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OPINION OF THE CONNECTICUT PROBATE COURT

IN RE: MOTION FOR RECUSAL AND/OR DISQUALIFICATION OF JUDGE LISA K. WEXLER FROM THE ESTATE OF CLARA MERTENS

PROBATE COURT, WESTPORT/WESTON DISTRICT

MAY 11, 2016

EDITOR'S SUMMARY & HEADNOTES

Executors of the Estate argued that three allegedly ex parte communications sufficiently affected the proceedings, such that disqualification of the Judge was required pursuant to section 68.1 (a)(1) of the Probate Court Rules of Procedure. The Court found that two of the three were substantively petitions or motions and, therefore, not ex parte communications according to the rule. The third communication was found by the Court to be ex parte, even though each party was on notice of the communications because it was sent to all counsel of record. The Court found that the ex parte communication was only meant to clarify information that had already been provided. The Court found that these circumstances would not permit an objective person to reasonably doubt the Court's impartiality, and therefore denied the Executor's Motion for Recusal and Disqualification.

1. **Judges: Recusal and Disqualification**

   Pursuant to the Connecticut Probate Code of Judicial Conduct, a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

2. **Probate Court: Filing**

   A document must be typed or printed in ink, signed, refer to the name of the matter and must satisfy requirements of any governing statute or

rule. A document may be accepted by the court if it is in substantial compliance with these requirements. While a significant number of "official" forms are provided, the rules make clear that their use is not required.

3. Ex Parte Communications: Generally

Pursuant to the Connecticut Code of Probate Judicial Conduct, a judge shall discourage ex parte communications in all but administrative matters and shall not initiate them in any contested matter.

4. Ex Parte Communications: Generally

Pursuant to the Connecticut Code of Probate Judicial Conduct, if an ex parte communication occurs in a contested matter the judge shall: reveal the general substance of the ex parte communication to the parties and their counsel attending the next court hearing; or notify all parties and their counsel of the general substance of the ex parte communication promptly after receiving it; or the judge shall seek recusal from the case.

5. Ex Parte Communications: Generally

Pursuant to Rule 68.1 of the Probate Court Rules of Procedure, except as otherwise provided by law, no person, party or attorney for a party shall initiate any written or oral communication with a judge outside a noticed hearing regarding a matter that is pending or impending in the court.

6. Ex Parte Communications: Generally

Pursuant to Rule 68.1 of the Probate Court Rules and Procedure, ex parte communications are not prohibited for any written: (1) petition, motion or objection to a petition or motion; (2) brief or memorandum of law; or (3) filing or report required by law or the court.

7. Executor: Attorney's Fees

Obligations of an executor, contracted in the course of administration, may be allowed as proper charges against the estate in the final account, but are, nonetheless, the private debts of the executor for which he alone is liable in his private capacity.

8. Executor: Attorney's Fees

Obligations incurred by executors are proper charges against the estate if the court determines that they are justly due and so incurred that they ought to be equitably paid out of the assets of the estate.

Opinion

The Executors[1] seek the recusal of the undersigned arguing that this Judge was the intended recipient and did in fact receive ex parte communications from the beneficiaries. The Executors argue that these communications tainted the proceedings such that an impartial observer could question the Judge's impartiality. They do not assert any misconduct by the undersigned. Executors' Memorandum of Law dated March 4, 2016, 1. Nonetheless, they argue that the recusal is necessary to maintain the appearance of impartiality. They further request that if the Judge does not recuse herself, this Motion for Disqualification be heard by another judge.

Facts

Clara F. Mertens died in October of 1985. Her Estate has been open in Westport Probate Court for these thirty-one-years because she and her family were Holocaust survivors whose personal possessions were confiscated by the Nazis during the late 1930's, when millions of Jewish families were looted, separated, tortured, and eventually killed during World War II. Most of Clara's family perished during the war, but she, her mother, and one sister survived.

