

FILED

02/03/2023

Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs December 22, 2022

**BEN C. ADAMS v. BUCHANAN D. DUNAVANT ET AL. v. WATSON
BURNS PLLC ET AL.**

**Appeal from the Probate Court for Shelby County
No. PR-24390 Joe Townsend, Judge**

No. W2022-01747-COA-T10B-CV

AND

IN RE BUCHANAN D. DUNAVANT 2011 DESCENDANTS TRUST

**Appeal from the Probate Court for Shelby County
No. PR-19953 Joe Townsend, Judge**

No. W2022-01762-COA-T10B-CV

AND

IN RE UTMA ACCOUNT OF MARY WILKINSON DUNAVANT

**Appeal from the Probate Court for Shelby County
No. PR-21063 Joe Townsend, Judge**

No. W2022-01763-COA-T10B-CV

AND

IN RE UTMA ACCOUNT OF LUCY HUGHES DUNAVANT

**Appeal from the Probate Court for Shelby County
No. PR-21064 Joe Townsend, Judge**

No. W2022-01770-COA-T10B-CV

AND

**IN RE UTMA ACCOUNT OF LILLIAN GARDNER DUNAVANT;
DUNAVANT V. DUNAVANT**

**Appeal from the Probate Court for Shelby County
No. PR-21065 Joe Townsend, Judge**

No. W2022-01771-COA-T10B-CV

In these related appeals, two law firms seek an order to recuse a judge. Finding that they waited too long to seek relief under Tennessee Supreme Court Rule 10B, we dismiss the petition as to the four related probate cases. As to the interpleader action, we vacate the orders entered since the Rule 10B motion was filed and order the judge to respond to the Rule 10B motion.

Tenn. Sup. Ct. R. 10B Interlocutory Appeal as of Right; Judgment of the Probate Court Vacated in Part and Remanded

ANDY D. BENNETT, J., delivered the opinion of the Court, in which JOHN W. MCCLARTY and KENNY W. ARMSTRONG, JJ., joined.

William F. Burns, Frank Lee Watson, III, and William Edward Routt, III, Memphis, Tennessee, for the appellant, Watson Burns, PLLC.

John S. Golwen and A. Alex Agee, Memphis, Tennessee, for the appellant, Bass, Berry & Sims, PLC.

George Joseph Nassar, Jr., and Jeremy G. Alpert, Memphis, Tennessee, for the appellees, Mary Dunavant and Lillian Dunavant.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

In this Tenn. Sup. Ct. R. 10B (“Rule 10B”) appeal, the law firms Bass, Berry & Sims PLC, and Watson Burns, PLLC (collectively, “the firms”), seek an order of recusal involving five cases for Shelby County Probate Judge Joseph Townsend. Both sides have furnished this Court with their versions of the facts and the law governing these facts. Many extraneous facts and issues are raised by both sides, and we have tried to sift through the matter to find the pertinent ones, for in a Rule 10B appeal we focus only on the recusal of the judge.

Both firms represent Buchanan (“Buck”) D. Dunavant in the legal action *Buchanan D. Dunavant v. Russell Cherry, et al.*, filed September 18, 2020 in the Shelby County Circuit Court. Buck asserts claims against William (“Billy”) Buchanan Dunavant, his father, as a third-party beneficiary to his parents’ 1975 Marital Dissolution Agreement (“MDA”). The MDA acknowledges that there were four trusts created for Buck’s older siblings, but there was not a trust for Buck, who was not born when the trusts were created. Therefore, an irrevocable life insurance trust was to be created for Buck’s benefit. Billy created the William B. Dunavant, Jr. Irrevocable Insurance Trust in 1984 (“1984 Trust”) for Buck. A 1991 Dunavant Children’s Sprinkle Trust (“1991 Trust”) was also discovered. The circuit court found that there were disputed facts about whether the 1984 Trust satisfied Billy’s obligation under the MDA. The court also found that the funds Buck Dunavant received from the 1984 Trust would be a credit against any damages he might be awarded against the defendants.¹ By agreement with Buck, the firms are to be paid their attorneys’ fees, expenses, and costs out of the funds Buck receives from the trust. This litigation is still pending.

