motion to file over-length petition granted, see ruling dated 7/30/20

98801-3

Division III, Case No. 365492

SUPREME COURT
FOR THE STATE OF WASHINGTON

BRITA GULSETH, RESPONDENT

v.

ANDREW GULSETH, APPELLANT
Craig A. Mason, Appellant in His Own Right re: Sanctions

PETITION FOR DISCRETIONARY REVIEW
Under RAP 13

Craig Mason, WSBA#32962
Attorney for Petitioner(s)
W. 1707 Broadway
Spokane, WA 99201
509-443-3681
masonlawcraig@gmail.com

TABLE OF CONTENTS **Page**

TABLE OF CONTENTS, cont. **Page**

TABLE OF CONTENTS, cont. **Page**

TABLE OF AUTHORITIES **Page**

TABLE OF AUTHORITIES, cont. **Page**

A. IDENTITY OF MOVING PARTY

Appellants, Andrew Gulseth and Counsel, Craig A. Mason ask the State Supreme Court to review the 5/12/20 unpublished opinion of Division III of the Court of Appeals and reinstate the assigned commissioner, or remand for a legal and factual basis for the reassignment, and they ask the State Supreme Court to reverse sanctions imposed for requesting the legal basis of the last-moment reassignment of commissioner on alleged bases not in the record and on bases not consistent with the current case law of Washington State.

The 5/12/20 opinion and the 6/23/20 denial of reconsideration are attached in the Appendix.

B. DECISION TO BE REVIEWED

The 5/12/20 opinion upheld the procedurally confused, or erroneous, last-moment reassignment/removal of an assigned commissioner, and the opinion upheld sanctions for requesting the legal basis of such a last-moment removal/reassignment of the commissioner.

The application of the judge-made rule that there can be no disqualification of commissioners is asked to be reviewed and revisited, and/or the proper procedures for removal (or alleged recusal) of a commissioner is sought to be formulated on review.

Reinstatement of the assigned commissioner and vacation of the sanction for requesting the legal basis of the reassignment of the commissioner is requested.

C. ISSUES PRESENTED FOR REVIEW

Issue No. 1: In a county in which the commissioners are assigned for the life of the case (potentially for 22 years from newborn child through post-secondary support) is it prejudicial to allow only one party to "commissioner shop" through processes (a) that are certainly off the record (as only speculations are provided by reviewing courts below), and (b) that by rational inference required ex parte contact with the courts? *Answer:* Yes, the prejudice on these facts is clear.

Issue No. 2: Should the court revisit the judicial interpretation of legislative intent (e.g., *State v. Espinoza*, infra) that a commissioner may not be disqualified from a case because the right of revision is sufficient protection against whatever bias or prejudice a party may otherwise fear? *Answer*: Yes, to provide regularity, consistency, and due process for all, the process must be revisited and clarified on discretionary review.

Issue No. 3: Is there a sufficient basis in the record in this case to justify the last-moment reassignment of the family law commissioner to another commissioner less than a day before hearing? *Answer*: No. The originally

assigned commissioner should be reinstated (unless the court revisits the process of commissioner removal in Issue No. 2).

Issue No. 4: Has equal access to the courts and to justice been provided to Andrew Gulseth in this case, and are many other citizens likely facing the same problems? *Answer*: Andrew did not receive equal access, and the problems are systemic. Discretionary review is needed.

Issue No. 5: Should Andrew Gulseth's counsel have been sanctioned for seeking a legal and factual basis for the last-minute change of commissioner that was not a recusal and that had no factual or legal basis in the record? *Answer*: No. The sanctions should be reversed and vacated.

D. STATEMENT OF THE CASE

1. Summary of the Trial Court Events on Appeal

Timeline Presentation: The procedural history and references to clerk's papers are presented in the following timeline:

10/22/18: Brita Gulseth, through her attorney, Matthew Dudley, filed a Summons and Petition for Dissolution. (CP: 1-6)

10/22/18: The court issued a case assignment notice, assigning Commissioner Ressa to the case (CP: 10-11), whose hearings were held on Thursdays in the Fall of 2018. (Div. III Motion for Reconsideration.)

11/8/18: Brita Gulseth filed a Motion for Temporary Orders (CP: 12-18), and on 11/15/18 she set the matter for Friday, 11/30/18 (CP: 21).

LSPR 94.04(2)(a) requires that family law motions be set on the "assigned commissioner's" day and docket. See LSPR 94.04 in Appendix.

Friday was not Commissioner Ressa's assigned family law motions day (Commissioner Ressa's day for the 8:30 a.m. Family Law Motion Docket was *Thursday* in the Fall of 2018).

11/14/18: Andrew Gulseth, then pro se, accepted service of the Summons, Petition, and a Motion for Temporary Orders from Brita Gulseth's counsel, Matthew Dudley. Matthew Dudley's Affidavit of Service swore that Mr. Gulseth received the Case Assignment Notice, assigning Commissioner Ressa for the life of the case. (CP: 19-20)

However, in fact, Mr. Gulseth had received no Case Assignment Notice from Mr. Dudley. (CP: 25) This sworn statement of Mr. Gulseth in this regard was not rebutted in the declaration subsequently filed by Mr. Dudley. (CP: 57-60)

Andrew Gulseth later learned of the Case Assignment Notice after hiring Mr. Mason as his attorney, who then retrieved the Case Assignment from the court file, upon which Mr. Gulselth filed his 11/19/18 declaration (CP: 26) stating that he was not served with the Case Assignment Notice.