Clara's father was an art collector. Many valuable pieces of art confiscated by the Nazis were eventually distributed or sold to persons and institutions who claimed ownership of this art. The story of the Clara Mertens Estate is the story of how the Executors and Attorneys for the Estate managed to regain title to some of the art, and whether and to what extent their fees for doing so are permissible under Connecticut law. All of the residuary Beneficiaries of the estate, all of whom are charitable entities, now question some of the decisions made by the Executors during this process. They also object to the remuneration sought by the Executors and their Attorneys for their efforts.

There were many years in which this Court had little to no involvement with this Estate. Occasional interim accountings were filed. The Executors sought approval for fiduciary and attorney's fees on a contingent basis on two separate instances.

After the Executors obtained and then sold some extremely valuable artwork, they filed another interim accounting with the Court for the period of June 30, 2012, through December 19, 2014 ("Interim Accounting"). Beneficiary objections were filed. A *pro hac vice* hearing was held to permit Aurora Cassirer, Esq., an attorney admitted to the New York Bar, to represent her client, beneficiary Technion Institute, in this Court in Connecticut. The Court held a

[1] The motion is made on behalf of the Executors and Sherwood & Garlick. Atty. Diviney of Sherwood & Garlick appears in this matter as Attorney for the Executors. As such, Sherwood & Garlick is not, itself a party to this matter and appears to have no standing, on its own behalf, to make such a motion. However, it is unnecessary to address this issue as the Executors, who are proper parties, have joined in the Motion.

Hearing Management Conference in July of 2015, thereafter issuing scheduling orders for discovery. The Court verbally instructed Richard Diviney, Esq., counsel for the estate with Sherwood and Garlick, not to distribute any of the $40,000,000 in funds he represented, which he held in a separate estate account, until these issues were resolved.

Discovery took place. In January, the Beneficiaries petitioned for an immediate hearing alleging that there was actually only approximately $34,000,000 in the estate account, and that money had been paid to the Executors and the Attorneys. A hearing was held in January of 2016, at which time Mr. Diviney apologized to the Court for what he said; there was a misunderstanding of the Court's instructions regarding the money. Another hearing was held in March of 2016. It was at this March hearing that the Executors asked for this Judge to recuse herself from the case, stressing that the recusal motion was not based on any actions of this Judge or Court, but rather based on improper ex parte communications sent to the Court by counsel for the Beneficiaries.

Except for the scheduling orders, and the approval of the stipulation of the parties, this Judge has issued no rulings whatsoever with respect to this case.

Law

Recusal and disqualification is governed by Rule 15 of the Probate Court Rules and Procedure. Conn. R. Prob. 15 (2016). Section 15.2 provides, in relevant part, that "[a] judge shall disqualify himself or herself if required under . . . these rules." *Id.* at 15.2.

[1] The Connecticut Code of Probate Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." Conn. Code of Prob. Jud. Conduct, Canon 3, Section E(1) (2012). A non-exclusive list of examples follows. They include a matter in which "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer or personal knowledge of disputed evidentiary facts concerning the proceeding." *Id.* at Section E(1)(a). The Executors neither allege that the undersigned has a personal bias or prejudice in this case, nor that this Judge has any personal knowledge of disputed evidentiary facts concerning the proceeding.

The Probate Court Rules and Procedure provide that "[a] party seeking disqualification of a judge shall file a motion . . . for disqualification." Conn. R. Prob. 15.3(a). The disqualification should come "at least three business days before the hearing on the matter for which disqualification is sought." *Id.* at 15.3(b). Executors did not meet this three-day requirement, having filed their motion on the Friday afternoon before a Monday hearing. Nonetheless, the Court waived this requirement pursuant to section 15.3(c); "[t]he court may waive the requirement of subsection (b) if strict adherence will cause injustice," because all parties were present with counsel to respond to the motion, and all parties were

further provided the opportunity to submit briefs and reply briefs to the court after the hearing. *Id.* at 15.3(c).

