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Fair Trials and the Recusal of Judges

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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 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. (The Canons of Judicial Conduct, 22 NYCRR 100.3 (B) (3), provide: 3) 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.) Absent a statutory basis for disqualification a judge is generally the sole arbiter of recusal. *People v. Moreno*, 70 NY2d 403 (1987); *see also People v. Smith*, 63 NY2d 41, 68 (1984) (noting that recusal is generally "a matter of personal conscience.").

Statutory Grounds for Recusal

Judiciary Law § 14 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." The only portion of Judiciary Law § 14 which could possibly serve as grounds for disqualification in most matrimonial cases is that the judge is "interested." However, the "interest" indicated in Judiciary Law § 14 is a pecuniary or property interest in the proceeding or motion." *People v. Lewis*, 165 Misc.2d 814 (Sup. Ct., Kings Cty.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.

In the absence of a violation of these express statutory provisions, 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, 54 (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 (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 (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 (1969). Recognizing this key premise, "it suffices to say that there is no prohibition against the same judge conducting a pretrial hearing as well as the trial itself." *People v. De Curtis*, 63 Misc.2d 246 (2d Dept. 1970), *affd.* 29 N.Y.2d 608 (1971) (Suppression hearing justice not disqualified from presiding over nonjury trial); see also *People v. Brown, supra* (Huntley hearing justice may preside over nonjury trial.); *People v. Latella*, 112 A.D.2d 324 (2d Dept. 1985) (Sandoval hearing judge not disqualified from presiding at nonjury trial.). Even the court's appointment of special prosecuting counsel (*People v. Smith, supra*); prior association with a law firm employed by a party (*Corradino v. Corradino*, 48 N.Y.2d 894 (1979)); past prosecution of the defendant, (*People v. Tartaglia, supra*; *People ex rel. Stickle v. Fay*, 14 N.Y.2d 683 (1964); *contra, People v. Corelli*, 41 A.D.2d 939 (2d Dept. 1973)); or past professional affiliation in a field specialized in by a party, (*Matter of Rotwein*, 291 N.Y. 116 (1943)), do not require the disqualification of a trial justice.

Bias, Prejudice, or Appearance of Impropriety

It has been noted that it may be the better practice in some situations for a court to disqualify itself in a special effort to maintain the appearance of impartiality. *Corradino v. Corradino, supra*. However, when recusal is sought based upon "impropriety as distinguished from legal disqualification, the judge ... is the sole arbiter." *People v. Patrick, supra*; see also *eg, People v. Bartolomeo*, 126 A.D.2d 375 (2d Dept. 1987), *lv. denied* 70 N.Y.2d 702 (1987) (Kaye, J.); *Matter of Johnson v. Hornblass*, 93 A.D.2d 732 (1st Dept. 1983).

In *People v. Zappacosta*, 77 A.D.2d 928 (2d Dept. 1980), the Second Department noted the presence of an "amalgam of peculiar circumstances" which required recusal despite a recognition of the rule that "there is no general prohibition against the same judge conducting a bench trial as conducted preliminary hearings on the admissibility of evidence." The trial justice, during the plea allocution of Zappacosta's codefendant wife, actively elicited information that incriminated Zappacosta. The information was not necessary to taking the wife's plea, but "constituted information on the ultimate issue of appellant's guilt which the court, as trier of fact, would not otherwise have had." In analogizing to the rule that permits an individual who withdraws a guilty plea to request a trial before a different judge, and noting its sensitivity to avoiding the appearance of partiality, the Appellate Division held in the exercise of its review function that defendant's recusal motion should have been granted.

In *Matter of Johnson v. Hornblass, supra*, 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." *U.S. v. Grinnell Corp.*, 384 U.S. 563 (1966); see also, *Berger v. U.S.*, 255 U.S. 22 (1921) ("bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case"); *People v. Moreno, supra*.

Although there may not be a legal basis for a judge to be disqualified pursuant to Judiciary Law § 14, Canon 2 of the Code of Judicial Conduct requires that a judge "avoid impropriety and the appearance of impropriety." Canon 3 C (1) 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." Judicial proceedings should never be conducted in a manner and under circumstances that do not reflect complete impartiality. Not only must there be no partiality in fact, even the appearance of partiality is to be avoided. *Matter of Johnson v Hornblass, supra*. The Code of Judicial Conduct requires a Judge's recusal when his or her "impartiality might reasonably be questioned. 22 NYCRR 100.3 (c)(1). This rule prohibiting the appearance of judicial impropriety applies with equal force to the conduct and activities of those individuals, such as law secretaries, whose close and confidential relation to the justices is manifest to all. *Goldstein v. Bartlett*, 92 Misc.2d 262 (1978). However, the final decision to recuse oneself is within the sole discretion of the court.

Judicial Bias or Prejudice

Although the court may not grant recusal, the bias or prejudice of a judge may be a ground for appeal. *People v. Capuano*, 68 Misc.2d 481 (Cty. Ct., Monroe Cty. 1971). 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*, 642 N.Y.S.2d 243 (1st Dept.1996).

A judge's actual bias is not a ground for disqualification, but there is recourse for actual bias that unjustly affects the result of the action, and that is 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 (4th Dept. 1977), quoting *Matter of Rotwein, supra*, 123. 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 (2d Dept. 1932); *In the Matter of Rotwein, supra*.

Ex Parte Communications

It has been suggested by a recent case involving a justice assigned to the matrimonial part of the Supreme Court (*People v. Garson*, 4 Misc. 3d 258 (Sup. Ct., Kings Cty. 2004), that if a judge has improper *ex parte* communications with a party or his counsel, apart from being reversible error, it may serve as a ground for recusal, because such communications would create the appearance of impropriety, if there was no actual impropriety or bias. 22 NYCRR 100.3 (c) (6) provides in part that: 6) ... A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except: a) *Ex parte* communications that

are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the *ex parte* communication and allows an opportunity to respond; b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond; c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges; d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters; and e) A judge may initiate or consider any *ex parte* communications when authorized by law to do so.

In *Coleman v. Coleman*, 61 AD2d 757 (1st Dept.1978), the First Department reversed a temporary support order because it was made by the court after it received an improper *ex parte* communication from the plaintiff, in violation of Code of Professional Responsibility EC 7-35 and DR 7-110 (B). *See also Meislahn v. McCall*, 246 AD2d 957 (3d Dept.1999) (*ex parte* communication with hearing officer in violation of Administrative Procedure Act created appearance of impropriety and bias); *Signet Const. Corp v. Golden*, 99 AD2d 431 (1st Dept.1984); *Bernstein v. Taj Group of Hotels*, 235 AD2d 370 (1st Dept.,1997).

Conclusion

Based upon the paucity of reported decisions granting recusal, such motions are infrequently 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 is usually the safer and wiser course to appeal a decision you feel is based on bias or prejudice, on "fair trial" grounds, rather than to seek recusal.

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