STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2017-AP-002132

In re the Paternity of B.J.M.

Timothy W. Miller,

Joint-Petitioner-Appellant,

and

Angela L. Carroll,

Joint-Petitioner-Respondent.

On Appeal from the Circuit Court of Barron County,
Honorable J. Michael Bitney, Circuit Judge, presiding

BRIEF OF APPELLANT

HERRICK & HART, S.C.
STEPHANIE L. FINN
STATE BAR NO. 1000734
DAVID J. RICE
STATE BAR NO. 1018742
Attorneys for Appellant
116 WEST GRAND AVENUE
POST OFFICE BOX 167
EAU CLAIRE, WI 54702-0167

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....iv

ISSUES FOR REVIEW.....vii

STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....viii

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS.....4

ARGUMENT.....13

I. Because of the appearance of impropriety and partiality, retroactive disqualification and new hearing with a new judge is warranted 13

A. The appearance of partiality must be avoided . 13

1. Standard of review. 13

2. Test for impartiality. 13

3. Appearance of impartiality arises from a social connection or from ex parte communications. 19

B. The appearance of impropriety or partiality exists in this case 21

1. The Facebook interaction was ex parte communication 21

2. The appearance of partiality is heightened given the timing of the ESM relationship and ex parte communications. 24

3. The ex parte communication that occurred gives rise to the appearance of Impropriety. 29

C. The ex parte communication and appearance of impropriety mandates relief. 31

II. Trial court erroneously exercised its discretion with regard to the best interest analysis

A. Standard of review.

B. The child's best interests must be protected.

C. The trial court erred in changing custody and substantially reducing placement without considering other forms of protection for A.C. which would not have impacted placement and B.M.'s best interests.

CONCLUSION.....46

FORM AND LENGTH CERTIFICATION AND CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12).....48

CERTIFICATION OF APPENDIX 49

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY. 50

TABLE OF AUTHORITIES

Federal Cases

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813, 106 S. Ct. 1580, 89 L. Ed. 2d 823 (1986) 15, 37

Bracy v. Schomig,
286 F.3d 406 (7th Cir. 2002) 15

Cartalino v. Washington,
122 F.3d 8 (7th Cir. 1997) 15, 16

Franklin v. McCaughtry,
398 F.3d 955 (7th Cir. 2005) 14

In re Murchison,
349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955) 14, 15

Jones v. Luebbers,
359 F.3d 1005 (8th Cir.) 16

Liljeberg v. Health Servs. Acq. Corp.,
486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988) 18, 33

Federal Statutes

28 U.S.C. § 455 ..... 18, 33, 34

Wisconsin Cases

260 N. 12th St., L.L.C. v. DOT,
2011 WI 103, 338 Wis. 2d 34, 808 N.W.2d 372 38-39

Dees v. Dees,
41 Wis. 2d 435, 164 N.W.2d 282 (1969) 41

Glidewell v. Glidewell,
2015 WI App 64, 364 Wis. 2d 588, 869 N.W.2d 796 46

Guelig v. Guelig,
2005 WI App 212, 287 Wis. 2d 472, 704 N.W.2d 916 39

Hartung v. Hartung,
102 Wis. 2d 58, 306 N.W.2d 16 (1981) 39

In re In Interest of S.S.K.,
143 Wis. 2d 603, 422 N.W.2d 450 (1988) 13

Johnson v. Merta (*In re Estate of Dejmal*),
95 Wis. 2d 141, 289 N.W.2d 813 (1980) 38

Larry v. Harris,
2008 WI 81, 311 Wis. 2d 326, 752 N.W.2d 279 34

Marris v. Cedarburg,
176 Wis. 2d 14 (1993) 16

Mathias v. St. Catherine's Hosp.,
212 Wis. 2d 540, 569 N.W.2d 330 (1997) 35

Murray v. Murray,
128 Wis. 2d 458, 383 N.W.2d 904 (1986) 13

State v. Edmunds,
2008 WI App 33, 308 Wis. 2d 374, 746 N.W.2d 590 35

State v. Gudgeon,
2006 WI App 143, 295 Wis. 2d 189, 720 N.W.2d 114 13, 14, 16

State v. Harrell,
199 Wis. 2d 654, 546 N.W.2d 115 (1996) 16

State v. McBride,
187 Wis. 2d 409, 523 N.W.2d 106 (1994) 15

State v. O'Neill,
2003 WI App 73, 261 Wis. 2d 534, 663 N.W.2d 292 15

State v. Rochelt,
165 Wis. 2d 373, 477 N.W.2d 659 (1991) 13

State v. Walberg,
109 Wis. 2d 96, 325 N.W.2d 687 (1982) 14, 15

Wisconsin State Statutes

Wis. Stat. § 60.03 17

Wis. Stat. § 757.19(2)(g) 17, 18

Wis. Stat. § 767.41(2)(b) 1

Wis. Stat. § 767.41(2)(am) 1

Wis. Stat. § 767.41(2)(d) 39

Wis. Stat. § 767.41(5)(bm) 3, 42

Wis. Stat. § 767.451(1)(b) 39

Wis. Stat. § 805.17(2) 38

Wis. Stat. § 805.17(3) 3

Wis. Stat. § 806.07 ..... 3, 34

Wis. Stat. § 809.22 ix

Wis. Stat. § 809.23 ix

Other State Cases

Chace v. Loisel,
170 So. 3d 802, 39 Fla. L. Weekly 221 (Fla. 5th DCA 2014) 31, 32

Frazier v. Frazier,
No. E2016-01476-COA-T10B-CV, 2016 Tenn. App. LEXIS 629 (Tenn. Ct. App. Aug. 26, 2016) 32

Hachenberger v. Hachenberger,
135 So. 3d 413, 39 Fla. L. Weekly 307 (Dist. Ct. App. 2014) 32

Harvey v. State,
751 N.E.2d 254 (Ind. Ct. App. 2001) 15

Rose v. State,
601 So. 2d 1181 (Fla. 1992) 21

Other

Current Development 2016-2017: The Convening Authority and Ex Parte Communications: A Threat to the Legitimacy of Military Justice? 30 Geo. J. Legal Ethics 1115, 1117-1118..20

Liljeberg v. Health Services Acquisition Corp.: *The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a)*, 1989 Wis. L. Rev. 1033, 1060 34

Attorney Misconduct on Social Media: Recognizing the Danger and Avoiding Pitfalls, 32 ABA Journal Lab. & Emp. Law 427, 431 (Spring 2017).....22

Notes: Certifying Statutory Class Actions in the Shadow of Due Process, 92 N.Y.U. L.Rev. 1977, 1985 (December, 2017) 22

Ronald R. Hofer, Comment, *The Best Interest of the Child Doctrine in Wisconsin Custody Cases*,
64 Marq. L. Rev. 343, 343 (1980) 40-41

ISSUES FOR REVIEW

1. Did the Judge's acceptance of a litigant's Facebook friend request after the hearing, but before rendering his decision, create an appearance of impropriety requiring relief?

Trial Court Answered: Judge Bitney held there was no subjective conflict or partiality, nor an objective appearance of such, because, even though he accepted a litigant's Facebook friend request before rendering his decision, he had already made up his mind.(R134,p32)

2. Did the Judge's acceptance of a litigant's Facebook friend request after the hearing, but before rendering his decision, create ex parte communications requiring relief?

Trial Court Answered: Judge Bitney held that there was no ex parte communication because he did not specifically "like" or comment on any of the litigant's posts.(p R134,p31-32)

3. Did the Judge err in how he conducted the best interest analysis?

Trial Court Answered: The safety of the mother, as well as the safety and wellbeing of the child, is a paramount interest.(R134,p36-38,41-44)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

There are two principal issues in this case. The first addresses judicial disqualification due to the appearance of impartiality and ex parte communications between the judge and a litigant in the context of electronic social media. This appears to be an issue of first impression in Wisconsin. As such, this case will enunciates a new rule of law or modify or clarify existing rules in the context of the relatively new medium of electronic social media (ESM). There are no Wisconsin published decisions addressing this issue. In the growing age of ESM, this issue presents a substantial and continuing public interest. As such, both oral argument per Wis. Stat. §809.22 and publication per §809.23 are warranted.

