

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned December 5, 2013

CHRISTINA LEIGH CZERNIAK V. ANTHONY KYLE CZERNIAK

**Appeal from the General Sessions Court for Wilson County
No. 2012DC46 John Thomas Gwin, Judge**

No. M2013-02637-COA-T10B-CV - Filed December 23, 2013

Petitioner in a divorce proceeding filed a motion to disqualify the trial court alleging that the court made comments and exhibited conduct at a hearing which indicated that the court was biased against her and that she could not receive a fair trial. The trial judge denied the motion and the petitioner then filed this interlocutory appeal as of right pursuant to Tenn. Sup. Ct. R. 10B. We affirm the denial of the motion to disqualify.

**Tenn. R. App. P. 3 Appeal as of Right / Tenn. Sup. Ct. R. 10B; Judgment of the
General Sessions Court Affirmed**

RICHARD H. DINKINS, J., delivered the opinion of the court, in which ANDY D. BENNETT and FRANK G. CLEMENT, JR., JJ., joined.

Todd Godwin Cole, III, Brentwood, Tennessee, for the petitioner, Christina Leigh Czerniak.

Jessica Hooper, Nashville Tennessee, for the respondent, Anthony Kyle Czerniak.

OPINION

This appeal arises out of the denial of a motion to recuse filed by Christina Leigh Czerniak (“Petitioner”), who had initiated a divorce proceeding on March 7, 2012. On November 15, 2013, Petitioner filed a Motion to Disqualify Judge John Gwin in accordance with Tenn. R. Sup. Ct. 10B; the motion was accompanied by copies of various pleadings and orders as well as the affidavits of Petitioner and her mother, Ms. Mary Harkleroad. On November 21, the court entered an order denying the motion as required by Tenn. Sup. Ct. R. 10B, § 1.03.

Petitioner filed her Petition for Recusal Appeal in this court on December 3 and on December 10 we ordered the trial court to file an amended order more particularly addressing

the specific factual assertions set forth in Petitioner's motion to disqualify and affidavits. We further ordered that Respondent, Anthony Kyle Czerniak, file a response to the petition on or before December 27 and that any reply to the response would be filed by January 3. On December 9, Petitioner filed a motion seeking an order staying the lower court proceedings pending resolution of the Petition for Recusal Appeal, which we denied on that date. On December 13, Petitioner renewed the motion to stay.¹

The court filed its Amended Order on December 19. Upon consideration of the record and the Amended Order, we have determined that no answer from Respondent is necessary; consequently, pursuant to Tenn. Sup. Ct. R. 10B § 2.05, we proceed to dispose of the appeal. In reviewing the trial court's order, we apply the *de novo* standard of review. Tenn. Sup. Ct. R. 10B § 2.06.

I. GROUNDS FOR THE TRIAL JUDGE'S RECUSAL

Petitioner presents three issues for resolution in this appeal, stated as follows:

1. Whether the Honorable John Gwin conducted hearings on the 7th, 20th and 22nd of November 2013, in such a manner and with such results as to form in the Petitioner reasonable grounds to fear that she will not receive a fair trial or hearing from Judge Gwin because of judicial bias.
2. Whether a trial judge may place children in DCS custody solely upon a finding of "imminent risk of irreparable psychological harm" without a corresponding explicit finding as to the nature and source of that harm (as enumerated in Tenn. Code Ann. § 37-1-102) or a finding that placing the children with DCS would be in their best interests.
3. Whether, under Tennessee law, a child may be compelled to testify against their parent in a Petition for Criminal Contempt proceeding, absent an explicit finding that it is in the best interests of the child to do so.

Only the first issue addresses the matters encompassed by Tenn. Sup. Ct. R. 10B; consequently that is the issue we resolve.

In their affidavits filed with the motion, Petitioner and Ms. Harkelroad recount events which occurred in a November 7, 2013 hearing on Respondent's Emergency Motion for Custody; in the Supplemental Order, the trial court made six findings relative to the November 7 hearing.

Petitioner asserts that the basis of her concern that the court is biased against her is the manner in which the court conducted the November 7 hearing, specifically, certain remarks made

¹ Inasmuch as it was not clear whether the motion for stay had been presented to and ruled upon by the trial court, this court took no action on the motion.

by the court.² The transcript of the November 7 hearing puts many of the statements and observations contained in the affidavits of Petitioner and Ms. Harkelroad in context; as well, the findings in the Supplemental Order add the perspective of the history of the case and the difficulties presented by both parties' behaviors throughout the time that the case has been pending. The record shows that the court allowed each party to testify and present such evidence as the party desired at the hearing and the court made no ruling prior to the close of proof and opportunity for each counsel to argue the evidence.³

The test of whether there is a reasonable basis for questioning a judge's impartiality is an objective one. *Bd. of Prof'l Responsibility of Supreme Ct. of Tennessee v. Slavin*, 145 S.W.3d 538, 548 (Tenn. 2004) (citing *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 564–65 (Tenn. 2001)).⁴ We have reviewed the specific comments and actions of the trial court identified in the affidavits and find that, considered in the context of the hearing as well as in the perspective of the case, there are no reasonable grounds for Petitioner to conclude that the trial court is biased against her or that she will not receive a fair trial. The judgment of the trial court is affirmed.

In light of our disposition of the Petition for Recusal Appeal, the Renewed Motion to Stay Lower Court Proceedings is denied.

RICHARD H. DINKINS, JUDGE

² While Petitioner also takes issue with certain rulings of the court, as noted earlier those rulings are not within the scope of this appeal.

³ We particularly note that at the November 7 hearing, in light of the fact that Mother's counsel was new to the case, the court recited the history of the case and prior rulings in the course of its ruling on the underlying motion for custody.

⁴ Recusal is appropriate "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d at 564–65 (quoting *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App.1994)).