STATE OF WISCONSIN
IN SUPREME COURT
CASE NO. 2017-AP-2132

In re the Paternity of B.J.M.

Timothy W. Miller,

Joint-Petitioner-Appellant,

v.

Angela L. Carroll,

Joint-Petitioner-Respondent-Petitioner

ON REVIEW OF A DECISION OF THE COURT OF APPEALS DATED FEBRUARY 20, 2019 REVERSING THE CIRCUIT COURT OF BARRON COUNTY, THE HONORABLE J. MICHAEL BITNEY, PRESIDING

RESPONSE BRIEF OF TIMOTHY J. MILLER

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TABLE OF AUTHORITIES

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STATEMENT OF ISSUES

1. Does the initiation of an undisclosed Facebook friendship, between the judge and one of the litigants, during the pendency of the case, under these facts, create an appearance of partiality requiring a new hearing before a different judge?

Court of Appeals: The Court of Appeals limited its decision to the facts of the case, and applied well-established law, judicial principles, and common sense to determine that the circuit court's undisclosed ESM connection with a current litigant, initiated during the proceedings, created a great risk of actual bias, resulting in the appearance of partiality and demonstrating the Judge was objectively biased. The presumption of Judge Bitney's impartiality was rebutted and a due process violation occurred. The erosion of public confidence and appearance of impropriety occurred under these facts.

2. Did the Court of Appeals correctly find that the Facebook friend request while the case was pending before the Judge, its acceptance, and the posting and liking of matters relevant to the issues before the court that would appear in the Judge's newsfeed, gave rise to ex parte communication concerns further contributing to the appearance of partiality?

Court of Appeals: The Court of Appeals did not deem it ex parte communication per se, but acknowledged that the communication raised concerns and contributed to the perception of partiality that further establishes the existence of objective bias.¶26 The court again focused on the specific facts with regard to the timing of the undisclosed friend request and acceptance, and the undisputed fact that Carroll was posting about issues relevant to the pending case, i.e. domestic violence. The court found the totality of the facts conveys the impression that Carroll was in a special position to influence Judge Bitney's ultimate decision. ¶22

STATEMENT OF THE CASE

This is a post-paternity action. The parties stipulated to custody and placement in August 2011.(R1) In August 2016, Carroll 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)

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

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

A custody hearing took place June 7-8, 2017. Written arguments were filed Friday June 16th. Judge Bitney rendered a written decision on July 14, 2017, granting Carroll sole custody, substantially modifying placement in her favor, and permitting the move.(R92)

That same day, the GAL learned of a post by Carroll about the decision and that Judge Bitney and Carroll were Facebook friends. The GAL notified Miller's counsel.(R104; 106;107)

Miller moved for reconsideration per Wis. Stat. §805.17(3), and relief per Wis. Stat. §806.07. As it relates to the issue before this Court, he argued the timing of 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 requiring disqualification and a new trial.(R103;109)

Judge Bitney denied the motion. The Court of Appeals reversed on the issue of impartiality without reaching the merits of the underlying custody and placement decision.

STATEMENT OF FACTS

The parties' relationship

Miller and Carroll were never married nor lived together. They share one child, "Bruce," born August 2010. When Bruce was six months old the parties had an altercation giving rise to criminal charges against Miller and a restraining order.(R54;57) Subsequently, Carroll recanted and requested the restraining order be dropped because she did not want Miller to be convicted of a crime he did not commit.(R83) Miller has always denied the accusations regarding the 2011 incident.

Several months later, in August 2011, they stipulated to shared joint legal custody and shared equal placement. (R1) They co-parented approximately five years. The nature of the parties' relationship for those five years was disputed at trial. Carroll alleged an ongoing pattern of domestic abuse against her by Miller culminating in the August 2016, 10 year injunction under Wis. Stat. §813.12(4)(d).(R59) Miller admitted verbal disagreements and untoward texts, but denied a prolonged history of abuse or physical abuse. He questioned Carroll's

stated concerns leading to the injunction pointing out that over the five years she repeatedly asked him for sex, asked him over to her house, asked him to go on trips together, and to plan events together.(R106;107;108;100;109) She allowed her other children to visit with Miller and go places with him. (R133,p77,93-94) Miller believed that Carroll became upset that the relationship was not resulting in a long term commitment.(R133,p95-99) In 2016 after drinking shots in a bar Carroll became physically violent when Miller let a woman use his phone. Carroll smacked him in the head and threw a glass at him while screaming and yelling.(R133,p59-60) Carroll agreed that the relationship had ups and downs and she had hoped to make it work.(R132,p247-257) But Carroll made clear that she did not believe Miller would physically harm Bruce.(R132, p228)

Carroll alleged that Miller violated the 2016 injunction on two occasions thereby justifying her request to move. One alleged violation occurred at Bruce's Christmas concert, the second at his wrestling match.(R132,p266-267) However, Miller presented evidence that he did not violate the injunction. He was unsure whether Carroll would be at either event.(R133,p133) He contacted two law enforcement officer friends for advice. (R132,p285;R133,p13) One officer testified that she

consulted the D.A. and advised Miller after that conversation that he should go and "watch his son as long as he didn't have contact with Carroll."(R133,p14) Miller also contacted his criminal defense attorney, his former family law attorney, and the Rice Lake Police on how to handle possible situations where both parents were at an event so as not to violate the injunction.(R133,p126-127) Importantly, Miller was never charged with, nor found to have, violated the injunction.

