

# Objective standard applied for judicial disqualification

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## VI. ETHICS

### A. *Objective Standard Applied for Judicial Disqualification*

Judges are required to recuse themselves from hearing a case upon evidence of personal bias or prejudice.<sup>1</sup> In *Parrillo v. Parrillo*,<sup>2</sup> the Rhode Island supreme court considered whether the judge hearing a child custody case erred in refusing to recuse himself after having contact with the maternal grandmother.<sup>3</sup> Finding that the trial judge's conduct did not raise reasonable questions of impropriety or judicial prejudice, the supreme court held that the trial judge did not err in choosing not to recuse himself.<sup>4</sup>

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statute, if clear and unambiguous, warrants literal construction. *See, e.g., Blue Cross v. Cannon*, 589 F. Supp. 1483, 1491 (D.R.I. 1984) (it is beyond cavil that plain and obvious meaning of clear and unambiguous statutory language generally controls); *Rathbun v. Leeson Corp.*, 460 A.2d 931, 933 (R.I. 1983) (court should apply literal and plain meaning to words if no evident contradictory legislative purpose); *Rule v. Dept. of Transp.*, 427 A.2d 1305, 1310 (R.I. 1981) (literal meaning given to statute's text when clear and unambiguous); *see also supra* notes 15-17 accompanying text (discussing cases interpreting criminal compensation statutes).

27. 490 A.2d at 968. Rhode Island case law interpreting the state's criminal injuries compensation act is limited. Since the Act's adoption, only one case has interpreted the Act's legislative intent and scope of coverage. *See Ayers-Schaffner v. Solomon*, 461 A.2d 396, 399 (R.I. 1983) (Rhode Island Criminal Injuries Compensation Act remedial in nature and should be construed liberally).

28. *See generally* Hoelzel, *supra* note 1, at 485, 485-87 (compensation programs represent new commitment to helping people recover from effects of crime).

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1. *See, e.g., Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979) (trial judge must hear case unless evidence of partiality exists); *Marr v. Marr*, 383 So. 2d 194, 196 (Ala. 1980) (judges should disqualify themselves if impartiality questioned); *Kelley v. City Council*, 61 R.I. 472, 482, 1 A.2d 185, 189 (1938) (judges disqualified upon evidence of personal bias or prejudice impairing impartiality).

2. 495 A.2d 683 (R.I. 1985).

3. *Id.* at 684.

4. *Id.* at 685-86.

On November 3, 1978, the family court entered a final divorce decree dissolving the marriage between Lori Parrillo (the mother) and Glenn Parrillo (the father).<sup>5</sup> The decree awarded the mother custody of the parties' two children.<sup>6</sup> Subsequently, the father petitioned the family court for change of custody, alleging the mother unfit to care for the children.<sup>7</sup> Pursuant to the father's allegations, the court reversed itself and issued an *ex parte* order granting the father's petition for custody and awarding the mother visitation rights.<sup>8</sup> Prior to the *ex parte* hearing, the trial judge received a letter from the maternal grandmother in which she complained of the delays in the issuance of the order and alluded to an earlier meeting with the trial judge.<sup>9</sup> The father moved to recuse the judge, alleging that this contact destroyed the judge's ability to rule on the case impartially.<sup>10</sup> The judge denied the father's motion, refused to recuse himself, and in a later proceeding returned custody to the mother.<sup>11</sup>

At the scheduled review of its order, the court further modified the decision in favor of the mother upon hearing testimony and noting that she had stabilized her life.<sup>12</sup> The father immediately appealed, challenging the family court's judgment on the merits and the family court judge's impartiality.<sup>13</sup> The Rhode Island supreme court upheld the family court's decision reasoning that the allegations of prejudice based on the trial judge's contact with the maternal grandmother failed to establish the requisite prejudicial state of mind or denial of a fair hearing by the judge.<sup>14</sup>

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5. *Id.* at 684-85. The court issued its original decree in 1978. *Id.*