The instant cases spring from a case filed in Shelby County Probate Court, *In re: Buchanan D. Dunavant 2011 Decendants Trust*. It was filed by Buck Dunavant’s former spouse, Douglas Dunavant, and alleges that Buck mishandled a trust and three accounts under the Uniform Transfers to Minors Act that were established for the benefit of their children. In an order dated October 18, 2021, Judge Townsend’s predecessor, Judge Webster, ordered that the case be split into four separate but related companion cases.² In

¹ Buck received a distribution from the 1984 and 1991 Trusts of \$100,000 in February 2022. As a favor, the firms did not take their fees, expenses and costs out of this distribution. A second distribution was halted by a temporary restraining order from Judge Webster that had been sought by the attorneys for Douglas Dunavant in the probate court cases, discussed *infra*. At the end of March 2022, the firms filed liens in an attempt to protect their interest in the distributions from the 1984 and 1991 Trusts.

² Those cases have been given the appellate case numbers of W2022-01762-COA-T10B-CV, W2022-01763-COA-T10B-CV, W2022-01770-COA-T10B-CV, W2022-01771-COA-T10B-CV, and W2022-01747-COA-T10B-CV.

each case, Douglas Dunavant alleges Buck Dunavant breached his fiduciary duties to his children. The firms do not represent Buck Dunavant in these cases.

On June 6, 2022, the firms allegedly learned that Buck Dunavant had agreed to settle the four Probate Court cases.³ The settlement would require distributions from the 1984 and 1991 Trusts and extinguish the liens the firms had filed. The next day, Douglas Dunavant's attorneys presented the settlement to Judge Webster. Watson Burns appeared for the firms. The judge ordered the firms and the settlement parties to mediation and set a status conference for September 27, 2022.

All these facts are but a prelude to the controversy giving rise to this appeal. On August 4, 2022, attorney Joseph Townsend defeated Judge Webster for reelection. The new judge had some history with the Watson Brown firm. While still an attorney in 2018, Judge Townsend was hired as an expert witness in opposition to a fee application by the Watson Burns firm. He was highly critical of the fee request, calling it "clearly excessive" and criticizing their billing records as "unintelligible."

Apparently, attorney Townsend's criticisms still stung, for at a status conference on the issues of freezing access to the trusts and enforcement of the firms' liens on September 26, 2022, Mr. Watson made an oral motion asking for Judge Townsend's recusal. Judge Townsend stated, "Yeah, I don't think I have a conflict, but we'll look at the issues in this case and have a full disclosure, et cetera, et cetera, obviously before we proceed too far." The next day Judge Townsend held the previously scheduled status conference regarding the mediation. Judge Townsend entered the four settlement orders, thereby extinguishing the firms' liens on the 1984 and 1991 Trusts. No one raised the issue of recusal. The firms filed motions to alter and amend the ruling, which the court orally denied on November 2, 2022, maintaining that the firms were not parties before the court.

The firms filed Rule 10B motions in the four probate court cases on November 15. On November 30, 2022, the court filed its order from the November 2 hearing, in which the court stated it was "ruling as set out in the transcript that is attached hereto as Exhibit A and incorporated by reference as the findings and order of this Court." The transcript was of the November 2 hearing. There was no mention of the 10B motion.

The Trustee of the 1984 and 1991 Trusts filed an interpleader action on November 29, 2022 because the funds in the trusts would not satisfy the settlement and the firms' attorney liens. The firms filed a Rule 10B motion on December 6 which was substantially similar to the one filed in the other cases on November 15. By an order entered on December 7, the court granted the interpleader and said that the firms were prohibited

³ The attorneys for Douglas Dunavant dispute this, maintaining that the firms knew of the settlement negotiations.

from asserting any claim or prosecuting any action against Trustee for any distribution payable by the Trustee or any claim related to the administration of the William B. Dunavant, Jr. Irrevocable Insurance Trust dated December 15, 1984, and the Dunavant Children's Sprinkle Trust dated April 1, 1991, the Buchanan D. Dunavant 2011 Descendant's Trust, the Buchanan D. Dunavant Descendant's Trust created on December 28, 2001 by William B. Dunavant, Jr.

