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COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

In re

BRITA GULSELTH Respondent and ANDREW GULSETH Appellant	**No. 365492**

RESPONSIVE BRIEF

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ORIGINAL

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The Appellant contends Spokane County Superior Court is required to have a written policy regarding recusals and reassignment procedures. (Brief of Appellant, i, 3, 4 and 5)

The Appellant further contends that a motion for recusal and opportunity to object to the recusal must be filed. (Brief of Appellant, i, 3, 4 and 5)

The Appellant contends that a hearing must occur each time a recusal might occur. (Brief of Appellant, i, 3, 4 and 5)

Statement of Case

Matthew Dudley represented Greg Weber in a domestic relations matter. The opposing party was Michelle Ressa during the time she was a sitting Spokane County Commissioner. (CP 83-98)

From that day forward, Commissioner Ressa has not heard any court matters where Matthew Dudley is attorney for a party. (CP 83-98)

From that day forward, if a case was assigned to Commissioner Ressa, she automatically recuses herself (CP 83-98)

The Gulseth case was assigned to Commissioner Ressa at the time of filing. (CP 7-9)

The Gulseth case was reassigned to Commissioner Jacquelyn High-Edward on November 28, 2018. (CP 30)

Appellant's counsel filed an "Objection to any change of commissioner without motion-notice of hearing" on November 28, 2018. (CP 31-32) Within such, Appellant alleged the reassignment was tantamount to my filing a disqualification against Commissioner Ressa. (CP 31-32)

A temporary orders hearing occurred before Commissioner High Edward on November 30, 2019. (CP 46-48 and 40-45).

Legal Argument

A. Law of Review of Revision

Appellant sought revision of an order of reassignment that was not the result of a hearing. (CP 30, 33-35) Appellant sought revision claiming a process was required by myself to file a motion to recuse under the case assigned to Commissioner Ressa, give notice to the other side, have a hearing on the recusal where Commissioner Ressa would then recuse herself. (CP 31-32, 26-29)

Following the theory of appellant, I could file a parenting plan action and the case is assigned to Commissioner Ressa. I would set a return on the immediate restraining order to Commissioner Ressa's calendar and then set a hearing on her motion to recuse. A hearing on the motion to recuse would have to occur prior to the return date of the motion for immediate restraining order. That would result in the immediate

restraining order being reissued due to the issue of recusal having to occur. A hearing have to occur on Commissioner Ressa's family law docket on the motion to recuse. One she recuses herself, the matter would have to go through a formal process of reassignment (as to be determined by Appellant) for who the newly assigned Commissioner will be.

As enunciated by Judge Ellen Kalama Clark, Commissioner Ressa recuses herself in all cases that I am involved in. (CP 83-98)

The sanction imposed by the Court for seeking revision of the order of reassignment I believe is related to the claim by Appellant's counsel, that Spokane County must have a process where it is required for a motion and hearing to occur every time Commissioner Ressa is assigned a case I am involved in. Seeking revision of this administrative process was frivolous. (CP 83-98)

Appellant requests a remand to Commissioner High Edward for there to be a record on her determination to reassign the case to herself from Commissioner Ressa. (CP 31-32)

Mr. Gulseth was timely served for a hearing to occur before Commissioner High-Edward. (CP 38-39) Instead of preparing for hearing, Appellant filed an Objection to Hearing set on wrong day and requested the matter be set before Commissioner Ressa. (CP 25)

Appellant cites to Perez v. Garcia 148 Wn. App. 131, 198 P.3rd 539 (2009) for the claim of "facts" being added to the record for a revision hearing and remand being required.

The case cited involved invalidating the local rule under LCR 59 in Mason County. The judge in Garcia allowed nine months and additional fact finding to occur before ruling on a motion revise that was not before the Commissioner. The case pertained to one party removing the child from Mexico to Mason County, WA. The Commissioner determined the party had wrongfully removed the child from Mexico. The judge, nine months later and after allowing additional fact findings, reversed the Commissioner. The reversal o the trial judge was a proper decision by the Court of appeals and is in no way similar to the facts of the Gulseth case.

No "new evidence" was provided to Judge Ellen Kalama Clark. The same evidence of Commissioner Ressa recusing herself that was before Commissioner High Edward was before Judge Ellen Kalama Clark.

Under the Appellant's theory, every time an order reassigning is done without a hearing, a party could seek revision of that order on the basis a hearing did not occur.

Issue B Affidavit of Prejudice-Disqualification of Commissioner

It is true there is no affidavit of prejudice nor disqualification procedure for a family law commissioner as a matter of right. The right of revision is available.

I have never sought a motion to disqualify or affidavit of prejudice of Commissioner Ressa as there is a standing determination by Commissioner Ressa that she recuse herself from cases involving myself. (CP 83-98)

Commissioner Ressa has the judicial integrity to recuse herself without the necessity of a formal motion. It would appear reasonable Commissioner Ressa does not wish to have to publicize every time a case is assigned to her that I am on, that she is recusing herself due to my representing her ex-spouse.

Appellant contends that there must be a motion to recuse filed each time a case assigned to Commissioner Ressa or that I appear on a case assigned to her. (CP 36-37, 26-29, 31-32) There is no support for such a position.