6. *Id.* at 684. The father received visitation rights with the children on Sundays, Christmas, Thanksgiving, and on their birthday. *Id.*

7. *Id.* at 684. The father alleged that the mother continually entertained unrelated male friends in the home and left the children unattended which resulted in the children sustaining injuries. *Id.*

8. *Id.* The court awarded the father custody and the mother visitation rights on Tuesdays, Thursdays, and overnight on Fridays. *Id.*

9. *Id.*

10. *Id.* at 686. The father challenged the family court's order on three additional points. *Id.* First, the father alleged the trial judge failed to consider evidence regarding the best interests of the children. *Id.* Second, the father alleged that the trial judge abused his discretion in failing to appoint a guardian ad litem to apprise the court of the children's best interests. *Id.* Third, the father alleged that the trial judge abused his discretion by refusing to order a mental examination of the mother. *Id.*

11. *Id.* at 684-85. Finding the father's allegations of overnight male company and inattention of the children without merit, the court returned custody to the mother. *Id.* at 685. The court issued this decree pursuant to a review of the parties' agreement providing the mother time to stabilize her life. *Id.* The trial judge also denied the motions for the appointment of a guardian ad litem and for a mental examination of the mother. *Id.*

12. *Id.*

13. *Id.* at 685-87.

14. *Id.* at 685-86. The court also ruled on the father's remaining contentions. *Id.* at 686-

At common law, judges could not be challenged for prejudice because the law presumed their impartiality once sworn to administer impartial judge.<sup>15</sup> Retreating from this absolute position which maintained that justices had a duty to sit, the law of judicial disqualification evolved as courts began to hold judges incompetent upon evidence of bias or prejudice.<sup>16</sup> The law of judicial recusal is codified both at the federal level and in some states, while the remaining jurisdictions follow the common law.<sup>17</sup>

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87. The supreme court held that the trial court did not abuse its discretion in refusing to modify the custody decree or in failing to appoint a guardian ad litem, and upheld the lower court's refusal to order a mental examination of the mother. *Id.*

15. See *Leonard v. Willcox*, 101 Vt. 195, 212, 142 A. 762, 769 (1928) (judicial bias resulting from interest or relationship did not exist at common law); 3 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND § 477 (W. Jones ed. 1916) (common-law rule that judges cannot be challenged based on notion law will not presume bias if judge already sworn to administer impartial judge); see also *infra* note 16 and accompanying text (discussing duty to sit doctrine).

16. See, e.g., *Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979) (trial judge shall hear case unless reasonable basis to doubt impartiality or fairness of tribunal exists); *Duplan Corp. v. Deering Milliken, Inc.*, 400 F. Supp. 497, 511 (D.S.C. 1975) (democracy and due process suffer unless courts try cases fairly and therefore there is no fair trial before judge lacking impartiality); *Leonard v. Willcox*, 101 Vt. 195, 213, 142 A. 762, 770 (1928) (biased judges incompetent to sit as interferes with right to impartial trial); see also *State v. Nunes*, 99 R.I. 1, 4, 205 A.2d 24, 26 (1964) (right to have one's case heard by judge reasonably free from prejudice is part of fundamental right to fair trial). Judges are disqualified upon proof of prejudice resulting in the denial of a fair impartial trial. *Id.* See ETHICS FOR JUDGES 8 (2d ed. 1975) (judges should perform impartially and diligently); THE STATE TRIAL JUDGE'S BOOK 6-8 (2d ed. 1969) (cases are to be heard by independent impartial judges subject to disqualification for bias unless voluntarily recusing themselves); Lutteneker, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 237 n.6, 241 (1978) (Congress eliminated duty to sit to enhance public confidence in impartiality of judicial system). This duty was eliminated because the due process clauses of the fifth and fourteenth amendments require a fair trial at a fair tribunal. *Id.*; see Hjelmfelt, *Statutory Disqualification of Federal Judges*, 30 U. KAN. L. REV. 255, 260-61 (1982) (duty to sit now outweighed by need to protect judicial process). *But cf.* *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 958 (2d Cir. 1978) (judges have affirmative duty not to disqualify themselves unnecessarily especially once litigation commenced), *cert. denied*, 439 U.S. 1072 (1979); *United States v. Conforte*, 457 F. Supp. 641, 659 (D. Nev. 1978) (court discourages recusal and will look at distance of travel and relative availability of other judges before disqualifying judges), *aff'd*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980); *Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979) (judge obliged not to recuse absent valid reasons); *State v. Clark*, 423 A.2d 1151, 1158 (R.I. 1980) (judge obliged not to recuse in absence of valid reasons, recusal not in order by mere accusation unsupported by substantial fact).

