JUDICIAL MERIT SELECTION COMMISSION
Sworn Statement to be included in Transcript of Public Hearings

Family Court
(Incumbent)

Full Name: Paul Warren Garfinkel
Business Address: C/O The Family Court
100 Broad Street, Suite 248
Charleston, SC 29401
Business Telephone: (843) 958-4417

1. Why do you want to serve another term as a Family Court Judge?

   Since becoming a Family Court Judge over seventeen years ago more and more each day, I realize what a tremendous difference Family Court Judges can make in the lives of the children and families of this State. Every day I see children who are the innocent victims of abuse and neglect and I see families who are dysfunctional because something has happened to cause the beak-up of that family. I also see families who want to adopt children and give them permanent loving homes as well as families who have to see their children sent to juvenile institutions because of some delinquent act the child has done. In all those instances, and dozens of others, I want to be in position to help those children and families who need the assistance of a Family Court judge. Our state is a leader in recognizing the need for a separate Family Court system and I am proud to have been a part of this specialized role of the judiciary.

2. Do you plan to serve your full term if re-elected?

   Unfortunately due to my age, I will only be able to serve until December 31, 2016; but, it's my present intention to serve until then, if I am re-elected.

3. Do you have any plans to return to private practice one day? No

4. Have you met the statutory requirements for this position regarding age, residence, and years of practice? Yes

5. What is your philosophy regarding *ex parte* communications? Are there circumstances under which you could envision *ex parte* communications being tolerated?

   Other than those instances specifically allowed by the Rules of Court Procedure and the Family Court Rules, *ex parte* communications are strictly forbidden by me. I have established rigorous procedures in my office to ensure that this does not ever occur.

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6. What is your philosophy on recusal, especially in situations in which lawyer-legislators, former associates, or law partners are to appear before you?

   I do not recuse myself in cases involving lawyer legislators, but I have not ever allowed anyone's position or title to affect my decision. None of my law partners ever appear in Family Court.

7. If you disclosed something that had the appearance of bias, but you believed it would not actually prejudice your impartiality, what deference would you give a party that requested your recusal? Would you grant such a motion?

   In all cases involving the lawyer who represented me in my divorce 25 years ago, I disclose that and have only once in at least 50 cases been asked to recuse myself and when any business associate of my present wife appears in front of me, I disclose that, here, too, I have only been asked once. Other than those instances and the instances involving 3 lawyers who have filed grievances, I have not been asked to recuse myself.

8. How do you handle the appearance of impropriety because of the financial or social involvement of your spouse or a close relative?

   Through self recusal.

9. What standards have you set for yourself regarding the acceptance of gifts or social hospitality?

   I never accept gifts or social hospitality from litigants or lawyers who appear in front of me. I do not attend holiday parties from either of these groups, either.

10. How do you handle a situation in which you became aware of misconduct of a lawyer or of a fellow judge?

    If it is misconduct that arises to the level of a breach of the Canons, I would (and have) reported it to the Office of Disciplinary Council. If poor judgment, but not an actual violation, I have a private conversation to warn them.

11. Are you affiliated with any political parties, boards or commissions which, if you were re-elected, would need to be re-evaluated? No

12. Do you have any business activities that you have remained involved with since your election to the bench? No

13. Since family court judges do not have law clerks, how do you handle the drafting of orders?

    Almost always I ask one of the lawyers to do so, but will not sign until opposing counsel has either approved or given me reasons for disapproval and, then, I decide the language I feel best reflects my ruling.

14. What methods do you use to ensure that you and your staff meet deadlines?

Every order submitted to me has been verified by my assistant that opposing counsel has approved it or had a chance to submit their comments to it. I am fortunate because my assistant is a law school graduate.

15. What specific actions or steps do you take to ensure that the guidelines of the Guardian Ad Litem statutes are followed during the pendency of a case?

As the person who teaches DSS cases to the new judges, I am constantly reviewing those statutes and am known to be very strict when it comes to adherence to the required statutes. The same standard applies in private Guardian ad Litem cases also.

16. What is your philosophy on "judicial activism," and what effect should judges have in setting or promoting public policy?

Judicial activism is not allowed and should never be allowed. Judges, have the sole role to carry out and administer the law as enacted, not to make or change the law in any way.

17. Canon 4 allows a judge to engage in activities to improve the law, legal system, and administration of justice. What activities do you plan to undertake to further this improvement of the legal system?

As I have done in the past, I plan to continue to teach, participate in professional organizations that advance the profession and serve on the Advisory Board of the Charleston School of Law, if asked.

18. Do you feel that the pressure of serving as a judge strains personal relationships (i.e. spouse, children, friends, or relatives)? How do you address this?

I am very fortunate in that my family and friends all understand my position and, in over 17 years, have I ever been asked to do anything to compromise my integrity.

19. Are you involved in any active investments from which you derive additional income that might impair your appearance of impartiality?

No

20. Would you hear a case where you or a member of your family held a *de minimis* financial interest in a party involved? No

21. Do you belong to any organizations that discriminate based on race, religion, or gender?

My synagogue only allows members who are our religion but race nor gender are never involved.

22. Have you met the mandatory minimum hours requirement for continuing legal education courses? Yes

23. What do you feel is the appropriate demeanor for a judge?

To always demonstrate a willingness to allow all sides to properly present their case to a judge who shows impartiality and respect for everyone in the courtroom.

24. Do the rules that you expressed in your previous answer apply only while you are on the bench or in chambers, or do these rules apply seven days a week, twenty-four hours a day? Yes
25. Do you feel that it is ever appropriate to be angry with a member of the public, especially with a criminal defendant? Is anger ever appropriate in dealing with attorneys or a pro se litigant? No
26. How much money have you spent on your campaign? If it is over $100, has that amount been reported to the House and Senate Ethics Committees? $0.00
27. While campaigning for this office, have you used judicial letterhead or the services of your staff for your campaign? No
28. Have you sought or received the pledge of any legislator prior to this date? No
29. Have you sought or been offered a conditional pledge of support by any legislator pending the outcome of your screening? No
30. Have you asked any third parties to contact members of the General Assembly on your behalf before the final and formal screening report has been released? Are you aware of any friends or colleagues contacting members of the General Assembly on your behalf? No.
31. Have you contacted any members of the Judicial Merit Selection Commission? No
32. Are you familiar with the 48-hour rule, which prohibits a candidate from seeking pledges for 48 hours after the draft report has been submitted? Yes

I HEREBY CERTIFY THAT THE ANSWERS TO THE ABOVE QUESTIONS ARE TRUE AND COMPLETE TO THE BEST OF MY KNOWLEDGE.

Paul Warren Garfinkel

Sworn to before me this 6th day of August, 2012.

Notary Public for South Carolina

My commission expires: 04/15/20_____

State of South Carolina
The Family Court of the Ninth Judicial Circuit

PAUL W. GARFINKEL
JUDGE

MERRILYN O. JOHNSON PhD. JD.
Administrative Assistant

100 BROAD STREET
SUITE 248
CHARLESTON, SOUTH CAROLINA 29402-0934
TELEPHONE: (843) 958-4417
FAX: (843) 958-4433
E-MAIL: pgarfinkelj@sccourts.org

Jane O. Shuler, Esq.
Chief Counsel
Judicial Merit Selection Committee
P.O. Box 142
Columbia, SC 29202

October 12, 2012

RE: Update of PDQ

Dear Ms. Shuler,

After reviewing the copy of the South Carolina Law Enforcement Division Report supplied by you on October 11, 2012, I wish to amend my answer to No. 34 on my PDQ, to reflect that there was a case filed against me and a former DSS attorney in Federal District Court in Columbia, case # 2:10-CV-02542. I was never served with anything on this case and was totally unaware of it until receiving the above mentioned report. The case was dismissed on November 5, 2010, against the other Defendant and me.

As always, if you have any questions or need further information please let me know.

Yours very truly,

Paul W. Garfinkel

State of South Carolina
The Family Court of the Ninth Judicial Circuit

PAUL W. GARFINKEL
JUDGE

MERRILYN O. JOHNSON PhD. JD.
Administrative Assistant

100 BROAD STREET
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Jane O. Shuler, Esq.
Chief Counsel
Judicial Merit Selection Committee
P.O. Box 142
Columbia, SC 29202

October 3, 2012

RE: Update of PDQ

Dear Ms. Shuler,

I am enclosing herewith the following which will update the information on my Personal Data Questionnaire No. 34.

1) Copy of Letter received this date from my attorney in case of Simmons v. Garfinkel et al.
2) Copy of Order of Judge Houck dismissing case
3) Copy of Report & Recommendation from Magistrate Carr
4) Copy of Pro Se Complaint filed by Plaintiff, Harold Simmons Jr.

The enclosed hopefully will give you the information you need for the PDQ. If not, please advise and I will be glad to supply you with any additional information needed.

Yours very truly,

Paul W. Garfinkel

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CYNTHIA W. DILLARD, SENIOR PARALEGAL
SANDRA S. GARVIN, OFFICE MANAGER

October 2, 2012

The Honorable Paul W. Garfinkel
Judge, The Family Court
100 Broad St. **PERSONAL, PLEASE**
Charleston, SC 29401

Pamela D. Brown, Esquire
Vice President, Trident Technical College
7000 Rivers Ave. **PERSONAL, PLEASE**
Charleston, SC 29423-8067

RE: Harold Simmons, Jr. vs. Charleston County Family Court, Paul W. Garfinkel, and South Carolina Department of Social Services, Pamela Brown
Court of Common Pleas, Charleston County
Appeal to the S.C. Court of Appeals

Dear Paul and Pam:

A search of PACER this morning resulted in our finding of a federal court case that Simmons filed back in December, 2010, against both of you for the same allegations as the state court case.

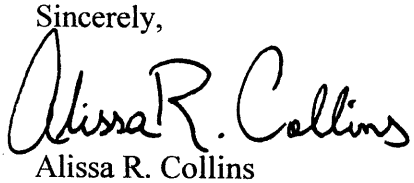
As you can see from the attached Report and Recommendation of Magistrate Judge Carr, it was recommended that the case be dismissed without prejudice and without the issuance of summons for service of process. Judge Carr labeled the case a "frivolous" considering the absolute immunity and Eleventh Amendment immunity discussed within the Report.

District Court Judge C. Weston Houck adopted the Report and Recommendation, dismissing the case and closing it out in April, 2012.

We just wanted to pass these documents along for your review and file. We await, yet again, the decision from the South Carolina Court of Appeals on the case we're defending. We'll be sure to inform you of any progress.

Kindest regards.

Sincerely,



Alissa R. Collins
Direct E-mail: acollins@stuckeylaw.com

ARC:kak

Enclosures

cc: Ms. Nancy Stevenson (IRF Claim Nos. 58765 and 58766) **Via Email only**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
Pro Se Non-Prisoner Complaint Form

HAROLD SIMMONS, JR.,	)	**CIVIL ACTION NO.**
	)	2:10-cv-3107-CWH-RSC
	)	
	)	
V.	)	
	)	
	)	
CHARLESTON COUNTY FAMILY COURT, PAUL W. GARFINKEL and SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, PAMELA BROWN	)	
	)	
	)	
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	)	

If allowed by statute, do you wish to have a trial by jury? **Yes** ✓ **No** ____

[If any answer requires additional space, please use additional paper and attach hereto.]

I. PREVIOUS LAWSUITS

A. *Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action?*

Yes ✓ No ____

B. *If your answer to A is Yes, describe the lawsuit in the space below. [If more than one lawsuit, describe on another sheet of paper using the same outline.]*

1. *Parties to this previous lawsuit:*
   Plaintiff: Harold Simmons, Jr.
   Defendant(s): Charleston County Family Court, Paul W. Garfinkel and South Carolina Department of Social Services, Pamela Brown
2. *Court:* Charleston County Court of Common Pleas

3. Docket Number: 2009-CP-10-4264

4. Name(s) of Judge(s) to whom case was assigned: Hon. R. Young

5. Status of Case: Still Pending
(For example, was the case dismissed? Settled? Appealed? Still Pending?)

6. Date lawsuit was filed: July 10, 2009

7. Date of disposition (if concluded): N/A

C. *Do you have any other lawsuit(s) pending in the federal court in South Carolina?*

Yes _____ No ✓

II. PARTIES

In Item A below, place your name and address in the space provided. [If additional plaintiffs, do the same on another sheet of paper.]

A. Name of Plaintiff: Harold Simmons, Jr.

Address: 1182 King Street, Charleston, SC 29403

In Item B below, place the full name of the defendant, and his/her/its address, in the space provided. Use Item C for additional defendants, if any.

B. Name of Defendant: Charleston County Family Court, Paul W. Garfinkel

Address: 100 Broad Street, Ste. 143, Charleston, SC 29403

C. *Additional Defendants (provide the same information for each defendant as listed in Item B above):*

South Carolina Department of Social Services, Pamela Brown
3346 Rivers Avenue, North Charleston, SC 29405

III. STATEMENT OF CLAIM

State here, as briefly as possible, the facts of your case. Describe how each defendant is involved. Include also the name(s) of other persons involved, dates, and places. ***Do not give any legal arguments or cite any cases or statutes.*** *If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheets of paper if necessary.*

On May 11, 2006, the Plaintiff appeared in Charleston County Family Court before Judge Segars-Andrews on a Child Support Rule to Show Cause. During the afore-mentioned hearing, Judge Segars-Andrews ordered that the Plaintiff be released from the custody of the Charleston County Detention Center and appear in Court at a later date to review the status of the Plaintiff's workers' compensation claim. On August 16, 2006, the Plaintiff reappeared before Defendant Judge Paul W. Garfinkel as mandated by the previous Order. During the hearing, Judge Garfinkel ignored the Order of Judge Segars-Andrews and imprisoned the Plaintiff for six (6) months for actions that were previously adjudicated. Defendant South Carolina Department of Social Services, Pamela Brown was present at the hearing on May 11, 2006, and agreed to the review and was present August 16, 2006, when Judge Garfinkel ignored the Order of Judge Segars-Andrews and imprisoned Plaintiff.

IV. RELIEF.

State briefly and exactly what you want this court to do for you.

Plaintiff is seeking trial by jury, judgment against the Defendants jointly and severally for actual damages of $100,000, judgment against the defendants jointly and severally for compensatory damages of $350,000, and for such other and further relief as the Court deems just and proper.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this 6 day of December, 2010.

Harold Simmons Jr.

Harold Simmons, Jr.,
Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Harold Simmons, Jr.,	)	C/A No. 2:10-3107-CWH-RSC
Plaintiff,	)	
vs.	)	
	)	REPORT AND RECOMMENDATION
Judge Paul W. Garfinkel; and Pamela Brown,	)	
Defendants.	)	

The plaintiff, Harold Simmons, Jr. ("Plaintiff"), proceeding *pro se*, filed a civil rights complaint on December 7, 2010, upon payment of the filing fee.[1] The complaint seeks monetary damages from a state family court judge and an attorney for the South Carolina Department of Social Services ("DSS"). Plaintiff's claims are based on a family court hearing in which Plaintiff was "imprisoned [] for six (6) months for actions that were previously adjudicated." ECF No. 1 at 3. The complaint is frivolous and should be dismissed.

INITIAL REVIEW

Plaintiff's claims are subject to an initial *sua sponte* review by the Court pursuant to the Court's inherent authority to ensure that subject matter jurisdiction exists and that the case is not frivolous. *See Fitzgerald v. First East Seventh Street Tenants*

[1] Pursuant to the provisions of 28 U.S.C. §636(b)(1)(B), and Local Rule 73.02(B)(2)(d), D.S.C., the undersigned is authorized to review such complaints for relief and submit findings and recommendations to the District Court.

Corp., 221 F.3d 362, 363-364 (2d Cir.2000) (District Courts "may dismiss a frivolous complaint *sua sponte* even when the plaintiff has paid the required filing fee); *see also Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 307 (1989) (mentioning in dicta that "Section 1915(d), for example, authorizes courts to dismiss a 'frivolous or malicious' action, but there is little doubt they would have power to do so even in the absence of this statutory provision."). In reviewing the *pro se* action, this Court is required to liberally construe *pro se* documents. *Erickson v. Pardus*, 551 U.S. 89 (2007). *Pro se* documents are held to a less stringent standard than those drafted by attorneys. *Estelle v. Gamble*, 429 U.S. 97 (1976); *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). The requirement of liberal construction, however, does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387 (4th Cir.1990). Under this initial review, the *pro se* complaint is subject to dismissal.

