STATE OF MICHIGAN

IN THE TRIAL COURT FOR THE COUNTY OF WASHTENAW

FAMILY DIVISION

In the Matter of: Case Nos.: 02-0130-AO/02-0129-RB
02-0120-AO/02-0119-RB
ADOPTION CASES   02-0092-AO/02-0091-RB
02-0148-AO/02-0149-RB
02-0151-AO/02-0150-RB
02-0145-AO/02-0146-RB
02-0143-AO/02-0144-RB

Honorable Archie C. Brown
On Assignment to the
Honorable Timothy M. Kenny

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ACLU of Michigan
By: Constance L. Jones (P40995)
300 North Fifth Ave., Suite 220
Ann Arbor, Michigan 48104
734/747-9989

Molly H. Reno (P28997)
221 N. Main St., Suite 300
Ann Arbor, Michigan 48104
734/769-0077

Cooperating Attorneys, American Civil Liberties Union Fund of Michigan

Jay D. Kaplan (P38197)
Kary L. Moss (P49759)
Michael J. Steinberg (P43085)
American Civil Liberties Union
Fund of Michigan
40 West Hancock Street
Detroit, Michigan 48201-1342
313/578-6800

Attorney for Petitioners

______________________________________/

SUPPLEMENTAL BRIEF IN SUPPORT OF

MOTION TO DISQUALIFY JUDGE

INTRODUCTION

This appeal is filed on behalf of Petitioners who collectively have seven adoption petitions pending in Washtenaw County. Petitioners seek the disqualification of Chief Circuit Judge Archie Brown on the basis of bias or prejudice and/or the appearance of bias or prejudice. Judge Brown's bias or prejudice is demonstrated by his removal of the original judge assigned to hear the petitions without good cause, his reassignment of the petitions to himself in blatant disregard of the local administrative order for reassignment of cases, and his admitted reasons for doing so - namely to change the outcome of the cases by preventing the seven adoption petitions from being considered.

Petitioners filed a Motion for Disqualification and Reassignment of Cases which was denied by Judge Brown in an Opinion and Order dated June 21, 2002. (Attachment 1). As Judge Brown is Chief Judge of the Washtenaw County Circuit and Trial Court, the appeal of the denial for disqualification was referred to the State Court Administrator's Office for assignment to another Judge to hear the matter *de novo* as required by MCR 2.003(C)(3)(b).

STATEMENT OF FACTS

On March 1, 2001, the Washtenaw County Circuit Court issued Local Administrative Order 2001-02D, requiring all Washtenaw County adoption cases to be assigned solely to Judge Donald E. Shelton, the then presiding Juvenile Division Judge in the Washtenaw County Family Court (LAO 2001-02D, Attachment 2). Prior to the March 1, 2001 LAO, adoption cases had

been assigned to Judge Nancy C. Francis, exclusively.[1] At no time prior to the events discussed in this brief was Judge Archie C. Brown assigned to adoption or other juvenile-related cases except for jury trials in juvenile cases which were handled on a one- month rotation among four judges including Judge Brown.[2] The nine petitions which are the subject of the instant cases were assigned to Judge Shelton pursuant to LAO 2001-02D, the administrative order governing case assignments to judges, in effect at all times relevant to this disqualification motion. [3]

The seven petitions which are the subject of the instant cases all involve so-called "second parent adoptions" of a minor child by two unmarried persons. There was no special or separate program of the Washtenaw County Juvenile Court that processed second parent adoptions; rather, second parent adoptions were processed in accordance with internal court policy similar to all other adoptions processed by the Court.4 This policy dated back to 1993. (See September 26, 1993 Washtenaw County Probate Court Adoption Policy, Attachment 4).

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[1] Due to physical plant issues in Washtenaw County, primary of which is the fact that the Juvenile Court is located some distance from the County Courthouse which houses the functions of the probate and circuit courts, juvenile cases, including adoptions, have historically been handled by only one of the three presiding Family Court Judges, located in that off-site facility. While LAO 1999-04D assigned 90% of the adoption cases to Judge Nancy Francis and 10% to Judge Timothy Connors, in practice all adoption cases were heard by Judge Francis due to their taking place in the off-site facility.