While there was some generalized testimony about potential effects on children who observe domestic violence, there was no credible evidence that Bruce exhibited any such effects. Carroll and some of her family and friends claimed that, after being with Miller, Bruce had behavioral problems, was disrespectful, and his stuttering increased. However, even these witnesses acknowledged that to the extent they reported changes it could be attributable to any number of other reasons.(R132,p23,39-41) The GAL asserted that no expert testimony was provided relating Bruce's behaviors to placement.(R91,p4) The only neutral witness who had both professional expertise and direct interaction with Bruce on a regular basis was his teacher – who opined there was no difference in Bruce based on which parent had

placement.(R133,p161-169) The teacher also expressed concern about Carroll's requested changes.(R133, 174-175)

The GAL recommended Miller's continued active involvement in Bruce's life and against a placement change:

> I am recommending sole legal custody be awarded to Carroll 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 Miller 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 Bruce'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 Bruce's speech changed. The beginning of the school year (after the restraining order went into affect); in February (the same month that Carroll 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 Bruce's speech did improve.
>
> I believe Carroll's proposed schedule for placement and attendance at activities would be a substantial change from the roles each parent currently plays in Bruce's life. The longest time Bruce currently spends away from either parent is three days. He is used to regular and consistent time with both mom and dad. Bruce is also used to his dad helping coach him in sports. Amanda [D] testified that she regularly sees Miller and Bruce at extracurricular functions. That

> Miller helped coach her children and others in wrestling and baseball… Bruce identifies Miller as being the parent involved in all of his activities. Under Carroll's proposal, Bruce 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." Carroll testified that she is worried about her own safety. Carroll indicated that she did not have a concern for Bruce'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 Carroll.(R91)

The Trial Court Decision

Judge Bitney found a substantial change in circumstances since the August 2011 Order and, contrary to the GAL recommendation, found it was in Bruce's best interests that Carroll have sole legal custody and primary physical placement, approved a move to Durand, and substantially decreased time with Miller.(R92,p5)

Facebook friending while matter pending

Following the evidentiary phase of the hotly contested hearing, but before the decision was rendered, Carroll sent a Facebook friend request to Judge Bitney and he accepted. (R134,p29)

This was discovered by the GAL who became aware that Carroll had posted on Facebook about Judge Bitney's

decision. After reading the post, the GAL felt a duty to report it to Miller's counsel.(R106) Miller's counsel accessed Facebook and confirmed that the Judge and Carroll were Facebook friends. Miller's counsel saw Carroll's post about Judge Bitney and his decision stating, "The Honorable Judge has granted everything we requested" and "…I'll be bouncing off fb…"(R107,ExB,App.16-19) Counsel also observed that Carroll had at least one post about domestic violence. (R107)

In addition, while not a complete listing of everything she did on Facebook after becoming friends with Judge Bitney, even the limited pages provided by Carroll in her affidavit show that she communicated about domestic violence -- a central issue in the case.(See R107;118,Ex A, showing Carroll's "likes" of and "reaction to" three separate posts from "Stacey Witkowski's Victim of Domestic Violence;" her "interest in" a "Stop the Silence Domestic Violence" post; and "sharing" of another "Stacey Witkowski's Victim of Domestic Violence" post). These would have then shown, attributable to Carroll, in Judge Bitney's newsfeed. While awaiting his decision Carroll likewise kept herself engaged with the Judge by liking 18 of his Facebook posts and commenting on two.(C.Brief p16)

Miller was understandably concerned. He perceived there to be a conflict, or certainly an appearance of conflict given, in part, the unknown nature of the Judge and Carroll's relationship and what information Carroll had posted or liked that then shown in the Judge's Facebook feed. Miller expressed concern that the friendship or posts may have impacted Judge Bitney's decision, even subconsciously. Had Miller known they were Facebook friends he would have requested recusal or pursued substitution or disqualification. He questioned what the decision may have been without any outside influences or the potential for such.(R104)

Miller's sister, who had been Facebook friends with Carroll, submitted an affidavit stating that during the custody dispute Carroll noticeably changed her Facebook persona and believed it was a purposeful attempt by Carroll 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.

> 6. In my own personal opinion, I believe that there was a purposeful switch in Ms. Carroll's Facebook persona to support her position in the custody dispute with my brother.
> 7. I personally noticed that her Facebook pictures switched from party type pictures and posts to family pictures and posts about children and family.
> 8. Her party type posts were removed or taken down or no longer available and changed to more family

> oriented posts. I don't remember the exact time or date that I noticed that happening but I do distinctly recall thinking to myself that it was, in my opinion, an attempt by Ms. Carroll to look better to anyone who may see her Facebook profile or newsfeed and to help with her custody case.
> 9. The types of images I was observing were so different than what she had posted before that I believe it was an attempt by her to have positive images of her cycled to her friends' newsfeeds.
> 10. It is my understanding from using Facebook that the way it works is that Ms. Carroll's images/posts would have appeared in her friends' newsfeeds and now I have learned that those friends included Judge Bitney at the time he was working on this case.
> 11. I have no idea which of Ms. Carroll's posts, if any, that Judge Bitney may have seen. But just in general I am concerned and personally believe that it appears unfair that he was provided with information from Ms. Carroll outside of the courtroom that we don't know about and that my brother did not have the opportunity to rebut those or to present the same images/information.(R105)

This was a custody and placement dispute and each party's personal life was relevant and had been the topic of extensive testimony.