DISCUSSION

The complaint's statement of claim alleges, verbatim:

> On May 11, 2006, the Plaintiff appeared in Charleston County Family Court before Judge Segars-Andrews on a Child Support Rule to Show Cause. During the afore-mentioned hearing, Judge Segars-Andrews ordered that the Plaintiff be released from the custody of the Charleston County Detention Center and appear in Court at a later date to review the status of the Plaintiff's workers'

> compensation claim. On August 16, 2006, the Plaintiff reappeared before Defendant Judge Paul W. Garfinkel as mandated by previous Order. During the hearing, Judge Garfinkel ignored the Order of Judge Segars-Andrews and imprisoned the Plaintiff for six (6) months for actions that were previously adjudicated. Defendant South Carolina Department of Social Services, Pamela Brown was present at the hearing on May 11, 2006, and agreed to the review and was present August 16, 2006, when Judge Garfinkel ignored the Order of Judge Segars-Andrews and imprisoned Plaintiff.

Based on these allegations, Plaintiff seeks monetary damages from the Defendants, a state court judge and state agency attorney.

A complaint is frivolous "where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A court has broad inherent power to *sua sponte* dismiss an action, or part of an action, which is frivolous. *See Fitzgerald v. First E. Seventh St. Tenants Corp.*, 221 F.3d at 363-64 (district courts have authority to dismiss frivolous claims *sua sponte*, notwithstanding payment of the filing fee); *Crowley Cutlery Co. v. United States*, 849 F.2d 273, 277 (7th Cir. 1988) (district courts have authority to dismiss frivolous claims *sua sponte*). Plaintiff's claims against Defendants Garfinkel and Brown are frivolous because the Defendants have immunity from suit under § 1983 and the complaint presents no meritorious issue to consider.

Absolute immunity "is an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Defendant Garfinkel is a state family court judge, and is clearly named as a defendant in Plaintiff's § 1983 lawsuit for

actions he took in the performance of his duties as a judge. The Supreme Court has specifically held that state judges are absolutely immune from liability under 42 U.S.C. § 1983. *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983); *Stump v. Sparkman*, 435 U.S. 349, 356 (1978); *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Defendant Garfinkel has absolute immunity from suit, and the lawsuit against him is patently frivolous.

Defendant Brown is an attorney for a state agency, and in her official capacity she is immune from suit under § 1983. In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the Supreme Court held that a suit against state officials acting in their official capacities is actually against the office itself and, therefore, against the state. A state has Eleventh Amendment immunity from suit in federal court, and state agencies, divisions, departments, and officials are also entitled to Eleventh Amendment immunity when acting as an arm of the state. *Id.* at 70. State officials may only be sued in their individual capacities under § 1983.

In as much as Plaintiff is suing Defendant Brown as an individual acting under color of state law, the complaint presents no issue to consider. Plaintiff simply claims Defendant Brown was in attendance at two state family court hearings. As a complaint for damages under § 1983, the complaint lacks an arguable basis in law, and is clearly frivolous.

As discussed, Plaintiff's claims against the Defendant are frivolous, and should be dismissed *sua sponte* without issuance of the summons for service of process.

RECOMMENDATION

Accordingly, it is recommended that the District Judge dismiss the complaint *without prejudice* and without issuance of the summons for service of process. **Plaintiff's attention is directed to the important notice on the next page.**

Robert S. Carr
United States Magistrate Judge

January 31, 2011
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

HAROLD SIMMONS, JR.,	)	Civil Action No. 2:10-cv-03107-CWH
Plaintiff,	)	
vs.	)	**ORDER**
JUDGE PAUL W. GARFINKEL, and PAMELA BROWN,	)	
Defendants.	)	

This matter is before the Court on the report and recommendation (R&R) of United States Magistrate Judge Robert S. Carr recommending that the Court dismiss the plaintiff's action without prejudice and without service of process. For the reasons set forth in this order, the Court adopts the R&R and dismisses the action without prejudice.

I. BACKGROUND

Harold Simmons, Jr. ("the plaintiff"), brought this action against Judge Paul W. Garfinkel ("Judge Garfinkel"), a state family court judge, and Pamela Brown ("Brown"), an attorney for the South Carolina Department of Social Services. The plaintiff's complaint alleges the following facts:

> On May 11, 2006, the Plaintiff appeared in Charleston County Family Court before Judge Segars-Andrews on a Child Support Rule to Show Cause. During the afore-mentioned hearing, Judge Segars-Andrews ordered that the Plaintiff be released from the custody of the Charleston County Detention Center and appear in Court at a later date to review the status of the Plaintiff's workers' compensation claim. On August 16, 2006, the Plaintiff reappeared before Defendant Judge Paul W. Garfinkel as mandated by the previous Order. During the hearing, Judge Garfinkel ignored the Order of Judge Segars-Andrews and imprisoned the Plaintiff for six (6) months for actions that were previously adjudicated. Defendant South Carolina Department of Social Services, Pamela

#1
Cont.

> Brown was present at the hearing on May 11, 2006, and agreed to the review and was present August 16, 2006, when Judge Garfinkel ignored the Order of Judge Segars-Andrews and imprisoned Plaintiff.

Compl. at 3, ECF No. 1. The plaintiff seeks "actual damages of $100,000" and "compensatory damages of $350,000." Id.

The case was referred to Magistrate Judge Carr pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02 (B)(2)(d), D.S.C. On February 1, 2011, the magistrate judge issued an R&R (ECF No. 8) recommending dismissal. The magistrate judge reviewed the plaintiff's complaint sua sponte, citing the Court's inherent authority to ensure that subject matter jurisdiction is proper and the case is not frivolous. See, e.g., Fitzgerald v. First E. Seventh St. Tenants Corp., 221 F.3d 362, 363-64 (2d Cir. 2000) (per curiam) (holding that "district courts may dismiss a frivolous complaint sua sponte even when the plaintiff has paid the required filing fee"). Magistrate Judge Carr found that, as a state court judge, Judge Garfinkel enjoys absolute immunity from liability under 42 U.S.C. § 1983. See, e.g., Briscoe v. LaHue, 460 U.S. 325, 334 (1983) (observing that "state judges are absolutely immune from liability for their judicial acts"). Additionally, the magistrate judge concluded that because Brown is an attorney for a state agency, she is immune from suit in her official capacity pursuant to the Eleventh Amendment. See Will v. Mich. Dep't of State Police, 491 U.S. 58, 70 (1989). Finally, the magistrate judge found that the plaintiff's claims against Brown as an individual acting under color of state law were frivolous. The complaint merely alleged that Brown was present at two family court hearings, which, taken as true, did not give rise to any cause of action. Thus, the magistrate judge concluded that the plaintiff's complaint "lacks an arguable basis in law" and recommended

#2 Cont.

that this Court dismiss the plaintiff's complaint sua sponte without issuance of the summons for service of process.

On February 28, 2011, the plaintiff filed objections to the R&R (ECF No. 8). The plaintiff's objections do not specifically address the magistrate judge's findings, but instead, reiterate the allegations of the complaint and assert additional violations of the law.

II. DISCUSSION

The Court is charged with making a de novo determination of any portions of the magistrate judge's recommendation to which a specific objection is made. 28 U.S.C. § 636(b). A party's objections must specifically identify the portion of the magistrate judge's reasoning that the party contends is flawed. See Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982) (suggesting that de novo review is unnecessary where "a party makes general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations"). The Court evaluates the evidence without granting any deference to the magistrate judge's findings and conclusions. Mathews v. Weber, 423 U.S. 261, 270-71 (1976); Estrada v. Witkowski, 816 F. Supp. 408, 410 (D.S.C. 1993). The final decision is made by the Court based upon the actual record, not merely the magistrate judge's reported findings. Wimmer v. Cook, 774 F.2d 68, 76 (4th Cir. 1985). The Court may accept, reject, or modify, in whole or in part, the report and recommendation, or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

"[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005) (internal quotation marks and citation omitted). Pro se submissions are to be

#3
CWH.

construed liberally and are "held to less stringent standards than formal pleadings drafted by lawyers." Estelle v. Gamble, 429 U.S. 97, 106 (1976) (internal quotation marks and citations omitted). Nevertheless, the requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim. See Weller v. Dep't of Soc. Servs., 901 F.2d 387, 391 (4th Cir. 1990).

As noted above, the plaintiff has failed to articulate any specific objections to the reasoning or findings of the magistrate judge. Accordingly, this Court need only satisfy itself that there is no clear error on the face of the record. The Court has reviewed the R&R, finds no clear error, and agrees with the magistrate judge that the plaintiff's complaint should be dismissed.

III. CONCLUSION

After reviewing the record of this matter, the applicable law, and the R&R of the magistrate judge, the Court agrees with the conclusions of the magistrate judge. Accordingly, the Court adopts and incorporates the R&R by reference in this order. The plaintiff's claims are dismissed without prejudice and without service of process.

AND IT IS SO ORDERED.

C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

April 12, 2012
Charleston, South Carolina

#4
aoA.

O'NEILL & FAIR
ATTORNEYS AND COUNSELORS AT LAW

Anthony B. O'Neill, Sr.
oneill@mojustice.com

Elonda Fair O'Neill (Also admitted in CA)
fair@mojustice.com

October 29, 2012

Judicial Merit Selection Commission
1101 Pendleton Street
Gressette Senate Office Building, Room 104
Columbia, South Carolina 29202

Re: Paul W. Garfinkel, Candidate for Ninth Judicial Circuit Family Court Judge

Dear Sir:

Enclosed is my affidavit with regard to the above referenced matter.

Respectfully submitted,

Elonda Fair O'Neill

Elonda Fair O'Neill, Esquire

Enclosures

1847 ASHLEY RIVER ROAD · SUITE 200 · P.O. BOX 80549 · CHARLESTON · SOUTH CAROLINA · 29416
843.763.3900 · FAX 843.763.7996
www.mojustice.com

JUDICIAL MERIT SELECTION COMMISSION)
)

In the Matter of: Paul W. Garfinkel)
Candidate for Family Court Judge)
Ninth Judicial Circuit) AFFIDAVIT OF ELONDA FAIR O'NEILL

PERSONALLY APPEARED, Elonda Fair O'Neill, who, being sworn says as follows:

1) That I am forty-two (42) years of age and reside at 8 Palomino Court, Charleston, South Carolina. My telephone numbers are: Work: (843) 763-3900 Ext 4., Home: (843) 763-3557.

2) I will appear to testify concerning the qualifications of the above-named candidate and will produce all documents in my possession, if any, which will further develop or corroborate my testimony.

3) The information contained herein was previously offered as a complaint the Judicial Standard Commission. It contains what we believe to be judicial misconduct on the part of the Honorable Paul Garfinkel while sitting as a judge in the case outlined below.

BASIS OF COMPLAINT

Action: Kevin E. *Burroughs v. Tracie A. Hale*: Case No.: 2010-DR-10-1836.

Plaintiff Kevin E. Burroughs commenced this action against Tracie A. Hale seeking custody of two minor children born of the plaintiff and defendant who were never married. The plaintiff is African-American and the defendant white. Plaintiff was represented by O'Neill & Fair and defendant proceeded *pro se.* Elizabeth Stringer was appointed guardian ad litem (GAL) for the children.

Temporary Hearing:

A temporary hearing was held before the Honorable Judy L. McMahon on July 12, 2010 where a second temporary hearing was ordered and the defendant directed to proceed by affidavit. (Temporary Order, July 12, 2010). **[Tab 1]** A second temporary hearing was held before the Honorable Paul Garfinkel on August 9, 2010 and following that hearing the court instructed the guardian *ad litem* to draft the temporary order. **[Tab 2, Exhibit A]** In accordance with procedures, the draft order was circulated to plaintiff's counsel who noted certain requested amendments. An order incorporating the plaintiff's requested changes was combined with proceedings held on August 26, in an order issued on August 31, 2010. **[Tab 3]** The proceeding on August 26, 2010 (which will be addressed in more detail below) was to have been simply a conference with the parties.

From the outset of this case, the trial judge had been treating the *pro se* litigant differently (*e.g.* allowing her to proceed outside of the procedural rules and excusing the failure to file an affidavit at the temporary hearing without a showing of good cause as required by Rule 21 (b) of the Family Court Rules even though she had been ordered to do so by Judge McMahon) and plaintiff felt it prudent to have all conferences with the court "on the record."

Ex Parte Communications with Court:

The defendant contacted the court by e-mail on August 17 and 18, 2010. The court then contacted the GAL to set a conference call regarding the e-mail. The GAL forwarded the e-mails to plaintiff's counsel. The court requested a conference call and plaintiff's counsel indicated that the call should be on the record. On or about August 20, the GAL informed plaintiff's counsel that the court decided against the conference call. Later, the court contacted plaintiff's counsel and indicated that he wanted a conference call to admonish the *pro se* defendant against *ex parte* communications. Plaintiff's counsel informed the court that they desired to have the conference call on the record.

In its order of March 1, 2011, "**the Order**," **[Tab 2]** (Page 4, first paragraph) the court indicates that the defendant was informed that she would have to give sworn testimony and instructions were given as to how that was to be arranged. This apparently was an additional *ex parte* communication between the court and the defendant. Plaintiff was not made aware that defendant would testify until the conference began.

Conference to Admonish Defendant to Cease E*x Parte* Communications with Court:

A telephone conference [1]was scheduled to address the matter of *ex parte* communications with the court. While the trial judge in the Order characterizes the telephone conference as a "hearing" (Order, March 1, 2011, Page 4 paragraph 3) **[Tab 2, Exhibit E]** the transcript of record of the proceedings on August 26, 2010 indicates that the proceedings were, in fact, convened as a conference call because the court had received an e-mail from the defendant and prior to reading the email wanted to know if the plaintiff had received the e-mail. (Tr. August 26, 2010, Page 3, Line 15 – Page 4, Line 8.) **[Tab 2, Exhibit E]** During those proceedings, the court did address the issue of *ex parte* communications with defendant (Tr. August 26, 2010, Page 11, Lines 3-22) but then went on, over plaintiff's objection, to address matters that went beyond the scope of the conference call and entertained substantive matters unrelated to the purpose of the conference call. (Tr. August 26, 2010, Page 11, Line 24). The court suggests that this was proper because the defendant was allowed to testify by telephone at the previous hearing without objection by plaintiff. (The Order, Page 4, last paragraph). Whether or not the defendant testified at a prior hearing by telephone without objection, there were several objections made at the hearing on August 26, 2010. The court dismissed plaintiff's objections as to the procedure because "We're moving on with the hearing for the benefit of the children. I'm concerned about the welfare of the children. Procedural matters come second to the welfare of the children." (Tr. August 26, 2010, Page 14, Lines 14 – 18.)

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[1] The court uses the terms "phone conference" and "hearing" to refer to the proceedings. (Order March 1, 2011, Page 4 first paragraph [phone conference]; second paragraph [phone conference]; fourth paragraph [hearing], fifth paragraph [phone conference]; and Page 5 second paragraph [phone conference].

Those substantive matters should have been raised in a properly filed motion with service to plaintiff rather than an e-mail. The court acknowledged that the *pro se* litigant was required to file a formal motion and follow the rules (Tr. August 26, 2010, Page 27, Line 25 – Page 28, Line 8); but, by entertaining matters raised in the e-mail, the court, while ostensibly convening a conference call to take up *ex parte* communications, went on to address other issues not raised by formal motion and the result was to encourage the *pro se* litigant to continue *ex parte* communications which she has done.[2]

Ex Parte Communication with the GAL:

At the behest of the judge, the GAL contacted plaintiff's counsel, Elonda O'Neill, regarding e-mails sent by the *pro se* litigant and inquired as to whether counsel had read the e-mails. On August 18, 2010 the GAL e-mailed the court relaying that plaintiff's counsel was "uncomfortable with any *ex parte* communication between [the court] and me" **[Tab 5, e-mail from Stringer to the court.]**. The GAL and the judge then had a conversation where, according to the order of March 1, 2010 ". . . Mrs. O'Neill told her [the GAL] she had definitely (emphasis added) read the emails but, then proceeded to be somewhat rude and somewhat less than professional in her conversational tone."