[2] The 4 judges were Judges Brown, Connors, Francis and Kirkendall.

[3] On June 18, 2002, Judge Archie Brown signed LAO 2002-05D (See Attachment 3) effective June 14, 2002 revising case assignments and providing that all second parent adoption cases (AO) would be subsequently assigned to him. The preamble to LAO 2002-05D incorrectly identifies itself as rescinding and replacing LAO 1999-04D which had previously been rescinded and replaced by the March 1, 2001 LAO 2001-02D.

4 See for instance Attachment 5 which lists the most recent case code assignment types for the Washtenaw County Family Division Courts, where 2nd parent adoptions (AO) are listed along with all other case codes types.

The policy, consistent with the Michigan Adoption Code, MCL 710.21 et seq., required the processing of adoption petitions in a manner to facilitate the best interests of the children who come before the Court. The 1993 Washtenaw County Adoption Policy with regard to second parent adoptions was issued by Judge Nancy C. Francis and was followed by Judge Donald E. Shelton during the time he was made the presiding Juvenile Court Judge, up to the time of Judge Brown's challenged conduct.

According to an article in the Lansing State Journal, prior to March 24, 2002, Judge Brown held the view that the Michigan Adoption Code, MCL 710.21 et seq., permitted unmarried couples to adopt a child together. (Lansing State Journal Article, March 24, 2002, Attachment 6). After noting that the Adoption Code allows single people to adopt, and that children are therefore already living with unmarried and gay couples, Judge Brown asked the rhetorical question, "Why shouldn't the child receive the full benefits?" According to this article, Judge Brown held the view that because Michigan's adoption law did not specifically ban unmarried individuals, from adopting, including same-sex couples from co-adopting, it was up to judges to determine how to implement the law.

Members of the Michigan Supreme Court including its Chief Justice, communicated concerns to Judge Brown about permitting unmarried and/or gay and lesbian persons to adopt in Washtenaw County. (See June 4, 2002, Directive from Judge Brown to Juvenile Court Staff, Attachment 7, and Judge Brown's June 11, 2002 letter to ACLU, Attachment 8). Upon information and belief, the communications from the Supreme Court were subsequent to Judge Brown's explanation of the legal basis underlying Washtenaw County's policy of granting

adoptions by two unmarried persons as reported in the March 24, 2002 Lansing State Journal Article.

On May 22, 2002, Judge Brown requested a legal opinion on the propriety of two unmarried people adopting a child from one private practitioner, attorney Herbert Brail. (May 23, 2002 Herbert Brail opinion letter to Judge Brown, Attachment 9). Upon information and belief, Judge Brown did not seek the legal opinion of attorneys or judges who had thoroughly researched the issue and concluded that the Michigan Adoption Code, like adoption codes from other states with nearly identical language, permits second parent adoptions by unmarried individuals.

On June 4, 2002, Judge Brown issued a directive to the Washtenaw County Juvenile Division Staff prohibiting them from processing petitions for second parent adoptions including all pending petitions. (June 4, 2002 Directive, Attachment 7). In a turnabout, Judge Brown's Directive stated in reference to the Adoption Code that "…it is clear that the statute, and our case law, bars adoptions by both gay couples and unmarried heterosexual couples." He further stated that "….any change in the statue to allow for second parent adoptions is solely a legislative issue rather than one for judicial resolution".

Judge Brown admitted that the extra-judicial communications from the Michigan Supreme Court were the impetus for ordering Juvenile Court staff on June 4, 2002, to halt all second parent adoptions. Judge Brown states in the June 4, 2002 Directive, "This decision comes after ... concerns about the legality of this program expressed to me by judges ... including

members of the Supreme Court." (June 4, 2002 Directive, Attachment 7). None of the Petitioners were given notice that the Chief Judge was rendering an interpretation of the Michigan Adoption Code that would prohibit them from adopting, nor were they given the opportunity to explain why the Adoption Code permits the adoption.

