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,
Case No. 11-PA-46 PJ, The Honorable J. Michael Bitney,
Circuit Judge, presiding

REPLY BRIEF OF APPELLANT

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This is not about a judge "being" a Facebook friend, or some long forgotten friend connection amongst thousands. Instead, this is about active communication between a litigant and the judge, while a case is pending, and before the judge rendered his decision. A.C.'s protests to the contrary aside, sending a friend request and accepting a friend request is communication, as is the newsfeed feature. "Liking" is not required.

One obvious question has never been answered – why did the Judge permit this? As a Facebook user, surely Judge Bitney would have understood that A.C.'s posts and likes would show up in his newsfeed every time he went online. She knew so as well. Why on earth, during the pendency of the case, would they strike up such a relationship? It is for this head-scratching reason that the objective test for the appearance of bias has been met. There is no rational explanation.

Contrary to A.C.'s arguments, actual bias or impartiality is not required. Instead, "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, ¶24, 295 Wis.2d 189, 720 N.W.2d 114. ***Gudgeon*** holds that even absent actual bias, this court must resolve the appearance of partiality based on what a reasonable person would conclude, not what a reasonable trial judge, a reasonable appellate judge, or even a reasonable legal practitioner would conclude. ***Id*** at ¶25-26. Thus, we must look at this from the perspective of a reasonable litigant or member of the general public, who are perhaps not as able to separate a judge's private life from his professional. Framed appropriately, would it be reasonable for a party involved in litigation, or the public in general, to be distrustful or suspect of the proceedings, where the judge accepts a Facebook friend request from a litigant in a pending matter, and then the litigant proceeds to place posts and likes regarding domestic abuse, an issue in the case, which would appear in the Judge's newsfeed for him to see? It can fairly be assumed that most people would say that they would be shocked and distrustful of the judge handling their case if he struck up a Facebook friendship with the other side during the case. That the judge did not "like" any posts

would be of little comfort, especially as it is undisputed that the newsfeed would have put A.C.'s posts, and likes of other people's posts, regarding domestic violence in the Judge's newsfeed, along with whatever else she posted to favorably portray herself. The judge would not have to go out of his way to receive contact from A.C. – what she posted automatically would appear in ***his*** newsfeed. A reasonable person would believe this had to have some effect, even subconsciously, on the judge's perception of her. Although Judge Bitney himself or even this court may be convinced that he was not biased or partial, that is not the test. "The risk of bias that the ordinary reasonable person would discern -which is the test- is simply too great to comport with constitutional due process." ***Gudgeon*** ¶30.

A.C.'s criticism that there is no evidence from a neutral and reasonable individual that they believe the communications biased Judge Bitney is misplaced. The reasonable person standard is a judicial test, not an actual individual/witness. Moreover, such evidence was provided. T.M. and his sister both averred that they perceived a conflict of interest.(R104;105) While the GAL didn't explicitly state her concern (she does after all have to be appointed by and appear in front of the judge in

other cases), it is certainly implied - otherwise why did she feel a ***duty*** to contact Attorney Pauls?(R106)

A.C.'s sources to support generally that judges may use ESM actually reinforce T.M.'s point. The New Mexico Advisory Opinion Concerning Social Media confirms that friending is an exchange of information, a/k/a communication. A.C.'s quote (p28) omits two important sentences. The text replaced by ellipsis reads: "In the social media context, 'friending' and 'liking' are methods of exchanging, both by sending and receiving, information." The omitted last sentence is as underlined:

> In this manner, 'friending,' 'liking,' or subscribing to a particular page or posting may not be seen as an endorsement. Of course, judges are cautioned that in some circumstances those activities could be construed as such.

The Arizona Supreme Court Advisory opinion (p29) says there is no per se disqualification where a litigant is a "friend" of a judge, but cautions "if the facts and circumstances are such that the judge's impartiality might reasonably be questioned, the judge may not preside over the matter." Id.p5 Such facts and circumstances exist here.

The Maryland Judicial Ethics Committee Opinion (p30) says the "mere fact of social connection" does not create a conflict, but does not go so far as to say that it cannot. It specifically recognizes the communication component: "By

becoming 'friends,' they are able to see photos, videos and other information posted by or about one other on their respective Facebook pages" (p1), cautioning:

> There is thus a concern that being designated as a "friend" of a judge on a social networking site might be perceived as indicating both that the person is in a position to influence the judge, and may have ex parte communications with the judge via that medium.p4

The 2010 Kentucky opinion (p30) specifically provides only a "qualified yes" to the inquiry of whether judges may be friends with "attorneys, social workers, and/or law enforcement officials" who appear before them. It warns:

> …the Committee is compelled to note that, as with any public media, social networking sites are fraught with peril for judges, and that this opinion should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public.p4

The New York opinion (p31) does not address a litigant, does not address the litigant's posting and liking of materials directly relevant to the issue before the judge (i.e., domestic abuse),and does not address a "friending" during litigation:

> Nor does the Committee believe that a judge's impartiality may reasonably be questioned…or that there is an appearance of impropriety…based solely on having *previously* "friended" certain individuals who are now involved in some manner in a pending action.