Upon receiving these representations from the GAL the court decided that it needed to take action as it wrote in the Order:

> *Based upon this judge's concern about Mrs. O'Neill's comments to the GAL, I took it upon myself to also send an email to Mrs. O'Neill [ ] a copy of Defendant's emails."*

Several important things appear from the Order: (1) the court held an *ex parte* conversation with the GAL; (2) the conversation between the court and the GAL went beyond administrative matters or other recognized exceptions to the rule against *ex parte* communications or other communications and entered a zone where the subject of discussion was the plaintiff's counsel; (3) during the conversation with the court, the GAL made representations to the court that plaintiff's counsel was "somewhat rude and somewhat less than professional in her conversational tone." (The Order, March 1, 2011, Page 3, first paragraph) **[Tab 2]**; (4) the court accepted the representations of the GAL; and (5) the court, without contacting Mrs. O'Neill for her side of the story, so to speak, decided to take action. ("*Based upon this judge's concern about Mrs. O'Neill's comments to the GAL, I took it upon myself to also send an email to Mrs. O'Neill (attached hereto as Exhibit B) a copy of Defendant's emails. (sic)).*

This is the inherent danger of *ex parte* communications. Apparently, the court was of the opinion that *ex parte* communications with the GAL are outside the ambit of the prohibition against *ex parte* communications. Cannon 3 (E) (1) recognizes no such exception. (*A judge shall not initiate permit, or consider ex parte communications, or consider other communications made to the*

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[2] E-mail from *pro se* litigant to trial judge dated January 23, 2011, requesting permission to participate in a forthcoming hearing by telephone. (Exhibit A, January 23, 2011); E-mail from *pro se* litigant to judge dated March 2, 2011, subject: Request for No Communications. (Exhibit B, March 2, 2011). **[Tab 5]**

judge outside the presence of the ***parties*** (emphasis added) *concerning a pending or impending proceeding.*) In this case, the order makes it clear that those *ex parte* communications colored the court's opinion as to the tone and substance of the conversation. This is so much so that the court in its order, issued almost six (6) months after the conversation with the GAL, added emphasis to the word "definitely." (Order - March 1, 2011, Page 3, top paragraph, ". . . definitely (emphasis added). . ."

Had the conversation with the GAL been limited to scheduling, administrative or other benign matters, it could possibly fit into one of the exceptions to the rule against *ex parte* communications. However, once the conversation took the direction where the GAL was offering up personal criticisms of plaintiff's counsel, it exceeded the bounds of propriety and moved to a sphere charged with injudiciousness.

Motion for Recusal:

Plaintiff subsequently moved that the court recuse itself based upon three grounds: (1) the court was engaged in *ex parte* communications, (2) the court took the bench with an order previously drafted, and (3) the court converted a procedural conference into an adversarial hearing without notice. Following the hearing on plaintiff's motion for recusal, the court issued a most curious order which in one sentence both (1) denied the motion for recusal and (2) granted the motion for recusal.[3] The Order contained even more disturbing language as a ground for granting the motion for recusal. It reads:

> *Also, this court recuses itself for an additional, very personal reason. This Court feels this additional personal reason does not need to be placed on the record because placing this additional ground as part of the record will not serve the ends of justice or benefit the children who are of the most concern to this court.* (the Order, March 1, 2011, Page 6, last paragraph). **[Tab 2]**

The court did not specify the "very personal reason" and offered as an explanation for not publishing the reason the notion that it would "not serve the ends of justice nor benefit the children who are of the most concern to this Court." Complainants disagree with this assertion because the ends of justice would seem to dictate that the court set forth its reasons for judicial action and the motion for recusal in no way touches upon the "benefit of the children."

The court left it to complainants here to speculate as to the very personal reason referred to in the Order. Assuming *arguendo* that the statement by the court that prior to this case it had never met nor knew anyone who knows the parties (the Order, Page 5, last paragraph) that does not answer the question whether the court was biased or unfair to plaintiff. In fact, it begs the question and we are only able to speculate. Is the very personal reason an indication that court harbors an impermissible animus to Elonda Fair O'Neill or to Anthony B. O'Neill, Sr., or to the firm O'Neill & Fair? Or, as complainants' client posits, is the "very personal reason" an indication of

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[3] "After review of the allegations in Plaintiff's Motion and the arguments presented by counsel this Court will, respectfully deny Plaintiff's Motion for recusal for the reasons requested; however, despite the allegations and arguments therein failing to convince the Court that it should recuse itself from further matter in this case, this judge does hereby recuse myself from further hearing in this matter based on two factors."

an animus toward the plaintiff in the action, Kevin Burroughs, based upon the fact that he is African-American and the defendant, Tracy Hale, is white? We think, at a minimum, the court needed to provide the reasons it characterized in its order as a "very personal reason."

Subsequently, the court offered as the "very personal reasons" that a "dear friend" of Anthony B. O'Neill, Sr., was a care giver for his mother. [**Tab 7**]. We have learned that the "dear friend" was a woman with whom Anthony B. O'Neill, Sr., went to school through sixth grade. We are still at a loss to understand how such a person – dear friend or otherwise – providing care, under the circumstances offered by the court would create a conflict or even the perception of a conflict. This explanation again raises more questions than it answers.

In the Order the court addressed plaintiff's assertion that the court took the bench with an order that had been previously drafted. (See, Tr. January 31, 2011, Page 9, Line 25 - Page 12, Line 4; Page 15, Line 9). [**Tab 2, Exhibit E**] The court argues that "five (exact number unknown) drafts of orders that might reflect possible outcomes of the hearing and some blank order forms with only the case caption on them had been prepared in anticipation of possible outcomes. . ." Since this was to have been a conference to address the issue of *ex parte* communications from the *pro se* defendant to the court, we can think of no reason for five orders to have been prepared and plaintiff finds that assertion to be highly unusual and less than persuasive.

Based upon the plain language of the Order, the court has admitted to an impermissible *ex parte* conversation with the GAL that colored the court's opinion of plaintiff's counsel. Furthermore, summarily converting a conference to a hearing without notice was prejudicial and calls into question the fairness and impartiality of the court. Complainants assert that it is an indication, as stated above, that there is likely some unstated animus flowing from the court to complainants or their client.

FURTHER THE DEPONENT SAYETH NOT!

Elonda Fair O'Neill

Elonda Fair O'Neill

SUBSCRIBED and SWORN to this
29th day of October, 2012

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires 11/7/15

Attachments: TAB

Temporary Order entered July 12, 2010 1

Order granting plaintiff's motion for recusal entered March 1, 2011 with exhibits 2

Exhibit A Bench Memorandum
Exhibit B e-mail from Court to Elonda Fair
Exhibit C e-mail from Elonda O'Neill to Court, the GAL, and parties
Exhibit D e-mail from Tracie Hale to the court (August 18, 2010)
e-mail from Tracie Hale to the court (August 20, 2010)
Exhibit E Transcript of Record, August 26, 2010

Temporary Order entered August 31, 2010 3

Motion for Recusal 4
(Redacted as to matters pertaining to Motion for Reconsideration)

Transcript of Record January 31, 2011 5

e-mail from Tracie Hale to Paul W. Garfinkel, dated January 23, 2011 6

e-mail from Tracie Hale to Elonda O'Neill, Elizabeth Stringer and pgarfinkel@sccourts.org dated March 2, 2011 6

e-mail from Elizabeth J. Stringer to Paul Garfinkel, Elonda O'Neill and Tracie Hale, August 18, 2010 6

Order dated April 18, 2011 7

I will appear to testify concerning the qualifications of the above-named candidate and will produce all documents in my possession, if any, which will further develop or corroborate my testimony.

I understand that this written statement must be completed and returned to the Judicial Merit Selection Commission at least five (5) days prior to the hearing at which I wish to testify in order for the commission to hear my testimony and that the deadline for complaints is

I understand that the information I have provided herein is confidential and is not to be disclosed to anyone except the Judicial Merit Selection Commission, the candidate and counsel.

WAIVER

I further understand that my testimony before the Judicial Merit Selection Commission may require the disclosure of information that would otherwise be protected by the attorney-client privilege. Therefore, in order that my complaint may be fully investigated by the commission, I hereby waive any right that I may have to raise the attorney-client privilege as that privilege may relate to the subject of my complaint. I further understand that by waiving the attorney-client privilege for this matter, I am authorizing the commission to question other parties, including my attorney, concerning the facts and issues of my case.

Signature

Sworn to me this 29 day of October, 2012

L.S.

Notary Public of South Carolina

My commission expires: 11/7/15

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE FAMILY COURT OF THE NINTH JUDICIAL CIRCUIT
Case No: 2010-DR-10-1836

2010 JUL 12 PM 4: 34
JULIE ANNE STROME
CLERK OF COURT
BY

KEVIN E. BURROUGHS,

Plaintiff,

vs.

TRACIE A. HALE,

Defendant.

FILE COPY

TEMPORARY ORDER

DATE OF HEARING:	July 12, 2010
TRIAL JUDGE:	Hon. Judy L. McMahon
PLAINTIFF'S ATTORNEY:	Elonda Fair O'Neill
DEFENDANT'S ATTORNEY:	*Pro Se*
COURT REPORTER:	Phyllis Norton

THIS MATTER CAME before this court on a motion for temporary relief filed on May 13, 2010 seeking custody of two minor children. At a prior temporary hearing on June 8, 2010 the defendant objected to jurisdiction in South Carolina and indicated that she wanted to retain counsel. She also moved for an order of continuance. The court granted the motion and continued the hearing. The court also indicated that the issue of [redacted] jurisdiction would be addressed at the continued hearing. At the hearing before me, the plaintiff appeared with his attorney, Elonda Fair O'Neill of the Charleston County Bar and the defendant appeared pro se.

On March 14, 2007, a final order of custody issued from the State of West Virginia. Subsequently, in August 2007, the defendant and the minor children joined the plaintiff who had moved to South Carolina in January 2007. The parties and the minor children established residence in South Carolina. In February 2010, defendant took the minor children and returned to West Virginia. During their time in South Carolina, the plaintiff and defendant lived together,

both worked in South Carolina and the children resided in South Carolina and attended school. Consequently, West Virginia lost jurisdiction and was no longer the resident or home state of the children or any of the parties to this action. *Brookshire v. Blackwell*, 384 S.C. 399, 682 S.E.2d 298 (S.C. App. 2009). South Carolina became and was the home state within six (6) months of the commencement of this action. It is therefore

ORDERED, that that West Virginia no longer has jurisdiction and South Carolina has home jurisdiction to hear this matter. It is further

the state

ORDERED, that another temporary hearing, by affidavit only, should be held on the issued of temporary custody and visitation on August 9, 2010 at 9:00 a.m. It is further

ORDERED, that the guardian *ad litem* appointed to represent the minor children (see order appointing Guardian *ad Litem*, issued July 12, 2010) shall have an initial report at the next scheduled hearing. It is further

ORDERED, the children are now ~~residing~~ with plaintiff and the *status quo* shall be maintained until further order of the court. It is further

for a 4 week period the (temporary custody to be determined at the Aug 9 2010 hearing)

ORDERED, that the parties may participate in discovery as allowed by the South Carolina Rules of Civil Procedure and the Family Court Rules.

AND IT IS SO ORDERED!

once both parties have reviewed this order the Court can set up a Conference call if there are objections as to the language in the order

Judy L. McMahon, Judge
Family Court of the Ninth Judicial Circuit

Charleston, South Carolina

July 12, 2010

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT

By _____
DEPUTY CLERK

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE FAMILY COURT
NINTH JUDICIAL CIRCUIT
Case No. 10-DR-10-1836

Kevin E. Burroughs

PLAINTIFF/PETITIONER

vs.

Tracie A. Hale

DEFENDANT/RESPONDENT

2011 MAR -1 PM 3:22
JULIE J. ARMSTRONG
CLERK OF COURT
BY

ORDER

DATE OF HEARING: January 31, 2011
PRESIDING JUDGE: Paul W. Garfinkel
PLAINTIFF'S ATTORNEY: Elonda O.Neill
DEFENDANT'S ATTORNEY: SRL
GUARDIAN AD LITEM: Elizabeth Stringer
GUARDIAN AD LITEM'S ATTY:
COURT REPORTER: Joyce Huck

THIS MATTER COMES BEFORE THIS COURT on Plaintiff's Notice of Motion and Motion for Reconsideration and Motion for Recusal filed September 13, 2010. This Court, because of time constraints on the docket, bifurcated the issues. This Court has previously issued an Order on the Motion for Reconsideration. On January 31, 2011 the Motion for Recusal was heard.

The context of this case is one of contested custody and visitation. This is complicated by the fact that the parties are not married to each other and that they now live in separate states. Plaintiff is a resident of South Carolina and Defendant is a resident of West Virginia. Defendant had formerly resided in South Carolina. It is unquestioned that this Court has jurisdiction to decide these issues.

At the first temporary hearing, Plaintiff/Father was awarded pendente lite custody and a Guardian ad Litem (GAL) was appointed. The GAL was tasked with the responsibility to prepare a preliminary report for a second temporary hearing. The undersigned presided over the second temporary hearing.

Throughout all matters, Plaintiff has been represented by Elonda Fair O'Neill, Esq. and Defendant/Mother has been a self represented litigant. This is crucial as to the issues raised in Plaintiff's Motion and the Order issued herein. This Court has, for almost sixteen (16) years, had the practice of having self represented litigants give statements as testimony under oath, even when arguing a motion. Admittedly, this Court has not to this day done extensive research on this topic, but other than the instant motion, this procedure has never been challenged. It is the further understanding that this procedure is common practice throughout the trial courts of this state, especially in the Family Court.

At the second temporary hearing after hearing arguments of Plaintiff and Defendant, which included Defendant's argument given under oath (without objection by Plaintiff), this Court took the matter under advisement in order to review notes taken at the hearing, affidavits submitted and the matters allowed under the Rules of Family Court. After a lengthy and considered study, this Court changed pendente lite custody from Plaintiff to Defendant, notified all parties of its decision by memorandum with instructions to GAL to draft a proposed Order in conformity with written instructions given in the memorandum and instructions (Exhibit A).

Subsequent to the issuance of the memorandum and instructions and while attending last year's State Judicial Conference, this Judge saw on his portable electronic device (Blackberry) that 2 emails had been sent by Defendant and received by him into the system. The Blackberry is configured so that the receiver of emails (the undersigned) can see the name of the sender without actually reading the contents of the email.

Upon receiving the emails and remembering the name of the Defendant, I contacted the GAL, told her I would prior to reading the emails forward them on to her and then asked her to forward them on to the Plaintiff's attorney. I also informed the GAL that I would verify this exact procedure was followed upon my return from the conference and asked that she inform Plaintiff's attorney that I would not read the emails until this verification had taken place.

After returning and discussing with the GAL if it was her understanding from any conversation she had with Plaintiff's counsel that the emails had been read by Mrs. O'Neill. She stated Mrs. O'Neill told her she had definitely (emphasis added) read the emails but, then she proceeded to be somewhat rude and somewhat less than professional in her conversational tone.

Based upon this judge's concern about Mrs. O'Neill's comments to the GAL, I took it upon myself to also send an email to Mrs. O'Neill (attached herein as Exhibit B), a copy of Defendant's emails. Subsequently, at about three (3) minutes after the deadline mentioned in Exhibit B, I received a response from Mrs. O'Neill (attached herein as Exhibit C) which led me to believe she had not only read the emails from Defendant, but also read my emailed comments to her. It is my belief that no other conclusion could be reached.

It was only after receiving the email response from Mrs. O'Neill (Exhibit C) did I then (emphasis added) read the original emails from Defendant. The emails (Exhibit D) raised two separate concerns to me. First, the issues raised in the emails (to be discussed herein) and, in addition, the fact that Defendant might be improperly communicating with this judge. At this time, it is important to note that I had not yet signed any Order from the hearing over which I had presided. The Order had been sent to me for signature but, as is my custom, I always wait a few days before signing to allow any opposing counsel/party time to lodge any objections they may have to the proposed Order.