As was noted, above, Mr. Dudley's later declaration (CP: 57-60) did not rebut those facts from Mr. Gulseth's 11/19/18 declaration.

NOTE: Contrary to Mr. Dudley's affidavit of service (CP: 19-20), Mr. Gulseth was *also* not given the court's automatic temporary restraining order, but that document is not at issue on this appeal. (CP: 25)

***11/15/18**:* As was noted, above, Brita Gulseth, through Mr. Dudley, on 11/15/18, set the temporary order hearing for Friday, 11/30/18 (CP: 21), which meant the hearing was not properly noted under LSPR 94.04(2)(a).

11/19/18: Andrew Gulseth filed his 11/19/18 declaration, noted above (CP: 25), and Andrew filed an objection to the mis-set hearing in that same document. To repeat, under LSPR 94.04(2)(a) the temporary order hearing should have been set on Commissioner Ressa's day, a Thursday, and not on a Friday. (If there had been a local procedure for a Notice of Disqualification, this 11/19/18 objection would have been Mr. Dudley's notice to invoke that process, or at least use LSPR 94.04(2)(c).)

11/20/18: Mr. Gulseth filed a memo with the case law showing that there is no right to affidavit a commissioner (no right to remove them by notice of disqualification) (CP: 26-29). And there was no recusal in the file.

11/28/18: Mr. Gulseth filed further objection and legal authority to oppose any future change of commissioner that had no proper basis in law or fact. *Objection to Any Change of Commissioner without Motion, Notice or Hearing,* filed on 11/28/18 (CP: 31-32), prior to the re-assignment, as is plain from the text of the objection that no reassigned commissioner was

indicated in the objection. A copy was also sent to the family law department.

11/28/18: After filing and serving the foregoing legal authorities (two days before the mis-set hearing) on 11/28/18, Commissioner High-Edward re-assigned the case to herself, without motion in the file, and without any basis in fact or law. (CP: 30) The putative reason was some nameless "conflict of interest." (CP: 30) Such facts, if presented, could be a basis for recusal; however, at no point did Commissioner Ressa recuse herself, which would have had to be done on the record. The Order of 11/28/18 was not Commissioner Ressa's decision or order.

To reiterate, the "finding" in the Order of Re-assignment at CP:30 included a finding of "conflict of interest," with no motion, no evidence, no notice to Mr. Gulseth, and no opportunity for Mr. Gulseth to be heard regarding these alleged facts of conflict of interest, or to be heard regarding the law.

11/28/19: On 11/28/18, Mr. Gulseth filed a motion to revise this finding and reassignment, with revision set for 12/6/18. (CP: 33-34)

11/29/18: Mr. Gulseth filed his memorandum, *Additional Authorities: No Right to File an Affidavit of Prejudice Against a Commissioner, etc., filed 11/19/18.* (CP: 36-37)

11/29/18: Suddenly faced with a hearing on less than two-days' notice, Mr. Gulseth filed responsive documents on 11/29/18, as the mis-noted hearing was suddenly on the Friday docket for 11/30/18, and Mr. Gulseth had responded within 24 hours to this less than 48-hour notice of hearing. Mis-noted hearings are always re-noted to the proper day, and that allows at least a week for response under local rules. (CP: 115, lines 10 to 14 and CP: 116, lines 8 to 10)

11/30/18: Prior to hearing on 11/30/18, at a "bench conference," the commissioner who re-assigned the case to herself "struck" Andrew Gulseth's filings, leaving him without a response for the hearing on Temporary Orders that proceeded on 11/30/18 (only able to rely upon his Response to the Petition, at CP 22-24). (CP: 107-116) Brita Gulseth had shown no prejudice from the late-filed responses, nor prejudice from a continuance of one-week for her to respond or properly set the hearing. *NOTE:* The decision to strike the responsive filings was also addressed at the revision held on 12/6/18. (CP: 83-98)

12/3/18: Andrew Gulseth filed additional legal authorities about the necessary bases for recusal, if somehow the un-written process that had been followed was seen as a recusal. See *Limitations on Recusals: Legal Authorities – A reasonable basis require even for self-recusal, filed 12/3/18.* (CP: 51-56)

12/3/18: On 12/3/18 Brita Gulseth's counsel, Mr. Dudley, filed a declaration (CP: 57-60, titled *Motion for Order denying motion to deny and for imposition of sanctions against Craig Mason, filed 12/3/18*).

In his declaration, Mr. Dudley added alleged facts into the court file that were not before the commissioner when the commissioner made her 11/28/18 decision, and which therefore should not have been before the judge at the revision hearing. (Andrew Gulseth objected at the revision hearing of 12/6/18 to additional facts being before the judge that were not before the commissioner.) If facts are to be added to the record, remand is required. See, e.g., *Perez v. Garcia*, 148 Wash. App. 131, 138, 198 P.3d 539, 542–43 (2009).

12/6/18: The revision judge denied revision and sanctioned Mr. Gulseth's counsel, Craig A. Mason, $300 for requesting the legal basis for the foregoing procedural irregularities. (CP: 81) Appeal timely followed.

