio St.3d 1225, 657 N.E.2d 1337 (1990), and *In re Disqualification of Haas*, 74 Ohio St.3d 1217, 657 N.E.2d 1331 (1990).

{¶ 27} Whether R.C. 2101.39 confers standing on Kunikis to file an affidavit of disqualification is a question of statutory interpretation. “The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact.” *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus. “When the statutory language is plain and unambiguous, and conveys a clear and definite meaning, [a court] must rely on what the General Assembly has said.” *Jones v. Action Coupling & Equip., Inc.*, 98 Ohio St.3d 330, 2003-Ohio-1099, 784 N.E.2d 1172, ¶ 12. For this reason, “[a]n unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus.

{¶ 28} Judge Gallagher claims that Kunikis lacks standing to seek her disqualification because Kunikis is not the “Ward’s counsel” in the guardianship case. However, Judge Gallagher has misinterpreted the applicable statutory language.

{¶ 29} Under the plain and unambiguous language of R.C. 2101.39, an attorney has standing to file an affidavit of disqualification if he or she is a “party’s counsel.” The statute does not limit the standing it confers to counsel of record in the case from which the attorney is seeking the judge’s disqualification. If only counsel of record in the case pending before the judge could file an affidavit of disqualification, the statutory language would provide that “any party to the proceeding or the party’s counsel *in the proceeding* may file an affidavit of disqualification.” The legislature, however, did not restrict the term “party’s counsel” to only those appearing before the judge in the underlying case. “[I]f the

General Assembly could have used a particular word in a statute but did not, [this court] will not add that word by judicial fiat.” *Hulsmeyer v. Hospice of Southwest Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶ 26.

{¶ 30} R.C. 2101.39’s language is broader than Judge Gallagher suggests. It permits a party represented by counsel in the underlying case to be represented by different counsel in filing an affidavit of disqualification. It also permits a party representing himself or herself pro se in a pending case to retain an attorney to assist in filing an affidavit of disqualification to request removal of the judge presiding over the case. The attorney in each of these situations would have standing to file the affidavit of disqualification as the “party’s counsel,” even though the attorney was not representing the party in the case pending before the judge. Judge Gallagher’s interpretation of the statutory language would require the addition of words to the statute.

{¶ 31} In support of her position, Judge Gallagher relies on *In re Disqualification of Gaul*, 144 Ohio St.3d 1202, 2015-Ohio-3929, 41 N.E.3d 420, and *In re Disqualification of Leach*, 164 Ohio St.3d 1244, 2021-Ohio-2321, 173 N.E.3d 530, but those cases are distinguishable from the circumstances here. In both of those cases, a judge removed a party’s attorney as counsel of record in a case pending before the judge and that attorney later sought to disqualify the judge based on the judge’s treatment of the attorney. A former chief justice found that the attorneys in those cases lacked standing to file an affidavit of disqualification on their own behalf because they were no longer counsel for the parties in the case pending before the judge. *Gaul* at ¶ 6-7; *Leach* at ¶ 4-5. In both cases, the attorney did not allege that the filing of the affidavit of disqualification was on behalf of the client.

{¶ 32} Here, Kunikis seeks Judge Gallagher’s disqualification based on the judge’s treatment of Barath and the judge’s handling of Barath’s guardianship case. Kunikis filed the affidavit of disqualification on behalf of the ward—not herself.

Unlike the facts in *Gaul* and *Leach*, the issues raised in Kunikis’s affidavit of disqualification remain “live” regardless of whether she serves as counsel of record in the guardianship case. Therefore, neither *Gaul* nor *Leach* supports the conclusion that Kunikis lacks standing to file an affidavit of disqualification on behalf of Barath.

{¶ 33} Kunikis has demonstrated that she qualifies as a “party’s counsel” for the limited purpose of filing an affidavit of disqualification under R.C. 2101.39. In her affidavit, Kunikis averred under oath that she serves as counsel for Barath, that she had confirmed with Barath that Barath wished to be represented by her, and that Barath believes that Judge Gallagher’s disqualification is appropriate and that the judge’s handling of the guardianship case has undermined her belief that she will receive fair and impartial justice. Kunikis is an officer of the court, and her sworn averments are adequate to establish that she is Barath’s counsel under R.C. 2101.39.

{¶ 34} Based on the foregoing, Kunikis has standing to file an affidavit of disqualification under R.C. 2101.39. Therefore, I turn to the merits of the affidavit of disqualification.

Merits of the Affidavit of Disqualification

{¶ 35} The granting or denying of an affidavit of disqualification turns on whether the chief justice determines that the allegations of interest, bias, prejudice, or disqualification alleged in the affidavit exist. *See* R.C. 2101.39 and 2701.03(E). The allegations must be “specific,” and the affiant must support those allegations with relevant facts. R.C. 2101.39 and 2701.03(B)(1).

{¶ 36} “The 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. A judge, however, is accorded a “presumption of impartiality” in an affidavit-of-disqualification proceeding. *In re Disqualification of Celebrezze*, 101 Ohio St.3d 1224, 2003-Ohio-7352, 803 N.E.2d 823, ¶ 7.