In denying Miller's motion for relief, Judge Bitney confirmed that he accepted Carroll's Facebook friend request 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 Carroll, nor did he believe a reasonable person would call into question his impartiality, stating that even though he accepted the friend request before penning his decision, he already had made up his mind.(R124,p30-35;134,p31-32)

The Court of Appeals reversed, holding that, under the facts, Judge Bitney was objectively biased and impartiality was rebutted.

ARGUMENT

The Court of Appeals' Decision is properly tailored to the specific extraordinary facts of this case. It did not create a bright line rule or test.

While addressing a relatively new medium, electronic social media (ESM), the Court of Appeals' analysis applies well settled judicial principles, case law, and common sense. Specifically, the Court of Appeals applies the principles of ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis.2d 166, 771 N.W.2d 385 (The right to an impartial judge is fundamental to the notion of due process under both the United States and Wisconsin Constitutions. We presume that a judge has acted fairly, impartially, and without bias; however, this presumption is rebuttable.); ***State v. Herrmann***, 2015 WI 84, ¶3, 364 Wis. 2d 336, 867 N.W.2d 772 (When the facts of a case reveal a great risk of actual bias, the presumption of impartiality is rebutted and a due process violation has been established); and ***State v. Gudgeon***, 2006 WI App 143, ¶¶20-24, 295 Wis.2d 189, 720 N.W.2d 114 (The appearance of partiality constitutes objective bias when a reasonable person could conclude

"that the average judge could not be trusted to 'hold the balance nice, clear, and true' under all the circumstances).

The Wisconsin rules have also long been clear as to the expectations on judge's conduct and the rigors of the appearance of impartiality. The Court of Appeals discussed multiple rules that stress the importance of an independent and impartial judiciary. SCR 60.02 ("An independent and honorable judiciary is indispensable to justice in our society"); SCR 60.03(1)("A judge…shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."); SCR 60.04(1)(g)("A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding.") The court also noted the comment to SCR 60.03(1) that not all prohibitions can be specifically listed:

> The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in [SCR chapter 60]. Decision ¶27

The Decision has been interpreted and accepted for what it is – a decision based on the extreme and

extraordinary facts of the case. The August 19, 2019 ABA article *Facebook "Friendship" Leads to Judge's Disqualification*, by Mark Flores, explains:

> Based primarily on the timing of the connection, the appellate court held that this conduct gave rise to the appearance of partiality. The court noted that the accusing party's and the judge's lack of disclosure only added to the appearance of partiality and gave rise to concerns regarding ex parte communications. Before requiring that the case proceed with a different judge, the appellate court cautioned "that judges should recognize that online interactions, like real-world interactions, must be treated with a degree of care."
> …
> "There is no per se rule against having Facebook friends with litigants or parties," says Daniel D. Quick, Troy, MI, cochair of the ABA Section of Litigation's Trial Practice Committee. "It all depends on context, and I think that's exactly what you saw play out here."
>
> In particular, Quick believes the pending nature of the ruling and the ex parte nature of the connection played a large role in the appellate court's decision. He also deduces this was not a hard decision, regardless of the statement in ABA Formal Opinion 462 that not all social media contacts are inappropriate.
>
> "If a judge completed a bench trial and one of the litigants suggested you go to lunch before giving a ruling, most judges would decline and deem the request inappropriate," adds Quick. "That's the functional equivalent of what this was."
>
> The timing was bad, agrees Emily J. Kirk, Edwardsville, IL, cochair of the Section of Litigation's Solo & Small Firm Committee. She also surmises the lack of a prior relationship played a role in the court's decision.
>
> "It would have been different if the client was already acquainted with the judge and the

> relationships had been disclosed," Kirk continues. "It's different with active litigation."(Apx 18)

The New York Law Journal April 5, 2019 article *Judges' Use of Social Media: Tensions Ahead?* by Michael Hoenig, characterized the facts of this case as, "likely over the edge…"(Apx 20)

Pennsylvania Bar News May 6, 2019 *Electronic Social Media and Judicial Recusal — Revisited*, by Jeffery Lewis:

> The holding in this case is not really inconsistent with the holding in *Herssein*, notwithstanding that the court here found that the judge should have recused himself for being a "friend" and the court there found that the judge declined to recuse himself for being a "friend." After all, unlike in *Paternity of B.J.M.*, there was no communication occurring during the ongoing litigation via social media in *Herssein* between the judge and his "friend" involved in the litigation. Therefore, the case in favor of recusal was much stronger in *Paternity* than in *Herssein*.(Apx 23)

Wisconsin Public Radio quoted Leslie Tenzer, a professor at Pace University's Elisabeth Haub School of Law in New York:

> …the case shows judges need to use discretion online, just as they would in the physical world.
>
> "If someone friends you, you don't have to accept the friendship," she said. "I think that it is incumbent upon the judge to use his or her discretion in deciding what to do, and accepting a friendship while a case is pending makes absolutely no professional sense to me."(Apx 25)

The Wisconsin Public Defender on-line publication *On Point*, commented in a February 26, 2019 post:

> The judge should have been, shall we say, more "unfriendly." While a judge may use electronic social media (ESM) just like the rest of (some of) us, "the authorities caution that judges must be careful to avoid creating the appearance of impropriety through their use of ESM.…Put simply, they reflect the common-sense rationale that '[a] judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must…avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.'" (¶16, quoting ABA Formal Ethics Opinion 462 at 1 (2013)).
>
> The circuit judge's conduct here doesn't hew to that line….
> If you're thinking this is pretty basic, you'd be right.(Apx27)

Far from creating "a bright-line new rule of law that no judge can utilize ESM" or "sentencing judges of this State to the life of a hermit" as Carroll dramatically asserts, the Decision presents the application of well-settled rules and common sense to a fact scenario that quite obviously is disturbing and taints the process.