It has been my experience that matters such as mentioned above can usually be handled by a conference call with all attorneys, self represented parties and GAL on the line with all hearing what each other has to say and what this judge has to say. To date, I have held hundreds and hundreds (if not thousands) of such calls and again all without objection from any party or attorney. I requested the GAL's assistance in setting up such a call because I did not want to talk to Plaintiff's attorney or the self represented Defendant without the other person having the opportunity to hear the other. The GAL informed me that Plaintiff's attorney did not want to participate in such a conference call, but wanted the call "to be on the record", i.e. court reporter transcribing the phone

conference. I had no objections to this and held the phone conference the next day. Defendant was instructed she would have to give sworn testimony and instructions were given as to how that was to be arranged.

The transcript of the phone conference will indicate I initially admonished Defendant on the emails and how future communications should be handled (Exhibit E, see also pages 27 and 28 of transcript wherein I agreed with Mrs. O'Neill on proper method of communicating with Court). This change in instructions to Defendant was contrary to my opening instructions to Defendant.

As to the content of the emails, this Court felt that under its inherent powers to do what is in the best interest of the children, this Court wanted the party to whom pendente lite custody was given to be able to have the children with her as soon as possible in order to get them into a routine, enrolled in school and provide for their general welfare. Defendant had wrongly felt she could obtain custody based upon this Court's memorandum and instructions for Order. She had driven to Charleston to pick up the children and return with them to West Virginia.

In its preparation for the hearing and trying to determine possible outcomes, this judge had prepared approximately five (exact number unknown) drafts of orders that might reflect possible outcomes of the hearing and some blank order forms with only the case caption on them. The purpose of having these drafts on the bench and ready for possible use was to expedite what this Court considered to be of utmost importance – the best interest of the children. This too, has been a common practice to have bench Orders handy and either completed or partially completed. The ones not used are disposed of and almost always one of the possible scenarios has developed so as to save time, one of the draft Orders are used. Every judge of this Court has blank Order forms on the bench for this very purpose. The only difference is that I prepare certain portions such as caption, in advance so as not to cause any extra delay while I complete the Order. This has been especially useful in dealing with self represented litigants.

Again, at the phone conference held "on the record", I had Defendant testify, as was done without objection at the previous hearing and, at the conclusion of the

conference was originally going to change my ruling from my previously issued written instructions. I ruled that Plaintiff should deliver the children to Plaintiff, but was convinced to allow an exchange to occur at a half-way meeting point.

The memorandum and instructions had already put the parties on notice as to who would be the custodial parent and I felt the transportation issue was so minor that either way would not be harmful to the children. These were the only two (2) issues dealt with in the telephone conference.

This Court also feels that had the Plaintiff's counsel wanted Plaintiff to be at the phone conference in August 26, 2010, he could have either been present as it was her request to have the conference "on the record" or she could have requested a continuance for him to be present. Neither of these was done and, to date, there has been no showing of prejudice to Plaintiff based on the outcome of the phone conference nor a request to allow him to testify at another later conference. This Court will not speculate as to what its' ruling would have been if such a request had been made.

At the hearing on the Motion for Reconsideration and Recusal, this Court as has originally been stated, bifurcated the two (2) issues and said it would recuse itself from hearing any matters that might arise between the decision hearing on the Motion for Reconsideration. It has done so. This Court is not aware if any matters have been heard, and what the decisions are, if any have been made.

Failure to present evidence of judicial prejudice results in a proper denial of a Motion for Recusal, Simpson v. Simpson, 377 S.C. 519, 523, 660 S.E. 2d 274 (Ct. App. 2008). Furthermore, it is not sufficient for a party seeking disqualification of a judge to simply allege bias; the party must show some evidence of bias or prejudice, Patel v. Patel, 359 S.C. 519, 552 S.E. 2d 114, 2004. Prior to this case, I have never met either party, nor do I know anyone who knows these parties. Outside of my role as a judicial officer I have not had any dealings with either party. I am unaware of any claim of personal bias or prejudice and believe I have explained what may have been viewed as ex-parte communication.

After review of the allegations in Plaintiff's Motion and the arguments presented by counsel this Court will, respectfully deny Plaintiff's Motion for recusal for the reasons requested; however, despite the allegations and arguments therein failing to convince this Court that it should recuse itself from further matters in this case, this judge does hereby recuse myself from further hearings in this matter based on two factors. First, the Court feels I incorrectly recused myself for a time during the pendency of this action (see above) and therefore, once this Court has recused itself, even if having to do so incorrectly, it should not then later hear matters in the case, so as to not possibly taint any future proceedings.

Also, this court recuses itself for an additional, very personal reason. This Court feels this additional personal reason does not need to be placed on the record because placing this additional ground as part of the record will not serve the ends of justice or benefit the children who are of the most concern to this Court.

AND IT IS SO ORDERED

Paul W. Garfinkel, Judge
Family Court, Ninth Judicial Circuit

March
~~February 24~~, 2011
Charleston, SC

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, FAMILY COURT
DEPUTY CLERK

Exhibit A

State of South Carolina
The Family Court of the Ninth Judicial Circuit

PAUL W. GARFINKEL
JUDGE

100 BROAD STREET
SUITE 248
CHARLESTON, SOUTH CAROLINA 29401-2275
TELEPHONE: (843) 958-4417
FAX: (843) 958-4433
E-MAIL: pgarfinkelj@scjd.state.sc.us

MEMORANDUM

TO: Elonda O'Neill, Esq. & Tracie Hales & Elizabeth Stringer, Esq.

FAX: (843)763-7996 (304) 656-7145 (843) 762-0144

FROM: Paul W. Garfinkel (PW)

RE: Burroughs v Hales, Case # 10-DR-10-1836

DATE: 8/12/2010 HEARING DATE: 8/9/2010

I would like for the Guardian ad Litem (Elizabeth Stringer, Esq.) to prepare a temporary Order in the above case incorporating the following findings and ruling. Please feel free to supplement the Temporary Order with necessary facts and background supported by the evidence, as the following is a "bare bones' synopsis.

FINDINGS:

1. JURISDICTION AND VENUE: Based upon the evidence and my review of the file, I find that jurisdiction and venue are proper and the parties and subject matter are properly before me.

2. TEMPORARY CUSTODY: The Defendant is granted temporary custody of the parties minor children.

3. VISITATION: The Plaintiff shall be entitled to reasonable and liberal visitation. Parties to consult with Guardian ad Litem to try to resolve. If no resolution then both parties to submit visitation plans to Court for disposition.
   a) Neither parent to smoke or to allow others to smoke in the presence of the children in an enclosed space (home, car, etc.).
   b) Neither parent to allow the boys to sleep with them in their bed.
   c) Mother and Father to be restrained from the use of corporal punishment.
   d) [redacted] to obtain speech therapy and for the parent's to follow any recommendations regarding either of the children's health or mental care; and
   e) For all contact between the children and Chastity's boyfriend, Josh, to be supervised by Mother or another responsible adult, however shall not be Mother's sister.

Exhibit B

Garfinkel, Paul W.

From:	Elonda Fair O'Neill, Esq. <fair@mojustice.com>
Sent:	Wednesday, August 25, 2010 12:03 PM
To:	Garfinkel, Paul W.
Cc:	elizabeth@stringerlaw.us; 'Kevin Burroughs'; Tracie Hale
Subject:	RE: Burroughs v Haile
Attachments:	Garfinkel.doc

Elonda Fair O'Neill, Esquire
Law Offices of O'Neill & Fair
1847 Ashley River Road, Suite 200
Charleston, South Carolina 29407*
843.763.3900 Ext 4 * 843.763.7996 Fax
*Also licensed in CA
www.mojustice.com

From: Garfinkel, Paul W. [mailto:[redacted]]
Sent: Monday, August 23, 2010 3:27 PM
To: 'Elonda C. Fair' (fair@mojustice.com)
Subject: Burroughs v Haile
Importance: High

Exhibit B

Please be advised I have received 2 emails from the Defendant. It is my understanding that last week during my absence you acknowledged to Ms Stringer you have read both. If this is not correct, please advise immediately. If I do not hear from you by noon, August 25, I will read the 2 emails because that would not then constitute ex parte communication. Also, please advise by the above mentioned date & time if you have any objections to the proposed order as drafted by the GAL.
pwg

Exhibit C

Garfinkel, Paul W.

..om:	Elonda Fair O'Neill, Esq. <fair@mojustice.com>
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To:	Garfinkel, Paul W.
Cc:	elizabeth@stringerlaw.us; 'Kevin Burroughs'; Tracie Hale
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pwg

Exhibit D

Garfinkel, Paul W.

From: Tracie Hale <tracie2592@hotmail.com>
Sent: Wednesday, August 18, 2010 1:46 AM
To: Garfinkel, Paul W.
Subject: FW: Directions re: Burroughs vs. Hale

From: tracie2592@hotmail.com
To: p[redacted]
Subject: Directions re: Burroughs vs. Hale
Date: Wed, 18 Aug 2010 01:39:08 -0400

Judge Garfinkel,

RE:
Case: Burroughs vs. Hale
Docket No.: 2010-DR-10-1836

I, Tracie Hale am writing you because you have reviewed the facts and findings in the case that I am involved in where Kevin Burroughs is trying to assume custody of our children because of my moving back to WV, children that I have raised from the time of their birth.

Thursday August 12, 2010 you faxed Ms. O'Neil (plaintiffs attorney), Ms. Stringer (Guardian at Litem), and myself a copy of your decision and instructions of how the TEMPORARY ORDER was to be drafted. In these instructions you stated that I was to be able to pick up the children and their belongings at the Plaintiff's residence on Saturday August 14, 2010 by 1200pm Noon. However, on Friday when I call to make the arrangements with Mr. Burroughs for my getting the children he stated,"There was no way I was getting the children because your instructions were not the order and that I would not get them until he has a order in hand signed by the judge". As of Tuesday, August 17, 2010 at approx. 630pm when I was on the phone with our youngest son [redacted], he informs me that they are starting school in Drayton Hall on Wednesday August 18, 2010. School is to start here in West Virginia on Thursday August 19, 2010 and I still can not get the children because Kevin refuses to allow me to pick them up with out the order.
I have been in contact with Ms. Stringer and she is working on drafting the TEMPORARY ORDER however the Plaintiff's Attorney Ms. O'Neil has been reviewing and making corrections which is causing a delay in the process.

Please advise me on how I can move this process along and get the children home so that there will not be a major delay with their starting school here in West Virginia. I have no doubt that these actions by Mr. Burroughs and his Attorney are deliberate in nature and are an attempt to prolong this entire process.

Sincerely,
Tracie Hale

Garfinkel, Paul W.

From: Tracie Hale <tracie2592@hotmail.com>
Sent: Friday, August 20, 2010 10:42 AM
To: Garfinkel, Paul W.
Subject: Temporary order for Burroughs vs. Hale

Sear Sir,

I am writing to ask if the TEMPORARY ORDER in case # 2010-DR-10-1836 Burroughs vs. Hale as well as the Child Support worksheet has been completed for you to sign?
My last communication with Ms. Stringer was on Tuesday 17 August. I have been unable to get through to her office number and the e-mails I have sent has been undeliverable.
I only ask because I would like to come pick up [redacted] and [redacted] so that we can get back into their routine and most importantly into the school that they will be attending but I am unable to do so without the signed order.

Thanking you,
Tracie Hale

Exhibit E

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
COUNTY OF CHARLESTON	)	DOCKET NO. 2010-DR-10-1836
KEVIN E. BURROUGHS	)	
Plaintiff	)	
VS.	)	
TRACIE A. HALES	)	
Defendant	)	
	)	TRANSCRIPT OF RECORD

August 26, 2010
Charleston, South Carolina

B E F O R E:

THE HONORABLE PAUL W. GARFINKEL, JUDGE

A P P E A R A N C E S:

ELONDA FAIR O'NEILL, ESQ.
Attorney for the plaintiff

ELIZABETH STRINGER, ESQ.
Guardian ad Litem

TRACIE A. HALES
Pro se defendant (via telephone)

JOYCE C. HUCK
Court Reporter

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1 PROCEEDINGS

2 [From the bench immediately prior to the
3 commencement of the hearing the court
4 established telephone connection with the
5 defendant for purposes of allowing her
6 participation in the hearing]

7 THE COURT: All right. This is the case
8 of Kevin Burroughs as plaintiff versus Tracie
9 A. Hales defendant, case number 2010-DR-10-
10 1836. Present in the courtroom we have the
11 attorney for the plaintiff, Ms. Elonda Fair
12 O'Neill, we have the guardian ad litem, Ms.
13 Elizabeth Stringer, and by closed circuit
14 telephone we have the defendant, Tracie Hales.

15 Now the original purpose of this
16 hearing was a result of a conference call this
17 court asked the guardian to initiate because
18 this court had received an email from Ms.
19 Hales, the email -- Ms. Hales the defendant.
20 The email did not indicate it had been sent to
21 the attorney for the plaintiff or the
22 guardian. The court contacted the guardian
23 merely to inquire if she had seen the email
24 and to arrange a conference call so that the
25 court prior to reading any email from the

1 defendant would know that the attorney for the
2 plaintiff had in fact received the email. The
3 court was informed that the attorney for the
4 plaintiff wished to have all conference calls
5 on the record. And that's why we are having
6 this conference call on the record. Have I
7 summarized pretty much your understanding, Ms.
8 O'Neill as to why we are here on this hearing?
9 MS. O'NEILL: Yes, Your Honor.
10 THE COURT: Okay. And is that your
11 understanding also, Ms. Stringer?
12 MS. STRINGER: Yes, Your Honor.
13 THE COURT: All right. Now, for purposes
14 of background for the purpose of this hearing
15 this court had sent instructions to the
16 guardian ad litem, to the attorney for the
17 plaintiff, and Ms. Hales, the defendant who is
18 a self-represented litigant, on its ruling
19 from the last hearing and asked the guardian,
20 or instructed the guardian to be technically
21 correct, to please draft the order resulting
22 from this court's findings. And this order
23 was not submitted. Included in the
24 instructions were that Ms. Hales, the
25 defendant could pick up the children from the

1 plaintiff where the children were then
2 residing on I believe it was this past
3 Saturday. And the emails from the defendant
4 indicated there were some problems with that.
5 At this point Ms. Hales I'm going to
6 ask you to please identify the name of the
7 notary that's with you and please have --
8 actually, is the notary there?
9 MS. HALES: Yes. She is right here
10 beside me.
11 THE COURT: All right. Madame Notary --
12 is the notary public there?
13 MS. HALES: Yes. The notary public is
14 here.
15 THE COURT: Okay. Could you ask her to
16 come to the phone, please?
17 MS. HALES: Yes.
18 [Whereupon, Ms. Hales complies]
19 MADAME NOTARY: Yes?
20 THE COURT: Are you the notary public?
21 MADAME NOTARY: Yes, sir. My name is
22 Leslie L-E-S-L-I-E, McComas M-C-C-0-M-A-S.
23 THE COURT: I'm sorry. M-C -- would you
24 spell that again because you went a little too
25 fast for me? M-C--

1 MADAME NOTARY: M, M as in monkey,
2 C-C-O-M-A-S.
3 THE COURT: O-M-A-S.
4 MADAME NOTARY: Yes, sir.
5 THE COURT: And you are ---
6 MADAME NOTARY: --- and that is through
7 McDowell County Correctional.
8 THE COURT: McDowell? Spell McDowell,
9 please.
10 MADAME NOTARY: McDowell,
11 M-C-D-O-W-E-L-L.
12 THE COURT: Okay. And you are a notary
13 public for the State of West Virginia?
14 MADAME NOTARY: For the State of West
15 Virginia. Yes, sir.
16 THE COURT: And do you have a commission
17 date when your commission expires?
18 MADAME NOTARY: Yes, sir.
19 THE COURT: And when ---
20 MADAME NOTARY: --- it's ---
21 THE COURT: --- would that be?
22 MADAME NOTARY: We're overlapping. I'm
23 sorry.
24 THE COURT: Okay. When does your notary
25 public commission expire for the State of West

1 Virginia?

2 MADAME NOTARY: September 27th, 2011.

3 THE COURT: Okay, very good. And you are

4 there within sight and sound of Ms. Tracie

5 Hales?

6 MADAME NOTARY: Yes, sir.

7 THE COURT: Good. Now, are we on a

8 conference phone or just an individual phone

9 that's going back and forth? What is the

10 method of communication?