The second issue presented in this case deals with the sufficiency of the evidence and the analysis for the court's findings and decision with regard to modification of custody and placement. This argument is more case specific and does not meet the standard for publication. The briefs should be able to adequately address these arguments.

STATEMENT OF THE CASE

This is a post-paternity action. The parties stipulated to custody and placement in August, 2011.(R1) In August, 2016 the mother, A.C., filed a motion to modify custody from joint legal custody to sole legal custody; to modify from joint physical placement to primary physical placement with her; and requested permission to move with the child to Arizona.[1](R4)

Her supporting affidavit alleged concerns about parenting and threats of abuse, and included a copy of a domestic abuse injunction obtained that same month.(R5;R7, Ex.C) The father, T.M., vigorously opposed the changes and disputed the allegations.

A custody hearing took place June 7-8, 2017. Written arguments were filed June 16th. The GAL's final recommendation provided, in part:

> Wis. Stats. §767.41(2)(am) provides a rebuttable presumption that joint custody is in the best interest of the minor child. However, sole custody may be granted pursuant to Wis. Stats. §767.4l(2)(b)2c. If the court finds the parties are unable to cooperate in the future decision making required under an award of joint legal custody. In making this finding the court shall consider, along with any other pertinent items, any reasons offered by a party objecting to joint legal custody. Evidence that either party engaged in abuse, as defined in s.813.122(1)(a), of the child, as

[1]The motion specified Arizona. A.C.'s Affidavit indicated the move was to Las Vegas.(R5) At the hearing A.C. stated she wanted to move to Durand.(R132,p7)

defined in s.813.122(1)(b), or evidence of interspousal battery, as described under s.940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(am), creates a rebuttable presumption that the parties will not be able to cooperate in the future decision making required.

I am recommending sole legal custody be awarded to A.C. as to education and medical care. The parties cannot have any communication and will not be able to cooperate in the future decision making required for the child.

I am recommending that because T.M. has been the primary parent involved in the non-school activities with the child, that he have the ability to make decisions regarding those activities and any extracurricular activities ie. sports, clubs, or association involvement.

As to physical placement, I am recommending that the parties continue with the current shared placement schedule…. Exchanges of the child should continue to occur at the school, at the police department (on non-school days), or with a third party….

My perception of B.M.'s speech impediment is that his stuttering becomes heavier when there are changes in his life. The teacher noted three specific times during this past school year in which B.M.'s speech changed. The beginning of the school year (after the restraining order went into affect); in February (the same month that Angela sold her home and moved in with her mother); the end of the school year (another residential move would occur). The teacher noted that after 2-4 weeks B.M.'s speech did improve.

I believe A.C.'s proposed schedule for placement and attendance at activities would be a substantial change from the roles each parent currently plays in B.M.'s life. The longest time B.M. currently spends away from either parent is three days. He is used to regular and consistent time with both mom and dad. B.M. is also used to his dad helping coach him in sports. Amanda DeLawyer testified that she regularly sees T.M. with B.M. at extracurricular functions. That T.M. helped coach her children and others in wrestling and

> baseball … B.M. identifies T.M.as being the parent involved in all of his activities. Under A.C.'s proposal, B.M. would not have this interaction with his father…
>
> I did take into consideration Wis. Stats. §767.41 (5)(bm), which states "the safety and well being of the child and the safety of the parent who was the victim of the battery or abuse shall be the paramount concerns in determining legal custody and periods of physical placement." A.C. testified that she is worried about her own safety. A.C. indicated that she did not have a concern for B.M.'s safety, while placed with his father. The restraining order is a court order, not just a piece of a paper. It has been in place since August of 2016; it does provide the necessary safety for A.C.(R91;App.1-7)

Judge Bitney rendered his a written decision on July 14, 2017 granting sole custody to A.C., substantially modifying placement, and permitting the move the Durand.(R92)

That same day, the GAL learned that Judge Bitney and A.C. were Facebook friends and notified T.M.'s counsel. (R104;106;107)

T.M. subsequently moved for reconsideration per Wis. Stat. §805.17(3), and relief per Wis. Stat. §806.07. He argued the Facebook friending, along with the ex parte communication from both the request and acceptance, as well as that which occurs through the newsfeed feature, gave rise to an appearance of impropriety which required disqualification and a new trial.(R103;109)

T.M. also argued that reconsideration was appropriate on the merits because of trial court error. Properly applying the modification criteria and considering the evidence presented, it was in the child's best interest to retain shared custody and placement.(R103;117)

The motion for relief was denied. This appeal follows.

STATEMENT OF FACTS

The parties' relationship

A.C. and T.M. were never married nor ever lived together. They share one child in common, B.M., born August 2010, whom they raised in the Rice Lake area. When B.M. was six months old the parties had an altercation giving rise to criminal charges against T.M., and a restraining order.(R54;57) Subsequently, A.C. recanted and requested that the restraining order be dropped, stating she did not want T.M.to be convicted of a crime he did not commit.(R83) T.M. has always denied the accusations regarding the 2011 incident.

In August 2011, several months after the alleged incident, the parties entered into a Stipulation and Order for Legal Custody and Physical Placement agreeing to shared joint legal custody and shared equal placement.(R1) They co-parented B.M. for approximately five years without

incident. The nature of the parties' relationship over that five years was debated at trial.

A.C. alleged that there was an ongoing pattern of domestic abuse by T.M. against her that culminated in the August, 2016, 10 year injunction under Wis. Stat 813.12(4)(d).(R59)

While admitting that they had verbal disagreements that would often be exaggerated through texting, T.M. denied a prolonged history of abuse, and denied any physical abuse. He questioned A.C.'s stated concerns prior to the injunction pointing to the fact over the course of the five years A.C. repeatedly asked him for sex, repeatedly asked him over to her house, repeatedly asked him to go on trips together, and to plan events together.(R106;107;108;100;109) She permitted her other children to visit with T.M. and for him to bring them places.(R133,p77,93-94) Instead, T.M. believe that A.C. became upset that the relationship was not going to result in a long term commitment.(R133,p95-99)

A.C. agreed that the relationship had ups and downs and that she had hoped to make it work with T.M., maintaining that she wasn't afraid of him every day but there were days he was mean.(R132,p247-257) However A.C.

was very clear that she did not believe that T.M. would physically harm B.M.(R132,p228)

A.C. also alleged that T.M. had violated the 2016 injunction on two occasions thereby justifying her request to move. One alleged violation occurred at B.M.'s school Christmas concert.(R132,p266-267). The second was B.M.'s wrestling match.(R132,p267) T.M. presented evidence that he was not trying to violate the injunction. He was not sure whether A.C. would be at either event.(R133,p133) He contacted two law enforcement officers who were also his friends, Detective Kummet and his wife Trooper Kummet, for advice as to whether he and A.C. could attend an event for B.M.(R132,p285;R133,p13) Trooper Kummet testified that she consulted with the District Attorney and advised T.M. after that conversation that he should go and "watch his son as long as he didn't have contact with A.C."(R133,p14) T.M. also contacted his criminal defense attorney, and his former family law attorney as well as the Rice Lake Police Department on how to handle possible situations where both parents were at an event so as to not be in violation of the injunction.(R133,p126-127) T.M. was never charged with, nor found to be, in violation of the injunction.

While there was some generalized testimony that children who observe domestic violence can suffer or have

lasting effects, there was no credible evidence that B.M. exhibited any such symptoms. A.C. and some of her family and friends testified that B.M. had behavioral problems after being with T.M. and was disrespectful toward his mother or that his stuttering may increase. However, even some of these witnesses acknowledged that to the extent they reported changes it could be attributable to any number of things.(R132,p23,39-41) The GAL pointed out that no expert testimony was provided identifying B.M.'s behaviors as being related to placement.(R91,p4) The only neutral witness who both had professional expertise and direct interaction with B.M. on a regular basis was his teacher – who was clear that there was no difference in B.M. based on which parent he was with:

> Q Miss Olson, you are aware that B.M. is from a split household?
>
> A Yes….
>
> Q And you're also aware that B.M. spends time both at mom's house and at dad's house throughout the week?
>
> A Correct.
>
> Q And that changes every week, correct?
>
> A Yup.
>
> Q Now on any given day, can you determine, based on B.M.'s behavior, as to what household he's been at?