Section 15.4(a) of the Probate Court Rules provides that "[o]n receipt of a motion for disqualification, the judge shall: (1) disqualify himself or herself; (2) conduct a hearing on the issue of disqualification; or (3) ask the probate court administrator to cite another judge . . . to hear and decide the issue of disqualification." *Id.* at 15.4(a). Because all parties were present, and the motion for recusal necessitated a stay with respect to the substantive issues raised by the beneficiaries, the Court held a hearing on the recusal motion itself. Counsel presented oral argument followed by written briefs, the reply brief supplementing its original brief accompanying the motion.

The sole argument for disqualification of the undersigned Judge is that she received three ex parte communications. Before addressing the alleged ex parte communications identified by the Executors, it is appropriate to consider some underlying principles of probate procedure.

"Probate proceedings have been characterized in general as expeditious, informal, simple, and flexible." Ralph H. Folsom & Gayle B. Wilhelm, *Gen. Principles of Prob. Ct. Proc., Prob. Jurisdiction and Proc. in Conn.*, §3:4 (2d ed.) (2017). "The issues involved . . . are not determined by formal pleadings, but by the statute providing for the proceeding described in the application for Probate Court action." *Id.* at §3:7. "[T]he forms of common law process and pleadings are not regarded, and can not be . . . ." *Wardens & Vestry of Trinity Church v. Hall*, 22 Conn. 125, 133 (1852). Probate courts are not "hampered by unyielding forms, and can adapt their proceedings, orders and decrees so as to meet the exigencies of the particular case before them . . . ." *Coggill v. Botsford*, 29 Conn. 439, 447 (1861). "[T]he utmost strictness in declaring is not usually considered so essential, and when by fair and reasonable intendment the necessary averment can be substantially found, the complaint will be held sufficient." *Treat's Appeal*, 40 Conn. 288, 291 (1873).

[2] The Probate Court Rules of Procedure establish basic filing requirements that are in accord with the above principles. Conn. R. Prob. 7. A document must be typed or printed in ink, signed, refer to the name of the matter, and must satisfy requirements of any governing statute or rule. *Id.* at 7.1(a)(1)-(4). A document may be accepted by the court if it is in substantial compliance with these requirements. *Id.* at 7.1(b). While a significant number of "official" forms are provided, the rules make clear that their use is not required. Parties are free to use other forms, provided only that they comply with the applicable statutes and rules. *Id.* at 7.3.

[3] The Code of Probate Judicial Conduct provides that a judge shall discourage ex parte communications in all but administrative matters and shall not initiate them in any contested matter. Code of Prob. Jud. Conduct, Canon 3, Section B(7)(a). The Executors do not allege that the undersigned initiated any ex parte communication in connection with this matter.

[4] In addition, section 3B(7) provides for the appropriate response of a judge to an ex parte communication. Subsection (a)(i) provides that if an ex parte communication occurs in a contested matter:

> the judge shall reveal the general substance of the ex parte communication to the parties and their counsel attending the next court hearing OR notify all the parties and their counsel of the general substance of the ex parte communication promptly after receiving it, OR the judge shall seek recusal from the case.

Id. at Section B(7)(a)(i). Thus, the fact of an ex parte communication does not, in itself, mandate the judge's recusal.

[5] [6] Section 68.1 of the Probate Court Rules of Procedure, entitled "Ex parte communication prohibited," states: "[e]xcept as otherwise provided by law, no person, party or attorney for a party shall initiate any written or oral communication with a judge outside a noticed hearing regarding a matter that is pending or impending in the court." Conn. R. Prob. 68.1(a). At the same time, "[t]his section does not apply to any written: (1) petition, motion or objection to a petition or motion; (2) brief or memorandum of law; or (3) filing or report required by law or the court." *Id.* at 68.1(a)(1)-(3). The threshold question for this Court is, given Rule 68.1(a)(1), whether any of these three communications even constitute ex parte communications. Then the next issue would be whether, if any of such communications are ex parte, do they rise to the level of significance that they would constitute a situation where this Judge's impartiality could reasonably be questioned.