11 MADAME NOTARY: She is on her personal

12 cell phone.

13 THE COURT: Okay. So you have to hand

14 the phone back and forth, is that correct?

15 MADAME NOTARY: Yes, sir.

16 THE COURT: All right. Let me ask if

17 either of the parties here in the courtroom

18 have any questions that they want to ask you

19 at this time. Ms. O'Neill, do you have any

20 questions you want to inquire of the notary as

21 far as her commission or anything having to do

22 with her credentials as a notary?

23 MS. O'NEILL: No, sir.

24 THE COURT: All right, how about you Ms.

25 Stringer?

1 MS. STRINGER: No, Your Honor.

2 THE COURT: All right Ms. McComas, is

3 that -- am I pronouncing that correctly?

4 MADAME NOTARY: Yes, sir.

5 THE COURT: All right Ms. McComas, at

6 this point I would ask you to ask Ms. Hales to

7 raise her right hand? Would you ask her to do

8 that?

9 MADAME NOTARY: Yes, sir. Ms. Hales,

10 would you please raise your right hand? It's

11 being done.

12 THE COURT: Okay. Is it in fact raised

13 at this time? Is her right hand raised?

14 MADAME NOTARY: Yes, sir. She has it

15 raised.

16 THE COURT: All right, I'm going to ask

17 you to repeat to her exactly what I repeat to

18 you. Would you explain that that's the way we

19 are going to do it? I'm going to ask you to

20 repeat exactly what I repeat to you. Tell her

21 that's the way we're going to handle her being

22 sworn in.

23 MADAME NOTARY: Okay.

24 [Whereupon, the instructions are repeated

25 to the witness by the Notary]

1 [Whereupon, the witness is duly sworn by
2 the Court through the Notary Public]
3 THE COURT: And please give me her
4 response.
5 MADAME NOTARY: She agrees.
6 THE COURT: Okay.
7 MADAME NOTARY: Her exact response is I
8 agree.
9 THE COURT: Thank you, very much. All
10 right, would you hand the phone to her now,
11 please? And it's up to her whether you stay.
12 We just needed you to swear you in at this
13 point. It's up to her whether she wants you
14 to stay. Hand the phone to her, please?
15 MADAME NOTARY: I'm giving the phone to
16 her.
17 [Whereupon, the court reporter confers
18 with the court]
19 THE COURT: Ma'am?
20 MADAME NOTARY: Yes, sir.
21 THE COURT: Okay, is this Ms. McComas
22 again?
23 UNIDENTIFIED SPEAKER: I'm sorry?
24 THE COURT: I'm sorry, is this Ms. Hales
25 or Ms. McComas?

1 THE WITNESS: This is Ms. Hales.

2 THE COURT: All right Ms. Hales, could

3 you just hand the phone back to the notary

4 again for one moment?

5 MS. HALES: Oh, yes.

6 [Whereupon, the witness complies]

7 MADAME NOTARY: Ms. McComas.

8 THE COURT: Ms. McComas, do you in fact

9 know Ms. Hales personally or has she given

10 identification to you?

11 MADAME NOTARY: She is a co-worker that

12 has worked in the environment with me.

13 THE COURT: All right, so you know her

14 prior to this encounter today? You know her

15 by sight, is that correct?

16 MADAME NOTARY: Yes, sir.

17 THE COURT: And in fact she is Tracie

18 Hales, is that correct?

19 MADAME NOTARY: Yes, sir.

20 THE COURT: Okay, thank you. Now if

21 you'll give the phone back to her I think

22 we've taken care of all the preliminaries.

23 MADAME NOTARY: Okay, I'm handing the

24 phone back to her.

25 THE WITNESS: This is Ms. Hales.

1 THE COURT: All right, Ms. Hales?

2 THE WITNESS: Yes, sir?

3 THE COURT: First of all let me instruct

4 you that any emails -- well, let me back up.

5 Don't send me any emails in the future. Any

6 time you need to communicate with this court

7 please do so through the offices of the

8 guardian ad litem.

9 THE WITNESS: Yes, sir.

10 THE COURT: There are problems with you

11 communicating with me directly. Should an

12 absolute emergency occur, and I'm talking

13 about anything that would be defined by any

14 reasonable person as an emergency and you do

15 need to email me, please make sure that the

16 email to me clearly indicates that you are

17 copying Ms. O'Neill and the guardian ad litem.

18 Do you understand?

19 THE WITNESS: Yes, sir. I understand.

20 THE COURT: But anything short of an

21 extreme emergency do not email me at all. Do

22 you understand?

23 THE WITNESS: Yes, sir.

24 THE COURT: Okay. Now, what I want --

25 the subject of your email dealt with your

1 attempt to pick up the children I believe this
2 past Saturday. Would you explain to me
3 exactly what happened?
4 THE WITNESS: Yes, sir.
5 THE COURT: Okay, please start now and
6 tell me.
7 THE WITNESS: I'm sorry?
8 THE COURT: Please tell me what happened
9 when you came to pick up the children.
10 THE WITNESS: I called on Friday, which
11 was the 13th to get in touch with Mr. Burroughs
12 so that I could make the arrangement to pick
13 up the boys on the given time, which was the
14 14th of August at noon.
15 When I contacted Mr. Burroughs what
16 he told me was he is not turning over the kids
17 because there is not the order in effect, that
18 the only thing that he knows of was the
19 instruction, which he does not have to go by
20 because they are not the formal order.
21 And he told me that he would not
22 relinquish the kids until he received that
23 order that was filed and signed by you.
24 THE COURT: Okay. So did you come to
25 Charleston to pick up the children or was this

1 all over the telephone?

2 THE WITNESS: This was all over the

3 telephone. I had had conversations with him;

4 I'm looking at my planner. I had

5 conversations with him that Friday, which

6 would be the 13th. I had a follow-up

7 conversation with him on the 14th and his words

8 was for me to not waste my time with coming

9 because until he has the filed and signed

10 order he does not have to relinquish the kids.

11 THE COURT: Okay. I want you to be on

12 stand-by and I'm going to ask the attorney and

13 the guardian to address the issues that you

14 raised. Please tell me if you cannot hear

15 them or understand them, okay?

16 THE WITNESS: Okay.

17 THE COURT: Thank you. All right Ms.

18 O'Neill, I'll be glad to hear from you as to

19 your client's position on the issue about

20 picking up the children.

21 MS. O'NEILL: Your Honor, first of all

22 I'm going to object to this whole hearing

23 situation. You stated that the pro se

24 litigant to communicate through the GAL

25 offices, however she's a litigant. There are

1 certain rules and procedures that we have and
2 if she has a problem and there is an order in
3 effect we have a procedure in which to seek
4 redress. She's not doing that. She needs to
5 follow the procedures that we all have to
6 follow afforded by the lawmakers in South
7 Carolina. Her redress was to file a motion
8 and file it in the Clerk's office whether that
9 be ex parte, expedited, or whatever ---
10 THE COURT: --- all right. Your
11 objection is noted. We're going ---
12 THE WITNESS: --- sir ---
13 THE COURT: --- ma'am, don't say
14 anything. We're moving on with the hearing
15 for the benefit of the children. I'm
16 concerned about the welfare of the children.
17 Procedural matters come second to the welfare
18 of the children. Please continue with
19 addressing the concerns raised about picking
20 up the children.
21 MS. O'NEILL: Your Honor, as she stated
22 Ms. Hales never came to South Carolina to pick
23 up the children. She was working on September
24 the 14th (sic). She was not planning to come,
25 therefore my client when -- he had enrolled

1 them in school because school started. And
2 she works throughout the week. In fact, she
3 works from 3 p.m. to 12. And she leaves 30
4 minutes prior to that and she gets home 30
5 minutes after that.
6 You know she does not have time to
7 spend with the children at the time that they
8 are home from school. So she never drove to
9 Charleston to come and get the kids or -- so
10 my client did what he has been doing, was to
11 enroll them in school.
12 THE COURT: Okay.
13 THE WITNESS: Your Honor, if I may say so
14 I can barely hear her.
15 THE COURT: All right, I'm going to ask
16 Ms. Fair if you'll -- I'm sorry Ms. O'Neill, I
17 apologize, to come forward and -- the speaker
18 is here and I'll try to put it...
19 [Whereupon, Ms. O'Neill comes forward]
20 THE COURT: All right, Ms. O'Neill, can
21 you sort of summarize again or explain what
22 you just said?
23 MS. O'NEILL: What I stated was that Ms.
24 Hales as she stated on the phone to you just
25 now, she never came to Charleston. She never

1 drove to Charleston. She was working on
2 Saturday, September the 14th. And she works
3 from 3 p.m. to 12 p.m. And she didn't make an
4 attempt to come here and retrieve the
5 children; therefore my client went ahead and
6 put them in school.
7 I think there was a conversation and
8 really I don't know from -- I'm not a party to
9 that so I really can't testify to it. But
10 from what I understand is that she was not
11 planning on getting the kids until the
12 following weekend.
13 THE COURT: All right, Ms. ---
14 THE WITNESS: --- sir.
15 THE COURT: Ms. Hales, first let me just
16 -- okay tell me about when you told Mr.
17 Burroughs you would be coming to Charleston?
18 THE WITNESS: Yes, sir. At 11:30 a.m. on
19 Friday I had a conversation with Kevin and
20 advised him that I would be coming to get the
21 kids. I had already made the arrangements
22 with my employer as to my getting off on
23 Saturday. He -- that was when he told -- sir,
24 are you still there?
25 THE COURT: Yes, yes. Please continue.

1 THE WITNESS: Okay. That was when he
2 told me that he does not have to relinquish
3 the kids because the only thing that that is
4 is that would be instructions as to what the
5 court order would be.
6 And until he got an actual
7 notarized, signed court order from you that he
8 does not have to relinquish those kids. At 11
9 a.m. on Saturday I spoke with Kevin again.
10 And he once again told me that until -- in his
11 exact words, until I have a court order signed
12 by the judge I am not giving you the kids.
13 THE COURT: Okay.
14 THE WITNESS: Also on Saturday at 12 p.m.
15 I spoke with Kevin. Once again, we had an
16 argument ---
17 THE COURT: --- excuse me. Was that --
18 you said 12 p.m. Was that noon? I'm sorry to
19 interrupt but was that 12 p.m. noon or 12 p.m.
20 midnight?
21 THE WITNESS: It was 12 p.m. during the
22 day; 12 noon ---
23 THE COURT: --- 12 noon ---
24 THE WITNESS: --- on Sunday. We had an
25 argument over the phone because he would not

1 go along with your instructions per what the
2 order was to be. He once again told me that
3 he is not giving me the kids and he hung up on
4 me. I called back at 1:20 p.m., had another
5 conversation with Kevin and asked why is it
6 that whenever I call to talk with him he
7 claims that we need to talk this through but
8 we end up in a full blown argument. And he
9 once again said he is not giving me the kids.
10 THE COURT: All right, Ms. ---
11 THE WITNESS: --- I have ---
12 THE COURT: --- go ahead ---
13 THE WITNESS: --- I have more documented
14 conversations if you would like to know.
15 THE COURT: No, ma'am. That's fine.
16 THE WITNESS: Okay.
17 THE COURT: All right Ms. O'Neill, is
18 there anything further you want to address
19 about this matter?
20 MS. O'NEILL: Other than my initial
21 objection that my client is not here to speak,
22 to testify.
23 THE COURT: I'm not ---
24 MS. O'NEILL: --- he wasn't served any
25 notice for anything so.

1 THE COURT: All right. Ms. Hales -- let
2 me ask the guardian. Madame Guardian, have
3 you had any conversation with either party
4 regarding this issue?
5 MS. STRINGER: I've only had
6 conversations with Ms. Hales. She emailed me
7 initially to ask if the children were going to
8 go to her. I called Ms. Fair and Ms. Fair
9 told me that she was not going to discuss it
10 with me.
11 THE COURT: Okay, very good. All right,
12 now we've got to get the children ---
13 MS. O'NEILL: --- now when was that?
14 MS. STRINGER: It was on -- it was on
15 Wednesday or Thursday of last week. You said
16 you wanted everything on the record --
17 MS. O'NEILL: With ---
18 THE COURT REPORTER: --- excuse me Ms.
19 Fair, I didn't hear the last thing you said
20 ---
21 MS. STRINGER: --- I'm sorry, last week.
22 I was actually leaving town so I guess it
23 would have been Thursday. And you said you
24 didn't want -- I asked you what -- was he
25 going to give the children to her and you said

1 I don't want to discuss it with you. I want
2 it on the record.
3 MS. O'NEILL: And that was after the 14th.
4 That was the 18th?
5 MS. STRINGER: That would have been the
6 19th.
7 THE COURT: Okay ---
8 MS. O'NEILL: --- do you have any
9 knowledge that Ms. Hales came here to pick up
10 the kids?
11 MS. STRINGER: No, I don't.
12 THE COURT: Okay, thank you. I've heard
13 enough. Ms. Hales?
14 THE WITNESS: Yes, sir?
15 THE COURT: Mr. Burroughs is in fact
16 correct. He does not have to comply.
17 However, I am going to change my instructions
18 and do a -- number one for a formal order, in
19 that I am going to instruct Mr. Burroughs to
20 deliver the children to you.
21 THE WITNESS: Okay.
22 THE COURT: Okay, now will you be able --
23 tell me what day this -- as soon as you can --
24 can you receive the children on Saturday or
25 Sunday?

1 THE WITNESS: Yes, sir. Saturday would
2 be great.
3 THE COURT: All right. And about how
4 long of a drive is it, I have no idea, between
5 your home and the residence here in
6 Charleston?
7 THE WITNESS: It is an 8 hour drive from
8 Charleston, South Carolina to my actual
9 residence. But sir, I would be more than
10 willing to meet him for the exchange in a
11 public place. And I would have a witness with
12 me so that there are no argumentative
13 exchanges going on between us.
14 THE COURT: What would ---
15 THE WITNESS: --- if that pleases the
16 court.
17 THE COURT: Okay. What would be
18 approximately a halfway meeting point?
19 THE WITNESS: Charlotte, North Carolina
20 is exactly the halfway point.
21 THE COURT: Okay, that's a big place. We
22 need to have a specific place. Is there a
23 place that you're familiar that would be a
24 meeting place? I know I-77 goes through
25 Charlotte is there a...

1 THE WITNESS: There is actually a rest
2 area right outside of Charlotte. It's the
3 first rest area after Charlotte.
4 THE COURT: I think we're going to need
5 to be more specific than that. I can see
6 trouble on the horizon where you are at one,
7 he's at another one, and then we say well they
8 didn't meet. Can you give me a specific exit
9 number or?
10 THE WITNESS: No, sir. I don't know the
11 exact exit number but what I can do I do --
12 there is an area called Statesville, North
13 Carolina. It's along route 77. It is exit 50
14 and I can meet him there.
15 THE COURT: Okay. Is there a landmark
16 there, a fast food store, is there a
17 particular brand of service station; something
18 so that ---
19 THE WITNESS: --- Yes, sir. There is a
20 store, it's called J.R. Outlet.
21 THE COURT: Oh, I've heard of that. J.R.
22 Outlet, okay. So if he left here about 9
23 a.m., we won't make it too early, on Saturday
24 he should be able to get there say between the
25 hours of 1:30 and 2:30. Would that be fair?

1 THE WITNESS: Yes, sir. He would
2 probably get there closer to 2 o'clock.
3 THE COURT: All right, between 1:30 and
4 2:30. And you can be there at the same time?
5 THE WITNESS: Yes, sir.
6 THE COURT: Okay. And so that's very,
7 very kind -- all right, let me do a bench
8 order so we can get that filed today. And
9 then I'm going to ask Ms. Stringer to amend
10 the other order, okay.
11 And this is just going to be an
12 informal bench order, but it will be binding.
13 It will be binding on everybody giving you
14 custody of the children and Mr. Burroughs to
15 meet you there on Saturday, October -- I'm
16 sorry, August the 28th between the -- what's
17 that exit number again?
18 THE WITNESS: Exit 50. 5-zero.
19 THE COURT: Thank you, ma'am. All right,
20 stay on the phone please, ma'am.
21 THE WITNESS: Yes, sir.
22 MS. STRINGER: And Your Honor, there is
23 an issue with the temporary order. I just
24 want to ---
25 THE COURT: --- yes ma'am and that would

1 be?

