IN RE DISQUALIFICATION OF SUNDERMANN.

HO *v.* CO.

[Cite as *In re Disqualification of Sundermann*, 173 Ohio St.3d 1303, 2023-Ohio-4884.]

Judges—Affidavits of disqualification—R.C. 2701.03—Without more, a judge's failure to serve on the affiant a copy of response filed in affidavit-of-disqualification proceeding is not evidence of interest, bias, prejudice, or other grounds for disqualification—Affiant merely attempts to raise arguments that were asserted in prior affidavit of disqualification and were previously rejected—Affiant failed to show that circumstances surrounding judge's scheduling of upcoming hearing show that judge is interested in underlying case, biased or prejudiced against affiant, or "otherwise is disqualified" under R.C. 2701.03(A)—Disqualification denied.

(No. 23-AP-193—Decided December 29, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Hamilton County Court of Common Pleas, Domestic Relations Division, Case No. DR2001507.

KENNEDY, C.J.

{¶ 1} Chia-Chi Ho, the plaintiff in the underlying domestic-relations case, has filed a successive affidavit of disqualification pursuant to R.C. 2701.03 seeking to disqualify Judge Betsy Sundermann of the Hamilton County Court of Common Pleas, Domestic Relations Division, from presiding over the case. The prior affidavit of disqualification was denied on December 6, 2023. *See* Supreme Court case No. 23-AP-176. Judge Sundermann was not asked to file a response to the successive affidavit of disqualification.

{¶ 2} As explained below, Ho has not established that the judge should be disqualified. Therefore, the successive affidavit of disqualification is denied. The case shall proceed before Judge Sundermann.

Trial-Court Proceedings

{¶ 3} The relevant proceedings in Ho's divorce case were summarized in the December 6 judgment entry and decision denying the first affidavit of disqualification. *See* Supreme Court case No. 23-AP-176.

{¶ 4} On December 20, Judge Sundermann scheduled an in-person hearing for January 8, 2024.

{¶ 5} On December 27, Ho filed this second affidavit of disqualification.

Affidavit-of-Disqualification Proceedings

{¶ 6} Ho alleges that Judge Sundermann has an interest in the case, that the judge is biased and prejudiced against her, and that the judge should be disqualified for other reasons. In support of the allegations, Ho asserts that Judge Sundermann failed to provide her with a copy of the judge's response in Supreme Court case No. 23-AP-176 and that when she requested a copy of the judge's response, her request was ignored. Ho eventually received the response, but she maintains that it includes numerous misleading statements. Ho delineates seven statements made in the judge's response that she believes are misleading.

{¶ 7} Ho also claims that Judge Sundermann scheduled an in-person hearing for January 8, 2024, knowing that Ho would not be able to attend the hearing because she has plans to travel to Taiwan. Ho further states that the judge has scheduled all motions on that hearing date except for a motion that Ho had filed.

{¶ 8} Additionally, Ho asserts that the guardian ad litem is retaliating against her, and she seems to be requesting the removal of the guardian ad litem.

{¶ 9} Ho's successive affidavit of disqualification raises two preliminary issues: first, whether an affiant may use a successive affidavit of disqualification to reply to a judge's response filed in a prior affidavit-of-disqualification case, and

second, whether the chief justice has authority in an affidavit-of-disqualification proceeding to remove a guardian ad litem. The answer to both questions is no.

Preliminary Issues

{¶ 10} Ho's statement that Judge Sundermann initially failed to provide her with a copy of the judge's response in Supreme Court case No. 23-AP-176 and her point-by-point explanation as to why the judge's response was misleading is tantamount to a reply to the judge's response. Such a reply is strictly prohibited.