Judge Brown's June 4, 2002, directive contradicts the July 1, 1997, Family Division Implementation and Operations Plan which requires that Judge Brown, as the Presiding Judge of the Family Division, work closely with and consult other division judges on matters of division concern and that education, training and experience be taken into consideration in making judicial assignments. (Family Division Implementation and Operations Plan, Attachment 10). Upon information and belief, other Washtenaw County Family Division Judges were not consulted prior to Judge Brown's actions.

On June 7, 2002, Judge Shelton advised Judge Brown that he would not follow the June 4, 2002 directive to Juvenile Court staff prohibiting the processing of adoption petitions filed by unmarried couples. (Judge Brown's June 11, 2002 letter to ACLU, Attachment 8). In direct response to Judge Shelton's refusal to follow Judge Brown's directive, and over Judge Shelton's objections, Judge Brown, effective June 7, 2002, reassigned the unmarried couple or second parent adoption portion of the adoption docket from Judge Shelton to himself. (June 11, 2002 letter to ACLU, Attachment 8). Judge Brown's actions were taken for the express purpose of preventing the pending adoption petitions from even being considered, much less granted or denied by Judge Shelton.

Although Judge Brown took control of the seven pending second parent adoption cases on June 7, 2002, he did not issue a written order of reassignment until June 20, 2002, nunc pro tunc to June 7, 2002. (Attachment 11). The June 20, 2002 Order of Reassignment was in contravention of the Michigan Court Rules, which require reassignment to be made by lot among the six judges then assigned to the Family Division [5] or pursuant to the system adopted by local court administrative order, as required by MCR 8.111(B) and (C). Additionally, the Reassignment Order does not state grounds for the disqualification of Judge Shelton, nor does it set forth other good cause under which Judge Shelton cannot undertake the assigned cases as required by MCR 8.111(C).

Subsequent to Judge Brown's reassignment of these seven second parent adoption cases to himself, the American Civil Liberties Union of Michigan, along with a number of other interested groups and 26 attorneys wrote Judge Brown a letter expressing objections to his actions (Attachment 12). On June 11, 2002, Judge Brown wrote to Kary L. Moss of the ACLU, reiterating the view expressed in his June 4, 2002, directive to the Juvenile Court staff and making it clear that he intended to rule against all of the pending petitions due to his personal view as to the applicability of the statute to the cases at hand. (Attachment 8).

[5] Judges Francis, Kirkendall, Brown, Shelton, Connors and Creal Goodridge were assigned in part to the Family Division as set forth in LAO 2001-02D. (Attachment 2)

ARGUMENT

I. JUDGE BROWN SHOULD BE DISQUALIFIED FROM HEARING THESE ADOPTION CASES WHERE HE HAS DEMONSTRATED BOTH ACTUAL AND APPARENT BIAS BY FIRST PREJUDGING THE CASES EXTRAJUDICIALLY, AND THEN TAKING EXTRAORDINARY MEASURES TO CHANGE THE OUTCOME OF THE CASE AND ENSURE THAT THE PETITIONS ARE DENIED.

The Michigan Supreme Court has held that there are at least two separate means to seek disqualification of a judge. The first method is to invoke MCR 2.300(B), the court rule governing disqualification. See *MDOC v Cain*, 451 Mich 470, 494-497 (1996). The second method is to seek disqualification under the Due Process Clause. *Id.,* 497-503; *Crampton v. Dep't of State*, 395 Mich 347 (1973).

To prove bias or prejudice under MCR 2.003(B)(1), the petitioner must prove actual bias against a party based on "events or sources of information gleaned outside the judicial proceedings." *Cain, supra,* 495. In contrast, it is unnecessary to prove actual bias in a claim under the due process clause. *Crampton,* 354. Rather, it is sufficient to show the appearance of bias that "poses an intolerable risk that the decisionmaker may have prejudged the case." *Spratt v. Dep't of Social Services*, 169 Mich App 693, 700 (1988), citing *Crampton* at 351; *Ireland v Smith*, 214 Mich App 235, 249 (1996) (disqualifying trial judge because of "the appearance of bias").

In the present case, petitioners are able to meet both the standard set forth under the court rule and the Due Process Clause. Accordingly, their motion for disqualification should be granted.

