

**IN RE DISQUALIFICATION OF WINKLER.**

**HELTON ET AL. v. FIFTH THIRD BANK.**

**[Cite as *In re Disqualification of Winkler*, 170 Ohio St.3d 1253,  
2023-Ohio-698.]**

*Judges—Affidavits of disqualification—R.C. 2101.39 and 2701.03—Timeliness of an affidavit of disqualification is question of reasonableness based on circumstances and is decided on case-by-case basis—Requesting a judge’s recusal is not a substitute for timely filing of an affidavit of disqualification—Affiant waived right to seek disqualification of judge by failing to raise objections for two years—Disqualification denied.*

(No. 23-AP-002—Decided January 31, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Hamilton County Court of Common  
Pleas, Probate Division, Case No. 2015003814.

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**KENNEDY, C.J.**

{¶ 1} Andrew D. Schlichter, counsel for the plaintiffs, Catherine Clarke, James Clarke, Helen Helton, Bridget Murphy, and Mary Zigo (hereinafter, “the Clarke Siblings”), has filed an affidavit of disqualification pursuant to R.C. 2101.39 seeking to disqualify Judge Ralph E. Winkler of the Hamilton County Court of Common Pleas, Probate Division, from presiding over the Clarke Siblings’ probate case. As explained below, Schlichter has waived the right to seek Judge Winkler’s disqualification. Schlichter became aware of the allegations asserted in his affidavit of disqualification on December 15, 2020, yet he did not file his affidavit in this court until January 3, 2023. Ohio caselaw requires the timely filing of an affidavit of disqualification. When an affiant becomes aware of circumstances that the affiant believes support disqualification, an affidavit of disqualification must be

filed as soon as possible. Waiver serves as an independent ground to deny an affidavit of disqualification. Because Schlichter did not act with the requisite speed and diligence, the affidavit of disqualification is denied.

### **Allegations and Responses**

{¶ 2} Schlichter’s affidavit sets forth two grounds for disqualifying Judge Winkler. First, Schlichter alleges that the judge has a conflict of interest because the defendant, Fifth Third Bank, managed money for Judge Winkler’s benefit and for a fee during the pendency of the underlying probate case. Second, Schlichter alleges that Fifth Third’s management of the judge’s money creates an appearance of impropriety.

{¶ 3} To support his allegations, Schlichter asserts the following: (1) the Clarke Siblings are beneficiaries of two trusts, which Fifth Third controls as trustee, (2) the probate case concerns the reasonableness of the fees Fifth Third collected from those trusts between 1987 and 2015, (3) between September 2020 and May 2021, Fifth Third managed two investment accounts that Judge Winkler had inherited from his father, and (4) Fifth Third’s management of money for Judge Winkler’s benefit and for a fee during the pendency of the probate case created a conflict of interest and an appearance of impropriety.

{¶ 4} Judge Winkler filed a response to the affidavit explaining why he believes that disqualification is not warranted. The judge states that after the passing of his father in late 2020, he inherited two investment accounts held at Fifth Third. During a December 15, 2020 hearing, he informed the parties of the accounts and further said that he intended to transfer the funds to a bank where he had existing accounts. He instructed Fifth Third to maintain the status quo of the accounts until he could transfer the funds, which he accomplished within a few months. The inherited accounts, Judge Winkler notes, were investment accounts—not trust accounts, which are at issue in the probate case. The judge describes the case as a dispute about Fifth Third’s “decades-long management of a trust that held

as its primary asset shares of a family business” and whether Fifth Third, as the trustee, is liable for the loss of value of the trust assets. Based on those circumstances and considering that he has presided over the case for more than seven years, Judge Winkler does not believe that an objective observer would harbor serious doubts about his impartiality.

{¶ 5} Fifth Third also filed a response to Schlichter’s affidavit of disqualification. The response was supported by an affidavit signed by Jessica K. Baverman, one of Fifth Third’s attorneys. Baverman averred that on January 7, 2021, Schlichter advised Judge Winkler’s law clerk that in light of the inherited accounts, the Clarke Siblings believed that Judge Winkler’s continued work on the case could create an appearance of impropriety. Yet Baverman claims that she heard nothing more about the suggestion of impropriety or Judge Winkler’s inherited accounts until September 2022, when Schlichter filed a motion seeking Judge Winkler’s recusal on the basis of those accounts. Baverman further alleges that between January 2021 and September 2022, the Clarke Siblings opposed one of Fifth Third’s motions but never raised the issue of impropriety or recusal.