I. CARROLL MISCHARACTERIZES BOTH THE FACTS AND THE DECISION WITH REGARD TO THE APPLICABLE ISSUE, WHICH IS, THE APPEARANCE OF PARTIALITY IN THIS CASE.

Carroll relies heavily on inflammatory facts to support the trial court's underlying decision to change custody and placement. She presents one-sided "facts" which were heavily contested over a two day hearing, and which are unnecessary to the issue before this court. The Court of Appeals specifically did not reach the merits of the

placement decision. Not only are such facts one-sided and irrelevant but they serve little purpose other than a blatant attempt to "poison the water" with regard to Miller's character and to detract from the real issue – the violation of due process based on the appearance of partiality and objective bias created by Carroll and the Judge's actions.

Carroll also ignores or mischaracterizes the pertinent facts relevant to the appearance of impropriety. Noticeably absent is any meaningful discussion of the timing of the friend request and acceptance. Not only is the crucial timing not addressed, but it is repeatedly and misleadingly implied that it was some random connection amongst over 2,000 of the judge's Facebook friends – as opposed to an undisclosed connection first initiated while the case was pending before the Judge as the Decision recognizes. ¶21

Carroll glosses over her domestic violence posts and likes which would have shown in Judge Bitney's newsfeed while the case was pending before him. She ignores the perception caused by her final post that the judge gave her everything she wanted coupled with her departure from Facebook.

The Decision is about the undeniable perception of partiality, or risk of partiality, that these facts create. The "limitless implications" she proclaims simply do not exist. The Decision makes clear that it was the timing, content, and undisclosed nature of the contacts that enhance the perception of partiality or special position to influence. Carroll's example of a judge and party passing each other and saying nothing more than "hi" at a coffee shop is not even close to what occurred. What would be more comparable would be a litigant approaching a judge at a coffee shop, having no connection to that judge other than the pending family law case, sitting down with judge and handing over a copy of her scrapbook. To make it worse, this "communication" wouldn't end at the one coffee shop visit. The judge would literally take the scrapbook with him. Each new entry into the scrapbook would automatically be sent to the judge. Whether or not the judge looked at the scrapbook, the point is that a judge should refuse to secretly accept a scrapbook being handed to him from a litigant during pending litigation over which he is presiding. The appearance of partiality or ability to influence is simply too great and cannot be assuaged.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT, UNDER THE FACTS, THE ESTABLISHMENT OF AN UNDISCLOSED FACEBOOK CONNECTION BETWEEN JUDGE BITNEY AND CARROLL, INITIATED DURING THE ONGOING LITIGATION, CREATED A GREAT RISK OF ACTUAL BIAS RESULTING IN THE APPEARANCE OF PARTIALITY. THEREFORE, THE PRESUMPTION OF JUDGE BITNEY'S IMPARTIALITY HAS BEEN REBUTTED AND A DUE PROCESS VIOLATION OCCURRED.

A. The appearance of partiality is to be avoided.

The law regarding impartiality of judges is well established. "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). ***State v. Gudgeon***, 2006 WI App 143, ¶¶20-24, 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.
>
> …
>
> 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.

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. See ***Caperton v. A. T. Massey Coal Co.***, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) recognizing that the appearance of impropriety may violate constitutional due process protections but, even if not rising to a constitutional violation, the appearance of impropriety may still violate judicial codes, statutes, or the professional

standards of the bench and bar, requiring disqualification. ***Id*** at 556 U.S. 889-890.

The Wisconsin legislature has spoken directly to the issue through Wis. Stat. §757.19(2)(g) which 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]

B. An appearance of partiality can arise from ESM communications.

An appearance of partiality can arise from a personal relationship or connection or communication. Judge Bitney's friending of Carroll while her case was pending before him creates such an appearance. No one has misconstrued the meaning of "friend" on Facebook – it does not necessarily mean friend in the traditional sense. But being a friend on Facebook is the initiation and continuation of communication, in this case undisclosed, and it creates an appearance of impropriety. As such, it calls into question the integrity of the judiciary. The Court of Appeals did not deem it ex parte communication per se, but acknowledged that the friend request (which is a request to connect or communicate in some fashion), the acceptance of that request, and the exchange of information which follows, which is the very basis and reason for Facebook "friendships" or connections, contributed to the perception of partiality that further establishes the existence of objection bias.¶26

Disqualification is appropriate where an ESM connection develops between the judge and a litigant. In ***Chace v. Loisel***, 170 So.3d 802, 803 (Dist.Ct.App. 2014) the court held that, in a marriage dissolution 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. 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 (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 ***Frazier*** court discussed both ***State v. Forguson***, 2014 WL 631246 Tenn.2014 and ***State v. Madden***, 2014 WL 931031 Tenn.2014, relied on by Carroll, 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 an Instagram follow request is the same as accepting a Facebook friend request. In either medium, once accepted, the items posted by one appear automatically in the other's feed. It is the initiation of online communication. Indeed the very purpose of such social media platforms is to communicate or share information about

one's life and likes and dislikes with those to whom you are connected, and to have those to whom you are connected see that information.

III. THE COURT OF APPEALS DID NOT CREATE A NEW DEFINITION OF EX PARTE COMMUNICATION. INSTEAD, IT CONSIDERED THE RATIONALE FOR PROHIBITING SUCH COMMUNICATIONS AS PART OF ITS REASONSING FOR FINDING AN APPEARANCE OF PARTIALITY.

