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COMMENTARY

Recusal in the context of domestic violence cases where there are children

Toby Kleinman and Daniel Pollack | October 11, 2022



States have canons of judicial conduct as well as rules governing circumstances when judges should recuse themselves from hearing cases. The rules may provide for judges to remove themselves and/or for litigants or their attorneys to seek their removal. The difficulty is what to do where judges do not remove themselves but counsel or a client believes a judge is not impartial.

This is particularly difficult in domestic violence cases. Children do not choose their parents. Both parents seemingly come to court as co-equals, with equal constitutional rights to parent their children. Simultaneously, parents have an obligation to raise their children to be safe and secure in their homes. When there is domestic violence, courts must understand these concerns in such a way as to make clear that they are still impartial arbiters. They must also recognize the negative impact of domestic violence on children even where the children themselves have not been personally assaulted.

Of course, every state's recusal is unique. Using New Jersey Judicial canons and rules as an example, Rule 1:12-1(g) requires disqualification of a judge, on the court's own motion, "when there is any reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." The Rules also permit "[a]ny party, on motion made to the judge before trial or argument and stating the reasons therefor," to move for recusal. R. 1:12-2. Similar to most other states, a judge must be removed if "a fully informed person might reasonably question the impartiality of [the] judge." *State v. Dalal*, 438 N.J. Super. 156, 161 (App. Div. 2014), certif. granted, 221 N.J. 216 (2015) (quoting *Hundred E. Credit v. Eric Schuster*, 212 N.J. Super. 350, 358 (App. Div.), certif. denied, 107 N.J. 6 (1986)).

Critically, it is not the actual impropriety that is the issue, but the appearance of impropriety that governs. See Canon 2(A) of the New Jersey Code of Judicial Conduct. Indeed, judges are supposed to maintain, enforce, and observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved" and "act at all times in a manner that promotes public confidence," Canon 2(A), and "must avoid

all impropriety and appearance of impropriety,” Commentary on Canon 2. NJ Code of Judicial Conduct. That standard requires judges to “refrain ... from sitting in any causes where their objectivity and impartiality may fairly be brought into question.” *Offutt v. United States*, 348 U.S. 11, 14, (1954)). “Thus, judges must avoid acting in a biased way or in a manner that may be perceived as partial. To demand any less would invite questions about the impartiality of the justice system and thereby ‘threaten[] the integrity of our judicial process.’ (Citation omitted).” *DeNike v. Cupo*, 196 N.J. 502, 514-15 (2008).

Treating litigants equally and appearing impartial where there has been a recognition of domestic violence by a court may require, for example, the use of different language to a perpetrator than to a victim. A court may, for instance, remind a perpetrator of harm or injury to the victim, and the court may remind a victim of their ability to seek assistance through police and the courts if there are violations of an order of protection. However, if a judge makes negative assumptions about a victim that, for example, a victim used the legal system to gain advantage in a custody case and the court admonishes that victim “as if” that were accurate where domestic violence was in fact found, this might lead a reasonable person to believe the court was not impartial.

When domestic violence is witnessed by a child, there can be long lasting effects on the child. If a court were to rely upon unproved assertions such as “children are always better off with two parents,” rather than giving weight to the impact of domestic violence on the child, it may show bias and partiality.

The purpose of judicial disqualification provisions “is to maintain public confidence in the integrity of the judicial process, which in turn depends on a belief in the impartiality of judicial decision making.” Even a “righteous judgment” will not find acceptance in the public’s mind unless the judge’s impartiality and fairness are above suspicion. “In other words, judges must avoid acting in ... a manner that may be perceived as partial,” otherwise the integrity of the judicial process will be cast in doubt[.] *In re Advisory Letter No. 7-11 of the Supreme Court Advisory Comm.*, 213 N.J. 63, 70 (2013).

Recusal motions are troubling to make. Lawyers don’t want to make recusal motions where they even appear to be frivolous. On the other hand, if there is the appearance of partiality by a court then a motion is warranted, and, even if denied, alerts a court to the appearance of bias. That said, if a recusal motion is made and denied there may be grounds for interlocutory appellate relief.

An attorney may hesitate to seek recusal of a judge out of fear of potential backlash from the court in the present or future cases. See the unpublished opinion of *MGS v. KF*, No. A- 0480-20, wherein the backlash by the court was seen as so profound that the appellate court reversed the court’s denial of recusal.

Again, using New Jersey as an example, Canon 3(C)(1) of the Code of Judicial Conduct provides that “[a] judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Similarly, Rule 1:12-1(f) directs judges not to sit in any matter “when there is any ... reason which might preclude a fair

and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.”

Attorneys must carefully scrutinize what a judge has said or done before making a motion for recusal, but one should not fear making such a motion where it is appropriate. A party might react differently than their lawyer. Their perception of bias must be considered as well. Some signs of bias may include:

- Negative comments about prior cases being similar to the one at bar
- How a court limits cross-examination of a party’s witness or the party themselves whereby the other party’s witnesses may be treated differently
- Occasions when a court negates testimony of witnesses prior to complete testimony, or when it completely ignores witnesses in its reasoning
- Court accepts reports as evidence absent appropriate cross examination
- Court permits unscientific theories as evidence and gives weight and positive statements to them prior to trial

The court’s reasoning may be important especially if it relies upon the affidavit of someone as to the appearance of bias, without acknowledging any pre-disposition. Many lawyers avoid recusal motions at all costs because, in part, they want a court’s continuing respect. On the other hand, zealous advocacy sometimes requires an attorney’s discomfort to

properly represent a client. Attorneys have a responsibility—indeed, an obligation to the client—to make unfairness a matter of record.

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