NOTE: The foregoing was found in the Opening Brief in Division III in a section titled, *III. Procedural History and Background.*

Motion for Reconsideration in Division III: Division III had added its own facts and theories to the case about secret lists of automatic reassignments, which Andrew Gulseth does not see as compliant with due process and existing law. Andrew also added, in denial to the (hypothesized!) existence of an "automatic" process:

> As the court notes, Mr. Dudley, whose presence is the alleged (with no facts in the record) basis of the re-assignment of Commissioner Ressa, filed suit for Ms. Gulseth on 10/22/18. And two weeks later Mr. Dudley filed a motion for temporary orders set for 11/30/18 (not on the assigned Commissioner Ressa's day for hearings, which normally means the hearing must be re-set).
>
> The Division III 5/12/20 Opinion overlooks that *no automatic process removed Commissioner Ressa from a case that was Mr. Dudley's case* at filing, **nor** at the time of Mr. Dudley setting a hearing.

Motion for Reconsideration in Division III at p.7.

The various theories about why case law was not followed and/or why there was no due process requires clarification as to what the public is to expect, and can be done if one wants to remove a commissioner from a case openly and under the law.

2. Summary of the 5/12/20 Division III Opinion Issues

The 5/12/20 Division III Opinion went far beyond the record to hypothesize events that could have justified the last-moment reassignment, and the 5/12/20 opinion went to great lengths to avoid the issues raised, above. Division III failed to see how important the issues presented are in general, and how prejudicial, and odd, the facts of this case were in particular, especially in the light of Division III precedent.

Mr. Gulseth may well have his commissioner for another eighteen years, as his youngest child was age four at divorce.

This is not a fleeting prejudice.

a. Parties Could Have the Same Commissioner for 22 or more years:

Once a commissioner is assigned, there is no removing him or her, except for cause. As Andrew stated in his Opening Brief at p.16:

> There is no right to disqualify a commissioner, as the right of revision is the proper relief. *State v. Espinoza*, 112 Wash. 2d 819, 774 P.2d 1177 (1989); *Matter of Marriage of Lyle*, 199 Wash. App. 629, 398 P.3d 1225 (Div. 3 2017).

If the parties had a new-born child, and then post-secondary support became an issue, parents could have the same commissioner for 22 or more years. Mr. Gulseth continues to be prejudiced by having his commissioner changed by Ms. Gulseth's counsel sub-rosa, and apparently with ex parte contact (as how else could the not-automatic-after-all process have been initiated?). Brita Gulseth was able to trigger the last-moment removal of Andrew Gulseth's preferred commissioner, by means that are completely off the record. That the revision judge and Division III added speculations to the record (a) is not evidence, and (b) is not consistent with the need for remand if additional facts are to be added to the record on revision (see *Perez v. Garcia*, above).

b. A Judge Can Be Removed in any Subsequent Modification:

Division Three has made it clear that all one needs for a change of judge is to file a modification (emphasis in the original):

> We understand that Mr. Brouillet and Judge Plese view *Mauerman* as distinguishable. Our record reveals that both

are emphatic that Ms. Hall did not, in fact, present a substantial change in circumstances, since where Mr, Brouillet spent his time—at his Seattle area home, or in the Mead area—had been addressed in the earlier action. But their skepticism about the substantive merits of Ms. Hall's petition for modification—even though well informed, and we would of course regard the judge's view as especially reliable—is irrelevant, given the statutory standard. *Mauerman* requires only that a modification petition be based on *allegations* of changed conditions. *Mauerman,* 44 Wash.2d at 830, 271 P.2d 435. And it is well settled that, once prejudice is established by the filing of an affidavit, no inquiry into the facts is permissible. Rather, "[s]uch a motion and affidavit seasonably filed presents no question of fact or discretion." *State v. Dixon,* 74 Wash.2d 700, 702, 446 P.2d 329 (1968).

Because the filing of the affidavit is conclusive, the court must take the petition at face value—regardless of whether it believes the allegations contained therein lack merit. This mandate makes sense in light of the purpose of the statutory scheme governing affidavits of prejudice and change of judges: "Every lawsuit must have a loser. This will be easier to bear if, before proceedings begin, the loser had the right to remove a judge who he thought might not be fair to him." *State v. Clemons,* 56 Wash.App. 57, 60, 782 P.2d 219 (1989). And if a petitioner has frivolously asserted changed circumstances and new facts, that will be discovered soon enough, by the next judge.

The trial court's prior retention of jurisdiction does not change the analysis, given that Ms. Hall framed her legal action as a petition for modification under RCW 26.09.260. In arguing in the trial court that the court's retention of jurisdiction made a difference, Mr. Brouillet relied on *In re Marriage of True,* 104 Wash.App. 291, 16 P.3d 646 (2000), but the case does not help him. In *True,* the trial court in a divorce action retained ongoing jurisdiction of the case for a short period of time during which provisions of its final order would be going into effect; the appellate court held that "a trial court may retain jurisdiction over the matter for a limited period of time in order to review the efficacy of its decision and to maintain judicial economy following its order." *Id.* at 298, 16 P.3d 646. But the appellate court did not agree with the wife, who challenged the retained jurisdiction, that it would deprive her of her statutory

> right to disqualify the judge if she filed a petition for modification proceeding. If the "situation and facts so merit," it concluded that she would be free to file a petition for modification and exercise her right to disqualify the judge. *Id.* In effect, the trial court in *True* made it possible for the parties to come back to it for further review and relief *short of modification.* The trial court was powerless in *True,* and Judge Plese was powerless here, to deprive Ms. Hall of her right to file a petition for modification under RCW 26.09.260 and exercise her rights under RCW 4.12. 050.
>
> We reverse the trial court's order denying Ms. Hall's motion for change of judge and remand with directions to vacate any actions taken in the action by Judge Plese and to transfer the petition to another department of the court.