Recusal decisions lie within the sound discretion of the trial court. *State v. Bilal*, 77 Wash.App. 720, 722, 893 P.2d 674 (1995). The appellate courts review a trial court's recusal decision for an abuse of discretion. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wash.App. 836, 840, 14

P.3d 877 (2000). The court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).*Tatham v. Rogers*, 283 P.3d 583 (Wash. App., 2012)

Appellant cites to *Williams and Mauseth Ins. Brokers Inc. v. Chapple*, 11 Wn. App. 623, 626-27, 524 P. 2d 431, 434 (1974) for the proposition that a judge has no right to recuse themselves in the absence of a valid reason. (page 16 of brief). Appellant contends that Commissioner Ressa being the opposing party of counsel for Ms. Gulseth is insufficient for such a recusal.

The Williams and Mauseth case involved parties who were aware of a possible conflict for disqualification but waived it. It was not until after the ruling, that the non-prevailing party sought to invoke the need for the judge to disqualify themselves. Id at 626. The appellate court determined the trial judge should not have recused themself due to the waiver. The result of ruling is that one cannot be aware of the possible conflict, waive the conflict, then seen disqualification nor recusal only after an unfavorable ruling.

In the instant case, Commissioner Ressa never made a ruling on the Gulseth matter.

Appellant contends that there is unwritten rule that allow a Notice of Disqualification of Commissioners. (page 17 of opening brief). There is no Notice of Disqualification of Commissioner Ressa. She recuses herself. (CP 46, 83-98). There is no contravention of state rules or statutes.

The appellate decisions regarding recusal appear to focus on cases where a judicial officer declined to recuse themselves.

Washington cases have long recognized that judges must recuse themselves when the facts suggest that they are actually or potentially biased. See Dimmel v. Campbell, 68 Wash.2d 697, 699, 414 P.2d 1022 (1966) ("It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties."). In State ex rel. McFerran v. Justice Court of Evangeline Starr, 32 Wash.2d 544, 548, 202 P.2d 927 (1949), the court stated "[t]here can be no question but that the common law and the Federal and our state constitutions guarantee to a defendant a trial before an impartial tribunal, be it judge or jury." It quoted the court's 1898 decision in State ex rel. Barnard v. Board of Education for its observation that " '[t]he principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the

history of courts.' " Id at 549, 202 P.2d 927 (quoting State ex. rel. Barnard v. Bd. of Educ., 19 Wash. 8, 17, 52 P. 317 (1898)).

In State v. Madry, the court held, " 'Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.' " 8 Wash.App. 61, 68, 504 P.2d 1156 (1972) (quoting Murchison, 349 U.S. at 136, 75 S.Ct. 623). Citing to the then-recently-enacted canons of the CJC of the American Bar Association, the court stated:

The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. Id. at 70, 504 P.2d 1156.

Beginning with *State v. Post*, 118 Wash.2d 596, 826 P.2d 172, 837 P.2d 599 (1992), the Supreme Court has characterized a judge's failure to recuse himself or herself when required to do so by the judicial canons as a violation of the appearance of fairness doctrine. The court also

narrowed the scope of the appearance of fairness doctrine from one under which a party could challenge whether decision-making procedures created an appearance of unfairness to a reformulated threshold: whether there is "evidence of a judge's or decisionmaker's actual or potential bias." 118 Wash.2d at 619 n. 9, 826 P.2d 172, 837 P.2d 599.

Washington's appearance of fairness doctrine seeks to prevent the problem of a biased or potentially interested judge. *State v. Carter*, 77 Wash.App. 8, 12, 888 P.2d 1230 (1995). Under this doctrine, evidence of a judge's actual bias is not required; it is enough to present evidence of a judge's actual or potential bias. Post, 118 Wash.2d at 619 n. 9, 826 P.2d 172, 837 P.2d 599. "The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." Sherman v. State, 128 Wash.2d 164, 205, 905 P.2d 355 (1995).

Sanctions

Appellant proffers that a revision Court cannot impose sanctions for seeking a revision because one as the right to seek revision. (Appellant's brief, page 20). Appellant is mistaken. Appellant contends that because he can find no legal authority that allows for the imposition of sanctions on revision, such must not be allowed. This is sophistry.

Revisions are de novo hearings and a Court could impose sanctions against the party seeking or responding to the motion.

Appellant repeatedly relies upon *Marriage of Lyle, 199 Wash. App. 629, 398 P.3d 1255 (2017)* related to the Commissioners. In fact, Lyle was a case where this Division rules that a judge acting on a motion to revise has "plenary authority over the matter and may issue findings or decisions that could have been entered by the Commissioner." Id. Lyle had nothing to do with the recusal of a commissioner or alleged conflict of a commissioner.

Appellant contends Commissioner Ressa being my opposing party in contested domestic relations litigation "is nothing unique" and that a procedure should be required to allow all parties to seek removal of Commissioner for conflicts.

Commissioner Ressa's actions would evidence her disagreement with Appellant.

Despite this, Appellant requests this Court direct the Gulseth case be reassigned to Commissioner Ressa. Appellant further requests this Court issue a dictate to Spokane County to institute a Disqualification of Commissioner procedure under state law and require a hearing each time such is done. The request by Appellant has no merit in law and should be denied.

In summary, it is requested the Court affirm the ruling of Judge Ellen Kalama Clark.

September 9, 2019

Respectfully submitted,

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