1. Judge Brown Must Be Disqualified for Actual Bias Under MCR 2.003(B)(1).

Plaintiffs properly filed a motion to disqualify pursuant to MCR 2.003(B), which provides, in relevant part:

> Grounds: A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:
> (1) The judge is personally biased or prejudiced for or against a party or attorney. [MCR 2.003(B)].[6]

The standard for applying MCR 2.003(B)(1) is set forth in *Cain v Michigan Department of Corrections,* 451 Mich 470 (1996). MCR 2.003(B)(1) requires a showing that the bias or prejudice complained of is both "actual" and "personal." *Id.* at 222. Moreover, the bias or prejudice must be "extrajudicial" or, in other words, "the challenged bias must have its origins in events or sources of information gleaned outside the judicial proceeding." *Id.*

In *Cain*, the Michigan Department of Corrections sought to disqualify Ingham Circuit Court Judge James Giddings because of multiple public exchanges between Judge Giddings and Governor Engler about rulings Judge Giddings had made in the case. The Supreme Court held that disqualification was inappropriate because counsel for the MDOC "admitted that Judge

[6] In his Opinion and Order, Judge Brown erroneously stated that the Petitioners' had not filed an affidavit with their motion, as required by MCR 2.003(C)(2). An affidavit was attached to the conclusion of Petitioner's original Motion and another affidavit is attached to this Supplemental Brief as well, in the event that the Court was making some unknown assessment of the sufficiency of the original affidavit.

Giddings has not prejudged the case, nor has he shown actual bias or prejudice." *Id.*, 504, 509. The Court further held that the court rule did not apply because Governor Engler was not a party to the case. *Id.*, 509.

In contrast to *Cain*, there is no question in the present case that Judge Archie Brown has prejudged petitioners' adoption petitions. In fact, Judge Brown did whatever he could to change the outcome of the case and to prevent the petitions from being granted. Initially, he issued a directive on June 4th to Judge Shelton and the rest of the Juvenile Division staff ordering them to stop processing petitioners' cases. In essence, Judge Brown attempted to force Judge Shelton to abandon Judge Shelton's interpretation of the Adoption Code (permitting second-parent adoptions by unmarried persons) and accept Judge Brown's new interpretation of the statute (prohibiting such adoptions).

Then when Judge Shelton objected to Judge Brown's directive (on the ground that only appellate courts, not chief circuit court judges, had the authority to issue a binding ruling on the interpretation of a statute), Judge Brown removed Judge Shelton from petitioners' cases and reassigned all the cases to himself. In doing so, Judge Brown violated the court rules requiring that reassignments be made by lot or pursuant to a local court administrative order. MCR 8.111(B) and (C). Further, his actions contradicted the Washtenaw County Trial Court's Family Division Implementation and Operations Plan which requires the chief judge to work closely with other judges on matters of concern to the division and in making judicial assignments.

Not only is it undisputed that Judge Brown took these extraordinary actions for the express purpose of ensuring that petitioners' adoptions would be denied, but it is also undisputed

that he took the reasons for taking this action were "extrajudicial" or had "origins in events or sources of information gleaned outside the judicial proceeding." *Cain*, 222. On March 24, 2002, the Lansing Journal quoted Judge Brown as stating that Michigan's adoption law permitted second parent adoption by unmarried individuals where it is in the best interest of the child. However, based upon pressure from Justice Corrigan and other justices and/or judges, Judge Brown changed his position. Further, he asked one adoption lawyer for his personal opinion on how the law should be interpreted. All this conduct occurred outside of the courtroom, outside the context of a case and outside an adversarial process.

In short, Judge Brown has prejudged petitioners' cases and abused his power to make sure that they are unable to adopt children with their partners. If ever there was a case where judge has prejudged a case and demonstrated actual bias based on extrajudicial events or pressures, this is the case.

2. Judge Brown Must Be Disqualified For the Appearance of Bias Under the Due Process Clause.

As recognized in *Cain, supra,* MCR 2.003(B)(1) is not the only source for making a motion to disqualify for bias or prejudice. A litigant may also seek disqualification under the Due Process Clause:

> The Due Process Clause requires an unbiased and impartial decisionmaker. Thus where the requirement of showing actual bias or prejudice under MCR 2.003(B)(1) has not been met, or where the court rule is otherwise inapplicable, parties have pursued disqualification on the basis of the due process impartiality standard. [*Cain*, 497.]

