Note: Filed in several unmarried couple adoptions petitions, Washtenaw County Trial Court, Family Division, 2002

BRIEF IN SUPPORT OF MOTION TO VACATE CHIEF JUDGE BROWN'S ORDER TO REASSIGN CASE TO HIMSELF, OR, ALTERNATIVELY, FOR DISQUALIFICATION OF JUDGE

For the reasons set forth in this brief, petitioners request that the Chief Judge of Washtenaw County Circuit Court vacate his order reassigning their adoption petition to himself. In the alternative, petitioners request that the chief judge disqualify himself from hearing this case.

STATEMENT OF FACTS

On information and belief, Supreme Court Chief Justice Maura Corrigan contacted Judge Brown regarding second parent adoption by unmarried couples and directed him to end the practice of granting second parent adoptions in Washtenaw County Court. (Brian Dickerson, "Judge's ruling hits kids, not gay parents," *Detroit Free Press*, June 10, 2002 -- attached to Petitioners' Motion as Exhibit A). Shortly thereafter, on June 4, 2002, Chief Judge Archie Brown ordered, in a special directive, that the Washtenaw County trial court no longer process petitions for second parent adoptions. (Letter from Chief Judge Archie Brown , hereinafter, "June 4 Directive," Exhibit B).

In this Directive, Judge Brown stated that "[t]his decision comes after ….concerns about the legality of this program expressed to me by judges from around the state, including members of the Supreme Court." (Exhibit B). Judge Brown also states that he obtained a legal opinion from an adoption specialist, Herbert Brail, and that "there is no legal basis for accepting or granting petitions for second parent adoptions." *Id.*

Judge Donald Shelton, who had a number of second parent adoption petitions pending before his court, indicated that he did not believe that Judge Brown had the authority to issue an advisory opinion about the interpretation of a statute and then make it binding upon all judges in the circuit. (Exhibit D). Judge Brown, in a letter to the ACLU of Michigan, dated June 11, 2002, stated that he had taken Judge Shelton's second parent adoption cases away from him and reassigned those cases to himself, due to his disagreement with Judge Shelton's interpretation of Michigan's Adoption Code and second parent adoptions by unmarried couples. (Exhibit E). Judge Brown repeated in the June 11th letter his opinion that Michigan's Adoption Code prohibits second parent adoptions by gay couples and unmarried heterosexual couples. *Id*.

ARGUMENT

I. JUDGE BROWN LACKED THE AUTHORITY TO REASSIGN JUDGE SHELTON'S SECOND PARENT ADOPTION PETITIONS TO HIMSELF SIMPLY BECAUSE HE DISAGREED WITH SHELTON'S INTERPRETATION OF MICHIGAN'S ADOPTION LAW.

While Michigan Court Rule 8.110(C) provides that a Chief Judge shall have the authority to oversee administrative functions of the Court, a judge may not render a substantive decision on a matter not properly before him or her. *Schell v Baker Furniture, 461 Mich 502 (2000)* (remanding case to circuit court for further proceedings where Chief Judge incorrectly entered dispositive order in case assigned to another circuit judge). While the Michigan Supreme Court may issue advisory opinions regarding the constitutionality of a Michigan law, MCR 7.301(A)(4), and the Attorney General may issue opinions regarding statutory interpretation, there is no equivalent provision giving

chief trial court judges the power to issue legal rulings outside the context of a specific case.

As clearly indicated in Judge Brown's June 4 Directive to the trial court, and in his letter to the American Civil Liberties Union on June 11, his sole purpose in reassigning the adoption petitions to himself was because he believes that the Michigan's Adoption Code does not pertain to second parent adoptions by unmarried couples. (See Exhibits B and E). By taking away these cases from Judge Shelton, the effect of Judge Brown's action is to render dispositive orders in the cases that had been assigned to another judge on his circuit. This is clearly not allowed. As the Michigan Supreme Court unanimously held:

> Substantive or dispositive rulings in individual cases are not exercises of administrative authority. Further, adherence to the approach set forth in MCR 8.111 enhances personal judicial accountability and assures litigants that rulings are made by a judge who is familiar with the substance and circumstances of each case…The rule that one circuit court judge should not enter orders in a case assigned to another circuit judge is longstanding.

Schell, 461 Mich at 510 (2000). *See also Montean v City of Detroit,* 143 Mich App 500 (1985) (Chief Judge lacked authority to rule on motion to set aside mediation acceptance; rather, unless assigned judge was absent or otherwise unable to act, her authority over the matter continued to the date of trial); *Liberty v. Michigan Bell Telephone Co*., 152 Mich. App. 780 (1986) (authority to rule on motion to set aside ministerially entered mediation judgment rested with assigned judge rather than chief judge).