In re Hall, 184 Wash. App. 676, 682–84, 339 P.3d 178, 181 (2014).

However, as can be seen by the State Supreme Court from its years of case reviews, often trial judges do not undertake de novo reviews of commissioner decisions (to avoid getting more revisions) and they can adopt a "standard of review" (usually abuse of discretion) or they simply determine to rubber-stamp the commissioners to prevent more revisions.

This has very practical and prejudicial impact on parties who can remove a judge by motion, but who never can change the most important judicial officers in their cases (the commissioners).

c. Judge-Made Rule Against Removing a Commissioner:

Welfare of McGee appears to be the first case establishing that a commissioner cannot be removed by affidavit of prejudice (Notice of Disqualification), the *In re Welfare of McGee* court wrote, in 1984:

> There is no constitutional right to the peremptory removal of a judge.[1] *See State v. Bolton,* 23 Wash.App. 708, 598 P.2d 734 (1979). The right is statutory, and the relief is limited to what the statute confers. Whether there is such a right in any given circumstance is to be determined by examining the statute and related court rules. *See State v. Cottrell,* 92 Wash.2d 606, 599 P.2d 1295 (1979).
>
> RCW 4.12.040[2] provides only for disqualification of judges. Had the Legislature intended to include commissioners, it would have done so specifically, as it has in other instances.[3] It created an alternative remedy instead, providing under RCW 2.24.050 for a revision hearing before a judge as a matter of right. There is no reason to assume that a revision hearing would not afford an adequate remedy.

In re Welfare of McGee, 36 Wash. App. 660, 661–62, 679 P.2d 933, 934–35 (1984). *Footnote 3*, in the foregoing quote, reads (emphasis added):

> It should also be noted that recognition of such affidavits against commissioners might result in the ability of a party to disqualify two judicial officers in a single action, a right specifically denied by RCW 4.12.050. Such a situation might arise where a party disqualifies one commissioner by affidavit, has his case heard by another commissioner, requests a revision hearing, and then disqualifies the judge.

In re Welfare of McGee, 36 Wash. App. 660, 662, 679 P.2d 933, 935 (1984). This proposition was treated as a matter of interpreting legislative intent through legislative silence in *State v. Espinoza:*

> Absent a constitutional challenge by the parties and given the clear language of RCW 4.12.050, RCW 2.24.050 and RCW 13.04.021, the right to automatic disqualification of a superior court judge for bias or prejudice in a juvenile case does not extend to court commissioners.

State v. Espinoza, 112 Wash. 2d 819, 826, 774 P.2d 1177, 1181 (1989).

d. The Importance of Preventing Sub-rosa Commissioner Shopping:

Attached as **Appendix A-4-7** to the Motion for Div. III Reconsideration are the publicly posted hearing days of the various commissioners who are assigned randomly to cases when they are filed in Spokane County. The days rotate, but the assigned commissioner remains on one's case, and hearings must be set on the proper day or they are struck. Each commissioner has different personalities and values, as do all judges, and the right of revision is the *State v. Espinoza* substitute for the ability to disqualify a commissioner (as noted above and in the briefing).

If one attorney can "remove" a commissioner through a secret process, then that attorney and his client have a fundamentally unjust advantage over the party who cannot influence the commissioner assigned to his case. It is rational to infer that other attorneys can play the game of associating with an attorney who had access to the sub-rosa commissioner-removal process to avoid a particular commissioner.

If there is no known record or rule to indicate this commissioner-shopping local practice, then no other attorneys or pro se litigants would be aware of this avenue of commissioner removal.

One-sided and secret processes contradict due process and legality. The court is asked to accept discretionary review to (a) correct these rulings as to Andrew Gulseth, and (b) in general for the public.

e. A Recusal Must Have a Basis in the Record:

As Mr. Gulseth showed in his Opening Brief at p.16, any judicial officer must have (a) a valid reason (b) in the record to recuse himself:

> *Williams & Mauseth Ins. Brokers, Inc. v. Chapple*, 11 Wash. App. 623, 626–27, 524 P.2d 431, 434 (1974) (a judge has no right to recuse himself or herself in the absence of a valid reason).