Under the due process disqualification standard, unlike MCR 2.003(B)(1), it is unnecessary to show actual bias. Rather, due process disqualification is required where the facts indicate an appearance of bias or the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Crampton v Michigan Dep't of State*, 395 Mich 347, 356 (1975).

Michigan courts have frequently granted motions to disqualify under the due process standard. For example, in *Crampton* – sometimes cited as the leading Michigan case on this due process disqualification – our Supreme Court discussed the due process

requirement that the decisionmaker be "neutral and detached," *id.* at 354, and the constitutional danger of making decisions outside of an "adversary hearing." *Id.* at 355. The Court then held that while the plaintiffs had not demonstrated that members of a Licence Appeal Board were actually biased against individuals seeking the restoration of their drivers licences, due process required their disqulaification from serving on the Board. The Court reasoned that the risk that the Board members could not step "outside their role as law enforcement officials into the rule of unbiased decisionmaker . . . presents a probability on unfairness too high to be constitutionally tolerable." *Id.,* 357-358.

Relying on *Crampton*, the Michigan Court of Appeals in *Ireland v. Smith*, 214 Mich App 235 (1996), summarized the due process disqualification standard as follows:

> The tests is not [just] whether or not actual bias exists, but also whether there was "such a likelihood or appearance of bias that the judge was unable to hld the balance between vindicating the interests of the court and the interests of the [affected party]" . . . Even when a judge is personally convinced that he is impartial, disqualification is warranted "where there are circumstances of such a nature to doubt as to [the judge's] partiality, bias or prejudice. [*Id*., 251; citations omitted.]

The *Ireland* Court then held that a judge who has been reversed in a high profile case on the ground that he made controversial findings of fact must be disqualified on remand. The Court stated that disqualification was required because the judge would have difficulty putting previously expressed views out of his mind and because permitting him to hear the case on remand would create an appearance of bias. *Id.*, 250-251.

Similarly, in *Spratt v. Dep't of Social Services*, 169 Mich App 693 (1988), the Court of Appeals held that a hearing officer in an administrative hearing should not preside over the case because he might have already formed an opinion during a prior preceding: "Because this situation poses an intolerable risk that the decisionmaker may have prejudged the case, due process requires a new decisionmaker. *Id*., 699-700.

Unlike the situation in *Spratt, supra,* where there was simply a possibility that the decisionmaker prejudged the case, there is no question that Judge Brown prejudged the adoption petitions at issue in this case. As described in detail above, Judge Brown, ignoring court rules and established protocol, intentionally reassigned petitioners' cases to himself with the express purpose of dismissing them. If this Court does not find that Judge Brown acted with actual bias, then clearly it must find that the situation "there are circumstances of such a nature to doubt as to [the judge's] partiality, bias or prejudice," *Ireland,* 251, or that Judge Brown, in taking the action he did outside the adversary process, created the "probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." C*rampton,* 356. In sum, due process dictates that this Court disqualify Judge Brown based upon the appearance of bias, if not actual bias.

3. <u>Judge Brown Must Be Disqualified For Violation of the Michigan Code of Judicial Conduct</u>

Also relevant to the issue of judicial disqualification is the Michigan Code of Judicial Conduct, whose first three Canons state as follows:

CANON 1: Requires judges to personally observe high standards of conduct so that integrity and independence of the judiciary may be preserved.

CANON 2: Requires a judge to avoid impropriety and the appearance of impropriety in all activities.

CANON 3: Requires a judge to perform the duties of office impartially and to abstain from public comment about a pending or impending proceeding in any Court.

Violation of these standards for judicial behavior could lead to discipline against an offending judge, including discipline as severe as disbarment. Judicial conduct which in extreme circumstances could result in disbarment for "failing to observe high standards of conduct" (Canon 1) or for failing to avoid impropriety or the "appearance of impropriety" (Canon 2), certainly can constitute grounds for disqualification under MCR 2.003.

