

**Matter of Werther**

2024 NY Slip Op 34597(U)

March 28, 2024

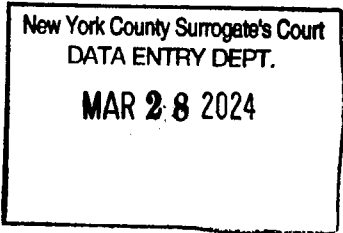
Surrogate's Court, New York County

Docket Number: File No. 2019-1133

Judge: Hilary Gingold

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This opinion is uncorrected and not selected for official publication.



SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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In the Matter of Probate Proceeding, Will of

J. LAWRENCE WERTHER,

DECISION & ORDER

File No.: 2019-1133

Deceased.

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GINGOLD, S.

The following papers were read in determining this motion:

	<u>Papers Numbered</u>
Notice of Motion – Affirmation of Sabrina E. Morrissey and Exhibits –	1-2
Affirmation of John G. Farinacci and Exhibits – Memorandum of Law in Opposition	3-4

Stephen Werther (hereinafter “movant”), who is represented by Sabrina E. Morrissey, Esq., Morrissey & Morrissey, LLP (hereinafter “counsel”), moves to disqualify this court from hearing any part of the above-named proceeding relating to the admission of the will of J. Lawrence Werther to probate and any other issues relative to the Werther estate on the basis that there is a conflict of interest between this court’s Principal Law Clerk, Lisa M. Barbieri, Esq. and the movant.<sup>1</sup> Counsel argues that this court should recuse itself from this proceeding to maintain the appearance of impartiality and to avoid any concerns about bias or prejudice. Petitioner, Ellen Werther Ressler a/k/a Ellen Werther, has opposed the motion.

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<sup>1</sup> Sabrina E. Morrissey, Esq. did not appear at the calendar call on March 26, 2024, the return date of this motion.

According to counsel’s affirmation in support of the motion, movant is a plaintiff in a related case *Werther v Ressler et al.* (Sup Court, NY County, Index No. 152008-2022) (hereinafter the “Supreme Court matter”), and among the defendants in the Supreme Court matter is Ellen Werther Ressler, petitioner in the underlying probate proceeding, as well as the Attorney General of the State of New York (hereinafter “Attorney General”). Counsel explains that Ms. Barbieri, prior to her appointment as this court’s Principal Law Clerk, was an Assistant Attorney General assigned to the Supreme Court matter. Counsel affirms that the Supreme Court matter, in sum and substance, concerns the gift of \$1,250,000 from The J. Lawrence Werther Research Foundation to the Icahn School by Ellen Werther Ressler, in “a scheme to disinherit her brother, Stephen, from her father’s estate” (Affirm at ¶8). Counsel maintains that the Attorney General “ha[d] a direct interest in seeing that the foundation gift is not returned to Dr. Werther’s estate” (Affirm at ¶13). According to counsel, Ms. Barbieri filed an answer, dated March 23, 2022, in response to the verified complaint in the Supreme Court matter in support of The J. Lawrence Werther Research Foundation (Affirm at ¶¶13-14).

Counsel states that Ms. Barbieri has a conflict of interest with the movant (Affirm at ¶19). Counsel states, in conclusory fashion, that Ms. Barbieri was a “staunch advoca[te]” against the movant in the Supreme Court matter (Affirm at ¶21). Given that this proceeding is “hotly contested” and that Ms. Barbieri “works directly” with this court, counsel argues that it would be “harmful in this case” for this court’s decisions to be questioned (Affirm at ¶¶20-21).

Absent a legal disqualification under Judiciary Law § 14, a judge is generally the sole arbiter of recusal (*People v Moreno*, 70 NY2d 403, 405 [1987]; *People v Smith*, 63 NY2d 41, 68 [1984] [noting that “the decision on a recusal motion is generally a matter of personal conscience”]; *People v Grasso*, 49 AD3d 303, 308 [1st Dept 2008] [“the court's decision to

continue to preside over the case also constituted a proper exercise of its broad discretion to determine whether recusal was warranted”). The Court of Appeals has 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,” but even when recusal is sought based upon “impropriety as distinguished from legal disqualification, the judge . . . is the sole arbiter” (*People v Moreno*, 70 NY2d at 406 [internal citations omitted]).

According to section 100.3(E)(1) of the Rules Governing Judicial Conduct (22 NYCRR), a judge “shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Instances in which a judge’s impartiality might be questioned includes where a judge “has a personal bias or prejudice concerning a party” or the judge has “personal knowledge of disputed evidentiary facts concerning the proceeding” (Rules Governing Judicial Conduct §100.3[E][1][a]).

Judges have been advised that they must isolate their law clerks and disclose the law clerk’s prior employment to all parties unless (a) the law clerk had no direct personal involvement in a matter that comes before the judge and the law clerk’s name does not appear in the papers filed in the matter or (b) the matter is uncontested (*see* Advisory Comm on Jud Ethics Op 15-172 [2015], citing Joint Op 07-105/07-119). A judge may continue to preside over the case if the judge concludes that the judge can be fair and impartial and that the law clerk does not participate in any way in the case and will be insulated from the case (*see* Advisory Comm on Jud Ethics Op 03-30 [2003]; Advisory Comm on Jud Ethics Op 09-27 [2009] [“taking into account matters such as the overall effectiveness of insulating the law clerk and any other relevant circumstances”]). Whether to continue to preside over the case is solely within the judge’s discretion (Advisory Comm on Jud Ethics Op 03-30 [2003]).

This court exercises its discretion and determines that recusal is unwarranted here. This court has no personal bias or prejudice concerning any of the parties. Nor does this court have any personal knowledge of the disputed evidentiary facts. This court will decide this proceeding and any related proceeding in a fair and impartial manner.

Given Ms. Barbieri's involvement in the Supreme Court matter, protocols have been implemented to insulate Ms. Barbieri from this and any related proceedings. On January 24, 2024, Diana Sanabria, Chief Clerk of this Court, notified the parties that Ms. Barbieri is no longer employed by the Attorney General, and that since January 19, 2023, had been appointed to serve as a Principal Law Clerk to this court (Notice of Motion, Exhibit A). The Chief Clerk explained that in the interest of protecting the parties' due process rights and to comport with judicial ethics, a protocol was developed by which Ms. Barbieri would be insulated from any involvement in this proceeding (Notice of Motion, Exhibit A).

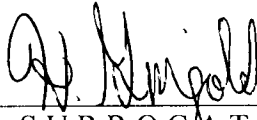
This proceeding and a related proceeding (under file no. 2019-991/D) have been reassigned to an impartial Court Attorney Referee within the Surrogate's Court law department. The reassignment has effectively insulated Ms. Barbieri from participating in this proceeding.

Accordingly, it is

ORDERED that the motion to disqualify this court is denied; and it is further

ORDERED that the Clerk of the Court shall email the parties, listed below, a copy of this decision and order.

Dated: March <sup>12</sup>28, 2024

  
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SURROGATE

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