Recusal in Matrimonial and Family Court Actions
By Joel R. Brandes

One of the most perplexing problems that a matrimonial attorney will face is deciding whether or not to take the chance of antagonizing the judge assigned to a case of hers and moving for his or her recusal. Although a judge may act gruff, be antagonistic, or treat the attorney poorly, this is not a basis for recusal, even though it may be a basis for judicial discipline under Canon 3 of the Canons of Judicial Conduct. (See Matter of O'Connor, (32 N.Y.3d 121, 87 N.Y.S.3d 140 (2018)). Canon 3 provides, in part: “A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.” (22 NYCRR 100.3 (B) (3))

Statutory Grounds for Recusal

Judiciary Law § 14 contains the sole grounds for recusal of a judge. It provides, in part, that "[a] judge will not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree."

Absent a basis for disqualification under Judiciary Law § 14 a judge is generally the sole arbiter of recusal. (People v. Moreno, 70 NY2d 403, 521 N.Y.S.2d 663 (1987); see also People v. Smith, 63 NY2d 41, 479 N.Y.S.2d 706 (1984) (noting that recusal is generally "a matter of personal conscience."))

The portion of Judiciary Law § 14 which usually serves as grounds for recusal in most matrimonial cases is that the judge is "interested." However, the "interest" referred to in Judiciary Law § 14 has been held to be a pecuniary or property interest in the proceeding or motion. (People v. Lewis*,* 165 Misc.2d 814, 630 N.Y.S.2d 605 (Sup. Ct.,1995), citing People v. Capuano, 68 Misc.2d 481 (Monroe Cty. Ct., 1971); Matter of Hancock, 91 N.Y. 284 (1883)). Where there is no showing that the judge stands to "profit or gain by any decision" in the case, "interest" is not established. (People v. Lewis*, supra*, at 819).

Judiciary Law § 14 also provides that “A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding . . . in which he [or she] has been attorney or counsel" (Judiciary Law § 14; 22 NYCRR § 100.3 [E] [1] [b] [i]). In Matter of John II, v Kristen JJ., 208 A.D.3d 1447, 174 N.Y.S.3d 158 (3d Dept.,2022) according to a November 2012 order issued upon the father's default, the mother was granted sole legal and physical custody of the children. Subsequently, in June 2017, the parties entered into an agreement through which the mother retained sole legal and physical custody of the children, and the father was entitled to weekly supervised visitation. The father filed a petition for modification of the June 2017 order. He also sought the Family Court's disqualification, noting that the November 2012 order

listed the same Family Court judge as the mother's counsel in those proceedings. Family Court denied the father's disqualification motion. Following a fact-finding hearing where the mother was the only witness, the Family Court dismissed the father's petition for failure to establish a prima facie case. The Appellate Division agreed with the father that the Family Court erred in denying his motion to have the court be disqualified from the matter. It held that this prohibition in Judiciary Law § 14 is absolute and establishes a bright-line disqualification rule. It pointed out that when the father moved for Family Court's recusal and/or disqualification, the judge explained that he did not recall the representation from eight to nine years prior. The November 2012 default order and the order on appeal both dealt with the custodial arrangement between the same two parents regarding the same three children. Under these circumstances, where the two proceedings involved the same claim of custody, guardianship, or visitation for the same children, the Family Court was statutorily disqualified from the proceedings. The order was reversed and the matter was remitted before a different judge for a new fact-finding hearing.

In the absence of a violation of an express statutory provision, bias or prejudice, or unworthy motive on the part of a judge, unconnected with an interest in the controversy, is not cause for disqualification, unless it is shown to affect the result. As stated in People v. Patrick, (183 N.Y. 52 (1905)), absent a legal disqualification with regard to an objection of "impropriety as distinguished from legal disqualification, the judge himself is the sole arbiter." This discretionary decision is within the personal conscience of the court when an alleged appearance of impropriety arises from inappropriate awareness of "nonjuridical data." (People v. Horton, 18 N.Y.2d 355, 275 N.Y.S.2d 377 (1966); see also People v. Smith, supra.) When the alleged impropriety arises from information derived during the performance of the court's adjudicatory function, then recusal can not be directed as a matter of law. A court's decision may not be overturned unless it is an abuse of discretion. (People v. Tartaglia, 35 N.Y.2d 918, 364 N.Y.S.2d 901 (1974); People v. Horton, supra.) The reasoning behind this rule is that, unlike a lay jury, a judge, "by reasons of ... learning, experience and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination" based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision. (People v. Brown, 24 N.Y.2d 168, 299 N.Y.S.2d 190 (1969)).