A I cannot. Honestly, if I didn't have his calendar with the schedule on there of where he was going, I would honestly have no clue who he was with.

Q So do you notice any behavioral changes on a day-to-day basis in your classroom?

A I don't. He's typically the same little silly boy. He needs redirection. He is six years old. He's very young. Some of the students in first grade are seven and some are turning eight, and he will just be turning seven. But no, like I -- his behavior was very consistent throughout the year, just needed redirection here and there to get back on task or to stay separated from another little student in the classroom.

…

Q You're aware that B.M. also has a stutter, correct?

A Correct.

Q Now is there days -- I'm sorry, are there days when B.M.’s stutter is worse than on other days?

A You know, there really was no pattern…It kind of seems like it comes and goes. I did e-mail both A.C. and T.M. just this week, I believe it was on Tuesday stating that I noticed his stuttering was getting a little bit more heavy again. It was more noticeable. So I kind of feel like it comes and goes, but there is no -- to me, there isn't like a rhyme or reason to it. There's nothing here at school that's changed or anything like that.

Q Have you noticed, based on the calendar of where B.M. is placed, if there's any pattern relating to whether his stuttering is heavy?

A I have not.

…

Q Let's talk about behavior now. Did you have behavior issues with B.M. in the classroom, particularly?

A You know at the beginning of the year with all kids, with all typical first graders, I guess, they kind of, you know, give the teacher a little run for her money, they kind of test you a little bit, and as with B.M.

at the beginning of the year trying to see what he could get away with, what he couldn't get away with, what the expectations and the rules were. But honestly, with redirection he did wonderful, and he needed it throughout the whole school year, as did a lot of the kids in the classroom.

At times he just wanted to be silly and he wants his friends to like him, he wants to have a good time. With a simple redirection of hey, B.M., I see ya, or B.M. , what are you doing? What do you need to be doing? He would get it together and he did great.

Q Did you happen to notice if there was any pattern in behavior based on his calendar of placement with either mom or dad?

A I did not, no. Every day he came in he was a happy little guy. He honestly had no like behavior issues. He was very consistent. He was just -- he was B.M.(R133,p161-169)

The teacher also testified that B.M. started out the year a bit behind, but both parents worked with the school to bring him up to speed.(R133,p164-167,173) She expressed concern about the proposed move:

Q If a child, Ms. Olson, doesn't have to move and he can maintain his school and not switch schools, do you believe that to be in the child's best interest?

A I do, just especially with B.M. being in some reading and math interventions. He's already built that relationship with those teachers. I know another school district would have the same -- they would probably have a math interventionist and reading interventionist as well, but again, if he would need that extra support in second grade, he would have to start over with building a relationship with those teachers.

Q And he already has established a rapport and connection with the teachers at Hilltop; is that correct?

A He has, uh-huh.(R133,174-175)

The GAL summarized the testimony in her recommendation stating as follows:

> Testimony indicated that B.M. is bonded with both parents and he enjoys spending time with each parent. He is used to having frequent contact with each parent. The current placement schedule was part of an agreement the parents entered into in August of 2011. B.M. only knows living at both mom's house and dad's. Prior to August of2016, when the restraining order went into effect, the parties were more flexible. Testimony indicated that if one parent had to work or had other commitments, the other parent typically spent time with the child.(R91,p4)

The Decision

Judge Bitney found that there had been a substantial change in circumstances since the August 2011 Order was issued, and that it was in the best interests and welfare of B.M. that his mother be granted sole legal custody and primary physical placement. The court approved the move to Durand.(R92,p5)

Facebook friending while matter pending

Following the hotly contested custody hearing, but before the decision was rendered, A.C. sent a Facebook friend request to Judge Bitney and he accepted.(R134,p29)

This was discovered when the GAL, Attorney Laura Sutton, became aware that A.C. had posted on Facebook about the Decision. After reading A.C.'s post, Attorney Sutton

felt a duty to report it to T.M.'s counsel, Attorney Heather Pauls.(R106) Attorney Pauls accessed Facebook and confirmed that the Judge and A.C. were Facebook friends. Attorney Pauls reviewed A.C.'s post about the decision which said, "The Honorable Judge has granted everything we requested."(R107,ExB,App.24-27) Attorney Pauls also noted that A.C. had at least one post about domestic violence.(R107) Attorney Pauls then advised T.M. of the Facebook connection and the post.

T.M. was understandably concerned. He expressed that he perceived there to be a conflict, or certainly an appearance of conflict given, in part, the unknown nature of the Judge and A.C.'s relationship and what information that A.C. posted or liked that may have then shown in the Judge's Facebook feed. T.M. expressed concern that the friendship or the posts may have impacted the decision in the case, even subconsciously. Had he known that they were Facebook friends he would have requested recusal or pursued options for substitution or disqualification. He questioned what the decision would have been without any outside influences or the potential for such.(R104)

T.M.'s sister, who had been Facebook friends with A.C., submitted an affidavit stating that during the custody dispute A.C. had noticeably changed her Facebook

persona and believed it was a purposeful attempt by A.C. to have positive images of herself cycled to her friends' newsfeeds -- which would have included Judge Bitney at the time he was working on the case. A.C. was posting family pictures and posts about children and family. T.M.'s sister averred that she perceived it to be a conflict of interest, or at the very least created an appearance of a conflict, because the Judge would have been provided with information from A.C. (i.e., all of her posts and likes) outside of the courtroom, and T.M. did not have the same opportunity to present such information.(R105)

At the hearing on the motion for relief, Judge Bitney confirmed that he accepted a Facebook friend request from A.C. shortly after the hearing and before he had rendered his decision. However, he concluded that he did not have a subjective bias in favor of A.C., nor would a reasonable person call into question his impartiality, stating that even though he accepted the friend request before penning his decision, he already had his mind made up.(R124,p30-35)

> I don't agree with the analogy to someone intervening during jury deliberations following a trial. That would certainly call question into the verdict rendered by a jury. And the reason I say that is because in this case, although the decision hadn't come down from the Court yet, a decision on whether to award A.C. full custody was made long before the friendship request was ever tendered. I think it was either ten days or two weeks after the conclusion of

> the hearing that the friendship request came in via Facebook. And I can assure counsel that by then, I had decided how I was going to rule, even though it hadn't been reduced to writing. And that the face – the friendship request had no bearing on the decision that was ultimately penned by the Court and filed I think it was in early August.(R134,p31-32)

Judge Bitney denied the motions for relief and reconsideration.

ARGUMENT

I. Because of the appearance of impropriety and partiality, retroactive disqualification and new hearing with a new judge is warranted.

A. The Appearance of Partiality must be avoided.

1. Standard of review.

Under the objective test, a judge must recuse himself where a reasonable person could question the judge's impartiality. ***State v. Gudgeon***, 2006 WI App 143, ¶¶20-24, 295 Wis. 2d 189, 720 N.W.2d 114. The objective test as to whether the judge's impartiality can reasonably be questioned is a question of law for this court's de novo review. See ***State v. Rochelt***, 165 Wis.2d 373, 379, 477 N.W.2d 659 (Ct.App. 1991), cite to ***Murray v. Murray***, 128 Wis. 2d 458, 463, 383 N.W.2d 904(Ct.App. 1986); ***In re S.S.K.***, 143 Wis. 2d 603, 618 n.7, 422 N.W.2d 450(Ct.App. 1988).