Nor is ***Law Offices of Herssein v. United Servs. Auto. Ass'n,*** 229 So.3d 408 (Fl.Ct.App. 2017) applicable. This is

not a situation where Judge Bitney didn't "recall" that he was friends with A.C. or where they became friends through a random algorithm. This was purposeful, knowing, and during the proceedings. Also, ***Herssein*** doesn't address ex parte communication arguments as raised here.

State v. Forguson, 2014 WL 631246 Tenn.2014 and ***State v. Madden***, 2014 WL 931031 Tenn.2014 were discussed in ***Frazier v. Frazier*** 2016 Tenn.App. LEXIS 629 cited by T.M. yet the Tennessee court still held:

> The Court notes that the effect of Judge Angel's action in accepting Wife's "follow" request [on Instagram] was to initiate an ex parte online communication with a litigant whose case was then pending before him, which is expressly prohibited by Rule 2.9(A) of the Code of Judicial Conduct.

Accepting a follow request on Instagram is the same as accepting a friend request on Facebook. In either medium, once accepted, the items posted by one appear automatically in the other's feed. Notably, A.C. does not address ***Frazier***, nor many of the arguments raised by T.M. Instead, A.C. incorrectly maintains, without support or explanation, that the friend request, the friend acceptance, and the newsfeed feature are not ex parte communications.

A.C.'s attempts to distinguish ***Chace v. Loisel***, 170 So.2d 802 (Fla. 5th DCA 2014) incorrectly state that the judge was disqualified for taking retribution for a failed

ESM connection. While such was alleged, the court never reached that issue. Instead, apart from the controlling Florida ***Domville v. State***, 103 So.3d 184 (Fla.4th DCA 2012) case (holding a judge's social networking "friendship" with the prosecutor of the underlying criminal case was sufficient to create a well-founded fear of not receiving a fair and impartial trial in a reasonably prudent person), the ***Chace*** court found yet another reason to disqualify – the Facebook friend request between the judge and a litigant, while litigation was pending, was an improper ex parte communication disqualifying the judge:

> Beyond the fact that *Domville* required the trial court to grant the motion to disqualify, 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…

So too here, the ex parte communications with a litigant undermines confidence in neutrality. As held in ***Chace***, friending during litigation, "would create in a

reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." ***Id*** at 186.

Thus even if, *arguendo*, there is a basis for the decision, and no finding of actual bias, the decision cannot stand as the objective appearance of bias test has been satisfied.

II. THE TRIAL COURT ERRED IN MODIFYING CUSTODY AND PLACEMENT BASED ON NON-EXISTENT VIOLATIONS OF THE RESTRAINING ORDER AND NON-EXISTENT IMPACTS ON B.M.

No dispute there is evidence damaging to T.M. - as was some of the evidence regarding A.C. With regard to the 2011 abuse allegation (that A.C. ultimately recanted) T.M. testified that while they were arguing A.C., who was feeding B.M., threw a baby food jar at him, flailed her arms at him, and he pushed her back.(R133,p96-99) In 2016 after doing shots in a bar A.C. became physically violent when T.M. let a woman use his phone. She smacked him in the head and threw a glass at him while screaming and yelling. (R133,p59-60)

T.M. agrees that it was for the trial court to determine credibility and decide between disputed evidence. But despite the unfavorable evidence toward T.M, the court erred in focusing on A.C. at the expense of B.M.'s contact with his father. The 2016 restraining order is a change of circumstances that may permit the court to review custody

and placement. However, it does not mandate a particular outcome. The focus should be B.M.'s best interests. T.M. reference to §767.41(2)(d)1.a. (p40) was to show the many interwoven statutes that all make clear the supremacy of the best interests of the child standard. T.M. has not conceded a pattern or serious incident of domestic abuse. But even if the court were to so find, the presumption is rebutted by T.M.'s active participation in counseling with Robert Brunner (R133,p124-126), and no finding by the court that T.M. had an alcohol problem. Even if not rebutted, the presumption applies only to custody, not placement.