Discretionary Disqualification under the Code of Judicial Conduct

Although there may not be a legal basis for a judge to be disqualified under Judiciary Law § 14, Canon 2 of the Code of Judicial Conduct requires that a judge "avoid impropriety and the appearance of impropriety in all his activities." Subdivision (A) states: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” (22 NYCRR 100.2 (A)).

Canon 3 of the Code of Judicial Conduct provides that a judge shall perform the duties of judicial office impartially and diligently. Subdivision (B), states, in part that

“…(4) A judge shall perform judicial duties without bias or prejudice against or in favor of any person. A judge in the performance of judicial duties shall not, by words or conduct, manifest bias or prejudice, … “(22 NYCRR 100.3 (B)(4)).

Canon 3 (E) (1) of the Code of Judicial Conduct calls on the judge to disqualify himself when his "impartiality might reasonably be questioned." It provides in pertinent part that: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." (22 NYCRR 100.3 (E)(1)).

In Daniel D. v. Linda C. (24 Misc. 3d 220, 876 N.Y.S.2d 333 (Fam. Ct. 2009)), the Family Court held that an ex parte communication with the Referee assigned to hear the matter did not constitute confidential communications and did not warrant the referee's recusal. However, the referee's inability to proceed in a fair and impartial manner required recusal in the interest of justice. In her Report, the Referee did not reveal the substance of the information **“**because it is privileged pursuant to CPLR 4503.**”** The ex parte communication upon which the Referee based her request for recusal was the statement from Petitioner's attorney, **“**He threatened me.**”** The Referee found this ex parte communication relevant to both the attorney's application to be relieved and the Petitioner's request for visitation. The Court pointed out that there is a voluminous body of case law recognizing that a judge, presiding over a bench trial, **“** is uniquely capable of distinguishing the issues and making an objective determination**”** based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision. Judges are **“**presumed to have disregarded inadmissible evidence**”** and to have **“**considered only competent evidence in reaching his verdict.**”** Although the Referee failed to set forth a legal basis for recusal under the applicable statutes and case law, the court found that it would not be ethically or morally responsible to retain someone on a case who harbors a bias or prejudice against one of the litigants, states they cannot proceed in a completely fair and impartial manner, despite knowing of this alleged threat, and render a reasoned determination confined to the admissible evidence. Therefore, in the interests of justice, the Referee was recused.

It has been noted that it may be better practice in some situations for a court to disqualify itself in a special effort to maintain the appearance of impartiality. (Corradino v Corradino, 48 N.Y.2d 894, 424 N.Y.S.2d 886 (1979)) However, when recusal is sought based upon "impropriety as distinguished from legal disqualification, the judge ... is the sole arbiter." In Matter of Johnson v. Hornblass*,* 93 A.D.2d 732, 461 N.Y.S.2d 277 (1st Dept. 1983) the court noted that "[i]n the absence of a violation of express statutory provisions, bias or prejudice or unworthy motive on the part of a judge, unconnected with an interest in the controversy, will not be a cause of disqualification, unless shown to affect the result." Insofar as the purportedly prejudicial information in that case was acquired through the court's performance of its adjudicative responsibilities, the precatory suggestion for recusal as the "better practice" had no applicability. "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source

and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

Bias or prejudice unconnected with a statutory "interest" in the controversy can constitute grounds for concluding that a trial judge abused his discretion by failing to disqualify himself where the record reveals that his bias affected the result of the trial. (See Matter of Johnson v. Hornblass, supra*;* Schrager v. New York University, 227 A.D.2d 189, 642 N.Y.S.2d 243 (1st Dept.1996)).

A party claiming court bias must preserve an objection and move for the court to recuse itself. When a claim of bias is raised, the inquiry on appeal is limited to whether the judge's bias, if any, unjustly affected the result to the detriment of the complaining party.(In re Baby Girl Z., 140 A.D.3d 893, 35 N.Y.S.3d 129 (2d Dep't 2016); Yehudah v. Yehudah, 144 A.D.3d 1046, 42 N.Y.S.3d 212 (2d Dep't 2016)). The argument that the judge should have recused herself will not be preserved for appellate review where the appellant fails to make a motion for the judge's recusal or otherwise raise the issue before the Court. (*See* People v. Rizzo*,* 5 A.D.3d 924, 774 N.Y.S.2d 98 (2004); People v. Lebron*,* 305 A.D.2d 799, 759 N.Y.S.2d 575 (2003)).

