

# Court of Appeals of the State of Georgia

ATLANTA,

*The Court of Appeals hereby passes the following order:*

## **A09A0385. GEORGIA REAL ESTATE APPRAISERS BOARD v. KROUSE.**

This Court's decision in the above-styled case was rendered on July 14, 2009. Appellee timely filed its Notice of Intent to Petition for Writ of Certiorari in this Court and thereafter, on August 1, 2009, filed a Petition for Writ of Certiorari in the Georgia Supreme Court. On September 28, 2009, the Supreme Court denied appellee's petition. On September 30, 2009, appellee filed in this Court a pleading entitled "MOTION OF APPELLEE FOR EXTRAORDINARY RELIEF." In the motion, appellee requests that the Court opinion in this case be withdrawn and that the matter be reassigned to another panel for resolution. As ground for the motion, appellee asserts that a "reasonable question of impartiality" exists as to Judge Debra H. Bernes, who authored the opinion, because her husband formerly served as a member and past chairman of the Georgia Real Estate Appraisers Board, "which prosecuted [the] action." For the reasons discussed below, the motion is DENIED.

As an initial matter, appellee's motion is in substance a motion to recuse. See *Roberts v. Bienert*, 183 Ga. App. 751, 754 (2) (360 SE2d 25) (1987) ("The well established rule in Georgia is that . . . the substance, rather than the nomenclature, of legal pleadings determines their nature.") (citation and punctuation omitted). As such, appellee's motion is subject to Court of Appeals Rule 44, which requires that [a]ny motion to recuse or disqualify a judge in a particular case shall . . . contain such evidence and affidavits which shall fully assert the facts upon which the motion is founded. . . . The affidavit shall clearly state the facts and reasons for the belief that bias or prejudice exists, being definite and specific as to time, place, persons and circumstances . . .

Court of Appeals Rule 44 (a), (b). Because appellee failed to file an accompanying affidavit with his motion as required by Rule 44, the motion is legally insufficient.

Furthermore, the service of Judge Bernes's husband on the Appraisers Board terminated in 2004.<sup>1</sup> Significantly, the Appraisers Board did not commence its investigation of appellee until 2005, after Mr. Bernes had completed his service on the board. Moreover, almost five years elapsed between the time Mr. Bernes completed his service on the Appraisal Board and the time the Court rendered its decision in this case. Under these circumstances, Judge Bernes's impartiality in this case could not be reasonably called into question.

We also find persuasive Opinion 222 of the Judicial Qualifications Commission, where the Commission considered "the propriety of newly appointed or elected judges who formerly served as District Attorneys presiding in cases involving matters which were of record in the District Attorney's office prior to the judge's appointment or election." Judicial Qualifications Commission, Opinion 222, at p. 2-146. The Commission concluded that "so long as the newly selected judge did not *personally* serve as a lawyer in the matter in controversy or gain knowledge of disputed evidentiary facts concerning the proceeding, his or her impartiality might not reasonably be questioned." (Emphasis in original.) *Id.* at p. 2-147. A fortiori, it follows that a judge may appropriately sit on a case involving a governmental agency or board upon which his or her spouse formerly served, where, as here, the spouse did not personally participate in the matter in controversy or gain knowledge of disputed evidentiary facts concerning the proceeding.

Finally, we note that appellee previously filed a similar motion in the Georgia Supreme Court. That motion was denied on the merits.

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<sup>1</sup> Mr. Bernes's service on the Appraisal Board terminated no later than August 20, 2004, the date on which his board replacement began his service. All the facts giving rising to the complaint against appellee had not yet accrued by that date.

*Court of Appeals of the State of Georgia  
Clerk's Office, Atlanta*

*I certify that the above is a true extract from  
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court  
hereto affixed the day and year last above written.*

....., Clerk.