{¶ 11} It is true that S.Ct.Prac.R. 21.02(B)(3) requires a judge to serve on the affiant a copy of the response filed in an affidavit-of-disqualification proceeding, but without more, a judge's failure to do so is not evidence of interest, bias, prejudice, or other grounds for disqualification. Nor did Ho suffer any prejudice from the lack of service of Judge Sundermann's response. Affiants and other persons are strictly prohibited from replying to a judge's response in an affidavit-of-disqualification proceeding. S.Ct.Prac.R. 21.02(C). Further, S.Ct.Prac.R. 21.02(B)(3) does not provide for any sanction for the failure of a judge to serve his or her response on the affiant. *See In re Disqualification of Bloom*, 173 Ohio St.3d 1216, 2023-Ohio-3384, 229 N.E.3d 127, ¶ 16 (denying a motion to strike a judge's response that was not served on the affiant because S.Ct.Prac.R. 21.02(B)(3) does not require a judge's response to be stricken if not served).

{¶ 12} Moreover, Ho's successive affidavit of disqualification is merely an attempt to reargue points that were raised in the prior affidavit of disqualification and were previously rejected. A subsequent affidavit of disqualification may not be used to reargue a point that was raised in a prior affidavit and previously rejected. *See In re Disqualification of Schweikert*, 158 Ohio St.3d 1211, 2019-Ohio-5487, 141 N.E.3d 258, ¶ 2 ("bias allegations that were raised—and rejected—in prior affidavits of disqualification * * * will not be addressed again"); *In re Disqualification of O'Malley*, 168 Ohio St.3d 1230, 2022-Ohio-3477, 198 N.E.3d 897, ¶ 5 (same).

{¶ 13} Additionally, Sup.R. 48 addresses the role of a guardian ad litem and the role of the court with respect to guardians ad litem, and Sup.R. 48.03(B)(2) provides that it is the trial judge who has the authority to remove a guardian ad litem.

{¶ 14} "The constitutional and statutory responsibility of the Chief Justice in ruling on an affidavit of disqualification 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." *In re Disqualification of Kate*, 88 Ohio St.3d 1208, 1209-1210, 723 N.E.2d 1098 (1999). Therefore, it is beyond the constitutional and statutory authority of a chief justice to determine whether the actions of a guardian ad litem are retaliatory or whether a guardian ad litem should be removed from a case.

{¶ 15} The remaining issue set forth in the successive affidavit of disqualification is whether Judge Sundermann should be disqualified based on the judge's scheduling of the January 8, 2024 hearing and her scheduling of all motions except for Ho's for that date. Disqualification is not warranted.

Disqualification of a Common-Pleas-Court Judge

{¶ 16} R.C. 2701.03(A) provides that if a judge of a court of common pleas "allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court," then that party or counsel may file an affidavit of disqualification with the clerk of this court. Granting or denying the affidavit of disqualification turns on whether the chief justice determines that the allegations of interest, bias, prejudice, or disqualification set forth in the affidavit exist. R.C. 2701.03(E).

{¶ 17} The burden falls on the affiant to submit "specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts

to support each of those allegations." R.C. 2701.03(B)(1). Therefore, "[a]n affidavit must describe with specificity and particularity those facts alleged to support the claim." *In re Disqualification of Mitrovich*, 101 Ohio St.3d 1214, 2003-Ohio-7358, 803 N.E.2d 816, ¶ 4.

{¶ 18} As set forth above, Ho alleges three bases for the disqualification of Judge Sundermann: (1) the judge is interested in the case, (2) the judge has a bias or prejudice, and (3) the judge should be disqualified for other reasons, *see* R.C. 2701.03(A) (specifying grounds for disqualification but also providing that an affiant may allege that a judge "otherwise is disqualified to preside").

{¶ 19} The term "interest" is not defined in R.C. 2701.03. The Code of Judicial Conduct requires a judge to disqualify himself or herself in any proceeding where the judge "[h]as more than a de minimis interest that could be substantially affected by the proceeding" or "the judge knows that he or she * * * has an economic interest in the subject matter in controversy or in a party to the proceeding." Jud.Cond.R. 2.11(A)(2)(c) and (3).

