Cite as 2012 Ark. App. 230

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA11-845

CHAROLETTE ASHLEY APPELLANT V. RICHARD H. ASHLEY AND J.D. ASHLEY, JR., IN THEIR CAPACITY AS PERSONAL REPRESENTATIVES FOR THE ESTATE OF J.D. ASHLEY, SR., DECEASED APPELLEES	**Opinion Delivered** April 4, 2012 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, 16TH DIVISION [NO. PDE 2010-383] HONORABLE ELLEN B. BRANTLEY, JUDGE AFFIRMED

ROBERT J. GLADWIN, Judge

This is a companion case to *Ashley v. Ashley*, 2012 Ark. App. 236, also handed down today. The background facts and procedural history are set out in that opinion. In this appeal, appellant Charolette Ashley argues that the circuit court erred in failing to recuse and in failing to set aside the earlier substantive orders. We affirm because appellant waived her right to seek recusal by not raising the issue in a timely fashion.[1]

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[1]We note that during oral argument there was a question of whether we have jurisdiction to hear this portion of the appeal. Arkansas Code Annotated section 28-1-116(e)(1) (Repl. 2012) provides:

> An appeal shall stay other proceedings in the circuit court except when and to the extent that the court finds that no interested person will be prejudiced and by order permits other proceedings to be had.

Under this section, "a court may not proceed further in a probate case when an appeal has been taken unless it makes a finding that no one will be prejudiced and by order permits

The recusal issue was raised as follows. Appellant moved for the payment of an allowance during the pendency of the proceedings. At an emergency hearing held on the motion on August 24, 2010, appellant's attorney brought to the court's attention the fact that the judge and one of the attorneys for the decedent's estate, William Haught, had co-authored a book together some years before. Counsel did not specifically ask the court to recuse and raised the matter so that the court could decide if it was completely unbiased in the matter. The court said that it could be unbiased and noted that it had been some time since the book had been written and that the relationship between the court and Haught was professional only. The remainder of the hearing addressed the merits of the motion for an allowance, and recusal was not mentioned again.

Haught sought to withdraw as co-counsel for the personal representatives when it became clear that he would have to testify concerning objections that appellant had made to the inventory filed by the personal representatives and whether property transferred to the revocable trust should properly be included in the estate. Haught was granted permission to withdraw and testified at hearings on appellant's objections to the inventory. At the conclusion of the hearing, the circuit court made comments from the bench, including that the court found the testimony of Haught and Stuart Hankins, another attorney involved in the preparation of the will, the family limited partnership, and the revocable trust for the

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additional proceedings." *Nat'l Union Fire Ins. Co. v. Standridge*, 299 Ark. 91, 92, 771 S.W.2d 22, 23 (1989). While there was no specific finding of no prejudice or specific order permitting further proceedings in the order in the companion case, there is language in that order that could be construed as making such findings. Therefore, out of an abundance of caution, we address appellant's argument.

decedent, to be credible. The court then stated that it was not saying that Haught's testimony was necessarily determinative but noted that there was a good argument that it was. The court also noted that it had had several discussions with Haught over how successful revocable trusts were in avoiding the negative consequences of probate. In addressing the fact that the decedent did not attach a schedule of the assets that were being transferred to the trust, the court noted Haught's testimony that it was frequently not attached. The court added that Haught is "certainly a pretty well-known estate planner in this area." In addition to the testimony of Haught and Hankins, the court found that there was other evidence tending to support the conclusion that the decedent's share of the family limited partnership had been transferred to the revocable trust. Finally, the court stated that Haught's only interest was "not looking like the estate plan was screwed up, which, you know, it was to some extent. . . . And, again, I found him credible."

A circuit judge has a duty to sit on a case unless there is a valid reason to disqualify. *Turner v. Nw. Ark. Neurosurgery Clinic*, 91 Ark. App. 290, 210 S.W.3d 126 (2005). A judge's decision not to recuse will not be disturbed absent an abuse of discretion, and the party seeking recusal must demonstrate bias. *Id.* There is a presumption of impartiality on the part of judges. *See id.* Whether a judge has become biased to the point that he should disqualify himself is a matter confined to his conscience. *Searcy v. Davenport*, 352 Ark. 307, 100 S.W.3d 711 (2003). Unless there is an objective showing of bias, there must be a communication of bias in order to require recusal for implied bias. *Turner*, *supra*.

To preserve a claim of judicial bias for review, appellant must have made a timely

motion to the circuit court to recuse. *S. Farm Bureau Cas. Ins. Co. v. Daggett*, 354 Ark. 112, 118 S.W.3d 525 (2003). Without such motion, the disqualification of a judge may be waived. *Worth v. Benton Cnty. Cir. Ct.*, 351 Ark. 149, 89 S.W.3d 891 (2002). Moreover, a judge's allegedly biased or harsh remarks are not subject to appellate review if the appellant failed to object to those statements or move for the judge's recusal. *Dodson v. Allstate Ins. Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001); *McWilliams v. Schmidt*, 76 Ark. App. 173, 61 S.W.3d 898 (2001). Here, the abstract does not show that appellant objected to the remarks that she contends exhibit bias. Nor was a motion for recusal filed until several months after the hearing at which these comments were made. Appellant has, therefore, waived her right to seek recusal. *Worth*, *supra*; *see also Powhatan Cemetery, Inc. v. Colbert*, 104 Ark. App. 290, 292 S.W.3d 302 (2009) (holding that trial court did not abuse its discretion in refusing to recuse where recusal is not sought until after an adverse decision was rendered).

Affirmed.

GLOVER and BROWN, JJ., agree.

Lyon & Phillips, PLLC, by: *Philip K. Lyon* and *Bruce H. Phillips*; and *F. Keith Adkinson*, pro hac vice, for appellant.

Chisenhall, Nestrud & Julian PA, by: *Jim L. Julian*, *Heather G. Moody*, and *Jason W. Earley*, for appellees.