#### **Disqualification of a Probate-Court Judge**

{¶ 6} “If 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,” then that party or the party’s counsel may file an affidavit of disqualification with the clerk of this court pursuant to R.C. 2701.03. R.C. 2101.39. Granting or denying the affidavit of disqualification turns on whether the chief justice determines that the allegations of interest, bias, prejudice, or disqualification alleged in the affidavit exist. R.C. 2701.03(E). The allegations must be “specific,” and the affiant must support those allegations with relevant facts. R.C. 2701.03(B)(1).

{¶ 7} In addition, “[i]t is well settled that an affidavit of disqualification must be filed as soon as possible after the affiant becomes aware of circumstances that support disqualification and that failure to do so may result in waiver of the objection.” *In re Disqualification of Dezso*, 134 Ohio St.3d 1223, 2011-Ohio-7081, 982 N.E.2d 714, ¶ 6. “The affiant has the burden to demonstrate that the affidavit is timely filed.” *In re Disqualification of Froelich, Donovan, & Welbaum*, 143 Ohio St.3d 1266, 2015-Ohio-3423, 39 N.E.3d 522, ¶ 5. An affiant’s delay in filing an affidavit of disqualification constitutes an “independent ground” for denying the affidavit. *In re Disqualification of Spon*, 134 Ohio St.3d 1254, 2012-Ohio-6345, 984 N.E.2d 1069, ¶ 34.

{¶ 8} A preliminary issue here is whether Schlichter acted with the requisite speed and diligence in filing his affidavit of disqualification after becoming aware of circumstances that he believed supported Judge Winkler’s disqualification. As explained above, if Schlichter failed to file the affidavit of disqualification in a timely manner, he has waived the right to seek Judge Winkler’s disqualification and there is no need to address the merits of Schlichter’s disqualification request.

### **Analysis**

{¶ 9} Whether a litigant or counsel has filed an affidavit of disqualification in a timely manner is a question of reasonableness and depends on the facts of each case. Therefore, whether an affiant has waived his or her right to seek disqualification is decided on a case-by-case basis. *See, e.g., In re Disqualification of Suster*, 127 Ohio St.3d 1240, 2009-Ohio-7202, 937 N.E.2d 1026, ¶ 4. To determine whether Schlichter timely filed his affidavit of disqualification, it is first necessary to understand the timeline of the probate case.

#### *Timeline of the probate case*

{¶ 10} The Clarke Siblings are beneficiaries of two trusts for which Fifth Third serves as the trustee. In 2015, the Clarke Siblings filed the lawsuit against

Fifth Third alleging that it had breached its duties relating to its management of the trusts' assets and that Fifth Third had been unjustly enriched.

{¶ 11} On April 20, 2018, Judge Winkler issued an entry granting Fifth Third's motion for summary judgment. He held that the Clarke Siblings' claims were barred by the statute of limitations and the equitable doctrine of laches.

{¶ 12} On December 18, 2019, the First District Court of Appeals affirmed in part and reversed in part Judge Winkler's judgment granting Fifth Third's motion for summary judgment. *Helton v. Fifth Third Bank*, 1st Dist. Hamilton No. C-180284, 2019-Ohio-5208, ¶ 2. The appellate court affirmed Judge Winkler's determination that the applicable statute of limitations barred the Clarke Siblings' claims of breach of the duty to diversify, breach of the duty of impartiality, and breach of the trust/fiduciary duty. *Id.* The appellate court, however, reversed Judge Winkler's order granting Fifth Third's motion for summary judgment on the claim of unjust enrichment and remanded that issue to the trial court. *Id.* at ¶ 2, 52.

{¶ 13} On April 14, 2020, this court declined to accept the Clarke Siblings' appeal from the First District's decision. *Helton v. Fifth Third Bank*, 158 Ohio St.3d 1466, 2020-Ohio-1393, 142 N.E.3d 685. On June 23, 2020, the court denied the Clarke Siblings' motion for reconsideration. 159 Ohio St.3d 1419, 2020-Ohio-3365, 147 N.E.3d 661.

{¶ 14} On remand, Judge Winkler granted Fifth Third leave to file a second motion for summary judgment on the unjust-enrichment claim. The judge scheduled a hearing on that motion for December 15, 2020.