And Mr. Gulseth added in his Reply Brief at p. 7:

> Division III also reiterated that there must be a basis for recusal (emphasis added):
>
> > In order for a judge to recuse, he or she must have information suggesting there is a reason for recusal. Attorneys will often be the source of that information, and that especially is the case when the attorney's activities are the basis for the potential recusal. Thus, we think attorneys should feel free to convey relevant information to the judge when necessary.[7]
>
> *State v. Rocha*, 181 Wash. App. 833, 842, 327 P.3d 711, 716 (2014).
>
> Footnote 7 in *State v. Rocha* reminds the courts and parties to avoid ex parte contact in the process of communicating information to the court that might lead to recusal:
>
> > We presume that both judges and attorneys will live up to their respective obligations to avoid *ex parte* communication. ELC 2.9; RPC 3.5(b).

f. Legal Basis of a Sub-Rosa Basis for Re-assigning a Commissioner:

Division Three has been very active in this area, and yet Division III refused to readdress the matter of commissioner removal in general, as well as articulate how a sanction can be justified for requesting a legal or factual basis for a re-assignment in this particular [*Gulseth*] instance.

g. Facts Overlooked by the Court – Timing of the Disqualification:

As the 5/12/20 opinion notes, Britta Gulseth's counsel (Mr. Dudley) -- whose presence is the alleged basis (with no facts in the record) of the re-assignment of Commissioner Ressa -- filed suit for Ms. Gulseth on 10/22/18, and Commissioner Ressa was assigned in the Case Assignment Notice, ***without*** *any automatic removal of Commissioner Ressa* in the clerk's or court's system. And two weeks later Mr. Dudley filed a motion for temporary orders set for 11/30/18, and even then, nothing in the system made an automatic reassignment of Commissioner Ressa. The hearing setting was a unilateral action of Mr. Dudley to refuse to set the motion on the assigned commissioner's (Ressa's) hearing day. There is no basis in any record for any rational observer to see the hearing as anything but a mis-set hearing. Nothing in any record says otherwise.

The Division III 5/12/20 Opinion overlooks that *no automatic process operated to remove Commissioner Ressa from a case that was Mr. Dudley's case* at the filing of the case, **and** that was Mr. Dudley's case at the time of Mr. Dudley setting the hearing.

The Opening Brief at p. 7 summarized these facts:

> ***10/22/18***: Brita Gulseth, through her attorney, Matthew Dudley, filed a Summons and Petition for Dissolution. (CP: 1-6)
> ***10/22/18***: The court issued a case assignment notice, assigning Commissioner Ressa to the case (CP: 10-11), whose hearings were held on Thursdays in the Fall of 2018.

> ***11/8/18***: Brita Gulseth filed a Motion for Temporary Orders (CP: 12-18), and on 11/15/18 she set the matter for Friday, 11/30/18 (CP: 21).
>
> LSPR 94.04(2)(a) requires that family law motions be set on the "assigned commissioner's" day and docket. See LSPR 94.04 in Appendix.
>
> Friday was not Commissioner Ressa's assigned family law motions day (Commissioner Ressa's day for the 8:30 Family Law Motion Docket was Thursday in the Fall of 2018).

There is no basis to remove Commissioner Ressa anywhere in the record. The only rational inference is that there was ex parte contact with some court officer that occurred, in violation of Division III's warnings in *State v. Rocha*, 181 Wash. App. 833, 842, 327 P.3d 711, 716 (2014).

h. Facts Overlooked by the Court – There Was NO EVIDENCE That Mr. Mason Knew Other Than What the Public Would Know – that the Hearing was Mis-noted:

The Opinion of 5/12/20 makes a mistaken inference that Mr. Mason "suspected reassignment." No. Mr. Mason saw a mis-noted hearing (set on the wrong day). Until the last moment "reassignment," the only thing in the record was that the hearing had not been set on Commissioner Ressa's hearing day. Anything else is speculation. Hearings set on the wrong day simply do not "go," and must be re-set. Whatever speculations Mr. Gulseth may have heard, or whatever comments Mr. Dudley may have made about his ability to avoid Commissioner Ressa, they are not in

any record, and they obviously came at the last-moment. They are not evidence in the record.

These speculations cannot explain the failure of any process at all to be articulated regarding the removal of Commissioner Ressa, nor can these speculations explain the sudden court order that changed commissioners the day before what had been the proper hearing day.

If the process was alleged to be justified because it was "automatic" (and not conceding that an automatic decision is a correct one) it should have happened *at the time of Mr. Dudley filing the case*, and it certainly would have happened *at the time of Mr. Dudley setting a hearing.* If Division III's speculations about non-public "lists" are to be added to the record of revision of a commissioner (contrary to *Perez v. Garcia*), by the point of hearing-setting some "lists" should have been activated. There is absolutely no evidence of court or clerk review of any "automatic lists."

The only rational inference is that ex parte contact occurred requesting a change of commissioner, and the reasons for any change of commissioner should have been part of a record accessible to Andrew Gulseth and his counsel.

/

i. There is NO EVIDENCE of a "Conflict of Interest" from Any Statement by Commissioner Ressa about a Basis for Recusal:

There is simply no evidence of a "conflict of interest" anywhere in the file. A recusal must have a legal basis and occur on the record. Loose, backroom, and off-the record "recusals" violate due process.

j. LSPR 94.04(c) Must Be Reconciled with Case Law:

The Opinion of 5/12/20 cites, on p. 3, LSPR 94.04.(c)(2) which contains the local process for a right to disqualify a commissioner, but without a record and without a basis for the order, the local rule does not meet the requirements of appellate case law, especially, as here, where there is a *sub-rosa, ex parte, process without a record*, and a reassignment occurs at the last moment before hearing to the prejudice of a party.