In analyzing judicial misconduct cases, Michigan Courts routinely consider the canons as a whole and focus on both actual misconduct and behavior that casts the appearance of misconduct or partiality. In *In re Trudel*, 638 N.W. 2d. 405 (Mich., Jan. 23, 2002) (No. 120741), a judge who altered a subordinates computer screen to include sexually suggestive messages, and who improperly used court equipment and resources for his own personal use, was publicly censured and suspended for a 90 day period for violations of numerous Court rules and Canons 1, 2 and 3 of the Code of Judicial Conduct.

In *Matter of Laster,* 404 Mich 449 (1979), a judge was reprimanded after the Court concluded that the judge had created the appearance of impropriety by granting a

large number of bond remissions originally ordered forteited by other judges. The Court further stated that the "appearance" of impropriety in that situation, where the Judge's behavior appeared to involve favoritism and partiality, regardless of the Judge's motivations, was clearly "prejudicial to the administration of justice" and in violation of the standards of judicial conduct. *Laster at* 459-461.

In the *Matter of Bennett,*403 Mich 178 (1978), the Michigan Supreme Court ruled that a Judge violated Canon 3 of the Michigan Code of Judicial Conduct, and ordered him suspended for one year without pay when he improperly sought to terminate the appointment of public defenders and appointed substitute counsel in their place, among other acts of misconduct. The Court ruled that the Judge had interfered with the attorney-client relationship by cutting off indigent defendants from their counsel without request or an explanation, which to many members of the original commission reviewing the Judge's behavior, gave the appearance of an arbitrary exercise of judicial power. *Bennett at* 196.

In the instant case, a number of Judge Brown's actions have, at a minimum, created the appearance of impropriety. First, Judge Brown changed his views about the propriety of granting second parent adoptions from the time of the March 24, 2002, Lansing State Journal article (Attachment 6) to present, admittedly in part, as a result of outside contact with members of the Michigan Supreme Court. Second, Judge Brown based his legal opinion to deny second parent adoption petitions on the legal opinion of but one practicing attorney, who had not appeared in the pending cases, without soliciting

other views. (See Herbert Brail letter to Judge Brown, Attachment 9). Third, Judge Brown issued a directive to juvenile court staff to stop processing second parent adoption petitions, without having an actual case or controversy in front of him. When the presiding Judge assigned to second parent adoptions cases objected to Judge Brown's directive, Judge Brown, in violation of his own internal court policy and the Michigan Court Rule on reassignment (MCR 8.111), simply reassigned the cases to himself (See Order of Reassignment, Attachment 11 and Judge Brown's June 11, 2002, Letter to the ACLU, Attachment 8), without legally sufficient grounds. Fourth, Judge Brown's action of arbitrarily appointing himself as petitioners' fact-finder while these cases were pending before another judge, while simultaneously publicly expressing his predisposition to rule against the petitions, and doing all of this without notice to the petitioners or an opportunity to be heard, clearly gives the appearance of an arbitrary exercise of judicial power. Finally, Judge Brown's correspondence and public statements about these cases, both before and after their assignment to him, and in particular his June 11, 2002, letter to the ACLU, appear to be improper public comment about a pending case, in violation of the Canon 3.

REQUESTED RELIEF

For the reasons stated above, Petitioners request that his Court grant their motion to disqualify Judge Archie C. Brown from hearing these cases pursuant to MCR 2.003, the Due Process Clause and the Michigan Code of Judicial Conduct. The adoption cases should be returned to Judge Shelton because all of Judge Brown's orders in the cases should be held ***void ab initio.***

In the unlikely event that this Court denies Petitioners' motion, they request that the Court enter a stay while Petitioners appeal this issue to the Court of Appeals.

Dated: July 31, 2002 Respectfully Submitted:

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Constance L. Jones (P40995)
Cooperating Attorney, American Civil
Liberties Union Fund of Michigan
300 N. Fifth Ave., Suite 220
Ann Arbor, MI 48104
(734) 747-9989

____
Molly H. Reno (P28997)
Cooperating Attorney, American Civil
Liberties Union Fund of Michigan
221 N. Main St., Suite 300
Ann Arbor, MI 48104
(734) 769-0077