{¶ 15} During that hearing, Judge Winkler disclosed that his father had passed away in late 2020 and that he had inherited two of his father's investment accounts held at Fifth Third. He told Fifth Third to maintain the status quo of the accounts until he could transfer the funds to a bank where he already had existing accounts.

{¶ 16} On January 7, 2021, during a telephone conference with Judge Winkler’s law clerk, Schlichter orally expressed concerns about the judge’s inherited accounts. The record here contains inconsistent statements about that communication.

{¶ 17} Schlichter claims that the Clarke Siblings orally requested Judge Winkler’s recusal. Baverman avers that Schlichter merely said that his clients believed that the judge’s continued work on the case could create an appearance of impropriety and that they wanted to see how the judge wished to proceed. Schlichter, according to Baverman, did not mention recusal.

{¶ 18} Schlichter did not further pursue the judge’s recusal by filing a motion in the probate court or an affidavit of disqualification in this court.

{¶ 19} The following day, Judge Winkler’s law clerk advised counsel that the judge did not believe that his recusal was warranted. On the same day, the judge denied Fifth Third’s second motion for summary judgment on the unjust-enrichment claim.

{¶ 20} On May 21, 2021, in light of new precedent from the First District Court of Appeals, Fifth Third filed a motion for reconsideration of Judge Winkler’s denial of Fifth Third’s second motion for summary judgment. The Clarke Siblings filed a response in opposition to the motion for reconsideration. On July 28, 2021, Judge Winkler granted the motion for reconsideration and entered judgment in favor of Fifth Third on the motion for summary judgment on the claim of unjust enrichment.

{¶ 21} The Clarke Siblings appealed that judgment to the First District. On March 30, 2022, the appellate court affirmed Judge Winkler’s order granting Fifth Third’s motion for summary judgment on the claim of unjust enrichment. *Helton v. Fifth Third Bank*, 1st Dist. Hamilton No. C-210451, 2022-Ohio-1023, ¶ 32.

{¶ 22} The Clarke Siblings sought a discretionary appeal in this court, but on August 2, 2022, the court declined to exercise jurisdiction. *Helton v. Fifth Third Bank*, 167 Ohio St.3d 1472, 2022-Ohio-2633, 191 N.E.3d 453.

{¶ 23} On September 8, 2022, Schlichter, on behalf of the Clarke Siblings, filed a motion seeking Judge Winkler’s recusal. Schlichter argued, among other things, that Fifth Third’s management of personal assets for the judge created a conflict of interest and the appearance of a conflict. Fifth Third filed a memorandum in opposition to the Clarke Siblings’ motion for recusal. On October 27, 2022, the parties appeared for a hearing on the motion for recusal.

{¶ 24} On November 7, 2022, Judge Winkler issued a judgment denying the motion for recusal, finding that no reasonable and objective observer would harbor serious doubts about his impartiality. The entry noted that on December 15, 2020, he disclosed to the parties that he had inherited two investment accounts held at Fifth Third and that he intended to transfer the funds to a different financial institution. The judge affirmed that he had transferred those funds within months and that the accounts were investment accounts, not trust accounts. Judge Winkler found that this “incidental and transitory arms-length dealing with” Fifth Third did not result in any undue friendship with or favoritism toward Fifth Third or create in the judge an economic interest in the subject matter of the probate case. The judge further noted that the Clarke Siblings’ recusal motion was untimely because disqualification issues should be raised without delay after the facts become known to the parties.

{¶ 25} Almost two months later, on January 3, 2023, Schlichter filed the affidavit of disqualification against Judge Winkler in this court. At that point, a status-report hearing was scheduled for January 10 in the probate case.

*Schlichter waived the right to seek Judge Winkler’s disqualification*

{¶ 26} As noted above, “[i]t is well settled that an affidavit of disqualification must be filed as soon as possible after the affiant becomes aware

of circumstances that support disqualification and that failure to do so may result in waiver of the objection.” *Dezso*, 134 Ohio St.3d 1223, 2011-Ohio-7081, 982 N.E.2d 714, at ¶ 6. “The affiant has the burden to demonstrate that the affidavit is timely filed.” *Froelich, Donovan, & Welbaum*, 143 Ohio St.3d 1266, 2015-Ohio-3423, 39 N.E.3d 522, at ¶ 5.

