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Division III, Case No. 365492

COURT OF APPEALS, DIVISION III,  
FOR THE STATE OF WASHINGTON

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BRITA GULSETH, RESPONDENT

v.

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

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REPLY BRIEF OF APPELLANT

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## **I. REPLY BRIEF of ANDREW GULSETH**

Andrew Gulseth (and sanctioned attorney, Craig Mason) herein Reply to the 9/9/19 Response Brief of Britta Gulseth.

## **II. BASIC ERROR OF BRITA GULSETH – ASSERTING A RECUSAL WHEN THE RECORD HAS NO RECUSAL**

Brita’s Response Brief (hereinafter *Response*) crucially errs to cast the issue in this case as one of the alleged “recusal” of Commissioner Ressa. Brita’s *Response* has some form of the word “recusal” on every page of Brita’s 11-page *Response*, except pages 9 to 11, and the idea of recusal is present on page 9.

However, nothing in the record shows a recusal of Commissioner Ressa. Commissioner High-Edward signed the 11/28/18 Order of Re-Assignment two days before the mis-set hearing of 11/30/18. CP: 30. The only stated reason for the order was a box checked as “conflict of interest,” without detail or basis.

Even if there had been a recusal, Commissioner Ressa signing a recusal would still have to have a sufficient basis for the recusal.

A judge is presumed to perform his functions regularly and properly without bias or prejudice.<sup>4</sup>

*State v. Leon*, 133 Wash. App. 810, 813, 138 P.3d 159, 160–61 (2006) (footnote 4 citing *Jones v. Halvorson-Berg*, 69 Wash. App. 117, 127, 847 P.2d 945, 951 (1993)).

There is simply no evidence in the record to call the re-assignment a recusal beyond hearsay and folklore-hearsay. For example, Brita writes, on page 10 of her *Response*: “Commissioner Ressa’s actions would evidence her disagreement with Appellant.”

However, there is not a single document signed by Commissioner Ressa in the record; no statement by Commissioner Ressa on the record. In short, there are no “actions” by Commissioner Ressa visible anywhere in the record. A public court merits statements and actions on the record. For this issue to be cast as a “recusal,” there should be some such record. See e.g., *State v. Rocha*, 181 Wash. App. 833, 839–40, 327 P.3d 711, 715 (2014), quoted in the next section.

The alleged “recusal” instead appears to be an un-written, standing, Notice of Disqualification, humored outside the record.

### **III. DIVISION III HAS DETERMINED THAT LITIGATED RECUSALS REQUIRE PUBLIC HEARINGS**

Even if this had been a recusal case, per Brita’s position in her *Response*, Division III has addressed this issue in 2014, in *State v. Rocha*, ruling that litigated recusals must be public hearings:

Although there is no reported case history of recusals being heard in closed courtrooms, every 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. Thus, we cannot conclude that all recusals take place in the courtroom.

Nonetheless, we believe the experience prong confirms that when recusals are *litigated* in Washington, they typically are litigated in open court. Accordingly, this prong favors hearing recusal *motions* in the courtroom.

The logic prong asks whether the purposes of the public trial right are significantly furthered by public access. *Sublett*, 176 Wash.2d at 73, 292 P.3d 715 (citation omitted). The purposes of the public trial right are

to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury. *State v. Brightman*, 155 Wash.2d 506, 514, 122 P.3d 150 (2005).

Since Washington courts have not yet addressed the question of judicial disqualification under the *Sublett* test, we believe the *NBC* opinion is again helpful. There, addressing the second prong, the court wrote:

“The first amendment right of access is, in part, founded on the societal interests in public awareness of, and its understanding and confidence in, the judicial system.” The background, experience, and associations of the judge are important factors in any trial. When a judge's impartiality is questioned it strengthens the judicial process for the public to be informed of how the issue is approached and decided.

*NBC*, 828 F.2d at 344–45 (internal citations omitted). We agree. Appearing to cover up allegations of bias can only hurt public perception of a judge's fairness. A public hearing concerning the judge's ability to impartially decide a case also would tend “to remind the officers of the court of the importance of their function.” *Brightman*, 155 Wash.2d at 514, 122 P.3d 150.

We conclude that this prong, too, favors public access. We therefore hold that a recusal motion argued to the court is subject to our constitutional commands of open proceedings and may

only be closed for compelling circumstances<sup>5</sup> in accordance with the test of *Bone-Club*.