Division III did not reconcile the local rule, and the practice in this case, and its own case law. While the 5/12/20 Opinion cites *State v. Rocha*, the relevant portions of the case are not addressed by Division III. See *State v. Rocha*, 181 Wash. App. 833, 327 P.3d 711 (2014). For Mr. Gulseth to request a legal basis for these actions is reasonable.

k. There is NO EVIDENCE of a "lists of conflicts of interests":

The Opinion of 5/12/20 again resorts to speculations about private "lists of conflicts of interest." *In the Matter of the Marriage of BRITA GULSETH, Respondent, & ANDREW GULSETH, Appellant.*, No. 36549-

2-III, 2020 WL 2392561, at *2 (Wash. Ct. App. May 12, 2020) There is no evidence that such a list exists. Given the case law (e.g., *State v. Espinoza*), the change of commissioners is so rare as to make the *Gulseth* change of commissioner a bizarre anomaly that is apparently open to only one attorney through an ex parte process that has no record, and which, therefore, has no known legal basis.

Such a "list" should be public knowledge and (a) should have been applied when Mr. Dudley filed the case, and/or (b) when he set the hearing. While there is no evidence of this speculative procedure, if it does exist, then it must surely follow the norms of being publicly available.

Andrew Gulseth does not challenge articulation of the duties of judges to withdraw from cases presented in the 5/12/20 Opinion. ***The issue is having a basis on the record for the recusal.*** There is no evidence of a withdrawal or recusal of Commissioner Ressa.

l. More Speculation in the 5/12/20 Opinion:

There is no evidence that the removal of Commissioner Ressa was merely an "administrative reassignment," as stated in the 5/12/20 Opinion on p.6.

Moreover, the removal cannot be **both** substantive (conflict of interest alleged by others but no record or order from Commissioner Ressa, requiring a reason on the record) **and** "merely procedural."

While any such "procedure" should be articulated, the point remains that this removal of Commissioner Ressa is painted as a substantive decision both (a) by Ms. Gulseth and (b) by 5/12/20 Opinion, and therefore ***the removal cannot be "merely procedural" on the very terms by which it was defended.*** These contortions to avoid a record of a recusal (and there is no evidence of a recusal) are contrary to law.

A "merely procedural" reassignment of all of Mr. Dudley's cases away from Commissioner Ressa would have occurred at filing, **or** at the setting of the hearing. The only rational inference is that some ex parte contact (with whom we must wonder?) stimulated the last-moment removal of Commissioner Ressa by a different commissioner.

"By a different commissioner" is meant to emphasize that there was no recusal by Commissioner Ressa (a self-directed act). Brita Gulselth *added factual allegations* to the record on revision, asserting that such conflict exists, but there is no evidence to this effect in the record.

m. Basis for Appealing the Sanction:

The sanction was appealed because asking for the legal basis of such irregular behavior should not be sanctionable. The process is profoundly flawed, and a courthouse operating on ex parte contact and sub-rosa procedures is not operating according to law. Asking for the legal basis of an order is not "bad faith."

n. Bad Faith and *State v. Gassman*:

The 5/12/20 Opinion cites *State v. Gassman,* to justify sanctions. However, in *Gassman* the trial court was actually reversed for imposing "bad faith" sanctions. *State v. Gassman*, 175 Wash. 2d 208, 213, 283 P.3d 1113, 1115 (2012).

There is no bad faith in Mr. Mason seeking to find the basis of a change of court commissioner in a process that could only have ex parte contact initiating it, especially given the timing of occurring just before a hearing set with Commissioner Ressa, per the case assignment.

The removal of Commissioner Ressa occurred through an irregular process that is not generally available to all. Due process requires more regularity and openness than is shown in this case. Review is requested.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED UNDER RAP 13.4(b)

The judge-made rule that there can be no disqualification of a commissioner is fraught with significance in its application, especially where, as here, there can be some sub-rosa, off-the-record, effective disqualifications or "recusals" without any record, or in counties in which judges do not actually perform de novo review.

The 5/12/20 Division III opinion is in conflict with the existing cited authorities under RAP 13.4(b)(1 & 2). The 5/12/20 opinion raises a

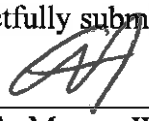
significant question of law under RAP 13.4(b)(3). And there is substantial public interest in regularizing the assignment and removal of commissioners who might preside over a family's parenting hearings for up to twenty-two years under RAP 13.4(b)(4). Finally, there is a damaging chilling effect for being sanctioned simply for asking the basis of a reassignment, especially, as here, where the basis is so non-existent that the trial judge and then Division III undertook a variety of speculative theories as to the basis of the "automatic recusal," that was not automatic.

F. CONCLUSION AND RELIEF REQUESTED

The court is asked to reconsider the significance of this case, and to articulate better standards for the removals of commissioners (if they are to be allowed, and on what basis), and to reassign Commissioner Ressa to this case. Also, the court is asked not to find bad faith meriting sanctions against Andrew Gulseth's counsel for simply asking the court for the legal basis of such a questionable reassignment of a commissioner.

That legal basis remains to be located and articulated by this court. Discretionary review is requested so that the State Supreme Court can regularize what has become an uncertain process as it applies to Andrew Gulseth and his counsel, and as it applies in general to future court hearings for all persons appearing before family law commissioners.