Especially given the fact that there are no appellate decisions contradicting Judge Shelton's interpretation of the adoption code as permitting second parent adoptions, Judge Brown's order reassigning petitioners' case to himself must be vacated and the case returned to Judge Shelton.

II. JUDGE BROWN'S ACTIONS AND STATEMENTS REGARDING HIS INTERPRETATION OF MICHIGAN'S ADOPTION CODE AND SECOND PARENT ADOPTION AND UNMARRRIED COUPLES ARE EVIDENCE OF HIS BIAS AND PREJUDICE REGARDING THIS ISSUE AND HIS INABILITY TO IMPARTIALLY HEAR THIS PETITION.

To disqualify a judge for personal bias or prejudice, the moving party must demonstrate a bias that has its origin in events or sources of information gleaned outside of a judicial proceeding. *Cain v Michigan Department of Corrections,* 451 Mich 470 (1996). MCR 2.003 (B)(1) requires a showing of actual bias. *Band v Livonia Associates*, 176 Mich App 95 (1989). MCR 2.003 (B)(1) also requires that a judge be "personally" biased or prejudiced in order to warrant disqualification. The federal disqualification statutes similarly contain the requirement that the bias or prejudice be "personal" in nature. See 28 USC 144 ("the judge…has a personal bias or prejudice either against (a party) or in favor of any adverse party"), and 28 USC 455 (b)(1) ("[w]here the (judge) has a personal bias or prejudice concerning a party). As a result of this statutory language, the federal courts have developed what is commonly known as the "extrajudicial source" rule. *Cain* at 486.

This requirement has been interpreted to mean that disqualification is warranted when the bias or prejudice is both personal and extrajudicial. The challenged bias must have its origin in events and sources outside the judicial proceeding. *See also Liteky v United States,* 510 U.S. 540 (1994) (requirement of extrajudicial bias outside of actual proceeding); *Harvey v Lewis,* 10 Mich App 23 (1968) (bias and prejudice must be in fact, aside from the actual decision in due course of judicial proceedings).

Judge Brown, through his actions outside of the courtroom has already rendered a decision on this petition and has demonstrated his inability to impartially hear this case. In *Ireland v Smith,* 214 Mich App 235 (1995), *aff'd on other grounds, mod on other grounds*, 451 Mich 457 (1998), the Michigan Court of Appeals identified the governing test:

> The test is not [just]whether or not actual bias exists but also whether there was 'such a likelihood of bias *or an appearance of bias* that the judge [is] unable to hold the balance between vindicating the interests of the court and the interests of the [affected party].

Id. In *Ireland* the Court ruled that tremendous media coverage of a case in which a judge had expressed comments created an appearance of bias and so ruled that he be disqualified.

In the present case, Judge Brown has clearly stated his personal bias and prejudice against granting second parent adoptions for unmarried couples. As support for this directive, he solicited the opinion of only one practitioner for an interpretation of Michigan's Adoption Code. He publicly stated through his directive, a letter to the ACLU of Michigan, and in interviews to the media, that he interprets Michigan's law to prohibit second parent adoptions by unmarried couples. He took away Judge Shelton's pending second parent adoption cases and reassigned them to himself. All of this has occurred outside an actual judicial proceeding or hearing on a second parent adoption petition and demonstrates clear bias as to the merits of the substantive issue.

CONCLUSION

Chief Judge Brown lacked the authority to reassign Judge Shelton's second parent adoption petitions to himself, based on his disagreement with Judge Shelton's

interpretation of Michigan's Adoption Code and in the absence of controlling legal authority. Judge Brown's actions have been taken as a means to influence the outcome of all pending second parent adoption petitions. He should vacate his order reassigning the pending second parent adoption cases to his Court, and return such cases to Judge Shelton.

In the alternative, Judge Brown has demonstrated through his directive to terminate the second parent adoption program and his statements outside of an actual hearing, interpreting Michigan law to prohibit second parent adoptions for unmarried couples, his personal bias and prejudice towards this issue. Because he is unable to impartially hear second parent adoptions petitions by unmarried couples, he should disqualify himself from this case.

For the reasons stated above, and in their motion, this Court should grant their motion. In the event that the motion is denied, petitioners request that this motion be referred "to the state court administrator for assignment to another judge, who shall decide the motion de novo." MCR 2.003(C)(3)(b).

Respectfully submitted,

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