However, the Appellate Division may exercise its power to review such cases in the interests of justice**.** In Matter of Anthony J., --- N.Y.S.3d ----, 2024 WL 395259, 2024 N.Y. Slip Op. 00574 (4th Dept., 2024) the Appellate Division reversed an order which, terminated the mother's parental rights under Social Services Law § 384-b. It agreed with the mother that she was denied due process of law based upon the bias against her displayed by the Family Court Judge. Although the mother's contention was unpreserved for review because the mother did not make a motion for the Family Court Judge to recuse herself the Court exercised its power of review in the interests of justice. It observed that in New York, the fact-finding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial. The State must provide the parents with fundamentally fair procedures, including the right to a hearing before an impartial factfinder. The record demonstrated that the Family Court had a predetermined outcome of the case in mind during the hearing. During a break in the hearing testimony, a discussion occurred on the record with regard to a voluntary surrender. When the mother changed her mind and stated that she would not give up her child, the court responded, "Then I'm going to do it." At that point, the only evidence that had been presented was the direct testimony of one caseworker. The court's comments, in addition to expressing a preconceived opinion of the case, amounted to a threat that, should the mother continue with the fact-finding hearing, the court would terminate her parental rights. Those comments were impermissibly coercive. That the court made good on its promise to terminate the mother's parental rights could not be tolerated. Given the preconceived opinion expressed and the lack of impartiality exhibited by the Family Court Judge the matter was remitted to Family Court for a new hearing by a different judge.

While a judge's actual bias is not a ground for disqualification, the recourse for actual bias that unjustly affects the result of the action is an appeal. "Even if actual bias

or prejudice is shown, it would not be grounds for disqualification but would only be reviewable on appeal on a showing that it had unjustly affected the result." (State Division of Human Rights v. Merchants Mutual Insurance Company, 59 A.D.2d 1054, 399 N.Y.S.2d 813 (4th Dept. 1977)). Bias might be grounds for setting aside a decision if the record of the trial indicates that the decision of the Trial Judge is based upon bias, rather than upon an impartial consideration of the evidence. (See Sherk v. Catena, 235 A.D. 686, 255 N.Y.S. 315 (2d Dept. 1932).

In the absence of an abuse of discretion, a court's decision not to recuse itself will be affirmed on appeal. (People v. Moreno, 70 N.Y.2d 403, 521 N.Y.S.2d 663 (1987); People v. Smith, 272 A.D.2d 679, 708 N.Y.S.2d 485 (2000); See York v. York, (98 A.D.3d 1038, 950 N.Y.S.2d 911 (2d Dep't 2012), aff'd, 22 N.Y.3d 1051, 981 N.Y.S.2d 358, (2014)).

When there is no statutory or discretionary ground for recusal, a court should not recuse itself. A court's decision to recuse itself will be reversed on appeal where recusal is not warranted. In Silber v. Silber, (84 A.D.3d 931, 923 N.Y.S.2d 131 (2d Dep't 2011)), the Appellate Division reversed an order which had granted the wife's motion to recuse the Judicial Hearing Officer from the trial of the action. After 16 days of testimony in this divorce action, the Judicial Hearing Officer learned from a member of his family that the family member had just been hired by the husband's father to babysit for the husband's children for four days. The husband's father was unaware that the babysitter and the Judicial Hearing Officer were members of the same family. Upon learning of the hiring, the Judicial Hearing Officer immediately convened the attorneys and disclosed the situation. Eventually, upon the wife's motion, the Judicial Hearing Officer recused himself. The Appellate Division held that this "discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of 'nonjudicial data". " Nevertheless, when there is no ground for recusal, recusal should not be ordered, especially when prejudice will result. A judge has an obligation not to recuse himself or herself, even if sued in connection with his or her duties unless he or she is satisfied that he or she is unable to serve with complete impartiality, in fact, or appearance." Under the unique circumstances of this case, recusal was not warranted. The Judicial Hearing Officer stated emphatically, several times, that he could be fair and the Judicial Hearing Officer's family member was in no position to offer any testimony in the case, much less material testimony.

Conclusion

The argument that the judge should have recused herself will only be preserved for appellate review, where the appellant makes a motion before the trial court for the judge's recusal or otherwise raises the issue before the trial Court.

Recusal motions are infrequently made and less frequently granted. Although a judge is not supposed to allow himself to make decisions in a case based on personal animosity toward a litigant or his counsel, judges are only human. Therefore, it may be

the safer and wiser course to appeal a decision counsel feels is based on bias or prejudice, on "fair trial" grounds, rather than to seek recusal.

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