17. See 28 U.S.C. § 144 (1982) (judge shall withdraw upon filing of affidavit of personal bias or prejudice); 28 U.S.C. § 455 (1982) (judges shall disqualify themselves when impartially might reasonably be questioned); see also *Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir. 1979) (section 455 expressly intended to abrogate duty to sit doctrine which required judge to hear case absent clear demonstration of extrajudicial bias or prejudice); *Marr v. Marr*, 383 So. 2d 194, 196 (Ala. 1980) (Alabama Canons of Judicial Ethics provide for disqualification when required by law or when impartiality might reasonably be questioned); *Amidon v. State*, 604 P.2d 575, 576 n.4 (Alaska 1979) (Alaska statute provides for disqualification of judge based on interest); *cf.* *Kelley v. City Council*, 61 R.I. 472, 481-82, 1 A.2d 185, 189 (1938) (Rhode Island follows common-law rule).

The law of judicial recusal in Rhode Island requires the complainant to prove bias or prejudice based on fact rather than opinion.<sup>18</sup> The complainant must establish that the justice's settled views prevented the complainant's right to a fair hearing.<sup>19</sup> Since the alleged prejudice must be directed against the complainant personally, neither heated criticisms nor adverse rulings alone are sufficient.<sup>20</sup> Finally, the complainant must affirmatively prove facts indicating that it is reasonable for the public, litigants, or counsel to question the trial justice's impartiality.<sup>21</sup>

In examining whether the trial judge erred in refusing to recuse himself, the *Parrillo* court first stated that one claiming judicial prejudice must establish that the judge ruled with a prejudicial state of mind.<sup>22</sup> The court noted that the trial judge's communication

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18. See, e.g., *State v. Clark*, 423 A.2d 1151, 1158 (R.I. 1980) (judge recused if reasonable for public, litigants, or counsel to question impartiality); *Cavanagh v. Cavanagh*, 118 R.I. 608, 621, 375 A.2d 911, 917 (1977) (respondent must establish judge had bias that swayed judgment), *aff'd*, 468 A.2d 286 (R.I. 1983); *Kelley v. City Council*, 61 R.I. 472, 481-82, 1 A.2d 185, 189 (1938) (disqualification if judge impaired by preconceived opinions).

19. See *Nelson v. Dodge*, 76 R.I. 1, 10-11, 68 A.2d 51, 56 (1949) (party urging disqualification must prove judge had partiality or prejudice); *Kelley v. City Council*, 61 R.I. 472, 482, 1 A.2d 185, 189 (1938); (prejudice or bias must be due to preconceived judicial opinion impairing judgment). See generally THE STATE TRIAL JUDGE'S BOOK, *supra* note 16, at 6-8 (judges personally interested or lacking impartiality subject to disqualification unless they voluntarily recuse themselves from further participation). The usual grounds for disqualification include situations in which the judge is a party to the action, related by blood or marriage to a party to the action, a material witness in the case, interested in the result, or otherwise biased and prejudiced. THE STATE TRIAL JUDGE'S BOOK, *supra* note 16, at 6.