A.C.'s brief illustrates the disputed testimony regarding T.M. and A.C.'s relationship between 2011 and the hearing, but she noticeably avoids two key evidentiary pieces. First, none of the evidence refutes the close bond and loving relationship between T.M. and B.M. No one alleged that T.M. harmed, or would harm, B.M. Even A.C. specifically admitted T.M. has never physically harmed B.M.(R132,p265-266) and she did not believe that T.M. would physically harm B.M.(R132,p227-228)

Second, A.C. does not dispute, as pointed out by the GAL, that no expert testimony identified B.M.'s alleged acting out as being related to placement with T.M.(R91,p4) Nor in this regard does A.C. address the testimony of the

only true neutral witness, B.M.'s teacher Ms. Olson, who unequivocally testified there was no difference in B.M. based on which parent he was with.(R133,p161-169) An observation confirmed by his CCD teacher.(R133,27-28)

That A.C.'s friends and family members testified she is a good mother and they think it is in B.M.'s best interests for his placement with his father to be reduced is of no great surprise. Indeed conversely, witnesses for T.M. testified as to his nurturing relationship with B.M. Riley Kummet, a long-time family friend of T.M. and an investigator with the Rusk County Sheriff's Department, testified that T.M. and B.M. have a loving and appropriate relationship. He never observed any anger issues between them, no profanity, no harsh words, no frustration or inappropriate discipline.(R132,p281-284) Mr. Kummet acknowledged that, based on his profession, people look at him differently and he would not testify on T.M.'s behalf if he thought there were any concerns about T.M. toward B.M. Id. Mr. Kummet acknowledged that T.M. had some trouble with the law prior to B.M.'s birth but that having a child changed him.(R132,p280-281) Mr. Kummet's wife, State Trooper Jody Kummet, echoed the changes in T.M. after B.M.'s birth and the importance of their relationship, opining: "I just believe that in the best interest of

[B.M.], I believe that [T.M.] is a great father…they both should have an equal amount of time with him."(133,p10-14)

B.M.'s CCD teacher who has known T.M. for 25 years, testified that B.M. would struggle if his time with father was decreased.(R133,p28) At the beginning of the year B.M. was behind. T.M. worked hard to catch him up. Every other Wednesday when he would pick up B.M., T.M. would stop to check on how B.M. was doing in class.(R133, p24-25) Conversely she had no contact from A.C. throughout the school year nor even met her.(R133,p23-24,26-27) When T.M. would pick up B.M., B.M. would rush into his arms. (R133,p26) Outside of CCD she frequently observed T.M. and B.M. walking after school holding hands, B.M. skipping and laughing. "It's just a different side of T.M. that I've never seen."(R133,p27)

There was evidence from T.M. as well as Ms. DeLawyer, a social worker friend of T.M.'s whose son is friends with B.M., of T.M.'s active involvement not only with B.M. but other children in coaching wrestling (R133,p36-37,100-102), helping with Little League(R133,p38-39,101)and helping on the playground.(R133,p35,92) The GAL noted, "…[T.M.] has been the primary parent involved in the non-school activities with the child…"(R91)

A.C.’s safety was adequately protected by the restraining order. The GAL agreed: “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) A.C. does not address the arguments that the restraining order was not violated, other than to subjectively state that it was. T.M. did not know for certain A.C. would be at the concert or wrestling meet (R133,p133) yet took steps to find out what he should do if she was. He was informed by his lawyer and his law enforcement contacts that he could be there. Based on her conversation with the DA, Trooper Kummet “advised T.M. that he should go to the wrestling match and he should be there to watch his son as long as he didn't have contact with A.C.”(R133,p14) There is no evidence of intent as is required for a violation. There is no violation. It’s a red herring.

A.C.’s Brief p42-43 alludes to expert testimony of B.M.’s best interest, yet provides no Record citation, as there is none. The court sustained the objections to Ms. Moran testifying as a custody or placement evaluator.(R132, p116-117). In addition -

> Q And based on your education, experience and training with regards to the safety of [B.M.], can you provide your opinion to the Court on the move to Durand?

> MS. PAULS: Your Honor, I'm not sure how she can testify as to the custody aspect of [B.M].
>
> THE COURT: Sustained. I agree.(R132,p109)

Finally, as was improperly done at trial, A.C. attempts to use T.M.'s pre-stipulation conduct (pre-2011) to support her argument that a 2017 change in custody and placement is in B.M.'s best interest. Her references to no contest pleas in 2003, 2006, and 2008 - years before B.M.'s birth in 2010 – are irrelevant and unduly prejudicial, as is Ms. Moran's reliance on the 2011 recanted allegation as part of pattern. ***Glidewell v. Glidewell***, 2015 WI App 64, 364 Wis.2d 588, 869 N.W.2d 796.

CONCLUSION

Judge Bitney's ex parte communications with A.C. would cause a reasonable person to be concerned of risk of bias with regard to these parties. He should be disqualified and there should be a new hearing.

The decision itself is in error as it is based on the Judge's finding that T.M. had an issue with violence that has had a substantial impact on B.M. Yet the evidence does not support an impact on B.M. A.C.'s concern for her safety is certainly something the court is required to account for, but is not a sufficient basis to reduce B.M.'s custody and placement with his father.

Dated this 13th day of April, 2018.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this reply 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 13 pages.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this reply brief 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 13th day of April, 2018

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on April 13, 2018, pursuant to Wis. Stats. §809.80(3)(b), Appellant's Reply Brief was delivered to FedEx, a third-party commercial carrier, for delivery to the Clerk of the Court of Appeals within three calendar days. I further certify that Appellant's Rely Brief was correctly addressed as follows:

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