Discussion

The Executors requested that this Court not hear the Motion for its own recusal. At the outset, this Court wishes to make known that it considers a Motion for Recusal very seriously, and is sensitive to the argument that could be made that the subject Judge cannot fairly hear a motion for her own recusal because of her personal stake in the outcome. In fact, this Court would have referred this Motion for Recusal to probate court administration to be heard by another judge if the grounds for recusal constituted colorable allegations of fact regarding improper judicial conduct. However, it is undisputed that in this instance no such allegations are being made. The conduct of this Judge is not at issue—what is at issue is whether or not, as a matter of law, certain written communications, which were copied to all parties, constitute impermissible ex parte communications. This Court is well qualified to answer such questions and shall do so.

Moving to the issue of the ex parte communications on which this Motion is based, we look to the particular documents offered as a basis for disqualification. In their Memoranda of Law, Executors argue that three documents, dated January 12, January 13, and March 1, 2016, constitute ex parte communications. A review of those documents reveals that each is in letter form,

addressed to the undersigned Judge, and signed by counsel for one of the Beneficiaries. In each case, copies were certified as sent to all counsel of record. Counsel for the movants admits that they actually received all such documents. The issue is whether any or all of these communications constitute ex parte communications within the meaning of Rule 68 of the Probate Court Rules of Procedure. Conn. R. Prob. 68.1.

The opening paragraph of the document dated January 12, 2016, after referring to the conference to occur the following day, requests that the Court take certain actions to address alleged "abusive and deceptive practices" that have purportedly caused harm to the Estate. The alleged actions are described in the body of the document. It concludes with the request that the Court take six specified steps alleged to be necessary for the preservation of the Estate.

The Executors vigorously argue that this document does not constitute a motion. Referring to the definition of a motion found in section 1.1(18) of the Rules of Procedure, they claim that it "fails to satisfy either requirement of a motion: (1) it did not seek a court action; and (2) it wasn't incidental to the matter before the court." *Reply Brief of Beneficiaries* at 11. This Court is not persuaded.

The Executors misconstrue the definition of "motion" as set forth in section 1.1(18) of the Rules of Procedure. It is necessary to compare the meaning of "motion" with that of "petition" under section 1.1(26). A petition "commences a matter in the court." Conn. R. Prob. 1.1(26). A motion is "a written filing seeking court action that is incidental to the matter before the court." *Id.* at 1.1(18). The "incidental" aspect of a motion is simply that it does not commence a new proceeding in the court.

The January 12 document begins with the request that the undersigned Judge "take certain actions to prevent, and to correct" actions which the beneficiaries claim "have harmed and continue to harm the Mertens Estate." In conclusion they "request that the Court take the following interim steps to safeguard the Estate's assets," followed by six lettered paragraphs, each of which requests the issuance of a specific order.

The Court notes that the timing of this Motion left much to be desired, having been filed on the day before the scheduled conference. However, had this document been presented in the form of a motion and titled as such, there could be no doubt that it would not constitute an ex parte communication under section 68.1(a)(1) of the Rules. *Id.* at 68.1(a)(1). Given the substance of the document, to argue that it is not a motion but an ex parte communication is to place form over substance. The Supreme Court of Connecticut "repeatedly has eschewed applying the law in such a hypertechnical manner so as to elevate form over substance." *Lostritto v. Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 34 (2004). That is particularly true in the context of the probate courts, which, as noted above, do not require formal pleadings and are not "hampered by unyielding forms . . . ." *Coggill*, 29 Conn. at 447.

Notwithstanding that it is in the form of a letter, this Court finds that it is, in substance, a motion. It is a written filing seeking court action that is incidental to the matter before the court. Conn. R. Prob. 1.1(18).

Moreover, Executors cannot now be heard to claim that the filing of these petitions operated to their detriment. At the conference on January 13, the parties asked for, and were granted, time to confer. They thereby reached an agreement that was ultimately reduced to a written stipulation and filed with the Court. That stipulation, according to Executors' own characterization, gave the Beneficiaries four of their six demands. *Reply Brief of Beneficiaries* at 5. It is incongruous for them to argue that, having stipulated to most of the requests made in the Motion, its filing impermissibly taints the proceedings.