*State v. Rocha*, 181 Wash. App. 833, 839–40, 327 P.3d 711, 715 (2014) (italics in original, and underlined emphasis added).

The court in *State v. Rocha* carefully distinguished between communicating information to a judge (which may be done in a non-public way, but not *ex parte*) and making a motion for recusal, which must be public (see below). And 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.<sup>7</sup>

*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).

In *State v. Rocha*, the determining factor was that only information was conveyed, but no action was requested:

The relevant distinction is, in our opinion, between conveying information and requesting action. Accordingly, we conclude that this hearing was not one to which the public access right of the constitution applied because no action was requested of the judge.

*State v. Rocha*, 181 Wash. App. 833, 843, 327 P.3d 711, 716 (2014).

**Application of *State v. Rocha* to *Gulseth v. Gulseth*:** The re-assignment of the case from the Assigned Commissioner Ressa to Commissioner High-Edward for “conflict of interest” was immediately objected to by Andrew Gulseth. CP: 31-32, and CP: 26-29 & 36-37.

Andrew immediately objected, filed legal authorities, and sought to revise the Commissioner High-Edward’s order. Any decision to “recuse” Commissioner Ressa should have been done at public hearing under *State v. Rocha*.

However, Andrew also holds his original position, that this removal of Commissioner Ressa is more akin to a Notice of Disqualification, and is legally inappropriate.

While superior court commissioners operate largely like their judicial counterparts, they are not subject to affidavits of prejudice under RCW 4.12.050. *State v. Espinoza*, 112 Wash.2d 819, 829, 774 P.2d 1177 (1989). Instead, a party dissatisfied with a commissioner’s ruling can seek relief through a motion for revision. *Smith*, 117 Wash.2d at 280, 814 P.2d 652. The right to seek revision permits a litigant appearing before a commissioner to be treated similarly to one appearing before a superior court judge. *Id.* at 276, 814 P.2d 652.

*Matter of Marriage of Lyle*, 199 Wash. App. 629, 631–32, 398 P.3d 1225, 1227–28 (2017).

#### **IV. DECISION AT ISSUE RE: COMMISSIONER RE-ASSIGNMENT**

In the *State v. Rocha* quote, above, Division III presumed that some recusals are “handled administratively.” However, the *State v. Rocha* court: (a) is discussing judges, not commissioners, and (b) has determined that contested recusals require a public hearing.

Judge Ellen Clark, in denying revision (and in sanctioning Andrew Gulseth’ counsel), stated (emphasis added):

Counsel, let me just kind of repeat what I said before, that this reassignment was an administrative act, it was not a discretionary act by any judicial officer. It was necessary before a judicial officer had previously determined that she had a conflict of interest. Which is absolutely good cause for the reassignment. It is not lore at all.

*Page 13 of the Revision Transcript of 12/6/18 at CP: 96.*

To review, Mr. Gulseth received written notice of his assigned commissioner (Ressa) and he promptly objected to the family law hearing not being set on his assigned commissioner’s (Ressa’s) day. Andrew’s objection was signed on 11/16/19, and filed on 11/19/19. CP: 25.

The Order Reassigning the Commissioner did not issue until nine days later, on 11/28/19, fewer than 48 hours before the mis-set hearing

incorrectly noted for 11/30/19. CP: 30. It would be rational for an objective observer to infer that this last-moment order of 11/28/19 was stimulated by ex parte contact “reminding” the court to make the change of assignment. Compare footnote 7 in *State v. Rocha*, 181 Wash. App. 833, 842, 327 P.3d 711, 716 (2014). The timing certainly raises that concern. In any event, timely revision of the 11/30/19 Order Re-assigning Commissioner was sought.

Subsequently, the Order on Revision issued on 12/6/18, sanctioning the appellants for a revision motion that questioned the legal basis of the reassignment, and sought reinstatement of Commissioner Ressa. CP: 81. (Transcript of the 12/6/18 hearing at CP: 84-98.)

Andrew Gulseth’s *Opening Brief* noted that Judge Ellen Clark added facts to the record, and noted the law that 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).

No matter which way the issue is viewed, however, both orders are erroneous on similar grounds, and a remand is requested (a) to either reinstate Commissioner Ressa (as commissioners remain assigned for all subsequent hearings in a case, including subsequent parenting plan enforcement and modifications), or (b) to order the court to hold a hearing on the (alleged) recusal of Commissioner Ressa.