2 MS. STRINGER: The child support

3 guidelines weren't attached and ---

4 THE COURT: --- I haven't seen the

5 proposed order yet.

6 MS. STRINGER: Okay. It should have been

7 -- it should have come over on the 18th.

8 THE COURT: I have not seen it.

9 MS. STRINGER: Okay.

10 THE COURT: What is your -- you have a

11 question regarding the instructions I have or?

12 MS. STRINGER: Well, the child support

13 guidelines weren't attached to the

14 instructions but you'd stated that they were

15 and so none of us have seen that. And Ms.

16 Fair had asked me if I had seen it ---

17 THE COURT: --- no I -- well, then maybe

18 my instructions -- I asked you to -- I

19 thought, I'm sorry, I asked you to work it out

20 and attach a child support worksheet to it.

21 MS. STRINGER: Okay, I can do that. I

22 know there is an issue as to -- isn't there an

23 issue as to the child support Elonda, as far

24 as drafting it or is there not? She filed an

25 amended financial declaration.

1 MS. O'NEILL: I mean there is -- we'll go
2 on her financial declaration ---
3 MS. STRINGER: --- okay, then I'll run
4 them.
5 THE COURT: Okay. All right, I'm having
6 to write most of this by hand. I had some of
7 it prepared in advance with the case caption
8 and some of the information on it.
9 [Whereupon, the court prepares the order]
10 THE COURT: What I am doing is I am
11 entering -- having -- I'm going to give to the
12 guardian ad litem and instruct the guardian ad
13 litem to get copies to you, Ms. Hales and Ms.
14 O'Neill is instructed to wait until she is
15 given a certified copy of the order for her
16 client today. And the order says -- the top
17 part of the order identifies the case name,
18 who everybody is, and it says as follows:
19 [Reading] The court finding that
20 the legal custody of the above named children
21 -- which are of course [redacted] and [redacted] --
22 should be placed with the defendant, Tracie
23 Hales pending execution of the written order
24 from the hearing in this matter this date and
25 -- previously held. It is therefore ordered

1 that the legal custody of the minor children,
2 [redacted] and [redacted] shall be
3 placed with the defendant, Tracie Hales.
4 Plaintiff shall be required to return the
5 children to defendant at exit 50 on I-77,
6 Statesville, North Carolina, J.R. Outlet
7 between the hours of 1:30 p.m. and 2:30 p.m.
8 on Saturday, August 28th, 2010.
9 Plaintiff shall also deliver all
10 personal effects of the children including,
11 but not limited to, their clothing and school
12 supplies. Upon the execution and the filing
13 of the written order from the hearing in this
14 matter this date this interim order shall be
15 of no further force and effect.
16 In other words, this is only to give
17 you actual custody of the children at this
18 time and instruct the plaintiff to return the
19 children to you. All right, do you understand
20 everything I've said, Ms. Hales?
21 THE WITNESS: Yes, sir. I do.
22 THE COURT: All right, and Ms. O'Neill
23 do you have any questions on anything that
24 I've said?
25 MS. O'NEILL: I don't have any questions,

1 but I do have objections.

2 THE COURT: All right, and for purposes

3 of the record would you state those?

4 MS. O'NEILL: The objection is the nature

5 of this hearing in itself. When I was

6 informed that this was going to be a

7 conference call, not a hearing, my client was

8 not notified to be here. This was supposed to

9 be something that was just heard on the

10 record. And from my understanding it was to

11 admonish the defendant from doing the ex parte

12 communications.

13 On the fairness my client has not

14 had a chance to be heard. And I think this

15 was scheduled maybe Monday or Tuesday of this

16 week, and that also with the instructions to

17 the pro se defendant that her recourse is to

18 engage to guardian.

19 Her recourse is to go through the

20 courts; not just the guardian. If she wants

21 to report something that's happened to the

22 kids I don't object to that. But I do object

23 to the pro se litigant using the guardian as

24 counsel for herself.

25 THE COURT: You know Ms. O'Neill, you are

1 correct. You are correct. Ms. Hales, I think
2 Ms. O'Neill is right. I'm going to change
3 what I've ordered before and if you have
4 communications that you wish to communicate,
5 please do it either by formal motion or
6 matters that you want to bring you are going
7 to be required to follow the rules. I'm going
8 to agree with Ms. O'Neill on that.
9 MS. HALES: Yes, sir.
10 THE COURT: However, for the welfare of
11 the children I think they need to be -- I
12 think nobody would disagree that children need
13 to be in school and they need to be in school
14 where they are going to remain in school.
15 And I think it sounds to me like Mr.
16 Burroughs has tried to thwart the intention of
17 this court. He is legally correct. He is
18 legally correct that he did not have to turn
19 over the children so I won't hold that against
20 him.
21 But I just want to get these
22 children in school where they need to be in
23 school. I don't think anybody is going to
24 object to that. And this is again; this is
25 pursuant to -- like I said this is a temporary

1 matter. Everybody will be heard at the final
2 hearing and decide where the children will be
3 here permanently. I'm going to instruct the
4 guardian once again to draw up a formal order
5 referencing the previously held hearing and
6 this hearing. I'm going to instruct Ms.
7 O'Neill to not leave the guardian until she
8 has been given on behalf of her client a copy
9 of this court order.
10 If there are any violations of this
11 court order, this court will be mindful to
12 seek -- to give sanctions in the strictness
13 possible form. I understand your concern, Ms.
14 O'Neill but keep in mind this is all about the
15 children; not the clients okay. Anything
16 further from you, Ms. Hales?
17 MS. HALES: No, sir.
18 THE COURT: All right, anything further
19 from you Ms. O'Neill?
20 MS. O'NEILL: Just to be clear my
21 objection to the hearing was overruled?
22 THE COURT: Pardon -- Yes, ma'am;
23 absolutely.
24 MS. O'NEILL: Okay.
25 THE COURT: Absolutely, okay.

1 MS. O'NEILL: Thank you.

2 MS. STRINGER: I have a question, Your

3 Honor.

4 THE COURT: Yes, ma'am?

5 MS. STRINGER: I need to know the family

6 portion for the health care for Ms. Hales?

7 THE COURT: Ms. Hales, do you know what

8 you pay in health insurance strictly for the

9 children, not yourself? What amount is it for

10 the children?

11 MS. HALES: The family amount is $191 and

12 some change. I'm not exactly sure of the

13 exact amount ---

14 THE COURT: --- we're not going to

15 quibble over a penny ---

16 MS. HALES: --- if you'll give me one

17 second I will look. The health insurance is

18 $191.60. On it I have myself and my 3 kids.

19 THE COURT: What would be the portion if

20 it were just you?

21 MS. HALES: The portion for just me is 70

22 plus dollars.

23 THE COURT: Well, can you give us -- be a

24 little more specific?

25 MS. HALES: Give me one second and I can

1 run in and ask.

2 THE COURT: No, no what I want you to do,

3 I don't want to delay this any longer, you

4 email that to the guardian and to Ms. O'Neill.

5 Do you have her email address?

6 MS. HALES: Yes, I do.

7 THE COURT: Okay. You email and don't --

8 you don't need to include me in that loop.

9 Send it to both and the guardian will prepare

10 a child support worksheet for that.

11 MS. HALES: Yes, sir.

12 THE COURT: All right, any further from

13 you, Madame Guardian?

14 MS. STRINGER: No, Your Honor.

15 THE COURT: All right, and I want the

16 order to specifically state that this court's

17 concern is only to get the children enrolled

18 in school on as permanent a basis as possible.

19 Okay, thank you very much. That concludes

20 this hearing.

21 MS. O'NEILL: Thank you.

22 MS. HALES: Thank you.

23 ********END OF TRANSCRIPT OF HEARING********

24

25

1 C E R T I F I C A T E

2 I, the undersigned, Joyce C. Huck,
3 Official Family Court Reporter for the Ninth
4 Judicial Circuit of the State of South
5 Carolina, do hereby certify that the foregoing
6 is a true, accurate, and complete Transcript
7 of Record of the proceedings had and evidence
8 introduced in the trial of the captioned case,
9 relative to appeal, in the Court of Family
10 Court for Charleston County, South Carolina,
11 on the 26th day of August, 2010.
12 I do further certify that I am
13 neither of kin, counsel, nor interest to any
14 party hereto.
15
16 August 26, 2010
17
18
19 Joyce C. Huck
20 Joyce C. Huck
21 Court Reporter
22
23
24
25

FILED
2010 AUG 31 PM 2:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
KEVIN E. BURROUGHS,)
Plaintiff,)
vs.)
TRACIE A. HALE,)
Defendant.)

IN THE FAMILY COURT
NINTH JUDICIAL CENTER
CASE NO.: 2010-DR-10-1836

Temporary Order

Date of Hearings: August 9, 2010 and August 26, 2010
Judge: Paul W. Garfinkel
Court Reporter: Joy C. Huck
Plaintiff's Attorney: Elonda Fair O'Neill
Defendant's Attorney: *Pro se*
Guardian *ad Litem*: Elizabeth J. Stringer

This matter came before the court on a Motion for Temporary Relief filed by the Plaintiff and initially heard on August 9, 2010. After reviewing all of the Pleadings and listening to argument by Plaintiff's counsel, this Court ordered as follows:

ONE: Temporary Custody: The Defendant is granted temporary custody of the parties' minor children.

TWO: Visitation: The Plaintiff shall be entitled to reasonable and liberal visitation. Parties are to consult with the Guardian *ad Litem* to try to resolve a visitation schedule. If there is no resolution, then both parties shall submit visitation plans to the Court for disposition. Defendant shall pick up the children and their personal property at noon (12:00 p.m.) on August 14, 2010 at Plaintiff's residence.

1/5 pwg

THREE: Visitation Provisions:

a) Neither parent to smoke or to allow others to smoke in the presence of the children in an enclosed space (home, car, etc.).

b) Neither parent to allow the boys to sleep with them in their bed.

c) Mother and Father to be restrained from the use of corporal punishment.

d) The parties' shall obtain speech therapy for their son, Micah, and they shall follow any recommendations regarding either of the children's health or mental care; and

e) For all contact between the children and Chastity's (the children's half-sister) boyfriend, Josh, to be supervised by Mother or another responsible adult; however, Mother's sister shall not act as supervisor.

FOUR: Child Support: The Plaintiff shall pay child support pursuant to the attached Child Support Guidelines. Said child support shall be paid monthly beginning on September1, 2010 and due on the first of each month thereafter.

FIVE: Reasonable Telephone Access: Each party shall be entitled to liberal and reasonable telephone access while the minor children are in the custody of the other party.

SIX: Notification of Major illness: Each party shall provide prompt and timely notification to the other party of any major illness of the minor children. Major illness shall include any illness lasting more than twenty-four (24) hours and/or requiring medical treatment.

SEVEN: Access to Records: Each party shall be entitled to full access to any records concerning the minor children, including, but not limited to, school records, daycare records, medical records, etc.

EIGHT: Addresses and Phone Numbers: Each party shall keep the other party informed of their respective addresses, specifically including their residential addresses and phone numbers; and each party shall provide written notice to the other party of any change of address.

NINE: Uncovered Medical Expenses of the Minor children: Defendant shall pay the first Two Hundred Fifty and 00/100 Dollars $250.00 per child per year of any uncovered medical/dental expenses. The parties shall pay their proportionate share according to the SC DSS Child Support Guidelines of any amount over the initial $250.00 per child per year. The defendant shall provide plaintiff with documentation of the medical statement with balance due. Both parties shall pay their proportionate share of the medical statement within 30 days of receipt of the statement.

TEN: Restraining Orders for Benefit of the Minor Children: The parties shall be temporarily restrained from:

a) Speaking ill of the other parent in the presence of the minor children and from allowing others to speak ill of the other parent in the presence of the minor children;

b) Interfering with the other parent's relationship with the minor children and from allowing others to interfere with the other parents relationship with the minor children;

c) Exposing the minor children to any overnight paramours and from exposing the minor children to overnight guests of the opposite sex whom are unrelated by blood or marriage;

d) Consuming any illegal drugs and excessive alcohol during custody/visitation periods;

e) Discussing this litigation with the minor children;

f) Exposing the minor children to any illegal and/or immoral conduct, including profanity; and,

g) Exposing the minor children to any violent conduct.

ELEVEN: Mutual Restraining Order: By agreement, the parties shall be temporarily restrained from harassing, abusing, threatening, bothering, or otherwise interfering with each other in any way whatsoever.

TWELVE: Discovery: The parties are granted full pretrial discovery pursuant to the South Carolina Rules of Civil Procedure and The South Carolina Family Court Rules.

THIRTEEN: Temporary Attorney's Fees and Costs: The issue of temporary attorney's fees and costs is held in abeyance at this time.

FOURTEEN: After issuing the instructions as outlined in paragraphs ONE through FOURTEEN, the Court was informed that the children were not transferred on August 14, 2010 as instructed in paragraph ONE above. The Court therefore amends its prior instructions and hereby orders as follows: A) Neither party shall email any judge directly and any future concerns shall be voiced through properly pleading to the Court pursuant to the Rules of Civil

Procedure and Family Court Rules of the State of South Carolina; b) the Court's main concern is that the children be enrolled in the school they will be attending pursuant to the earlier instructions and based upon this concern, Plaintiff Father shall meet Defendant Mother on Saturday, August 28, 2010 at Exit 50 off of I-77, Statesville, North Carolina at the JR Outlet between the hours of 1:30 p.m. and 2:30 p.m. to transfer the children. Plaintiff Father shall deliver at this same time all of the children's personal effects, including their clothing and school supplies.

AND IT IS SO ORDERED, ADJUDGED AND DECREED this 30 day of August, 2010 at Charleston, South Carolina.

PAUL W. GARFINKEL
CHARLESTON COUNTY
FAMILY COURT
NINTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
2010 SEP 13 PM 4:42)
KEVIN E. BURROUGHS)
JULIE ANN ... Plaintiff,)
CLERK OF COURT
vs.)
BY_____)
TRACIE A. HALE)
Defendant.)

IN THE FAMILY COURT
NINTH JUDICIAL CIRCUIT

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Docket No. 2010-DR-10-1836

Plaintiff's Attorney:	Defendant's Attorney:
Elonda Fair O'Neill, Bar No. 13434 Address: O'Neill & Fair 1847 Ashley River Road, Suite 200 Charleston, South Carolina 29407 Phone: 843.763.3900Fax 843.763.7996 E-mail: fair@mojustice.comOther: _____	Pro Se, Bar No. N/A Address: PO Box 478 Davy, West Virginia 24828 Phone: _____ Fax_____ E-mail: tracie2592@hotmail.comOther: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion for Reconsideration
Estimated Time Needed: 15 min Court Reporter Needed: ☒ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Elonda Fair O'Neill
Signature of Attorney for ☒ Plaintiff/☐ Defendant

September 13, 2010
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $_____
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____ Judge Signature: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
KEVIN E. BURROUGHS,)
)
Plaintiff,)
)
vs.)
)
TRACIE A. HALE,)
)
Defendant.)

2010 SEP 13 PM 4:42
JULIE ARMSTRONG
CLERK OF COURT
BY

IN THE FAMILY COURT OF THE
NINTH JUDICIAL CIRCUIT
CASE NO.: 2010-DR-10-1836

NOTICE OF MOTION AND MOTION FOR RECONSIDERATION AND MOTION FOR RECUSAL

TO: THE *PRO SE* DEFENDANT ABOVE NAMED and ELIZABETH STRINGER, GAL:

YOU WILL PLEASE TAKE NOTICE that the undersigned attorney for the Plaintiff, Kevin E. Burroughs, will move before the Presiding Judge of the Family Court of the Ninth Judicial Circuit, Charleston County Judicial Center, 100 Broad Street, Charleston, South Carolina on the 2nd day of November, 2010 at 9:15 o'clock AM/PM. or as soon thereafter as counsel may be heard for reconsideration of the matter and Temporary Order against the Plaintiff and recusal from further hearings on the following grounds:

I. Motion for Reconsideration

Affidavit Exhibit E).