{¶ 27} Schlichter acknowledges in the affidavit of disqualification that caselaw holds that a party that waits too long to request disqualification may thereby waive the right to seek disqualification of a judge. Schlichter argues that because the Clarke Siblings sought Judge Winkler’s voluntary recusal shortly after learning that he had inherited the Fifth Third investment accounts, the Clarke Siblings “did not unreasonably delay before seeking disqualification.” Contrary to Schlichter’s position, an informal recusal request made through a judge’s law clerk does not shield an affiant from the determination whether he or she timely filed an affidavit of disqualification.

{¶ 28} “Counsel and parties to pending cases are encouraged to resolve potential disqualification requests prior to invoking the formal procedures set forth in Section 5(C), Article IV of the Ohio Constitution and R.C. 2701.03.” *In re Disqualification of Kontos*, 94 Ohio St.3d 1224, 1225, 763 N.E.2d 595 (2001). However, attempting to obtain a judge’s recusal is not a substitute for the timely filing of an affidavit of disqualification. *See, e.g., Dezso* at ¶ 6.

{¶ 29} Schlichter was free to seek the judge’s recusal before filing an affidavit of disqualification. But based on the evidence here, Schlichter did not seek the judge’s disqualification as soon as possible after learning the facts that might warrant disqualification.

{¶ 30} On December 15, 2020, Judge Winkler disclosed to the parties that he had inherited two Fifth Third investment accounts from his father. During a January 7, 2021 telephone conference, Schlichter raised the issue whether the judge’s inheritance of the investment accounts had created a conflict of interest.



{¶ 31} On January 8, 2021, Judge Winkler’s law clerk informed counsel that the judge did not believe that his recusal was warranted. On the same date, Judge Winkler denied Fifth Third’s second motion for summary judgment—meaning that the Clarke Siblings’ unjust-enrichment claim would proceed before Judge Winkler. But Schlichter did not pursue the judge’s disqualification.

{¶ 32} Almost five months later, Fifth Third filed a motion for reconsideration in light of the new First District precedent. Although the Clarke Siblings opposed the motion, Schlichter did not seek to disqualify Judge Winkler from deciding it or from continuing to preside over the case. Instead, Schlichter waited until *after* Judge Winkler granted Fifth Third’s motion for reconsideration and its second motion for summary judgment to seek his disqualification.

{¶ 33} “ ‘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). Nor may an attorney wait until receiving an adverse decision before belatedly seeking a judge’s disqualification. *See Froelich, Donovan, & Welbaum*, 143 Ohio St.3d 1266, 2015-Ohio-3423, 39 N.E.3d 522, at ¶ 5. An affiant’s delay in filing an affidavit of disqualification until after receiving an adverse decision may suggest that the disqualification request was prompted by the adverse decision rather than the judge’s personal connection to the underlying case as alleged in the affidavit. *Id.*; *see also In re Disqualification of Glickman*, 100 Ohio St.3d 1217, 2002-Ohio-7471, 798 N.E.2d 5, ¶ 8.

{¶ 34} As explained above, Schlichter had numerous opportunities to timely file his affidavit of disqualification, but he failed to do so. Nothing in this record justified the two-year delay, and Schlichter therefore has waived the right to

obtain Judge Winkler's disqualification. *See, e.g., In re Disqualification of Fregiato*, 163 Ohio St.3d 1256, 2021-Ohio-1265, 169 N.E.3d 695, ¶ 5; *In re Disqualification of Corrigan*, 91 Ohio St.3d 1210, 1210-1211, 741 N.E.2d 137 (2000).

### **Conclusion**

{¶ 35} The question whether an affidavit of disqualification is timely filed is decided on a case-by-case basis. The question turns on reasonableness and depends on the facts of the case.

{¶ 36} Waiver serves as an independent ground to deny an affidavit of disqualification. When a party or counsel believes that a judge has a conflict of interest or that an appearance of impropriety exists, he or she must promptly file an affidavit of disqualification. Litigants and counsel alike must act with requisite speed when raising issues of interest, bias, or prejudice or other claims of disqualification and file affidavits of disqualification at the earliest possible time.

{¶ 37} Here, Schlichter inexplicably failed to do so. Schlichter has therefore waived his right to seek Judge Winkler's disqualification based on the facts disclosed to him on December 15, 2020. Because Schlichter waived the statutory right to seek Judge Winkler's disqualification, there is no need to address the merits of his allegations.

{¶ 38} The affidavit of disqualification is denied. The probate case may proceed before Judge Winkler.

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