{¶ 37} “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.

{¶ 38} Kunikis argues that Judge Gallagher should be disqualified for two reasons: (1) the judge has violated Canons 1 and 2 of the Code of Judicial Conduct and (2) the judge’s handling of the guardianship case has created an appearance of bias or impropriety, and the judge lacks impartiality and an open mind. Kunikis asserts that the judge is exhibiting “confirmation bias.”

Allegation One

{¶ 39} As set forth above, Kunikis’s first allegation is that Judge Gallagher has violated Canons 1 and 2 of the Code of Judicial Conduct. However, “affidavit-of-disqualification proceedings are not the appropriate mechanism for determining whether a judge has followed the Code of Judicial Conduct.” *In re Disqualification of Capper*, 134 Ohio St.3d 1271, 2012-Ohio-6287, 984 N.E.2d 1082, ¶ 19. Judicial-misconduct complaints are heard by the Board of Professional Conduct and ultimately decided by all members of this court. *In re Disqualification of Burge*, 142 Ohio St.3d 57, 2014-Ohio-5871, 28 N.E.3d 48, ¶ 4. “[T]he issue before the chief justice in disqualification proceedings is a narrow one” and is “ ‘limited to determining whether a judge in a pending case has a bias, prejudice, or other disqualifying interest that mandates the judge’s disqualification from that case.’ ”

Id., quoting *In re Disqualification of Kate*, 88 Ohio St.3d 1208, 1209-1210, 723 N.E.2d 1098 (1999).

Allegation Two

{¶ 40} In support of Kunikis’s second allegation, she asserts that Judge Gallagher (1) found Barath incompetent without holding a proper evidentiary hearing, without offering Barath counsel, and without giving Barath an opportunity to review the expert evaluation or the investigator’s report, (2) denied Barath an opportunity to meaningfully review, with counsel, the necessity of continuing the guardianship, (3) failed to appropriately oversee Goodwin, who has prevented Barath from having contact with Kunikis and has forced Barath into a “locked down” memory-care facility where she is not receiving appropriate medical care and is isolated from her friends, (4) improperly shifted the burden onto Barath to prove that she is competent in order to terminate the guardianship, (5) failed to ensure that Barath was present for the March 13, 2023 conference, even though the purpose of the conference was to determine whether Barath had retained Kunikis to challenge the guardianship, and (6) used “her power to silence Mrs. Barath’s complaints” by improperly removing Kunikis as Barath’s counsel and by making factual findings without holding the evidentiary hearings required by R.C. 2111.02 and 2111.49(C). Kunikis alleges that these alleged actions and failures to act demonstrate that Judge Gallagher lacks impartiality and an open mind and that the judge is exhibiting confirmation bias.

{¶ 41} In response, Judge Gallagher states that she has always acted in Barath’s best interests, that she has complied with R.C. 2111.02 and 2111.49(C), and that Kunikis’s affidavit of disqualification is merely an attempt to collaterally attack her decisions appointing a guardian and continuing the guardianship.

{¶ 42} Kunikis’s allegations raise serious questions about the integrity of Barath’s guardianship proceedings and the probate court’s compliance with R.C. 2111.02 and 2111.49(C). R.C. 2111.02 sets forth the basic procedures for

appointing a guardian, and R.C. 2111.49(C) governs review hearings for continuing an existing guardianship. Both statutes require probate courts to comply with certain procedures to protect a ward's rights.

{¶ 43} For example, R.C. 2111.02(C) provides that prior to the appointment of a guardian, the probate court “shall conduct a hearing.” If the hearing concerns the appointment of a guardian for an alleged incompetent person, the alleged incompetent person has the right to be represented by independent counsel of his or her choice and the right to introduce evidence of an independent expert evaluation. R.C. 2111.02(C)(7)(a) and (c). If a guardianship is established, the ward has the right to seek termination of the guardianship. R.C. 2111.49(C) provides that

upon written request by the ward, the ward's attorney, or any other interested party made at any time after the expiration of one hundred twenty days from the date of the original appointment of the guardian, a hearing shall be held in accordance with [R.C. 2111.02] to evaluate the continued necessity of the guardianship.

{¶ 44} Additionally, the ward has the right to a guardianship-review hearing on an annual basis. *Id.* Further, if the ward argues that the guardianship should be terminated because the ward is competent, “the burden of proving incompetence shall be upon * * * the guardian, by clear and convincing evidence.” *Id.*

{¶ 45} Under these two statutory provisions, there is little doubt that Barath has the right to retain an independent attorney of her choosing to challenge the necessity of continuing the guardianship. At least one appellate court has concluded that a probate court errs by denying a ward's motion for independent counsel without evidence of the ward's actual wishes.