II. Motion for Recusal

17. That on or about Monday, August 16, 2010, counsel for the plaintiff received a telephone call from Elizabeth Stringer's (GAL) secretary, informing her that Judge Paul Garfinkel, in an *ex parte* telephone call, informed her that he received two email communications from the *pro se* defendant, that he was out of town at a judicial conference but wanted to have a conference call with the *pro se* defendant, the GAL and counsel for the plaintiff.

18. Elizabeth Stringer, Esquire (GAL), called plaintiff's counsel a second time on or about Tuesday, August 17, 2010 to inform counsel that Judge Garfinkel wanted to have the conference via telephone on Wednesday, August 18, 2010, Thursday, August 19, 2010 or Friday, August 20, 2010.

19. That counsel for the plaintiff informed Ms. Stringer that she would be available and requested that the telephone conference be held on the record.

20. That on or about August 18, 2010, Elizabeth Stringer (GAL) emailed the proposed Temporary Order to Judge Garfinkel, the *pro se* defendant and counsel for the plaintiff. **(Exhibit F).**

21. That on Friday, August 20, 2010, Elizabeth Stringer informed plaintiff's counsel that Judge Garfinkel decided not to have the conference call.

22. That on or about Monday, August 23, 2010, Judge Paul Garfinkel personally called plaintiff's attorney and informed her that he received two emails from the *pro se* litigant and again wanted to conduct a conference call to "admonish the defendant regarding *ex parte* communications" and confirmed counsel's request for a court reporter to be present.

23. That Judge Garfinkel requested plaintiff's counsel to be present at the courthouse for this conference call regarding *ex parte* communications because he did not have the capabilities to handle a conference call with all of the needed phone lines. Judge Garfinkel did not state any further purpose of the conference call except to address *ex*

parte communications.

24. That on or about August 26, 2010, the Court erred in conducting a full hearing whereby the *pro se* litigant was provided the opportunity to fully testify via telephone to the substance of the email communications. (Transcript of hearing attached as **Exhibit G**).

25. That plaintiff was not provided the opportunity to answer the allegations and strenuously objected to the Court conducting a full hearing *sua sponte* without notice of the hearing to the plaintiff. (See Transcript **Exhibit G**)

26. That the Court asked counsel to respond to the allegations of the *pro se* litigant. That plaintiff's counsel objected that she was not a party and could not testify on her client's behalf and objected that her client was not noticed a hearing would be conducted against her client's right to due process.

28. That the Court informed the parties that "*I'm having to write most of this by hand. I had some of it prepared in advance with the case caption and some of the information it.*" (Transcript page 25-**Exhibit G**)

29. That upon information and belief, prior to the conference call, the Court read the *ex parte* email communications from the *pro se* defendant and drafted an Interim Bench Order **(Exhibit H)** based upon the defendant's *ex parte* communications.

30. That the Court did not prepare any portion of the typewritten Order while on the bench. That the Court could not foresee that the *pro se* defendant was willing to meet the plaintiff halfway between her residence in West Virginia and plaintiff's residence in Charleston, South Carolina instead of what he already had drafted. The marked out information and handwritten information was the only information added to the previously prepared document during this period. (Please See Exhibit, Interim Bench Order-**Exhibit H** and Transcript line, 15 page 20 through line 9, page25- **Exhibit G**)

31. That the Court no longer became an impartial trier of fact when he informed counsel for the plaintiff to appear in court because he did not have the capabilities to perform a phone conference and conducted a full hearing with testimony only from the *pro se* defendant over the objections of plaintiff's counsel.

32. That the Court erred in failing to provide plaintiff with notice of this *sua spo*nte hearing depriving plaintiff of his procedural due process rights.

33. That plaintiff moves that the Court reconsider the matter based on its failure to consider the totality of all of the facts, evidence and circumstances provided at the temporary hearing.

34. That based upon the Courts lack of impartiality and fairness to plaintiff, plaintiff moves that the Court orders a *de novo* temporary hearing and recuse himself from

presiding over any further hearings or issues regarding these parties.

PLEASE BE PRESENT TO DEFEND IF SO MINDED!

Respectfully submitted,

Fonda Fair O'Neill, Esquire
O'Neill & Fair
Attorneys for the Plaintiff
1847 Ashley River Road, Suite 200
Charleston, South Carolina 29407
843.763.3900 x 4* 843.763.7996 Fax

Charleston, South Carolina

September 13, 2010

CERTIFICATE OF MAILING

I, the undersigned, DO HEREBY CERTIFY that I served one copy of Plaintiff's Notice of Motion and Motion for Reconsideration and Motion for Recusal on the Guardian *ad Litem* and a copy on the *pro se* defendant this 23rd day of September 2010, by personally depositing the same in the United States mail, with sufficient postage affixed thereto, addressed as follows:

Elizabeth Stringer, Esquire
Stringer & Stringer
753 Folly Road
Charleston, South Carolina 29412

Ms. Tracie Hale
PO Box 478
Davy, West Virginia 24828

Elonda Fair O'Neill, Esquire

Sworn to before me this
24 day of Sep., 2010

Notary Public for South Carolina
My Commission Expires: 11/7/15

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
COUNTY OF CHARLESTON	)	DOCKET NO. 2010-DR-10-1836
KEVIN E. BURROUGHS	)	
Plaintiff	)	
VS.	)	
TRACIE A. HALE	)	
Defendant	)	
	)	TRANSCRIPT OF RECORD

January 31, 2011
Charleston, South Carolina

B E F O R E:

THE HONORABLE PAUL W. GARFINKEL, JUDGE

A P P E A R A N C E S:

ELONDA FAIR O'NEILL, ESQ.
Attorney for the plaintiff

ELIZABETH STRINGER, ESQ.
Guardian ad Litem

TRACIE A. HALE
Pro se defendant

JOYCE C. HUCK, CVR
Court Reporter

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1 PROCEEDINGS

2 THE COURT: This is the case of Kevin E.
3 Burroughs as plaintiff versus Tracie A. Hale,
4 defendant, case number 2010-DR-10-1836.
5 Present in the courtroom today is the
6 plaintiff with his attorney, Ms. Elonda Fair
7 O'Neill. The defendant, Tracie Hale, is here
8 as a self-represented litigant, and also with
9 us is the guardian ad litem, Ms. Elizabeth
10 Stringer.

11 This is the second part of a two-
12 part motion. The original hearing date was
13 November the 2nd, 2010. The original motion
14 consisted of a motion for the court to
15 reconsider its original pendente lite order as
16 well as a motion for this judge to be recused.
17 Because of the time constraints on the
18 previous motion we limited it -- we divided it
19 and bifurcated the matters. The court has
20 issued an order on the motion for
21 reconsideration and that was filed with the
22 Clerk on December the 20th. Ms. O'Neill, did
23 you get a copy of that order?

24 MS. O'NEILL: Yes, Your Honor.

25 THE COURT: Ms. Hale, did you get a copy?

1 MS. HALE: Yes, sir.

2 THE COURT: I assume you did too, Ms.

3 Stringer?

4 MS. STRINGER: Yes, Your Honor.

5 THE COURT: All right. So that part is

6 disposed of. We're now going to take up the

7 matter of plaintiff's motion for this judge to

8 be recused from further matters.

9 At the hearing on the original

10 motion this judge had said that I would not

11 hear any additional matters pending the

12 resolution of the motion for recusal. Just

13 for my information, I haven't gone through the

14 whole file, have there been any additional

15 matters that have come up, Ms. O'Neill? Are

16 there any matters since we had the original

17 hearing?

18 MS. STRINGER: Actually, Your Honor, I

19 have a Rule to Show Cause pending but we

20 continued it because it was in front of you

21 and it's reset.

22 THE COURT: All right, Ms. O'Neill I'm

23 going to give you about five minutes to

24 summarize your position on the motion to

25 recuse -- to have me recused. Ms. Hale, I'll

1 give you an equal amount of time. I'll give
2 Ms. Stringer an equal amount of time. And
3 then almost assuredly I will take this matter
4 under advisement. All right. Ms. O'Neill,
5 your five minutes starts now.
6 MS. O'NEILL: Thank you, Your Honor. As
7 you stated this is a motion for you to recuse
8 yourself based on the fact that the hearing
9 that we had on I guess it was August 26th, that
10 was supposed to be a conference call.
11 And what I was informed; Your Honor
12 was that was a conference call to admonish the
13 defendant to cease writing ex parte
14 communications to the court. I was not given
15 any other indication that we were going to
16 have testimony or that it would be a hearing
17 or that an order would be issued. And ---
18 THE COURT: --- that was what hearing
19 now? I want to make sure I get my dates
20 straight. August ---
21 MS. O'NEILL: --- it was August the 26th.
22 And it was not supposed to be a hearing. It
23 was just supposed to be a conference call
24 because the defendant resides in West
25 Virginia. And we were in court based on the

1 fact that the guardian ad litem nor I had
2 enough lines to accommodate everyone that
3 needed to be on the conference call so we were
4 requested to come to the courthouse for the
5 conference call.
6 THE COURT: Now, you said your basis was
7 that you didn't realize it was going to be a
8 hearing. Tell me why were you under -- you
9 said a hearing. Were there matters that were
10 ordered as a result of that hearing and if so
11 was there an order issued?
12 MS. O'NEILL: Yes, Your Honor. You
13 issued an order from the bench, an interim
14 bench order, which is a part of my motion that
15 was filed in exhibit H.
16 THE COURT: All right, that's what I want
17 to know. In all honesty I don't remember the
18 details. I just want to make sure I'm up to
19 speed on it now.
20 [Whereupon, the court reviews documents]
21 THE COURT: Exhibit H, all right.
22 MS. O'NEILL: And when we came to the
23 courthouse to admonish the defendant from
24 ceasing the ex parte communications ---
25 THE COURT: --- all right tell me --

1 again, so I understand where were you under
2 the information -- was there something that
3 said that would be the purpose of the hearing
4 to admonish the defendant?
5 MS. O'NEILL: You called me on the phone
6 and told me that. There's no notice of any
7 hearing because there was not supposed to be a
8 hearing. There was no notice given, no
9 documents or anything. It was supposed to be
10 a conference call to admonish the defendant to
11 cease the ex parte communications.
12 THE COURT: All right.
13 MS. O'NEILL: That was my understanding
14 and I know you will hear from the guardian
15 that was her understanding as well.
16 THE COURT: Okay, please continue.
17 MS. O'NEILL: Then during this conference
18 call it went into the substance of the ex
19 parte communications, which I have read
20 through the Canon 3 of the Judicial Conduct
21 and this is specifically prohibited by Canon 3
22 of the Judicial Code of Conduct. And I could
23 not find an exception that ---
24 THE COURT: --- you say ex parte
25 communications. Did I communicate with the

1 defendant or she communicated with me?

2 MS. O'NEILL: She wrote you the emails,

3 Your Honor. If we go into Canon 3 it states

4 that specifically. [Reading] A judge shall

5 not initiate, permit, or consider ex parte

6 communications or consider other

7 communications made to the judge outside the

8 presence of the parties concerning a pending

9 or impending proceeding except that when

10 circumstances require ex parte communications

11 for scheduling -- that was not an issue here

12 -- administrative purposes or emergencies that

13 do not deal with substantive matters or issues

14 on the merits.

15 And we went into the merits of the

16 emails. You had her testify. We have a

17 transcript where you asked her what the email

18 said. Where, when, what, how ---

19 THE COURT: --- okay why would that --

20 let me ask you Ms. Fair -- I mean Ms. O'Neill;

21 I apologize. Why would that be ex parte

22 communication if I didn't know about what it

23 was -- you're saying because you didn't have a

24 chance to prepare for that hearing?

25 MS. O'NEILL: It was an ex parte

1 communication because she sent it to you.

2 THE COURT: Right. Now wasn't there

3 communication saying that I had not read it at

4 point. I can't stop somebody from receiving

5 it. Are you saying that I should be recused

6 because somebody sent me something?

7 MS. O'NEILL: No. I'm not finished, Your

8 Honor.

9 THE COURT: Okay.

10 MS. O'NEILL: If you'll let me continue

11 on with the rest of the Canon 3 then we'll get

12 to the meat of why it's ---

13 THE COURT: --- okay ---

14 MS. O'NEILL: --- improper for a judge to

15 do so. And then it says: [Reading] The judge

16 reasonably believes that no party will gain a

17 procedural or tactical advantage as a result

18 of the ex parte communication and -- the

19 second part is -- the judge makes provision

20 promptly to notify all other parties of the

21 substance of the ex parte communication and

22 allows an opportunity to respond.

23 However, Your Honor, this is what

24 the plaintiff alleges is that she did get a

25 tactical advantage. You issued an order. In

1 fact, you had that order prepared prior to us
2 coming to court. This was drafted and printed
3 prior to us getting here before you even had
4 her testify.
5 And the reason that we're saying
6 this, and is part of the motion, is because
7 this was already printed. And the only parts
8 that were changed is the part in here where on
9 the record that you're stating that you were
10 having to write most of this by hand. But
11 Your Honor, quite frankly and with all due
12 respect, we feel that this was pre-drafted
13 prior to us coming and pre-prior -- prior to
14 her testifying ---
15 THE COURT: --- Ms. O'Neill ---
16 MS. O'NEILL: --- that's the only ---
17 THE COURT: --- Ms. O'Neill, for your
18 information I do recall some of the facts. If
19 I remember correctly, and I'm sure I'm right
20 on this, I had a series of orders, blank
21 orders that I felt that if necessary I could
22 modify. I had about four or five orders that
23 should any of the results of the hearing be
24 appropriate I would fill in the blanks. I
25 have an entire -- every judge has on their

1 bench an entire file folder of pre-prepared
2 orders that we just fill in the blanks. Are
3 you not aware of that?
4 MS. O'NEILL: Your Honor, but this is not
5 a fill in the blank order. This has in
6 typewritten with the defendant Tracie
7 Burroughs (sic) and you specifically have
8 [redacted], [redacted]s in type; the
9 only thing that was changed or the things that
10 you could not have known after her testimony
11 ---
12 THE COURT: --- all right ---
13 MS. O'NEILL: --- her testimony -- she
14 says that she could meet him. You didn't have
15 that in there. And you already had that he
16 should take the children there. You could not
17 have foreseen that she would say she would
18 meet him halfway. And that's the only
19 handwritten part. So, Your Honor, the fact
20 that you have pre-drafted orders, this one
21 specifically has information that is just
22 specific to these parties.
23 THE COURT: Okay. As I said I had about
24 admittedly about four or five orders pre-
25 prepared on the basis of that hearing but Ill

1 review it. Go ahead.

2 MS. O'NEILL: It's a part of the file in

3 the motion letter H. She did get an advantage

4 because you made a ruling out of that and ---

5 THE COURT: --- all right, what advantage

6 did -- I'm looking at the August 26th hearing

7 date. Is that what you're saying?

8 MS. O'NEILL: Yes.

9 THE COURT: All right. Now ---

10 MS. O'NEILL: --- also ---

11 THE COURT: --- again, I want to get the

12 sequence of events. Had I issued the

13 temporary order at that point yet?

14 MS. O'NEILL: The temporary -- yes, from

15 the bench and Ms.

16 THE COURT: --- no, the one -- we had an

17 earlier hearing on it where everybody was

18 present, the initial temporary hearing?

19 MS. O'NEILL: The order was drafted by

20 the guardian and she had sent it to you.

21 THE COURT: Okay, had that been issued?

22 MS. O'NEILL: Had it been filed in the

23 Clerk's office?

24 THE COURT: Yes, ma'am?

25 MS. O'NEILL: No, it hadn't.

1 THE COURT: Okay.

2 MS. O'NEILL: However, we had an

3 additional hearing. And where this becomes

4 sticky is this conference turns into a

5 hearing. A hearing we must have all of the

6 parties procedural, due process rights should

7 be safeguarded.

8 Here my client's was not. This was

9 a full-blown hearing without notice. We did

10 not know you were going to take her testimony.