The Rule 10B motion was not mentioned. As of the date the responses in this appeal were filed, the judge had not filed a response to the Rule 10B motion.

The firms filed this Rule 10B appeal on December 15, 2022, encompassing the four related probate court cases and the interpleader. This Court asked for answers and those have been filed.

ANALYSIS

Tennessee Supreme Court Rule 10B, section 1.01 states:

Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by a written motion filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal. The motion shall be filed no later than ten days before trial, absent a showing of good cause which must be supported by an affidavit. The motion shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials. The motion shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this rule. Any subsequent motion under this section filed in the same case must state, with specificity, substantially different factual and legal grounds than those relied upon in support of a prior motion filed under this section. If a party fails to satisfy this requirement, the subsequent motion may be deemed repetitive and summarily denied as provided in section 1.03.

The first sentence provides two key elements of a motion to recuse. First, a written motion is required. Second, the written motion must be "filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal."

The information provided by the parties shows that an oral motion was presented to the judge on September 26, 2022. An oral motion does not meet the conditions of Rule 10B. It may be tentative. It may not be presented with supporting authority. It might be a heat-of-the-moment statement. There may or may not be a transcript. Rule 10B envisions a thoughtful motion supported by facts and law that can be evaluated by the judge and, if need be, the appellate court. An oral motion does not invoke the procedures of Rule 10B. *See Williams by & through Rezba v. HealthSouth Rehab. Hosp. N.*, No. W2015-00639-COA-R10B-CV, 2015 WL 2258172, at *4 (Tenn. Ct. App. May 8, 2015).

“Courts frown upon the manipulation of the impartiality issue to gain procedural advantage and will not permit litigants to refrain from asserting known grounds for disqualification in order ‘to experiment with the court . . . and raise the objection later when the result of the trial is unfavorable.’” *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998) (quoting *Holmes v. Eason*, 76 Tenn. (8 Lea) 754, 757 (Tenn. 1882)). A delay in asserting the right to an impartial judge will result “in a waiver of a party’s right to question a judge’s impartiality.” *Id.* The firms were aware of the alleged conflict when Judge Townsend took office on September 1, 2022. The firms waited two and a half months, until Judge Townsend had ruled against their motion to amend, to file a written request for recusal on November 15. Rule 10B requires recusal motions to be filed promptly. The firms did not do so. *See Dialysis Clinic, Inc. v. Medley*, No. M2017-00269-COA-T10B-CV, 2017 WL 1137100, at *6-7 (Tenn. Ct. App. Mar. 27, 2017) (concluding that recusal issue was waived because party waited nearly two months to move to recuse after learning of reason). Their motions to recuse in the four related Shelby County Probate Court cases are denied.

The filing of the recusal motion in the interpleader action was timely, as it was filed only days after the interpleader was filed. Tennessee Supreme Court Rule 10B, section 1.02 provides: “While the motion is pending, the judge whose disqualification is sought shall make no further orders and take no further action on the case, except for good cause stated in the order in which such action is taken.” Tennessee Supreme Court Rule 10B, section 1.03 states that, “Upon the filing of a motion pursuant to section 1.01, the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion.” Judge Townsend did not follow the Supreme Court’s rules. He entered an order on December 7, 2022, without stating good cause for not obeying the dictates of Rule 10B, § 1.02, and he failed to address the motion to recuse as required in Rule 10B, § 1.03. Consequently, we must vacate the December 7, 2022 order and any orders in the interpleader action that Judge Townsend has filed since. Furthermore, Judge Townsend is instructed to file a response to the motion to recuse in the interpleader action promptly. If he denies the motion, the response must state in writing the grounds upon which he denied the motion. If he denies the motion, the firms may seek further appellate relief as they deem necessary and appropriate.

CONCLUSION

The petition seeking Rule 10B relief in the interpleader action is granted. The orders entered since the Rule 10B motion was filed in the interpleader action are vacated and the judge is ordered to respond to the Rule 10B motion. The other Rule 10B appeals are dismissed. Costs are assessed against Bass, Berry and Sims and Watson and Burns, for which execution may issue if necessary.

/s/ Andy D. Bennett
ANDY D. BENNETT, JUDGE