Executors further argue that "[o]ver the Executors' objection, the Court ruled that the Executors' legal fees to defend their accounting could no longer be drawn from the estate thereby awarding the Beneficiaries demand from their list." *Reply Brief of Beneficiaries* at 5. They assert that the Beneficiaries thereby "obtained actual, significant relief on a contested matter without a motion, an opportunity for objection or an actual hearing being held." This assertion is not, however, accurate.

First, paragraph 2 of the Stipulation provides that "no further disbursements will be made from the Estate account without Court order." This covers all payments, including those for attorney's fees. This is not the result of a ruling by the Court, but of the stipulation of all parties, including the Executors.

Next, the Court did not, in fact, enter any order specific to legal fees. The only order that came out of the January 13 conference was the Court's adoption, as an order, of the written stipulation of the parties. It contains no order specific to legal fees.

[7] [8] In the course of the January 13 conference, the Court made a statement concerning attorneys' fees. It noted that Executors may or may not be awarded attorneys' fees, but that no such determination would be made at that point. This was not an order or ruling, but merely a statement of the governing law.[2] It has long been held that the obligations of an executor, contracted in the course of administration, may be allowed as proper charges against the estate in the final account, but are, nonetheless, the private debts of the executor for which he alone is liable in his private capacity. *Chambers v. Robbins*, 28 Conn. 542, 555 (1859). *See also Hewitt v. Beattie*, 106 Conn. 602, 613 (1927); *Dillaby v. Wilcox*, 60 Conn. 71, 75 (1891); *Sophia Miller's Appeal from Probate*, 20 Conn. Supp. 179, 181 (1956); *Ballard v. Estate of Ballard*, 13 Conn. Supp. 400, 402 (1945). In effect, the executor seeks indemnification

[2] Section 3.3 of the Rules requires that all decrees shall be in writing. Any decrees stated orally must be memorialized in writing. Conn. R. Prob. 3. The file contains no such writing with respect to this alleged ruling by the court.

from the estate for such expenses, and the allowance of the same is in the discretion of the probate court. *Ballard,* 13 Conn. Supp. at 402. If properly incurred, they are allowed in the account as a matter of course. *Hewitt,* 106 Conn. at 613. Obligations incurred by executors are proper charges against the estate if the court determines that they are "justly due" and "so incurred that they ought to be equitably paid out of the assets of the estate." *Id.* at 614.

Executors are precluded from making any payments from the Estate account, including for attorneys' fees, without an order from this Court. This is not, however, the result of a ruling by the Court over their objection, but is part of the stipulation of all parties to which the Executors agreed. Ultimately, the Court will determine, in accordance with the established law set forth above, the extent to which the fees of the Executors' attorneys are lawfully payable from the Estate. No such determination has been made at this point.

The nature of the March 1 document is similar to that of January 12. The opening paragraph states that "the beneficiaries hereby give notice that they seek the removal of the executors." It goes on to address the statutes governing removal of executors. It states the alleged facts upon which the beneficiaries claim that removal would be appropriate. It concludes with the request that the court take specific steps: (a) removal of the executors by unanimous agreement of the beneficiaries; or (b) removal of the executors for cause; and (c) an order that the attorney for the executors cease further action on behalf of the estate.

The court finds that the March 1 document is, in substance, a petition or motion within the meaning of section 1.1 of the Probate Rules of Procedure.[3] It clearly requests action by the Court, sets forth the legal authority for such action and the facts that allegedly support it. To conclude that, by virtue of the fact that it is in the form of a letter, it is something other than a petition or motion would be to elevate form over substance. Moreover, this Court finds that the recitation of the reasons for the relief is similar to those found in any complaint in any court. This Court leaves these movants to their proof.

The January 13 document presents a different picture. Following the conference on the same date, counsel for one of the beneficiaries sent the document to the undersigned by email.[4] Noting that "estimates" of certain payments had been provided in the course of the conference, the email purports to provide more accurate information obtained after review of the relevant records. This document does not seek action by the Court. Instead, it seeks to supplement information provided to the Court in the course of the conference earlier that day. As such, it clearly constitutes an ex parte communication, even

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[3] No hearing has yet been set on this Motion due to the pendency of this Motion for Disqualification. Pursuant to section 15.3 (d) of the rules, the Motion for Disqualification must be determined before any underlying matter can be heard. Conn. R. Prob. 15.