The Court of Appeals' reference to ex parte communications cannot be considered in a vacuum. The court considered the timing of the communications, the undisputed content of some of the communications, their undisclosed nature, and, importantly, how these factors contributed to create the appearance of partiality or special position to influence. The court did not find ex parte communication in violation of SCR 60.04(1)(g). Instead, it analyzed the purposes behind the prohibition of ex parte communication to explain why an objectively reasonable person would be concerned about the judge's impartiality.¶¶24-27

A. It cannot be disputed that friending, posting, liking, and newsfeed are all forms of communication.

The Facebook friend request by Carroll and the acceptance by Judge Bitney are both 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).[Emphasis added]

The very nature of Facebook and its newsfeed function create a continuing stream of 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).

As Carroll points out: "Facebook is an online social network where members develop personalized web profiles to interact and share information with other members." ***Lane v. Facebook, Inc.,*** 696 F.3d 811, 816 (9th Cir. 2012). "Members generally publish information that they want to share to their personal profile, and the information is therefore broadcasted to the members' online 'friends' (i.e., other members in their online network)."***Id***. Thus, when Carroll posted about or liked posts about domestic violence, an issue in the pending case, she was "interacting and sharing

information with" and "broadcasting that to her online friends" including Judge Bitney. So too when she was posting family pictures or otherwise providing a behind the scenes glimpse at her life it was relevant to the custody/placement issues before the court and was being broadcast to her connections, including Judge Bitney. Likewise each time she liked or commented on Judge Bitney's posts she was inserting herself into his communications and saying "Hey, remember me."

B. It was undisclosed communication with the sole decision maker regarding issues relevant to the case.

The concern is all the more heightened given that Judge Bitney was the sole decision maker and the case was still pending for his consideration. Just as lawyers must be scrupulous in avoiding contact with jurors while they are deliberating, judges certainly should be as well.

> Sending a connection/access invitation (such as a "friend request" on Facebook) is widely regarded as a communication, even though it is simply a click of the mouse and no words are exchanged. The ABA's Formal Opinion 466 states that, for purposes of Model Rule 3.5, a lawyer may review a juror's or potential juror's public postings but should not send a request for access to private sites, directly or indirectly. This applies to lawyers and to anyone acting on their behalf. The ABA offers an analogy for explanation:
>
> This would be the type of ex parte communication prohibited by Model Rule 3.5(b). This would be akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to

> look inside the juror's house because the lawyer cannot see enough when just driving past.

ARTICLE: LAWYERS' ABUSE OF TECHNOLOGY, 103 Cornell L. Rev. 879, 945-946.

While Carroll may not have specifically referenced her own case, it is undisputed that she communicated, by liking, sharing, or posting, about a key issue in her pending case, domestic violence, and that such posts would have appeared in Judge Bitney's feed as attributable to her. Such falls under the umbrella of impermissible ex parte communication regarding a pending proceeding. Further the parties' personal lives and behaviors were the subject of the contested evidentiary hearing in the custody/placement hearing. Yet what is Facebook but a peek into someone's life? Recall Miller's sister indicated that Carroll's Facebook posts not only included information related to domestic violence, but also began portraying herself in a positive light.(R105) The whole point in posting on Facebook and having Facebook friends is for them to see what you post, a/k/a your communications. Regardless of how overt, or how subtle, the communications were, they were still communications by Carroll outside of court to Judge Bitney about an issue in the case, domestic violence, and about her life.

During judicial or other adjudicatory proceedings, ex parte communications are strictly prohibited because they inherently create the appearance of ability to influence or partiality:

> I. THE RATIONALES UNDERLYING THE PROHIBITION OF EX PARTE COMMUNICATIONS
> …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….
> 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.

This article, and the Court of Appeals, referenced ***Rose v. State,*** 601 So.2d 1181 (Fla. 1992):

> [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.

The timing also affects the impermissible nature of the contact. Unlike the situation where a judge has thousands of connections or doesn't recall that a litigant is an ESM connection of old, this communication started while the case was pending and under consideration. A reasonable person would call such undisclosed communication into question. Assume testimony at a jury trial ends. The jury is excused at night to return over several days to continue deliberations. It would be hard pressed to find anyone who would say it was acceptable for the litigant or a juror to send/accept a Facebook friend request while deliberations were ongoing. Judges instruct jurors against contact:

> WIS JI-Civil 50: 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.

Judge Bitney even agreed that a litigant friending a juror during deliberations would *certainly* call into question the jury's decision(R134,p320)[Emphasis added] This is no different, and even more concerning, as it involves undisclosed contact, during "deliberation" with the sole decision maker.

Judge Bitney's summary dismissal of these concerns claiming he had already made up his mind do not address the relevant inquiry, i.e., the communications and 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 Carroll.

IV. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH OTHER SOURCES THAT HAVE LIKEWISE APPLIED WELL-ESTABLISHED PRINCIPLES OF AN IMPARTIAL JUDICIARY AND CODES OF JUDICIAL CONDUCT TO CONCLUDE THAT ESM COMMUNICATIONS MAY GIVE RISE TO THE APPEARANCE OF PARTIALITY OR EX PARTE COMMUNICATION CONCERNS.

A. The Decision is in accord with ABA Opinions.

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. This is the only ABA opinion specifically addressing a judge's use of ESM. 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."