Respectfully submitted, 7/20/20



Craig A. Mason, WSBA#32962
Attorney for Appellant, Andrew Gulseth and counsel
W. 1707 Broadway, Spokane, WA 99201
509-443-3681/ masonlawcraig@gmail.com

APPENDIX:

A-1 to A-3: 5/12/20 Opinion of Division III in the Gulseth Matter

A-4: 6/23/20 Denial of Reconsideration

A-1

2020 WL 2392561
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 3.

In the Matter of the Marriage of
BRITA **GULSETH**, Respondent,
and
ANDREW **GULSETH**, Appellant.

No. 36549-2-III
|
MAY 12, 2020

UNPUBLISHED OPINION

Siddoway, J.

***1** SIDDOWAY, J. — Andrew **Gulseth** appeals an order of reassignment of a commissioner to this family law matter. His lawyer, Craig Mason, in his own right, appeals a CR 11 sanction. While the order of reassignment is not an appealable order under RAP 2.2, the sanction, which is appealable, depends on the procedural propriety of the reassignment. We affirm.

PROCEDURAL BACKGROUND

Brita **Gulseth** petitioned for divorce from Andrew **Gulseth**. A case assignment notice issued pre-assigning the matter to Judge Ellen Clark and Commissioner Michelle Ressa. Two weeks later, Ms. **Gulseth** filed a motion for temporary orders, setting the motion for Friday, November 30, 2018.

Mr. **Gulseth**'s lawyer, Craig Mason, was aware that Commissioner Ressa did not hear family law motions on Friday and apparently suspected the case was being reassigned. On November 19, Mr. **Gulseth** filed a declaration objecting that the hearing was set for the wrong day, stating, "I have not been served with any motion to change my commissioner." Clerk's Papers (CP) at 25. He filed a memorandum the next day, arguing that a notice of disqualification cannot be filed against a court commissioner and recusal is required only if a judicial officer is biased against a party or the officer's impartiality reasonably may be questioned.

On November 28, Mr. **Gulseth** filed an "Objection to ANY Change of Commissioner without Motion, Notice or Hearing." CP at 32. It acknowledged that his wife's lawyer, Matthew Dudley, "opposed Commissioner Ressa in a legal matter some years ago," but stated that "[t]his one legal event of Commissioner Ressa's dissolution does not dwarf the law, nor allow Mr. Dudley a unilateral right of sub rosa commissioner selection." *Id.*

As anticipated by Mr. **Gulseth**, on November 28, an order assigning/reassigning commissioner was filed, reassigning the matter from Commissioner Ressa to Commissioner Jacqueline High-Edward. The order stated that the reassignment was made "[u]pon motion of the court," the reason being "[c]onflict of interest." CP at 30. Mr. **Gulseth** appealed the reassignment order by filing a motion for revision.

When the motion for revision was heard by the trial court, it was confirmed that the reassignment was based on Mr. Dudley's representation of Commissioner Ressa's ex-husband in a marital dissolution action. The trial court denied the revision motion, explaining in its oral ruling that "this reassignment was an administrative act, it was not a discretionary act by any judicial officer." CP at 96.

Ms. **Gulseth** had argued that the revision motion "should be ... deemed frivolous and imposition of sanctions considered." CP at 60. The trial court awarded fees to Ms. **Gulseth**'s lawyer of $300, identifying the fee award in its written order as a sanction. Mr. **Gulseth** and Mr. Mason appeal the order on revision.

ANALYSIS

A local Spokane County Superior Court rule provides that upon the filing of a petition for dissolution the clerk will assign the matter to a court commissioner and a superior court judge. LSPR 94.04(c). It goes on to provide:

> ***2** (1) Parties are required to set all hearings before the assigned judicial officer(s).
>
> (2) *If the matter needs to be reassigned due to conflict, recusal or unified family court principles, an order will be entered by the court.*

A-2

LSPR 94.04(c) (emphasis added).

Rule 2.11(A) of the Code of Judicial Conduct (CJC)[1] provides, "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." (Internal asterisk omitted). Comment [1] to the provision observes that "[i]n many jurisdictions in Washington, the term 'recusal' is used interchangeably with the term 'disqualification.' " One circumstance calling for judicial recusal is when "[t]he judge has a personal bias or prejudice concerning a party or a party's lawyer." CJC 2.11(A)(1). "A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed." CJC 2.11, cmt. [2].

In *State v. Rocha*, a public trial case, this court observed in passing:

> [E]very member of this panel is familiar with informal recusal requests occurring outside of the courtroom. *Many recusals also are handled administratively, with clerk's offices having lists of conflicts of interest for judges who have named attorneys or parties whose cases they will not hear.*

181 Wn. App. 833, 839, 327 P.3d 711 (2014) (emphasis added).

Commissioner Ressa is obliged by the Code of Judicial Conduct to recuse herself in any proceeding in which her impartiality might reasonably be questioned. Mr. **Gulseth** cites no authority that a party can challenge the judicial officer's personal decision on that score. As observed by this court in *Rocha*, it is commonly (perhaps universally) the case that clerk's offices have lists of conflicts of interest for judges who have named attorneys or parties whose cases they will not hear. 181 Wn. App. at 839. The Spokane County local rules address administrative reassignment in the case of a judge's decision to recuse himself or herself, and they were followed: an order was entered that the case was being reassigned on the court's own motion for conflict of interest reasons. Mr. Mason was aware of the reason for the recusal as revealed by Mr. **Gulseth**'s November 28 submission.