{¶ 20} "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. " 'Bias or prejudice on the part of a judge will not be presumed. In fact, the law presumes that a judge is unbiased and unprejudiced in the matters over which he presides, and bias and prejudice must be strong enough to overcome the presumption of his integrity.' " *Id.* at ¶ 16, quoting 48A Corpus Juris Secundum, Judges, Section 108, at 731 (1981). A determination of whether a judge is biased or prejudiced is based on the

judge's words and/or actions and whether those words and/or actions convey that the judge is predisposed to an outcome of a case.

{¶ 21} A judge "otherwise is disqualified" under R.C. 2701.03(A) when one of the express bases for disqualification—interest, relation to a party, bias, or prejudice—does not apply but other grounds for disqualification exist. *See In re Disqualification of Schooley*, 173 Ohio St.3d 1241, 2023-Ohio-4332, 229 N.E.3d 1224, ¶ 19. For example, the statute speaks in terms of *actual* bias and prejudice; "[n]evertheless, even in cases in which no evidence of actual bias or prejudice is apparent, a judge's disqualification may be appropriate to avoid an appearance of impropriety or when the public's confidence in the integrity of the judicial system is at issue." *In re Disqualification of Crawford*, 152 Ohio St.3d 1256, 2017-Ohio-9428, 98 N.E.3d 277, ¶ 6. In addition, an ex parte communication between a judge and a party can be a ground for disqualification when the communication either was initiated by the judge or addressed substantive matters in the pending case. *In re Disqualification of Calabrese*, 100 Ohio St.3d 1224, 2002-Ohio-7475, 798 N.E.2d 10, ¶ 2. Jud.Cond.R. 2.11 sets forth additional circumstances when a judge should be disqualified, including the economic interests of the judge's family members and the judge's likely being a material witness concerning the matter in controversy.

{¶ 22} These examples are not exhaustive, but they illustrate that a judge may be "otherwise * * * disqualified" when the grounds for disqualification specified in R.C. 2701.03(A) are not applicable.

Analysis

{¶ 23} For the reasons explained below, Ho has not established that Judge Sundermann's disqualification is warranted.

{¶ 24} The only evidence presented in support of the three allegations is Ho's assertions that Judge Sundermann scheduled an in-person hearing in the underlying case on January 8, 2024, knowing that Ho would not be able to attend

the hearing and that at that hearing, the judge would hear the motions of the guardian ad litem and the defendant but not Ho's motion.

{¶ 25} "[A] judge's determination as to how to proceed with proceedings pending before him * * * generally provides no grounds for judicial disqualification." Flamm, *Judicial Disqualification*, Section 15.1, at 411-412 (2d Ed.2007). Moreover, "[t]rial judges are entitled to exercise considerable discretion in the management of cases on their dockets, * * * and any alleged abuse of that discretion should be remedied on appeal, not in an affidavit of disqualification." *In re Disqualification of Holbrook*, 138 Ohio St.3d 1206, 2013-Ohio-5863, 3 N.E.3d 201, ¶ 7.

{¶ 26} The overview of the trial-court proceedings provided in Supreme Court case No. 23-AP-176 shows that the underlying case has been ongoing for over three years. Judge Sundermann has discretion to determine the best date for a hearing, to determine whether to grant or deny a requested continuance, and to determine which motions should be scheduled for a hearing. It is not the chief justice's role in deciding an affidavit of disqualification to second-guess such decisions. Ho has not demonstrated that the circumstances surrounding the scheduling of the January 8 hearing show that Judge Sundermann is interested in the underlying case, biased or prejudiced against Ho, or "otherwise is disqualified" under R.C. 2701.03(A).

{¶ 27} Therefore, Ho's allegations lack merit.

Conclusion

{¶ 28} The affidavit of disqualification is denied. The case shall proceed before Judge Sundermann.