[4] The undersigned responded with an email to all counsel indicating that any such correspondence be directed to the clerk of the court in order to avoid ex parte communications.

though it was copied to all parties, none of whom denies receipt. The Court notes that no party objected to the January 13 communication until after the March 1 document was filed.

The question then becomes whether the contents of this communication sufficiently taint the proceedings such that an outside observer could reasonably question the Judge's impartiality. The answer to that question is clearly "no."

The information contained therein relates to the amounts of certain payments allegedly made from the estate account. It purports to supplement and clarify information already provided to the Court in the course of the conference earlier that day. The purpose of the conference was to address the beneficiaries concerns about payments made from the estate. *Reply Brief of Beneficiaries* at 3. The result of the conference was that the parties, after discussions between them, reached an agreement on certain matters. Their agreement was embodied in a written stipulation. The Court accepted the stipulation as filed and entered it as an order. The January 13 communication in no way impacted the stipulation or the Court's order.

Moreover, the information contained in the communication has not, and will not, be considered by the Court. Should any party wish such information to be so considered in future proceedings in this matter, such as the Motion for Removal of the Executors or in connection with their account, it will need to be offered in evidence in the usual course. Unless and until that happens, this Court will give no consideration whatsoever to the information contained in the January 13 communication.

The primary case law support for the movant's argument appears to be some dicta in the case of *Bruno v. Chase Home Fin., LLC,* No. DBDCV135009149S, 2014 WL 6996492 (Conn. Super. Ct. Oct. 31, 2014), but this Court finds both the facts and the law of that case to be inapposite to this case. In the *Bruno* case, which was a decision as to whether or not to sanction an attorney who had acted in a divorce matter, the court's reasoning actually supports the Beneficiaries' argument. *Id*. at *1. In *Bruno,* the wife was unrepresented by counsel, but the husband had counsel. *Id.* at *4. There was a hearing in which the husband's counsel presented argument. The wife argued that she had no way of knowing whether either or both judges had read the letter and she had no ability to respond in a timely fashion. *Id.* at *2. During the hearing, she argued that her rights were prejudiced. *Id.* The husband's counsel argued that he had mailed the letter and that because he had certified that he had mailed the letter, such mailing constituted notice and therefore the letter could not have been an ex parte communication. *Bruno*, 2014 WL 6996492, at *4. The court conducted a lengthy discussion of the purpose of barring ex parte communications:

> [t]he purpose of the requirement of notice is to furnish the party against whom a claim was to be made such warning as would prompt him to make such inquiries as he might deem

> necessary or prudent for the preservation of his interests, and such information as would furnish him a reasonable guide in the conduct of such inquiries, and in obtaining such information as he might deem helpful for his protection . . . .

Id. (citing *Wasilewski v. Comm'r of Transp*., 152 Conn. App. 560, 567 (2014)). The court further stated the following:

> [t]he prohibition on such communication is designed to make sure that the parties are given the opportunity to reply to their adversary's argument. Therefore, it is not the accuracy of the information that is determinative, but rather the fact that the plaintiff was not afforded an opportunity to dispute the accuracy of the information in the letter . . . .

Id. (citation omitted). The court found that the wife's testimony was credible in that she had not received the letter on a timely basis. *Id*. Further, the court found that the plaintiff had no warning about the allegations in the letter that would have allowed her to preserve her interest. *Id*. Moreover, the court found that the letter invited the court to take action before the wife had an opportunity to respond. *Bruno*, 2014 WL 6996492, at *4.

In this case, it is undisputed that the Executors and their counsel, and the counsel representing their counsel, all had actual notice of all of these communications. All parties would have had plenty of opportunity to respond to the various accusations made in the communications, which this Court more accurately views as petitions. No rights were compromised; this Court has not yet had the opportunity to hear evidence on any of the substantive allegations made in the Motions. Furthermore, the Beneficiaries indicated that they would be investigating the finances of this Estate back in July of 2015. The shock and alarm argument by the counsel to the Executors strikes this Court as disingenuous.