No notice of disqualification (formerly termed an affidavit of prejudice[2]) was filed nor was there a motion for recusal, so the case law on which Mr. **Gulseth** relied in challenging the order does not apply. In *Rocha*, for example, this court held that the experience prong of the public trial "experience and logic" test "favors hearing recusal *motions* in the courtroom." *Id.* at 838-39. The term "litigated recusals" as used in that decision refers to a party's contested motion asking a judicial officer to recuse himself or herself. It does not include a challenge, unsupported by legal authority, to a judicial officer's own decision to recuse.

Accordingly, there was no basis in fact or law for challenging the superior court's administrative reassignment. Mr. **Gulseth** argues that when his motion for revision was heard, the reason for the administrative reassignment was elaborated on, which he complains constitutes the consideration by the trial court of new and additional evidence, contrary to RCW 2.24.050. But any elaboration on the background of the order appears to have been in an effort to dispel Mr. Mason's misguided assumption that it was *something other than* an administrative reassignment. The elaboration was not essential to the decision or to supporting it on appeal; the order denying revision can be affirmed on the basis of the earlier "records of the case" alone. *Id.*

***3** Mr. Mason appeals the $300 sanction because the trial court did not enter findings explaining why it was imposed. He points to *Biggs v. Vail*, a 1994 case involving sanctions imposed under CR 11, in which the Supreme Court said "it is incumbent upon the court to specify the sanctionable conduct in its order. The court must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose." 124 Wn.2d 193, 201, 876 P.2d 448 (1994) (emphasis omitted); *see accord Dexter v. Spokane County Health Dist.*, 76 Wn. App. 372, 377, 884 P.2d 1353 (1994) ("If an appellate panel cannot ascertain what reasons prompted a trial court's ruling, it is impossible to determine whether the ruling is based on tenable grounds or is manifestly unreasonable.").

More recently, our Supreme Court held that where a sanction is imposed under the court's inherent equitable powers to manage its own proceedings, we may uphold it absent express findings if an examination of the record establishes that the court found conduct equivalent to bad faith. *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113 conduct equivalent to bad faith. *State* v. *Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113

A-3

(2012). It is a simple matter to identify the court's reasoning here. Mr. **Gulseth** challenged an administrative reassignment of a judicial officer with no factual basis for contending it was a sub rosa notice of disqualification and no legal basis for challengin'g Commissioner Ressa's personal decision not to preside over matters in which Mr. Dudley represents a party. The motion required Ms. **Gulseth** to defend the court's administrative action against an unsupported attack. The imposition of a $300 sanction was not an abuse of discretion.

Affirmed.

A majority ofthe panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Korsmo, A.C.J.

Lawrence-Berrey, J.

All Citations

Not Reported in Pac. Rptr., 2020 WL 2392561

Footnotes

1 The Application section of the CJC states a judge includes court commissioners. CJC, Application at I(A).

2 RCW 4.12.050; *see* LAWS OF 2017, ch. 42, § 2.

A-4

FILED
JUNE 23, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Marriage of BRITA GULSETH, Respondent, v. ANDREW GULSETH, Appellant.	)	No. 36549-2-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 12, 2020, is hereby denied.

PANEL: Judges Siddoway, Korsmo, Lawrence-Berrey

FOR THE COURT:

REBECCA L. PENNELL
Chief Judge

Division III No. 365492

SUPREME COURT
FOF THE STATE OF WASHINGTON

BRITA GULSETH, RESPONDENT

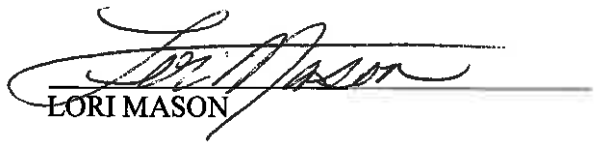
v.

ANDREW GULSETH, APPELLANT
Craig A. Mason, Appellant in His Own Right re: Sanctions

DECLARATION OF SERVICE

I, Lori Mason, declare under penalty of perjury under the laws of the State of Washington, that on July 21, 2020, I provided, via electronic filing through the Washington State Appellate Courts' Secure Portal, a copy of Appellant's PETITION FOR DISCRETIONARY REVIEW to:

Matthew J Dudley **mjdudley@cet.com**



LORI MASON

MASON LAW
Craig Mason
1707 W. Broadway
Spokane, WA 99201
(509) 443-3681

MASON LAW

July 21, 2020 - 1:18 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	In re the Marriage of: Brita Gulseth and Andrew Gulseth (365492)

The following documents have been uploaded:

- PRV_Petition_for_Review_20200721131737SC218812_3728.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Discretionary Review.pdf

A copy of the uploaded files will be sent to:

- mjdudley@cet.com

Comments:

Filing fee sent to COA, Div. III.

Sender Name: Lori Mason - Email: masonlawlori@gmail.com
Filing on Behalf of: Craig A Mason - Email: masonlawcraig@gmail.com (Alternate Email: masonlawlori@gmail.com)

Address:
W. 1707 Broadway Ave.
SPOKANE, WA, 99201
Phone: (509) 443-3681

Note: The Filing Id is 20200721131737SC218812