ABA formal opinion 462 likewise distinguishes between the 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…[Emphasis added].

Knowingly "friending" while litigation is pending and the judge is deliberating a case does not "promote public confidence in the independence, integrity, and impartiality of the judiciary," nor does it "avoid…the appearance of impropriety."

The September 2019 ABA Formal Opinion 488, while not about social media per se, discusses generalized guidelines for when judges should disclose relationships or are disqualified. Opinion 488 is in accord with, and reinforces, the Court of Appeals' Decision:

> Public confidence in the administration of justice demands that judges perform their duties impartially, and free from bias and prejudice. Furthermore, while actual impartiality is necessary, the public must also perceive judges to be impartial. The Model Code therefore requires judges to avoid even the appearance of impropriety in performing their duties. As part of this obligation, judges must consider the actual and perceived effects of their relationships with lawyers and parties who appear before them on the other participants in proceedings. If a judge's relationship with a lawyer or party would cause the judge's impartiality to reasonably be questioned, the judge must disqualify himself or herself from the proceeding. Whether a judge's relationship with a lawyer or party may cause the judge's impartiality to reasonably be questioned and thus require disqualification is (a) evaluated against an objective reasonable person standard; and (b) depends on the facts of the case. Judges are presumed to be impartial. Hence, judicial disqualification is the exception rather than the rule. [Footnotes omitted]

Opinion 488 goes on to provide general guidance, not hard and fast rules, about when judges must disclose and disqualify –notably keeping it based on the specific facts:

> Apart from the personal relationships identified in Rule 2.11(A), a judge may have relationships with other categories of people that, depending on the facts, might reasonably call into question the judge's impartiality. These include acquaintances, friends, and people with whom the judge shares a close personal relationship.[Emphasis added]

Carroll tries to paint herself as an "acquaintance" of the Judge as that term is used in Opinion 488, and then use that terminology to support her arguments that her relationship with the judge did not require recusal. But the Judge and Carroll are more than "acquaintances" as used in Opinion 488. To be an acquaintance, "[g]enerally, neither judge nor the lawyer [in this case party] seeks contact with the other, but they greet each other amicably and are cordial when their lives intersect." Here, Carroll purposefully reached out and sought contact with the Judge, while her case was pending. Nor does she qualify as an acquaintance because her contact is neither coincidental nor does it stand alone. "[A] judge's acquaintance with a lawyer [in this case party], standing alone, is not a reasonable basis for questioning the judge's impartiality." As set forth herein, Carroll's request to connect by Facebook does not "stand alone." The totality of these

facts reasonably call into question their connection and the judge's impartiality and, per Opinion 488, the result would be the same as determined by the Court of Appeals.

B. The Decision is aligned with the position that Judges may use ESM but must recognize the potential for the appearance of partiality and ex parte communications. Thus, each case is to be assessed on its own facts.

The Court of Appeals found persuasive ***State v. Thomas***, 376 P.3d 184 (N.M. 2016), for the proposition that:

> While we make no bright-line ban prohibiting judicial use of social media, we caution that "friending," online postings, and other activity can easily be misconstrued and create an appearance of impropriety. Online comments are public comments, and a connection via an online social network is a visible relationship, regardless of the strength of the personal connection. Decision ¶17 citing to ***Thomas*** at 198-99.

Carroll's citations to support the proposition that generally judges may use ESM recognize this very principle --that ESM is a form of communication for which judges must act carefully. The New Mexico Advisory Opinion confirms that the code of judicial conduct applies to a judge's use of social media in the same way it applies to other activities. "A judge may not communicate on a social media site in a manner that the judge could not otherwise communicate." It endorses the concept that judges may participate in social media but must do so cautiously. Acknowledging that in some circumstances friending someone

could be construed as an endorsement.(Carrol Apx128-156) The Arizona Supreme Court Advisory opinion does not per se disqualify 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."(Carroll Apx168-182) The Tennessee Judicial Ethics Committee states that while the code of judicial conduct permits judges to utilize social media, "it must be done cautiously."(Carroll Apx164-167)

The Maryland Judicial Ethics Opinion recognizes the "mere fact of social connection" does not alone create a conflict, but does not go so far as to say that it cannot, recognizing concern:

> 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. (Carroll Apx186)

Kentucky provides a "qualified yes" to whether judges may be friends with "attorneys, social workers, and/or law enforcement officials" who appear before them but 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.(Carroll Apx192)

The Ohio opinion recognized this same caution to declare "a judge's participation on social networking must be done carefully." "A judge must not foster social networking interactions with individuals…if such communications will erode confidence in the independence of judicial decision making." Also, "a judge should not view a party's…page on a social networking site…"(Carrol Apx270, 272)

The New York opinion unremarkably states that there is nothing inherently inappropriate about a judge using a social network but notes the judge must avoid appearance of impropriety and act at all times in a manner that promotes public confidence in the impartiality of the judiciary. "Solely" a "previous" Facebook connection, without more, may not create an appearance of impropriety.(Carroll Apx195) So too the cases cited by Carroll simply provide that an existing ESM connection, without more, is alone not enough to demonstrate impropriety. The difference is that in this case there is "something more" - the timing of the undisclosed connection and the content of the posts/likes.

All of these sources cited by Carroll come to the same reasoned conclusion as did the Court of Appeals. Judges are not prohibited from using ESM, but they must

recognize the perils it brings with the potential for the appearance of partiality and the potential for and perception of ex parte communications. Each case is assessed on its own facts.