2. Test for impartiality.

"The trial judge should recuse himself…whenever he believes his impartiality can reasonably be questioned." ***State v. Walberg***, 109 Wis.2d 96,104-106, 325 N.W.2d 687(1982). ***Gudgeon,*** supra, summarizes the test for judicial bias holding that even the appearance of partiality may require action:

> When analyzing a judicial bias claim, we always presume that the judge was fair, impartial, and capable of ignoring any biasing influences. See ***Franklin***, 398 F.3d at 959. That presumption, however, is rebuttable. ***Id.*** at 960. The test for bias comprises two inquiries, one subjective and one objective. ***Id.*** Either sort of bias can violate a defendant's due process right to an impartial judge. ***Id.***; ***State v. Walberg***, 109 Wis.2d 96, 105-06, 325 N.W.2d 687 (1982). Judges must disqualify themselves based on subjective bias whenever they have any personal doubts as to whether they can avoid partiality to one side. ***Id.*** The parties agree that this sort of bias is not at issue here.
>
> The second component, the objective test, asks whether a reasonable person could question the judge's impartiality. ***Franklin***, 398 F.3d at 960; ***Walberg***, 109 Wis.2d at 106-07 (looks to whether impartiality can "reasonably be questioned"). Actual bias on the part of the decision maker certainly meets this objective test. ***In re Murchison***, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955); ***Franklin***, 398 F.3d at 960-61. Sometimes, however, the appearance of partiality can also offend due process:
>
> > [O]ur system of law has always endeavored to prevent even the probability of unfairness…. "[E]very procedure which would offer a possible temptation to the average man [or woman] as a judge…not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." ***Tumey v. Ohio***, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749, 5 Ohio Law Abs. 159, 5 Ohio Law Abs. 185, 25 Ohio

> L. Rep. 236 [(1927)]. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way "justice must satisfy the appearance of justice." ***Offutt v. United States***, 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 [(1954)].

Murchison, 349 U.S. at 136.

We have reviewed numerous cases, both state and federal, that discuss these two aspects of objective bias. Initially, we had a difficult time discerning from them whether actual bias was necessary or merely sufficient. Several cases indicated that the former was true, that apparent bias did not suffice to establish a due process violation. See, e.g., ***Cartalino v. Washington***, 122 F.3d 8, 11 (7th Cir. 1997); ***State v. O'Neill***, 2003 WI App 73, ¶¶11-12, 261 Wis.2d 534, 663 N.W.2d 292 (objective test asks whether objective facts reveal actual bias; "It is not sufficient to show that there is an appearance of bias or that the circumstance might lead one to speculate that the judge is biased."); ***State v. McBride***, 187 Wis.2d 409, 417, 523 N.W.2d 106 (Ct.App. 1994) ("While the record provides an ample basis for the judge's conclusion that there would be the appearance of partiality, it does not demonstrate that Judge Koehn was actually biased."); ***Harvey v. State***, 751 N.E.2d 254, 259-60 (Ind. Ct.App. 2001). Other precedents stated the contrary. See e.g., ***Walberg***, 109 Wis.2d at 109; ***Murchison***, 349 U.S. at 136 (see language quoted above that sometimes judge without actual bias must be recused); ***Aetna Life Ins. Co. v. Lavoie***, 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed. 2d 823 (1986); ***Bracy v. Schomig***, 286 F.3d 406, 411 (7th Cir. 2002) ("ordinarily 'actual bias' is not required, the appearance of bias is sufficient to disqualify a judge"). On its face, the law appeared to be hopelessly contradictory.

Further examination, however, reveals that this divergent case law can be harmonized. Those cases that recognized appearance of partiality as sufficient seemed to do so only where the apparent bias revealed a great risk of actual bias. The Eighth Circuit's

> opinion in ***Jones v. Luebbers***, 359 F.3d 1005, 1012-13 (8th Cir. 2004), cert. denied, 543 U.S. 1027, 125 S.Ct. 670, 160 L.Ed.2d 507 (2004), is particularly illuminating. Upon setting forth the ***Murchison*** rule that apparent bias can violate due process, the court goes on to observe how the application of ***Murchison*** has varied depending on context. ***Jones***, 359 F.3d at 1012-13. According to Jones, for certain manifestations of judicial bias-such as taking bribes or presiding over contempt proceedings arising out of alleged misconduct that occurred in front of the presiding judge in closed chambers -***Murchison*** will nearly always require disqualification. ***Jones***, 359 F.3d at 1012-13. See also ***Cartalino***, 122 F.3d at 11 (observing some temptations are so severe, one can safely presume a substantial biasing incentive, such that "a demand for further evidence would be otiose").
>
> In other cases, ***Jones*** teaches that we determine whether "the potential for bias is sufficiently great" to sway the average person serving as judge away from neutrality, assessing that risk in light of a realistic consideration of "psychological tendencies and human weaknesses." ***Jones***, 359 F.3d at 1013 (citation omitted). See also ***State v. Harrell***, 199 Wis.2d 654, 666, 546 N.W.2d 115 (1996)(Abrahamson, J., concurring); cf. ***Marris***, 176 Wis.2d at 25 (employing similar language in light of common-law due process mandates: due process violated "when there is bias or unfairness in fact [or when] the risk of bias is impermissibly high" (emphasis added; footnote omitted)). In short, the appearance of bias offends constitutional due process principles whenever a reasonable person-taking into consideration human psychological tendencies and weaknesses-concludes that the average judge could not be trusted to "hold the balance nice, clear and true" under all the circumstances.

State v. Gudgeon, 2006 WI App 143, ¶¶20-24, 295 Wis.2d 189, 720 N.W.2d 114.

Disqualification for perceived conflict or appearance of bias is based not only in due process considerations,

but also in statutory law and judicial conduct codes. The Wisconsin legislature has spoken directly to the issue. Section 757.19(2)(g) governing disqualification makes clear recusal is required if there is the *appearance* of partiality – even if no actual partiality is established:

> (2) Any judge *shall disqualify himself* or herself from any civil or criminal action or proceeding when one of the following situations occurs: …
> (g) When a judge determines that, for any reason, he or she cannot, *or it appears* he or she cannot, act in an impartial manner. [Emphasis added].

The Wisconsin Supreme Court Rules are in accord that the appearance of partiality is unacceptable. SCR 60.02 provides: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."

Section 60.03 provides: "*A judge shall avoid* impropriety *and the appearance of impropriety* in all of the judge's activities. (1) A judge shall respect and comply with the law and shall act at all times in a manner that *promotes public confidence in the integrity and impartiality of the judiciary*. (2) A judge may not allow… social…or other relationships to influence the judges

judicial conduct or judgment. *A judge may not…convey or permit others to convey the impression that they are in a special position to influence the judge…*" [Emphasis added]

The mandate that the integrity of the judiciary be free from even the appearance of partiality is so great that a judge can be disqualified post-hearing or post-decision. In ***Liljeberg v. Health Services Acquisition Corp.***, 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), the losing party discovered 17 months after trial that the judge appeared to have had a serious conflict of interest. The judge claimed to have been unaware of the conflict, but the losing party nevertheless sought to have the judgment vacated. Interpreting section 455(a) of the Judicial Code, the United States Supreme Court held, that if an objective observer would believe that the judge should have known of the conflict, then the judge may be retroactively disqualified. The Court further held that, in appropriate cases, final judgments may be vacated for this reason.

While interpreting the federal rule for disqualification for the appearance of partiality, the underpinning of ***Liljeberg*** applies, or should be applied, in Wisconsin. Both the federal rule, 28 USC 455, and §757.19(2)(g) require that a judge shall disqualify himself

when it appears he cannot act in an impartial manner and/or his impartiality might reasonably be questioned.

3. Appearance of impartiality arises from a social connection or from ex parte communications.

An appearance of partiality can arise because of a personal relationship or connection. In this case, T.M. contends that the Judge's friending of A.C. while the action was pending creates such an appearance of partiality.