The crux of the movant's argument to this Court is that disqualification is necessary because a reasonable person would conclude that a judge's impartiality would be irrevocably compromised merely by reading the allegations of a petition set forth in the form of a letter. Were the undersigned to follow this line of reasoning, no judge would ever be able to sit on any case in which detailed complaints are filed. This Court rejects this argument. Furthermore, it finds that neither the Executors nor their counsel were actually harmed by the mere allegations contained in these motions.

The ability of judges to disregard evidence not properly before them is well established in our law. In a criminal matter in which the judge received an unsolicited letter about the defendant prior to sentencing the Connecticut Supreme Court said:

> [t]o impose, however, a requirement that a criminal trial court recuse itself every time it receives unsolicited material

> uncomplimentary to a defendant prior to trial or sentencing would create an intolerable situation which could lead to a manipulation of the criminal justice system . . . [the trial judge] emphatically and categorically stated that he could, and would, disregard the letter's contents. There is no reason to believe he could not do so, or that a reasonable person would have cause to question his ability to do so.

State v. Santangelo, 205 Conn. 578, 602 (1987).

In a matter in which the trial court requested certain information but received additional unsolicited information in the nature of evidence, the Connecticut Supreme Court said:

> [t]he mere fact that information has improperly come to the attention of the trier does not invariably compel a new trial. In cases tried to a jury, curative instructions can overcome the erroneous effect of statements that a jury should not have heard. It would be anomalous indeed to hold that an experienced trial court judge cannot similarly disregard evidence that has not properly been admitted.

Ghiroli v. Ghiroli, 184 Conn. 406, 408 (1981) (citations omitted). In court trials, judges are expected to be capable of disregarding incompetent evidence. *Doe v. Carriero*, 94 Conn. App. 626, 640 (2006).

The Executors correctly point out that proof of actual bias is not required to make a case for recusal. At the same time, because there is a strong presumption that judges perform their duties impartially, a claim that a judge is required to recuse himself or herself must be supported by more than mere speculation, conclusory opinion, or representations of counsel. *State v. Rizzo*, 303 Conn. 71, 126 n. 48 (2011). The question is whether another, not knowing whether the judge is actually impartial, might reasonably question the judge's impartiality on the basis of all of the circumstances. *Burton v. Mottolese*, 267 Conn. 1, 30 (2003).

A judge also has at least as great an obligation to remain seated on a case as she does to recuse herself where she is not disqualified by law. *Laird v. Tatum*, 409 U.S. 824, 837 (1972); *Rosen v. Sugarman*, 357 F.2d 794, 797-98 (1966). In contentious litigation, a motion for recusal may itself be a strategy employed to induce delay prejudicial to the interests of a party. Our principles of law strongly discourage this as being contrary to the interests of justice and casting unsubstantiated doubt on the competency of the judiciary.

Conclusion

The Executors base their request for disqualification upon three allegedly ex parte communications which they contend sufficiently taint the proceedings such as to require disqualification. The Court finds that two of the three are, in substance, petitions or motions and, as such, do not constitute ex parte communications under our rules. Accordingly, they cannot form the basis for the instant motion. The Court finds that the third communication sent on January 13 was, in fact, ex parte in nature, despite the fact that it was copied to all parties. However, its content merely sought to add, in minimal fashion, to information already before the Court, and was disregarded by the Court. Under these circumstances, it cannot be said that an objective person would reasonably doubt the Court's impartiality.

For the foregoing reasons, the Motion for Recusal and Disqualification is denied.

For purposes of forestalling future arguments regarding the form of pleadings, this Court suggests that all parties formalize their motions in this case and avoid a letter format. In addition, the parties should observe the filing requirements of Rule 7. Conn. R. Prob. 7.

It is so ORDERED.

Dated at Westport, Connecticut, this 11th day of May 2016.

/s/

Lisa K. Wexler, Judge