NOTE: There is not a single statement in the record of Commissioner Ressa. None. Certainly there is nothing from Commissioner Ressa in the record that she has a conflict with Mr. Dudley that requires recusal. It is hearsay at best, and an alleged hearsay unknown to all attorneys, let alone known to pro se litigants or out-of-town lawyers. Law should proceed on the record, with proper notice for all participants.

## V. SANCTIONS

In her *Response*, Brita does not address whether, as a general matter: (a) sanctions can issue for seeking a revision when a right to a revision is a statutory right under RCW 2.24.050, and when revision is also a constitutional right under Article IV, Section 23 of the State Constitution, especially when (b) sanctions were not before the commissioner in the decision revised to the judge.

And Brita does not address the case law about whether sanctions are appropriate in this particular situation, in which there was an “administrative” removal of a commissioner for “conflict of interest” issues that were not in the record, on terms that violate, or appear to violate, the laws of the State of Washington. See, e.g., *Matter of Marriage of Lyle*, 199 Wash. App. 629, 398 P.3d 1225 (2017) and *State v. Rocha*, 181 Wash. App. 833, 327 P.3d 711 (2014). She does not address the lack of findings, or the absence of other bases for an order on sanctions.

Brita's *Response* made no attempt to address the following sanctions cases that Andrew applied to this particular case in his *Opening Brief*: *Biggs v. Vail*, 124 Wash.2d 193, 876 P.2d 448 (1994); *Dexter v. Spokane Cty. Health Dist.*, 76 Wash. App. 372, 884 P.2d 1353 (1994); *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wash. App. 697, 9 P.3d 898 (2000). See also *Bryant v. Joseph Tree, Inc.*, 119 Wash. 2d 210, 219, 829 P.2d 1099, 1104 (1992) (However, the rule [CR 11] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories).

The sanctions are asked to be reversed as lacking a basis in law or fact.

## VI. CONCLUSION AND RELIEF REQUESTED

The absence of any record at all in this case supporting the removal of Commissioner Ressa is not consistent with the case law of Washington:

The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Dominguez*, 81 Wash.App. 325, 328–29, 914 P.2d 141 (1996).

*West v. State, Washington Ass'n of Cty. Officials*, 162 Wash. App. 120, 136–37, 252 P.3d 406, 414 (2011).

*State v. Rocha* properly distilled the case law applicable to any recusal matter, if the *Gulseth* case is somehow re-cast in that light. And the record required by the case law on recusal shows that there is no required facts or evidence in the *Gulseth* file. See *State v. Rocha*, 181

Wash. App. 833, 327 P.3d 711 (2014). With the competing interpretations of Commissioner Ressa's re-assignment by Commissioner High-Edward in mind, the following relief is requested.

Andrew Gulseth still finds no basis in the record for the issue here to be called a matter of "recusal," and so his initial request for relief from an essential "disqualification" of Commissioner Ressa remains before this court, which was: (a) To vacate the re-assignment and then "re-assign" (or restore the initial assignment) of Commissioner Ressa to his case; (b) To determine if a local procedure for a Notice of Disqualification of commissioners is allowed under State Law, and then, of course, if such a procedure is consistent with state law, (c) clarify that such a procedure must be published and generally available to all litigants; (d) To reverse the sanctions against Mr. Mason on these facts; and (e) To determine if sanctions for seeking revision are appropriate generally.

If the matter is re-cast as a "recusal" then the court is asked: (f) To determine that there are no facts in this file to justify a recusal; (g) To clarify that hearings are required on contested recusals; and (h) To establish that there must be a sufficient record made to support any recusal decision that has been contested.

Respectfully submitted on 9/22/19,



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Division III No. 365492

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**Andrew Gulseth (and counsel), Appellant**

**v.**

**Brita Gulseth, Respondent**

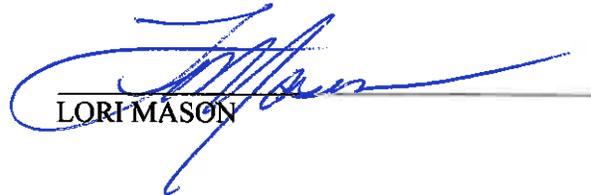
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**DECLARATION OF SERVICE**

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I, Lori Mason, declare under penalty of perjury under the laws of the State of Washington, that on September 22, 2019, I provided, via electronic filing, a copy of Appellant's REPLY BRIEF to:

**Matthew J Dudley**     [mjdudley@cet.com](mailto:mjdudley@cet.com)

  
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