An appearance of partiality can also arise from ex parte communications. Ex parte communications are particularly troubling when it comes to the appearance of partiality or bias. During judicial or other adjudicatory proceedings, ex parte communications are strictly prohibited because they inherently create the appearance of bias or partiality:

> I. THE RATIONALES UNDERLYING THE PROHIBITION OF EX PARTE COMMUNICATIONS
>
> A. EX PARTE COMMUNICATIONS AND DUE PROCESS
>
> It is an axiomatic principle of American law that ex parte communications between the prosecution and a judge are prohibited not "merely [as] a matter of ethics; it is part of a defendant's right to due process and effective representation." The essential reason that due process forbids a judge from engaging in ex parte communications lies in the corrosive effects those communications can have on the adversarial process, which has been "the primary

> method of dispute resolution in America since the beginning of the republic." Indeed, ex parte communications with a judge challenge the most fundamental aspect of the adversarial process: that the parties will present their case to an impartial tribunal. One court described the problem of ex parte communications in the following way:
>
> Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments.
>
> Importantly, even ex parte communications that do not affect the outcome of a judge's decision are problematic because they have the potential to create the appearance of impropriety and thus erode public confidence in the legitimacy of the judicial process…

See *Current Development 2016-2017: The Convening Authority and Ex Parte Communications: A Threat to the Legitimacy of Military Justice?* 30 Geo. J. Legal Ethics 1115, 1117-1118.

As one court noted, "[n]othing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter

how pure the intent of the party who engages in such contact, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments." ***Rose v. State***, 601 So.2d 1181 (Fla. 1992).

The ex parte communications that were initiated and ensued between A.C. and Judge Bitney while the case was pending create the appearance of partiality or impropriety that reasonably erodes the public's confidence in the legitimacy of the judicial process.

B. The appearance of impropriety or partiality exists in this case.

1. The Facebook interaction was ex parte communication.

The Facebook friend request by A.C. is an ex parte communication in and of itself, as is the Judge's acceptance of the same. Judge Bitney is simply wrong on this point. "Friending" is communication.

> Many social media profiles are private, meaning a third-party cannot access a profile's content without user consent. Requesting access to another's social media account is commonly referred to as "friending." As opposed to viewing a public profile, friending--the

> overture to friend someone--almost certainly constitutes a communication with the social media owner, subjecting friending to ethical constraints.

See *Attorney Misconduct on Social Media: Recognizing the Danger and Avoiding Pitfalls*, 32 ABA Journal Lab. & Emp. Law 427, 431 (Spring 2017) citing to Model Rules of Prof'l Conduct R.4.2, 4.3(Am. Bar Ass'n 2016).

Additionally, the very nature of Facebook and the newsfeed function create a continuing stream of ex parte communications:

> Facebook is a social networking site that enables users to share their daily lives with their friends and the world at large. In Facebook's world, a "friend" is somebody who has full access to your profile. If you write a "status update" complaining about your wife, Facebook will show the message to your friends on their "News Feed." If you "like" somebody else's post (or an artist or a corporation), that information will be conveyed to your friends as well.

See *Notes: Certifying Statutory Class Actions in the Shadow of Due Process*, 92 N.Y.U. L.Rev. 1977, 1985 (December, 2017).

Facebook connections and ESM contacts raise several concerns as to the impartiality of the judiciary such as influence of extrajudicial sources, ex parte communication, and conflict of interest. In February 2013 the ABA issued Formal Opinion 462 Judge's Use of Electronic Social Networking Media. According to that Opinion, "[a]ll of a

judge's social contacts, however made and in whatever context, including ESM, are governed by the requirement that judges must at all times act in a manner 'that promotes public confidence in the independence, integrity, and impartiality of the judiciary,' and must 'avoid impropriety and the appearance of impropriety.' This requires that the judge be sensitive to the appearance of relationships with others."

A reasonable person would perceive an appearance of impropriety. Not only did T.M. perceive a conflict and express concerns as to how Judge Bitney and A.C. knew each other, when they met, the nature of their relationship, what the judge may have seen from her Facebook feed, and whether any of these factors even subconsciously impacted the decision in this case(R104), but the GAL is the one who, upon learning of the connection between Judge Bitney and A.C., felt "a duty" to contact T.M.'s counsel to advise of the same.(R106) T.M.'s counsel further confirmed that A.C. was posting and/or liking posts related to domestic violence, a primary issue in the case, which would have then appeared in Judge Bitney's newsfeed while the case was pending.(R107)

In this regard Judge Bitney's analysis is flawed. He improperly focused on the fact that he did not specifically

like A.C.'s posts nor did he and A.C. correspond directly about the case.

> With regards to the issue of the Facebook friending, the cases that have been cited by both counsel do not mandate or require that a judge recuse simply because there's a friendship that's been established on Facebook absent something more. And while it's un -- while it's certainly uncontradicted or not contested that the Court accepted A.C.'s Facebook friend request, Mr. Schwartz presented accurately the substance of the interaction between A.C. and the Court on Facebook. None of it had anything to do with this case. The Court did not respond, other than to accept the Facebook friendship request to any of the posts made by A.C. The Court did not like any posts, respond to any posts, or conduct any communication ex parte or otherwise with A.C., other than simply accepting the Facebook friendship request. And that was done long after the custody hearing was concluded. The cases certainly talk about the Courts being careful, even in the electronic world just as they would be in the normal world about who you talk to, and when, and even under what circumstances to avoid the impropriety, even the appearance of impropriety if not an actual bias.(R134,p31-32)

Judge Bitney failed to consider that the friend request and acceptance itself is per se ex parte communication. He also failed to consider or address that even though he may not have "liked" A.C.'s posts, he was admittedly still seeing them in his feed while the case was under his consideration.

2. The appearance of partiality is heightened given the timing of the ESM relationship and ex parte communications.

Unlike the situation where a judge may have thousands of connections or not recall that a litigant was an ESM

connection, the connection in this case arose while the case was pending and that fact was not disclosed. A reasonable person would call such action into question.

The ABA formal opinion 462 likewise distinguishes between that sort of historical, innocuous, Facebook friendship that a judge and persons appearing before him may not even recall exists, with situations where, as here, the judge knows of the ESM connection and there is current communication:

> Because of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes ***current*** and frequent communication, the judge must very carefully consider whether that connection must be disclosed. When a judge ***knows*** that a party, a witness, or a lawyer appearing before the judge has an ESM connection with the judge, the judge must be mindful that such connection may give rise to the level of social relationship or the perception of a relationship that requires disclosure or recusal. The judge must remember that personal bias or prejudice concerning a party or lawyer is the sole basis for disqualification under Rule 2.11 that is not waivable by parties in a dispute being adjudicated by that judge. The judge should conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professionally or personally. A judge should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for the disqualification…[Emphasis added].

The case at bar, however, is not about a judge failing to search through all of his ESM connections or where the

judge has no specific knowledge of an ESM connection to the litigant. Far from being the type of situation where some people have thousands of Facebook "friends" and cannot recall every person they have "friended" over the years, A.C. and Judge Bitney had to have realized that her case was pending before him and awaiting decision. Such "friending" conveys, or permits others to convey, the impression that A.C. was in a special position to influence the judge. The friend request and the acceptance, while litigation was pending, both presents ex parte communications and the appearance of impropriety.

Assume a jury trial and testimony ends. The jury is excused each night to return over the course of the several following days to continue deliberations. It would be hard pressed to find anyone who would say it was acceptable or proper for either the litigant or a juror to send/accept a Facebook friend request while these deliberations were ongoing. It would be contrary to the instructions provided to the jury. WIS JI-Civil 50 provides in part:

> CONDUCT
> We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers (interpreters) or witnesses do not speak with them. For their part, the parties, lawyers, (interpreters) and witnesses will not contact or speak with the jurors….

> Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.

Even Judge Bitney agreed that a juror friending a litigant during deliberations would be improper, or at least give rise to impropriety or partiality, as he stated it would *certainly* call into question the jury's decision.

> I don't agree with the analogy to someone intervening during jury deliberations following a trial. That would certainly call question into the verdict rendered by a jury.(R134,p320)[Emphasis added]

This is no different, and in some respects more concerning, as it involves undisclosed contact, during "deliberation" with the sole decision maker.