20. See, e.g., *Rhode Island Defense Attorneys Ass'n v. Dodd*, 463 A.2d 1370, 1371 n.1 (R.I. 1983) (judges' silent acquiescence to police order instituting security procedures at courthouse insufficient evidence of bias); *Cavanagh v. Cavanagh*, 118 R.I. 608, 621, 375 A.2d 911, 917 (1977) (trial judge's criticisms of complainant's dress and behavior insufficient evidence of personal bias or prejudice), *aff'd*, 468 A.2d 286 (R.I. 1983); *State v. Buckley*, 104 R.I. 317, 320-22, 244 A.2d 254, 256-57 (1968) (adverse evidentiary rulings insufficient to prove bias or prejudice); see also *Nelson v. Dodge*, 76 R.I. 1, 10-11, 68 A.2d 51, 56 (1949) (trial judge's tentative opinion of sworn testimony not evidence of personal bias against complainants); cf. *In re IBM Corp.*, 618 F.2d 923, 930-31 (2d Cir. 1980) (proof of prejudice must be established clearly and convincingly and statistical patterns of rulings not enough); *United States v. Conforte*, 457 F. Supp. 641, 657 (D. Nev. 1978) (prejudice is result of opinion from sources other than contents of case), *aff'd*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980); *Leonard v. Willcox*, 101 Vt. 195, 215, 142 A. 762, 770 (1928) (prejudice must be directed against complainant and not against cause of action). But cf. *United States v. Carignan*, 600 F.2d 762, 764 (9th Cir. 1979) (prejudice against counsel so virulent as to represent bias for or against complainant on grounds for judicial disqualification).

21. See *State v. Clark*, 423 A.2d 1151, 1157-58 (R.I. 1981) (familiarity between members of bench and bar unreasonable ground for recusal since it is unreasonable for persons to question trial judge's impartiality); *State v. Nunes*, 99 R.I. 1, 5, 205 A.2d 24, 26-27 (1964) (reasonable for public to infer prejudice from trial judge suggesting defendant's guilt of crime).

22. 495 A.2d at 685; see *Leonard v. Willcox*, 101 Vt. 195, 219, 142 A. 762, 772 (1928) (judge disqualified upon admission of doubt from bench that any evidence would change

with the maternal grandmother concerned scheduling delays, rather than substantive discussions of the case merits.<sup>23</sup> Reasoning that the father neither established personal bias or prejudice based on the judge's conduct, nor proved that the judge's actions raised reasonable questions of impartiality, the court affirmed the family court's judgment and dismissed the father's appeal.<sup>24</sup>

In determining that the father failed to affirmatively establish that the trial judge had personal bias resulting in a prejudicial judgment, the Supreme Court of Rhode Island reaffirmed the state's position on recusals.<sup>25</sup> The court followed sound and well-settled state precedent since the proof required for judicial recusal, while difficult to establish, is based upon an objective test.<sup>26</sup> Under *Parrillo*, judges will be disqualified only upon clear averments of personal bias or prejudice, or upon facts showing conduct raising reasonable questions of judicial impartiality.<sup>27</sup>

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beliefs already formed). See generally *State v. Nunes*, 99 R.I. 1, 5, 205 A.2d 24, 27 (1964) (prejudice essentially state of mind and ascertainable by reasonable inferences drawn from judge's conduct and surrounding circumstances).

23. 495 A.2d at 684, 686; see also *Cavanagh v. Cavanagh*, 118 R.I. 608, 623, 375 A.2d 911, 918 (1977) (no judicial misconduct since case merits not discussed and meeting not intended to influence judicial action), *aff'd*, 468 A.2d 286 (R.I. 1983).

24. 495 A.2d at 687.

25. *Id.* at 686; see *supra* notes 18-21 (discussing Rhode Island position on judicial recusals).

26. *Id.* at 685-87; see *supra* note 18 and accompanying text (discussing objective standard requirement).

27. 495 A.2d at 685-86.