{¶ 46} In *In re Guardianship of Carpenter*, 2016-Ohio-3389, 66 N.E.3d 272, ¶ 9-10 (3d Dist.), the court of appeals held that “when a ward wishes to challenge a guardianship, he or she is entitled to independent counsel of his or her choice,” “the determination of who that counsel should be is the [ward’s] alone, not that of the trial court,” and “there is no requirement that a ward has to have his or her choice of independent counsel approved by the guardian,” even when the ward is incompetent. *Id.* at ¶ 9. The court of appeals in *Carpenter* criticized the probate court’s failure to take any steps to determine the ward’s wishes and the probate court’s reliance instead on unsworn statements by the guardian and other attorneys. *Id.*

{¶ 47} Kunikis raises arguments similar to those raised in *Carpenter*—i.e., that Judge Gallagher removed her as counsel for Barath without obtaining any evidence from the ward, despite the ward’s rights under R.C. 2111.02 and 2111.49(C) to independent counsel of her choosing to challenge the continuation of the guardianship. But *Carpenter* is also relevant for another reason: the case shows that the proper vehicle for raising Kunikis’s claims is the appellate process.

{¶ 48} An affidavit of disqualification addresses the narrow issue of the possible bias, prejudice, or disqualification of a judge and “is not a vehicle to contest matters of substantive or procedural law.” *In re Disqualification of Solovan*, 100 Ohio St.3d 1214, 2003-Ohio-5484, 798 N.E.2d 3, ¶ 4. Therefore, it is generally outside the scope of an affidavit-of-disqualification proceeding to determine whether a judge has complied with the law. Here, Kunikis essentially argues that Judge Gallagher’s rulings in the guardianship case have created an appearance of bias. But to accept Kunikis’s allegations, it must first be determined whether the judge’s rulings were legally correct. An affidavit-of-disqualification proceeding is not the appropriate forum in which to determine whether Judge Gallagher has violated Barath’s right to obtain independent counsel or whether the judge has complied with the law—i.e., the requirements in R.C. 2111.02 or

2111.49(C). Even if the judge erred, it is long established that “[a] trial judge’s opinions of law * * * are not by themselves evidence of bias or prejudice and thus are not grounds for disqualification,” *In re Disqualification of Murphy*, 36 Ohio St.3d 605, 606, 522 N.E.2d 459 (1988).

{¶ 49} This determination—that the proper vehicle for addressing Kunikis’s allegations is the appellate process—is made evident by Kunikis’s last allegation, which is that Judge Gallagher is exhibiting confirmation bias. Confirmation bias is “the tendency to search for, interpret, favor, and recall information in a way that confirms or supports one’s prior beliefs or values.” *Shine-Johnson v. Warden, Belmont Correctional Inst.*, __ F.Supp.3d __, __, S.D. Ohio No. 2:20-cv-1873, 2023 WL 2364663, *2 (Mar. 6, 2023), citing 2 Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, Review of General Psychology 175 (1998). In other words, Kunikis is asserting that Judge Gallagher relies only on evidence that supports her view that Barath is incompetent and that the judge improperly rejects other evidence. But the decision whether a trial court has abused its discretion in granting and continuing a guardianship is within the sound discretion of the appellate court. *E.g., In re Guardianship of Igah*, 2d Dist. Montgomery No. 26416, 2015-Ohio-4511, ¶ 29.

{¶ 50} I recognize that the granting of a guardianship of an adult is a significant life-altering event and results in a complete loss of autonomy and that Kunikis strongly believes that Judge Gallagher’s purported legal errors are threatening the health and well-being of the ward. But Article IV, Section 5(C) of the Ohio Constitution requires the chief justice to “pass upon the disqualification of any judge of the courts of appeal or courts of common pleas or division thereof.” That enumerated power does not give the chief justice unilateral authority to resolve legal issues that are subject to appellate review.

{¶ 51} Barath had the right to appeal the final, appealable order declaring her incompetent and appointing a guardian, and caselaw suggests that there is a

right to appeal a final, appealable order denying a motion to terminate a guardianship. *See, e.g., In re Guardianship of Scobie*, 6th Dist. Lucas No. L-07-1126, 2007-Ohio-1900, ¶ 4; *Igah* at ¶ 20-21; *see also In re Guardianship of Pinkney*, 8th Dist. Cuyahoga No. 102577, 2015-Ohio-2709. But “reviewing alleged legal errors is not the role of the chief justice in deciding affidavits of disqualification.” *In re Disqualification of D’Apolito*, 139 Ohio St.3d 1230, 2014-Ohio-2153, 11 N.E.3d 279, ¶ 5.

Conclusion

{¶ 52} As explained above, an attorney who qualifies as a “party’s counsel” has standing to file an affidavit of disqualification. The attorney need not be serving as counsel of record in the case from which the attorney seeks to disqualify a judge. Here, Kunikis established that she is Barath’s counsel for the purpose of filing an affidavit of disqualification. Therefore, Kunikis has standing to file the affidavit of disqualification.

{¶ 53} Despite this conclusion, Kunikis’s allegations are not properly reviewable in an affidavit-of-disqualification proceeding. Affidavit-of-disqualification proceedings are not the appropriate forum in which to determine whether a judge has complied with the Code of Judicial Conduct. The legal issues raised in the affidavit of disqualification—including whether the judge abused her discretion in denying Barath’s motions and whether Barath’s guardianship should be terminated and she should be released from the nursing home—are subject to appellate review.

{¶ 54} Therefore, the affidavit of disqualification is denied. The case may proceed before Judge Gallagher.