Judge Bitney's summary dismissal of these concerns by stating that he had already made up his mind do not address the relevant inquiry, i.e., the appearance of impartiality. Nor does it eliminate the obvious – he had not, in fact, actually rendered his decision at the time he accepted the friend request and willingly and knowingly exposed himself to communications from A.C. through Facebook feed.

> And the reason I say that is because in this case, although the decision hadn't come down from the Court yet, a decision on whether to award A.C. full custody was made long before the friendship request was ever tendered. I think it was either ten days or two weeks after the conclusion of the hearing that the

> friendship request came in via Facebook. And I can assure counsel that by then, I had decided how I was going to rule, even though it hadn't been reduced to writing.(R134,p32)

This does nothing to address *the appearance* of partiality. Final arguments were submitted on Friday June 16th and A.C. and Judge Bitney became friends on Monday June 19th (R115,ExA) The decision was not rendered until July 14.

Judge Bitney himself acknowledged how easy it could be to create an appearance of impropriety and the necessity of avoiding any such appearance. In addressing a possible violation of the witness sequestration order by A.C.'s witnesses during the hearing, he admonished against creating any such speculation:

> All right, the Court finds that there has not been a violation or material breach of the sequestration order that's previously been ordered. I don't believe that the witnesses have been tainted or have been influenced by the brief conversation they had with Ms. Stienbuch prior to her -- or following her testimony this morning. Maybe I should have made the admonition that to avoid even the appearance of impropriety you not go into the room or have conversations with people, because it leads to speculation of what you're talking about or whether you're trying to go around my back or get through the back door of what the Court specifically prohibited previously.(R132,p71-72)

If the Judge recognized that even purportedly innocuous conversations between witnesses made lead to speculation of what was discussed and raise the appearance of impropriety - what does friending a litigant while the

case is pending and being exposed to the party's Facebook feed raise? If the judge and the litigant met in a café ten days or two weeks after the hearing but before a decision had been rendered, and exchanged scrapbooks, it would be hard pressed to find anyone who would deny that such created an appearance of impropriety or partiality, or that such was ex parte communication. This is no different and, in fact, is actually worse. Far from being a one-time exchange, given the very nature how Facebook newsfeed works, it created a constant stream of out of court communication, away from the other parties' knowledge.

3. The ex parte communication that occurred gives rise to the appearance of impropriety.

Neither A.C. nor the judge answered the lingering question – why did A.C. friend the judge? Why did the judge accept? Why would a litigant and a judge become friends after the litigant provided testimony but while the judge was still drafting its decision? It is this very reasonable speculation that creates the appearance of impropriety. Certainly these questions and A.C.'s declaration that the "Honorable judge gave us everything we wanted" conveys the impression that she was in a special position to influence the judge contrary to SCR 60.03.

So too Judge Bitney's comments that he did not like or comment on anything that A.C. posted misses the mark. The way that Facebook works, anything A.C. posted would have appeared in Judge Bitney's feed for him to see whether he "liked" it or not. Also, anything A.C. liked that others posted likewise would have shown in his feed with the designation that A.C. liked this. This is communication with the judge. Thus, not only is there an appearance of impropriety because of the action of friending during the pendency of the proceeding, but also because of the ex parte communications that arise through Facebook.

While not a complete listing of everything that she did on Facebook after becoming friends with Judge Bitney, we know from even the limited pages attached to her own affidavit that she undertook communication (by "liking") related to one of her central arguments in this case, (i.e., domestic violence) that would have shown up in Judge Bitney's newsfeed attributable to her.(See R107;118,Ex A, App.24-27 and 28-31 - showing A.C.'s "likes" of and "reaction to" three separate posts from "Stacey Witkowski's Victim of Domestic Violence;" A.C.'s "interest in" a "Stop the Silence Domestic Violence" post; and A.C.'s "sharing" of another "Stacey Witkowski's Victim of Domestic Violence" post). These would have then shown, attributable to A.C.,

in Judge Bitney's newsfeed. We also know that Attorney Pauls observed at least one post on A.C.'s Facebook page about domestic violence.(R107,¶6). While perhaps one way communication, it was still communication from or by A.C. regarding domestic violence that Judge Bitney would have seen.

Not only did A.C. friend him so he could see her feed, but she publically acknowledged him and his decision and then stated she was leaving Facebook. Perhaps mission accomplished? This is the direct type of perception to influence by a party litigant that SCR 60.03 seeks to avoid.

C. The ex parte communication and appearance of impropriety mandates relief.

Disqualification is appropriate where an ESM connection develops between the judge and a litigant. In ***Chace v. Loisel***, 170 So.3d 802, 803, 39 Fla. L. Weekly 221 (Dist. Ct.App. 2014) the court held that, in a dissolution of marriage case, a judge who sent the wife a Facebook friend request during the proceedings, which the wife rejected, made an ex-parte communication and was required to recuse herself. A Facebook friend request between a judge and a party during a pending case was an improper ex parte communication. While the ***Chace*** court expressed

reservations regarding rules about judges and lawyers being Facebook friends as the word "friend" is a term of art, such reservations did not exist when it came to friending of parties in litigation before the court. As the court stated, "the 'friending' of a party in a pending case raises far more concern than a judge's Facebook friendship with a lawyer" ***Id.*** at 804:

> …, the motion to disqualify was sufficient on its face to warrant disqualification. The trial judge's efforts to initiate ex parte communications with a litigant is prohibited by the Code of Judicial Conduct and has the ability to undermine the confidence in a judge's neutrality. The appearance of partiality must be avoided. It is incumbent upon judges to place boundaries on their conduct in order to avoid situations such as the one presented in this case.
>
> Because Petitioner has alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial, we quash the order denying the motion to disqualify and remand to the trial court for further proceedings consistent with this opinion. ***Chace,*** at 170 So. 3d at 804.

So too in granting a petition for disqualification in ***Hachenberger v. Hachenberger***, 135 So. 3d 413, 413, 39 Fla. L. Weekly 307 (Dist.Ct.App. 2014) the court held, "the trial judge initiated ex parte communications with a party through a Facebook 'friend' request." Likewise, in ***Frazier v. Frazier***, 2016 Tenn. App. LEXIS 629, *1, the court remanded the case for assignment of a different judge holding that the effect of the judge's action in accepting

the wife's "follow" request on Instagram was to initiate an ex parte online communication with a litigant whose case was pending before him which was prohibited.

The fact that the appearance of impropriety or partiality is discovered after the fact does not diminish the need for relief to protect the integrity of the system. See ***Liljeberg v. Health Services Acquisition Corp.***, 486 U.S. 847, supra, permitting such relief based on a discovery of the conflict 17 months after trial. In a Wisconsin Law Review article discussing the ***Liljeberg*** decision it was opined that the Supreme Court was sending a clear message that the appearance of impartiality of the judiciary must be maintained and preserved, even at the expense of the finality of a particular case:

> The Court held that when facts suggestive of judicial bias are not discovered until after judgment, and the judge claims to have been unaware of those facts, disqualification may be made retroactive and the judgment reversed. In doing so, the Court made a strong statement that the appearance of impartiality must be maintained to preserve public confidence in the judiciary.
>
> The Court's decision is a sound one that will encourage greater scrutiny of possible judicial bias and will allow reversal of possibly tainted judgments while avoiding direct inquiries into the judge's state of mind. The decision may blunt the trend toward limited application of section 455(a) that has been apparent in the Seventh Circuit, and it sends a clear message to all lower courts and litigants that the appearance of judicial impartiality should be

> preserved, even at the expense of efficiency and finality, if necessary.

Note: *Liljeberg v. Health Services Acquisition Corp.*: *The Supreme Court Encourages Disqualification of Federal Judges Under Section 455(a)*, 1989 Wis. L. Rev. 1033, 1060.

Further, if there is impartiality or the appearance of impartiality in a proceeding, it can be a compelling reason for overriding finality and conducting a new hearing with a different decision maker. This is consistent with the Wisconsin Supreme Court's interpretation of Wis. Stat. §806.07 as permitting relief from judgment on various equitable grounds:

> We have previously recognized that Wis. Stat. §806.07 seeks to strike a balance between the judiciary's interest in achieving fair resolutions of disputes and the policy favoring finality of judgments. ***Edland***, 210 Wis. 2d at 644. Indeed, §806.07 serves both interests, enhancing "fairness in the administration of justice by authorizing a circuit court to vacate judgments on various equitable grounds." ***Id***.