C. The ESM communications in this case created an appearance of partiality.

Even absent actual bias, this court must resolve the appearance of partiality based on what a reasonable person would conclude, not what a reasonable legal practitioner or reasonable judge would conclude. ***Gudgeon*** 2006 WI App 143, ¶26. Safe to say that most people would be shocked and distrustful of the judge handling their case if he began a Facebook friendship with the other side during the case. That the judge didn't "like" any posts would be of little comfort, especially as it is undisputed that the newsfeed would have put Carroll's posts and likes 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 communication from Carroll – 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. The Court of Appeals found that "…a reasonable person could believe Carroll sent the "friend" request in an attempt to influence Judge Bitney's decision…" ¶23.

Not only was Miller concerned but the GAL, an independent officer of the court whom we can likely all agree is impartial, neutral, and reasonable, is the one who, upon seeing Carroll's post and learning of the connection, felt "a duty" to contact Miller's counsel.(R106)

The fact that others in addition to Judge Bitney could see Carroll's posts does not diminish the contacts as one-sided or undisclosed. It was communication, involving issues relevant to the case, which Carroll was having with Judge Bitney of which Miller, his counsel, and the GAL were unaware. Even though Judge Bitney has not denied seeing Carroll's posts or likes, Carroll speculates that perhaps he did not. Not only speculative, as her posts would have shown in his newsfeed, but the very purpose of posting is so that your "friends" can see what you post. Bottom line is if Carroll didn't want the judge to see, she wouldn't

have sent a friend request -- and if the judge didn't want to see what people posted, he wouldn't be accepting their friend requests.

V. REVERSAL AND REMAND FOR TRIAL BEFORE A DIFFERENT JUDGE IS THE APPROPRIATE REMEDY.

The Court of Appeals properly determined that it could not ignore the constitutional requirement that Miller have the custody and physical placement determination made by an impartial decision-maker, and that adherence to this fundamental precept of due process compelled reversal and remand for a new trial before a different judge.

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.

Although interpreting the federal rule for disqualification for the appearance of partiality, the underpinning of ***Liljeberg*** applies. 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.

In a Wisconsin Law Review article discussing ***Liljeberg*** it was opined that the Supreme Court was sending a clear message that the appearance of impartiality of the judiciary must be 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….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.

Once the integrity of the proceedings has 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, 475 U.S. 813 at 825, 106 S.Ct. at 1587, 89 L.Ed.2d at 835. Wisconsin has adopted these same principles:

> The United States Supreme Court says that a "fair trial in a fair tribunal is a basic requirement of due process." ***In re Murchison***, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). We have remarked that this proposition is so plain as to be axiomatic. ***State v. Herrmann***, 2015 WI 84, ¶25, 364 Wis.2d 336, 867 N.W.2d 772. But there cannot be a fair trial without a constitutionally acceptable decisionmaker: "It is, of course, undisputable that a minimal rudiment of due process is a fair and impartial decisionmaker." ***Guthrie v. Wisconsin Employment Relations Com.***, 111 Wis.2d 447, 454, 331 N.W.2d 331 (1983). Our commitment to this principle is such that we do not accept even the appearance of bias:"[W]hen determining whether a defendant's right to an objectively impartial decisionmaker has been violated we consider the appearance of bias in addition to actual bias. When the appearance of bias reveals a great risk of actual bias, the presumption of impartiality is rebutted, and a due process violation occurs." ***Herrmann***, 364 Wis.2d 336, ¶46. Therefore, a biased decisionmaker is "constitutionally unacceptable." ***Withrow v. Larkin***, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed. 2d 712 (1975).

Tetra Tech EC, Inc. v. Wis. Dep't of Revenue, 2018 WI 75, ¶64, 382 Wis.2d 496, 914 N.W.2d 21.

The facts of this case rise to that constitutional level. Physical placement and legal custody determinations indisputably implicate parental rights, which are a fundamental liberty interest. ***Guelig v. Guelig***, 2005 WI App 212, ¶33,287 Wis.2d 472, 704 N.W.2d 916. The right to an impartial judge is fundamental to the notion of due process under both the United States and Wisconsin Constitutions. ***State v. Goodson***, 2009 WI App 107, ¶8. The right to trial by an impartial judge is a fundamental right, the denial of

which is a structural constitutional error, and therefore prejudicial per se and not subject to harmless-error analysis. ***State v. Pinno***, 2014 WI 74, ¶50, 356 Wis.2d 106, 850 N.W.2d 207. A party who suffers from a structural error need not show prejudice arising from the error. ***Id.*** Structural errors permeate or call into question the entire proceeding or decision or are difficult to determine the effect of the error. They are so intrinsically harmful as to require automatic reversal (i.e., 'affect substantial rights') without regard to their effect on the outcome. See ***In re S.M.H.***, 2019 WI 14, ¶15, 385 Wis.2d 418, 922 N.W.2d 807 (majority). Under either the Majority or Dissent's analysis in ***S.M.H.*** this was a structural error:

> ¶69 (Dissent) The United States Supreme Court decision in ***Weaver*** provides a helpful summary and a clear roadmap for assessing whether a constitutional error is structural. ***Weaver*** explained that, generally, structural errors fall within one of three categories, although the categories may overlap. They are: (1) affect an underlying right that protects some interest other than an adverse determination for the defendant; (2) the error's quantitative effect on the trial is too hard to measure; and (3) fundamental unfairness results from the error. ***Weaver***, 137 S.Ct. at 1908.