See ***Larry v. Harris***, 2008 WI 81, ¶18, 311 Wis. 2d 326, 752 N.W.2d 279.

The after-the-fact discovery of these ex parte communications supports T.M.'s §806.07 claim for relief not only for equitable principles, but also on the basis that it is newly discovered evidence. The law recognizes newly discovered evidence as an exception to the general prohibition of collateral challenges. The test for newly

discovered evidence contains five elements. In order to satisfy this test, T.M. must show that: (1) he learned of the evidence after the relevant proceeding; (2) he was not negligent in seeking to discover it; (3) the evidence is not merely cumulative to other evidence adduced; (4) the evidence is material to the issue before the court; and (5) it must be reasonably probable that a different result would be reached in a new proceeding. ***State v. Edmunds***, 2008 WI App 33, ¶13, 308 Wis.2d 374, 746 N.W.2d 590. See also ***Mathias v. St. Catherine's Hosp.***, 212 Wis.2d 540, 555-56, 569 N.W.2d 330 (Ct.App. 1997) listing a similar four part test. The test is met in this case:

(1) There is no dispute that the ESM connection and ex parte communications were not disclosed at the time of the hearing and were not discovered until after the Decision.

(2) As with other conflicts, the responsibility to disclose falls upon the Judge, not on the attorneys and parties to investigate. Neither Attorney Pauls nor T.M. were Facebook friends with Judge Bitney or A.C. to know that the two became friends while the matter was pending.

(3) These ex parte communications through friending and the newsfeed are not cumulative to testimony or evidence adduced at the custody hearing, nor could it have

been presented at the hearing. Indeed it is the fact that A.C. was providing information after the hearing through her newsfeed that is a basis for the appearance of impropriety.

(4) This newly discovered evidence is directly material to the issue of retroactive disqualification for T.M.'s claim of ex-parte communications and appearance of impropriety/partiality.

(5) As the issue before the court is the appearance of impropriety, the impact on the decision or outcome is of less importance. As discussed, *supra*, the mandate that the judiciary be free from even the appearance of partiality is so great that even ex parte communications that do not affect the outcome of a judge's decision are problematic because they have the potential to create the appearance of impropriety and erode public confidence in the legitimacy of the judicial process. However, while this factor is tempered in these circumstances, given that A.C. was posting and liking posts about domestic violence, a key issue in the case, does also call into question even a subconscious effect on the decision. Coupled with the weight that the Judge gave to A.C.'s concerns over the best interests of B.M. as discussed in Section II, calls into

question whether a different result may have been reached by a different judge.

Once the integrity of the proceedings have been tainted or called into question, the damage has been done. Actual bias is not required. In ***Aetna Life Insurance Co. v. Lavoie***, 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), a case involving a bad faith refusal to pay an insurance claim, the Court held that due process may bar trial by judges who have no actual bias, and who would do their very best to weigh the scales of justice equally between contending parties, if there is an appearance of bias:

> We conclude that Justice Embry's participation in this case violated appellant's due process rights as explicated in ***Tumey***, ***Murchison***, and ***Ward***. We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average…judge to…lead him not to hold the balance nice, clear and true.'" ***Ward,*** 409 U.S. at 60 (quoting ***Tumey v. Ohio***, supra, at 532). The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" ***Murchison***, 349 U.S. at 136 (citation omitted).

Aetna Life Ins. Co., 475 U.S. 813 at 825, 106 S.Ct. at 1587, 89 L.Ed.2d at 835.

Harsh as it may be, justice must satisfy the appearance of justice. Hollow assurance of "don't worry the contact didn't influence me" do not change the analysis, because the question isn't whether there was actual influence, but, instead, the appearance of impropriety or the opportunity to influence.

Friending litigants while a case is pending before the judge is, and should be, treated differently than some casual, historic ESM connection. It is ex parte communication, it creates an appearance of impropriety, and, as such, calls into question the integrity of the judiciary. Relief, in the form of retroactive disqualification and a new hearing, is warranted.

II. Trial court erroneously exercised its discretion with regard to the best interest analysis.

A. Standard of review.

When considering the sufficiency of the evidence, the court of appeals applies a highly deferential standard of review. See ***Johnson v. Merta***, 95 Wis.2d 141, 151, 289 N.W.2d 813(1980). The circuit court's findings of fact will not be set aside unless the appellate court concludes that they are clearly erroneous. See §805.17(2), Stats.

A circuit court erroneously exercises its discretion if it applies an improper legal standard or makes a

decision not reasonably supported by the facts of record. ***260 N. 12th St., LLC v. DOT***, 2011 WI 103, ¶38, 338 Wis.2d 34, 808 N.W.2d 372. "A discretionary determination, to be sustained, must demonstrably be made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law. Additionally, and most importantly, a discretionary determination must be the product of a rational mental process by which the facts of record and law relied upon are stated and are considered together for the purpose of achieving a reasoned and reasonable determination." ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16 (1981).

B. The child's best interests must be protected.

While there are a myriad of factors the court is to consider in deciding custody and placement, the best interests of the child is the ultimate goal. See generally, ***Guelig v. Guelig***, 2005 WI App 212, ¶1, 287 Wis. 2d 472, 704 N.W.2d 916 ("paramount concern in placement and custody decisions is the best interests of the minor child"). Wisconsin Stats. §767.451(1)(b) and (2) specifically make clear that modification of custody and placement can only occur if in the best interests of the child. Even in the case of domestic abuse, where there is a presumption of sole custody (not placement), §767.41(2)(d) makes clear

that the child's best interests may overcome that presumption:

> (d) 1. …if the court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, as described under s. 940.19 or 940.20(1m), or domestic abuse, as defined in s. 813.12(1)(am), pars. (am), (b), and (c) do not apply and there is a rebuttable presumption that it is detrimental to the child and contrary to the best interest of the child to award joint or sole legal custody to that party. The presumption under this subdivision may be rebutted only by a preponderance of evidence of all of the following:
> a. ….
> b. It is in the best interest of the child for the party who committed the battery or abuse to be awarded joint or sole legal custody based on a consideration of the factors under sub.(5)(am).[Emphasis added].

The factors in sub.(5)(am) are again focused on the best interests of the child:

> (5) Factors in custody and physical placement determinations.
> (am) Subject to pars. (bm) and (c), in determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child….[Emphasis added]

767.41(5)(bm) which requires the court to consider "the safety of the parent who was the victim of the battery or abuse," in determining legal custody and periods of placement, likewise requires that the court consider the "well being" of the child.

Under these statutes, the court is required to consider all facts relevant to the best interest of the child in determining custody and placement. The child's

best interest "has long been hailed in Wisconsin as the primary guide for any custody decision." Ronald R. Hofer, Comment, The Best Interest of the Child Doctrine in Wisconsin Custody Cases, 64 Marq. L. Rev. 343, 343 (1980). Indeed, it is considered the "primary and controlling consideration" in such cases. ***Dees v. Dees***, 41 Wis.2d 435, 440, 164 N.W.2d 282 (1969). There are other way to protect the "safety of A.C." other than minimizing T.M.'s placement especially, where here, there was insufficient evidence to find any harm to B.M.

C. The trial court erred in changing custody and substantially reducing placement without considering other forms of protection for A.C. which would not have impacted placement and B.M.'s best interests.

One thing that all parties agreed upon was T.M. was a very involved father, that T.M. and B.M. had a very close relationship, and that there was no allegation that T.M. had harmed, or would harm, B.M. A.C. testified that T.M. has never physically harmed B.M.(R132,p265-266), and in response to direct questioning by the judge, A.C. denied that T.M. would harm B.M.:

> THE COURT: Excuse me. Are you concerned at all for your son's safety with his father?
> THE WITNESS: Not at this point, no.
> THE COURT: No?
> THE WITNESS: Not at this point….
> THE COURT: You're not concerned that T.M. would try to get back at you by harming your son?
> THE WITNESS: No, I don't believe that.(R132,227-228)

The GAL recommended that while sole custody was appropriate, it was in B.M.'s best interest to retain the equal placement with his father:

> I did take into consideration Wis. Stats. §767.41 (5)(bm), which states "the safety and well being of the child and the safety of the parent who was the victim of the battery or abuse shall be the paramount concerns in determining legal custody and periods of physical placement." A.C. testified that she is worried about her own safety. A.C. indicated that she did not have a concern for B.M.'s safety, while placed with his father. The restraining order is a court order, not just a piece of a paper. It has been in place since August of 2016; it does provide the necessary safety for A.C.(R91)

B.M. had not been subject to abuse. He did not observe abuse. Even A.C. repeatedly acknowledged that she did not believe T.M. would harm B.M. The one neutral witness, B.M.'s teacher, saw no signs of abuse and could not attribute any behavioral, or stuttering, or school issues that B.M. was having to his father. She could not even tell from whose house B.M. had come to school.

As regards the disputed evidence of abuse against A.C., even if the court accepted such in its function as factfinder, such may support an injunction as between the parents, or may even support A.C.'s request for move, but it is an inquiry separate from how much placement should be awarded to T.M.

No legal precedent supports the proposition that A.C.'s desire to move away from T.M., reasonable or not, trumps B.M.'s best interests where such move substantially modifies his placement with his father. The focus should have been on what was in B.M.'s best interest. The judge failed to consider that safety factors for A.C. could have been accomplished while still maintaining shared placement. The third party exchanges had been implemented and were working well, and that placement could have remained the same without having any contact between the parties or without any violation of the injunction.

It was also error for Judge Bitney to find that the move and a change in placement were required to protect A.C. because the injunction had purportedly been violated and not enforced.(R92,p4) First, this factor goes to what safety factors may need to be implemented for A.C., whether B.M.'s placement with T.M. should be reduced.

Second, there was no violation. T.M. was never charged nor convicted. There was no testimony from the D.A. or law enforcement as to whether they had perceived a violation or not, nor why they did not charge or prosecute T.M. There was no fact finding hearing or determination on the issue of any alleged violation. The necessary intent required for a violation is missing:

WIS JI-Criminal 2040 VIOLATING A TEMPORARY RESTRAINING ORDER OR AN INJUNCTION §§ 813.12, 813.122, 813.123, 813.125

Statutory Definition of the Crime

Violating (an injunction)…,…is committed by one who *knowingly violates* an injunction issued under § ___ …

Elements of the Crime That the State Must Prove

1. (An injunction)…was issued against (name of defendant), the respondent, in favor of (name), the petitioner, under § ___ of the Wisconsin Statutes….

ADD THE FOLLOWING FOR VIOLATIONS OF §813.12 WHEN SUPPORTED BY THE EVIDENCE

[An injunction remains in effect even if the petitioner allows or initiates contact with the respondent or if the respondent is admitted into a dwelling that the injunction directs him or her to avoid.]

2. The defendant committed an act that violated the terms of the (injunction)….

3. *The defendant* knew that the (injunction)…had been issued and *knew that (his)…acts violated its terms…*.[Emphasis added]

It follows that the reason T.M. was not charged with violating the injunction is that there was no violation. To be a violation there must be knowledge that the actions violated the terms of the injunction. The testimony was that T.M. had contacted numerous law enforcement personnel, or had others do so on his behalf, to ensure compliance. He specifically stated it was not his intent to violate and he was not sure whether A.C. would be at the events in question.(R133,p126-127,133) Indeed, it must not have been so clear because Judge Bitney ultimately clarified the injunction with regard to attending the child's activities as part of his Decision:

8. A.C. and T.M. shall attend B.J.M.'s activities on an alternating basis and are not to attend the same event(s) together under any circumstances. If a parent will not be attending B.J.M.'s activity, they shall provide the other parent at least 24-hours notice.

9. The injunction in Case Number 16-CV-253 shall remain in full force and effect and shall prevent T.M. from being on any premises where A.C.is for any reason whatsoever.(R97,p3)

To support the reduction in T.M.'s placement as "protection for the victim" Judge Bitney also erroneously found that "nor has [T.M.] done anything to deter such abusive conduct in the future."(R92,p4) This is incorrect. T.M. testified that he was actively participating in counseling with Robert Brunner and that he had found counseling to be effective in helping him (R133,p125-126). T.M. testified that he was in compliance with the terms of Deferred Acceptance of Guilty Plea stemming from the August, 2016 disorderly conduct charge from which the domestic abuse injunction arose.(R133,p124)

Finally, a key component of the finding of the pattern of abuse was the disputed 2011 incident. Judge Bitney found "Said abuse began prior to the parties' aforementioned Stipulation [in 2011]."(R92,p2). Not only did A.C. recant this event but, as an event occurring prior to the parties' 2011 custody and placement stipulation, the court should not have relied on it as a changed circumstance warranting

modification. ***Glidewell v. Glidewell***, 2015 WI App 64, 364 Wis.2d 588, 869 N.W.2d 796. This is not to say that the court could not consider any purported incidents of verbal abuse after the stipulation was entered into, but the repeated reliance of the witnesses and the court on the disputed 2011 event was improper.

CONCLUSION

The Facebook friending which occurred during the pendency of the litigation is, in and of itself, improper ex parte communication, as is the communication that occurs through the newsfeed feature. These actions, in conjunction with their timing, give rise to an appearance of impropriety which requires disqualification and a new trial.

Even ex parte communications that do not affect the outcome of a judge's decision are problematic because they have the potential to create the appearance of impropriety and thus erode public confidence in the legitimacy of the judicial process.

Once objective impartiality has been lost the cat is out of the bag, so to speak, and the harm cannot be undone by refuting actual bias or attempts to support the decision. Justice must satisfy the appearance of justice.

Relief in the form retroactive disqualification and a new trial is warranted.

The decision itself is problematic because the Judge found that T.M. had an issue with violence that has had a substantial impact on B.M. However, the evidence does not support such finding.

While A.C.'s concerns about her safety were certainly something the court was required to account for, there was no basis in the record that placement needed to be modified. It was in the best interest of B.M. to continue shared custody and shared placement.

Dated this 27th day of February, 2017.

HERRICK & HART, S.C.

By: _____
Stephanie L. Finn
State Bar No. 1000734
David J. Rice
State Bar No. 1018742
Attorneys for Appellant, T.M.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a monospaced font.

The length of this brief is 47 pages.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of §809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of February, 2018.

HERRICK & HART, S.C.

By: _____

Stephanie L. Finn
State Bar No. 1000734
David J. Rice
State Bar No. 1018742
Attorneys for Joint Petitioner-Appellant, T.M.

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. §809.19(2)(a) and that contains:

1. a table of contents;

2. the findings or opinion of the circuit court;

3. portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues; and

I hereby further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using the first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 27th day of February, 2018.

HERRICK & HART, S.C.

By: _____

Stephanie L. Finn
State Bar No. 1000734
David J. Rice
State Bar No. 1018742

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on February 27, 2018, pursuant to Wis. Stat. §809.80(3)(b), Appellants' Brief was delivered to FedEx, a third-party commercial carrier, for delivery to the Clerk of the Court of Appeals, Schwartz Law Firm, and Laura Ann Sutton within three calendar days. I further certify that Appellants' Brief was correctly addressed:

Wisconsin Court of Appeals
110 E. Main Street
Tenney Building, Suite 215
Madison, WI 53702

Michael D. Schwartz
Brandon M. Schwartz
Schwartz Law Firm
600 Inwood Avenue North, Suite 130
Oakdale, MN 55128

Laura Ann Sutton
2247 20 1/4 Street
Rice Lake, WI 54868

Dated this 27th day of February, 2018.

HERRICK & HART, S.C.

By: _____
Beth R. Johnson
Legal Assistant