S.M.H. at ¶69. The error in this case is so profound that it meets or overlaps all three categories: (1) it affects an underlying right that protects some interest other than an adverse determination for Miller -- the right to an impartial adjudicator, the right to a fair trial, the right

that evidence relevant to the case or potentially impacting on the judge's decision be provided in court with the opportunity to rebut or provide similar evidence; (2) the error's quantitative effect on the trial is too hard to measure -- the very reason one sided communication with a litigant while an action is pending is to be avoided is that 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 influenced by what he sees or hears; and (3) fundamental unfairness results from the error -- it was wrong. It has an unquantifiable effect on the decision, and it clearly erodes public confidence in both the process and the decision. Unbeknownst to Miller, his counsel, and the GAL, Carroll sought out and initiated a separate and undisclosed line of communication with the Judge.

Moreover Carroll's motives are extraordinarily suspect and seem to have had no other purpose than to attempt to influence the Judge. She advanced no other connection to the judge or reason to connect on Facebook other than her case. So why did she friend him while he was considering her case? Why did the tenor of her posts change

to things that reflected her in a more positive light? Why was she posting/liking/sharing about domestic violence – an issue in her case? Why was she interacting with the judge by liking or commenting on his posts while he was considering her case? While Judge Bitney states he already had made up his mind at the time he accepted her request, surely Carroll would not have known that. She wouldn't have known that for another month when the decision was released. Once Judge Bitney gave his decision, why did Carroll publically thank him for giving her everything she wanted, and then leave Facebook? (R107,ExB) Perhaps mission accomplished? A reasonable person would conclude this was unfair and improper. But quantifying the influence this improper contact had is too hard to measure. Thus, the relief is a new trial.

Even if, *arguendo*, not structural error, the error was not harmless. The burden of proving no prejudice is on the beneficiary of the error, Carroll. ***State v. Dyess***, 124 Wis. 2d 525, 543, 370 N.W.2d 222(1985) This is especially so because she instigated the error. The contact was ex parte. By definition, the opposing party is not aware of the information given in secret to the judge. That prevents the party from countering such information with evidence. When one party is unaware of the evidence or information

used by a judge to decide a dispute and is unable to challenge it, our adversary system breaks down. Without knowing the effect this communication had on the decision, this Court cannot conclude that the error was harmless. Because demonstration of prejudice in this kind of case is a practical impossibility, prejudice must necessarily be implied.

Nor can it be said that the outcome would be the same in the absence of the error. While Carroll points to some evidence to support the judge's decision, there was also substantial competing evidence supporting a different result. Tellingly, the GAL (who had *not* seen Carroll's Facebook page prior to Judge Bitney's decision (R106)), reached an opposite conclusion as to placement – thereby intrinsically establishing a reasonable possibility that a neutral decision maker would have reached a different outcome. ***Martindale v. Ripp***, 2001 WI 113, ¶32, 246 Wis.2d 67, 89, 629 N.W.2d 698. As such, confidence in the outcome is undermined thereby affecting Miller's substantial rights per Wis. Stat. §805.18.

Taking all this into consideration it cannot be said that the error was harmless. Instead, it more likely

appears that the error played a role in the Judge's decision.[2]

CONCLUSION

The Court of Appeals' Decision is nothing more than the application of well-established law and common sense to the specific extreme and extraordinary facts of this case. It is not a ban on judges using social media. It is not a new definition of ex parte communication. The facts of this case are so obviously improper that any other outcome would be wholly unsupported by authority and contrary to justice.

[2]The second appellate issue not currently before this Court addresses Judge Bitney's error in finding that Miller's behaviors had a substantial impact on Bruce – something the evidence not only did not support, but refuted.(R133,p161-169;R91,p4) The Judge also relied on his unsupported belief, without evidence, that law enforcement wouldn't enforce the restraining order.(R92,p4) He also erroneously found that "nor has [Miller] done anything to deter such abusive conduct in the future."(R92,p4) – which was directly contrary to Miller's testimony that he was actively participating in counseling that he found to be effective (R133,p125-126), and was in compliance with the terms of DAGP stemming from the August 2016 disorderly conduct charge from which the domestic abuse injunction arose.(R133,p124) Judge Bitney made findings inconsistent with the facts at trial, and misapplied the best interest analysis, focusing on Carroll's relationship with Miller as opposed to Miller's relationship with the child, to reach a determination contrary to the GAL.

Dated this 1st day of October, 2019

HERRICK & HART, S.C.

By: _____

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response 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 48 pages.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

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

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

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

Dated this 1st day of October, 2019

HERRICK & HART, S.C.

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SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this response brief, either as a separate document or as part of this response, is an appendix that complies with Wis. Stat. §809.19(3)(b) and that contains:

1. A table of contents;

2. Court of Appeals' Decision; and

3. A copy of non-Wisconsin authority cited.

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 designation of parties and juveniles as done in the court of appeals' decision recommended for publication.

Dated this 1st day of October, 2019.

HERRICK & HART, S.C.

By: _____
Stephanie L. Finn (#1000734)
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Attorneys for Joint Petitioner-Appellant

CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on October 1, 2019, pursuant to Wis. Stat. §809.80(3)(b)and(4), Joint-Petitioner-Appellant's Response Brief was delivered to FedEx, a third-party commercial carrier, for delivery to the Clerk of the Supreme Court and Schwartz Law Firm within three calendar days. I further certify that Appellant's Response Brief was correctly addressed:

Wisconsin Supreme Court
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Dated this 1st day of October, 2019.

HERRICK & HART, S.C.

By: _____
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