11 We -- if so I would have had my client to come

12 had you given us notice or there was a hearing

13 notice. And then the fact that you took the

14 position -- you became an advocate for the

15 defendant when you had this hearing.

16 It was upon Ms. Hale as a litigant

17 to file the proper motion, which would have

18 been a motion to expedite temporary order or

19 whatever. That was on her. She is here as a

20 pro se litigant and she should know and apply

21 the Rules of Civil Procedure. That wasn't

22 done here. The court did it for her and that

23 is detrimental to my client for a judge to

24 take -- an issue that shows impartiality. And

25 with that impartiality my client does not feel

1 that he received a fair trial. And the
2 hearing has been tainted. This case is
3 tainted. Even when I objected strenuously in
4 the court, and it's all through the record,
5 which is attached to the motion, I objected
6 and you made a statement that this has to do
7 with the child and you know we can do this.
8 But I have not found any law that
9 gives a Family Court judge any discretion
10 whatsoever to have a hearing without notice to
11 the parties. In fact, that's against our
12 constitutional rights, due process rights, to
13 have a hearing without notice. And because it
14 was supposed to be a conference call my client
15 wasn't there.
16 I was there to entertain whatever
17 the judge had to say between the guardian ad
18 litem and the defendant. And we were all
19 understanding that that was supposed to
20 admonish her from making any further ex parte
21 communications.
22 THE COURT: All right, let me just ask
23 one question and I'll give Ms. Hale a chance
24 to respond. Is it your position that I had
25 read the emails from Ms. Hale at that time

1 because if I remember, and I may be mistaken,
2 there was some communication I had with the
3 guardian and I want the guardian to address
4 this, that admittedly I had received some
5 emails and I did not want to read them until
6 everybody had a chance to read them. Is it
7 your position that I had read the emails prior
8 to that hearing?
9 MS. O'NEILL: I believe that you had read
10 them prior to the hearing because based on the
11 communication in the email you had this order
12 pre-drafted. Yes, it is my position.
13 THE COURT: Okay. Thank you ---
14 MS. O'NEILL: --- and Your Honor, quite
15 frankly ---
16 THE COURT: --- okay, let me hear from
17 Ms. Hale. We said we're not going to keep
18 this more than a fifteen minute motion ---
19 MS. O'NEILL: --- Your Honor, this was
20 scheduled ---
21 THE COURT: --- let me hear from Ms.
22 Hale. Thank ---
23 MS. O'NEILL: --- for thirty minutes ---
24 THE COURT: --- you -- please ---
25 MS. O'NEILL: --- thank you, Your Honor.

1 THE COURT: Okay. Thank you, ma'am. I
2 appreciate everybody -- you understanding
3 everybody -- we're under a time constraint
4 here. All right Ms. Hale, I'll give you a
5 chance to respond.
6 MS. HALE: Sir, this is all being brought
7 about because after the hearing that had taken
8 place where you had taken everything under
9 advisement and was going to fax the results as
10 to your decision to the guardian ad litem for
11 her to draft the order.
12 Once the information was faxed to
13 myself that day -- I received the fax on
14 August the 13th. I contacted Mr. Burroughs so
15 that I could make the arrangements to come
16 down here to pick up the kids ---
17 THE COURT: --- all right, now I had sent
18 you the order or the instructions ---
19 MS. HALE: --- the instructions ---
20 THE COURT: --- for the guardian ---
21 MS. HALE: --- a copy of the instructions
22 of what the order was to be. And in that
23 order it advised that I was able to pick up
24 the children on Saturday, August the 14th at
25 Mr. Burroughs' residence as well as their

1 clothing and stuff. When I called Mr.
2 Burroughs to make the arrangements so that I
3 could come down and get the kids he told me
4 that he wasn't allowing me to get the kids.
5 He then told me that he had to make some phone
6 calls. I assumed it was to discuss the
7 situation with his attorney ---
8 THE COURT: --- do you not understand
9 that instructions for an order and an order
10 are two completely different things?
11 MS. HALE: Yes, sir. Yes sir, I
12 understand that.
13 THE COURT: Had the order been issued
14 when you came?
15 MS. HALE: No. Ms. Stringer was working
16 on it but because of the wording and whatever
17 else it was that Ms. O'Neill found that she
18 didn't like particularly with the way -- with
19 the wording of the insurance and the child
20 support and whatever else it was, there were
21 several delays in it. Finally I contacted Ms.
22 Stringer I think on the 18th and asked -- it
23 was the same time I emailed you as well
24 because I forwarded it ---
25 THE COURT: --- all right, when you

1 emailed me did you email Ms. O'Neill and Ms.
2 Stringer?
3 MS. HALE: I hadn't but then I went back
4 and I forwarded the copy to them.
5 THE COURT: All right ---
6 MS. HALE: --- because I'm not ---
7 THE COURT: --- before we go any further
8 let me make sure you understand that you
9 cannot send anything to any judge at any time
10 unless the opposing side is notified. I don't
11 know whether I told you that at the ---
12 MS. HALE: --- you did on the 26th ---
13 THE COURT: --- hearing we had but I want
14 to emphasize that point to you ma'am. That is
15 totally, completely wrong ---
16 MS. HALE: --- yes sir. You made that
17 clear to me on the 26th. But anyway the whole
18 thing the conference call slash hearing took
19 place because Mr. Burroughs would not let me
20 come and get the kids.
21 You had given the direction for me
22 to be able to come and pick up the children so
23 that they would be able to start school in
24 West Virginia. He didn't want that. I don't
25 know whether it was per his -- in his

1 attorney's advice or what. But because there
2 was a delay in the actual order being signed
3 that caused the delay in me picking up Micah
4 and Devon and bringing them back home and
5 getting them back on their schedule and into
6 their regular daily routine. So that was the
7 reason for the communication.
8 Short of that I don't think there
9 has been any issues where you've been partial
10 to one person or the other. I think that with
11 given the circumstances and the delays and
12 everything that had been taking place I
13 honestly believe that is the right decision to
14 make.
15 THE COURT: Thank you, ma'am. All right,
16 let me hear from the guardian, Ms. Stringer.
17 MS. STRINGER: May it please the court?
18 I hear a lot of truths but let me try to tell
19 you what I remember of this. After the
20 hearing in August, the earlier August hearing,
21 you requested that I draft the order. I
22 immediately drafted the order. I sent it to
23 both Ms. Fair and Tracie to review. There
24 were some corrections. And in the meantime
25 Ms. Hale was given information that the

1 children were not going to be given to her. I
2 contacted Ms. Fair and then the email was sent
3 on August 18th directly to you. And I remember
4 you calling and saying I'm getting some ex
5 parte communication. You do a conference call
6 with Ms. Fair, Tracie, and myself. And we ---
7 THE COURT: --- okay, on August the 18th I
8 just happened to remember I was in Columbia at
9 the State judicial conference.
10 MS. STRINGER: Right. So we were having
11 difficulty trying to get any sort of
12 conference call. I'm kind of an idiot when it
13 comes to those things so I know we had
14 difficulty doing that. And then the hearing
15 was held on the 26th because Ms. Fair had
16 stated that she did not want to do a
17 conference call unless it was on the record.
18 And so that was the purpose of having it here
19 so we can have a record of it.
20 And I believe that it was to discuss
21 the ex parte communication. I don't know if
22 it was an admonishment; but that wasn't what
23 was conveyed to me. It was we need to discuss
24 this ex parte communication. So I can see
25 where it would be honestly on either side.

1 Maybe Ms. Hale believed it was to discuss the
2 actual contact -- content, while Ms. Fair
3 believed that it was to admonish Ms. Hale
4 based on her even sending that ex parte
5 communication. And then you issued this
6 order, which to my knowledge basically ---
7 THE COURT: --- let me ask you. Did you,
8 Ms. Fair, and I have any conversation about
9 setting up this or did you advise me that Ms.
10 O'Neill wanted it on the record?
11 MS. STRINGER: I advised you.
12 THE COURT: Okay. So it was not part of
13 a conference call that Ms. Hale wasn't a part
14 of?
15 MS. STRINGER: No, Your Honor.
16 THE COURT: Okay. I just wanted to make
17 sure we didn't exclude Ms Hale.
18 MS. STRINGER: That's correct I believe.
19 And then this order was issued basically, and
20 to my knowledge, because the other order had
21 not been signed yet because there was some
22 tweaking of the language. So that's what I
23 know of what occurred.
24 THE COURT: Okay, so the interim order,
25 the August 26th order, came before the actual

1 order from the August 9th hearing is that it?
2 MS. STRINGER: Yes. It was filed before
3 the other one.
4 THE COURT: All right, thank you very
5 much. I need to take this matter under
6 advisement and review the entire file, which
7 has now grown.
8 Let me just state for purposes of
9 the record that Ms. O'Neill is correct in that
10 part of that order had been pre-drafted and
11 about -- there were four or five different --
12 I remember having four or five different
13 orders on the bench that I had pre-drafted
14 that I thought might expedite matters based
15 upon what went on at that hearing. Obviously
16 the other ones were not necessary so they were
17 not issued, but various scenarios were
18 considered by this judge. I'll take this
19 matter under advisement and issue an order.
20 Thank you very much ---
21 MS. O'NEILL: --- Your Honor, may I just
22 put one thing on the record?
23 THE COURT: Certainly.
24 MS. O'NEILL: I'm just going to object
25 because I was not able to finish my argument.

1 At the last hearing you told me to schedule it
2 for the appropriate amount of time so that I
3 can state everything and I did so. I was not
4 given my full thirty minutes that I scheduled
5 this for and I feel like I was cut off again.
6 And also another ---
7 THE COURT: --- was this set for thirty
8 minutes?
9 MS. O'NEILL: Yes it was, Your Honor.
10 And that's what I was trying to tell you.
11 THE COURT: Okay, so you want more time.
12 I was trying to get Ms. Stringer -- you were
13 the one that informed me Ms. Stringer needed
14 to get out of here so I was trying to
15 accommodate Ms. Stringer. I'll be glad to
16 hear from you further.
17 MS. O'NEILL: Yes. And one thing that
18 should be said is that I didn't even get to do
19 my request, which is based on the arguments
20 that I made. And then also that I must inform
21 the court that my client, nor I, nor my
22 business partner who is also my husband
23 believes that this court was impartial and
24 that this court can not be impartial in this
25 matter or any other matter that we have before

1 this court. And we are moving that you recuse
2 yourself from this matter and any other
3 matters involving the lawyers of O'Neill and
4 Fair. And in the part ---
5 THE COURT: --- is that part of the
6 original motion or that something that's being
7 added on?
8 MS. O'NEILL: It's a part of my argument
9 today, Your Honor.
10 THE COURT: Okay, well you'll have to --
11 I can't consider any new matters. I'll let
12 you limit it to what's there and you'll
13 certainly be entitled to file any new matters
14 or any new motion that you want as far as
15 expanded relief. But I will consider this as
16 far as this ---
17 MS. O'NEILL: --- and also the basis is
18 also the basis of procedural due process,
19 which was not followed in this case. It
20 became a hearing and we were not given notice
21 of any kind that testimony would be taken.
22 And if so Mr. Hales (sic) was not able to get
23 on the stand, raise his hand, swear to tell
24 the truth and give you the other side. That
25 is totally unfair and against our court

1 systems in the U.S. And that's it, Your
2 Honor. Nothing further.
3 THE COURT: All right, you said you had
4 thirty minutes I want to make sure that you
5 were given your full time. Does that conclude
6 your ---
7 MS. O'NEILL: --- I just wanted to
8 finish. Thank you.
9 THE COURT: Okay. Thank you, very much.
10 This hearing is now concluded.
11 ********END OF TRANSCRIPT OF RECORD********
12
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1 C E R T I F I C A T E

2 I, the undersigned, Joyce C. Huck,
3 Official Family Court Reporter for the Ninth
4 Judicial Circuit of the State of South
5 Carolina, do hereby certify that the foregoing
6 is a true, accurate, and complete Transcript
7 of Record of the proceedings had and evidence
8 introduced in the trial of the captioned case,
9 relative to appeal, in the Court of Family
10 Court for Charleston County, South Carolina,
11 on the 31st day of January, 2011.
12 I do further certify that I am
13 neither of kin, counsel, nor interest to any
14 party hereto.
15
16 February 4, 2011
17
18
19 Joyce C. Huck
20 Joyce C. Huck, CVR
21 Court Reporter
22
23
24
25

Elonda Fair O'Neill, Esq.

From: Tracie Hale [tracie2592@hotmail.com]
Sent: Sunday, January 23, 2011 10:02 PM
To: [redacted]
Cc: Elizabeth J. Stringer; fair@mojustice.com
Subject: REQUEST TO PARTICIPATE IN HEARING VIA PHONE

Request to participate in Hearing via telephone

Hearing Date and Time:
Monday January 31, 2011 @ 9:00am

Hearing Info:
Plaintiff's Motion to Recuse

Re:
Kevin E. Burroughs vs. Tracie A. Hale
Case No.: 2010-DR-10-1836

Your Honor,

With regard to the above referenced case matter with the above referenced case number, I Tracie Hale am requesting that the court would allow me to participate in said hearing via telephone.

I am unable to obtain the time off from work without being docked in pay to travel back to South Carolina and appear in person for this hearing, as I have used all personal time thus far.

I am willing to call in to the courts to be patched thru or I can give a number where I can be reached. I also understand that if granted, I will need to have a notary available and with me.

I have copied all parties involved and they will receive the same e-mail. I will await your response so that I may plan accordingly.

Thanking you,
Tracie Hale

Elonda Fair O'Neill, Esq.

From: Tracie Hale [tracie2592@hotmail.com]
Sent: Wednesday, March 02, 2011 6:45 AM
To: Elonda O'Neill
Cc: Elizabeth J. Stringer; [redacted]
Subject: REQUEST FOR NO COMMUNICATIONS
Attachments: request for NO CONTACT.docx

Ms. O'Neill,

You will find attached a request for your client, Kevin E. Burroughs to have no further communications with myself with the exception of written letter and/or e-mail communications from a **personal** e-mail account.

This letter and attachments are being forwarded to ALL parties at the same time.

Said attachment will be notarized and mailed to all parties and filed with the Family Court of Charleston, SC.

Thanking you,
Tracie A. Hale

Elonda Fair O'Neill, Esq.

From: Elizabeth J. Stringer [elizabeth@stringerlaw.us]

Sent: Wednesday, August 18, 2010 5:00 PM

To: Paul Garfinkel

Cc: Elonda Fair O'Neill, Esq.; Tracie Hale

Attachments: Temporary Order.rtf

Judge Garfinkel,

I called Mrs. O'Neill per your instructions to inquire if she received the earlier email from Ms. Hale. Mrs. O'Neill does not feel comfortable with answering that question or with any ex parte communication between you and me. Mrs. O'Neill stated that she wants all future communication to be on the record. At this point, I have attached the Order which has been circulated and which I believe all parties approve. I did not receive a copy of the Child Support Guidelines to attach. Please advise. Thanking you, Liz Stringer

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE FAMILY COURT
NINTH JUDICIAL CIRCUIT

FILED
2011 APR 18 AM 10: 08
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Ex Parte:

Anthony B. O'Neill Sr. and
Elonda Fair O'Neill
(O'NEILL & FAIR)

PETITIONERS

ORDER

This matter is before me on Petitioners' Motion for an Order of Recusal for this Judge to recuse himself for hearing all matters in which either Anthony B. O'Neill Sr. or Elonda Fair O'Neill are representing any parties.

After careful review of the last Order issued in a case in which Elonda Fair O'Neill represented a party, this Judge included some language which may be construed to mean this court may have personal concerns with either Elonda Fair O'Neill or Anthony B. O'Neill Sr. or their clients. This is not true. This Judge should have either omitted the paragraph altogether or give an explanation of why this court chose to recuse itself in the case in question.

This Court will now explain the personal reasons the Court chose to recuse himself at the time of the issuance of the Order March 1, 2011 (from the hearing held January 31, 2011). That reason is simply that this Judge's mother was being assisted in her physical care by a person who has represented herself as a "dear friend" of Anthony B. O'Neill Sr. This Judge felt, perhaps erroneously, this may be, in some way, perceived as a conflict. Also, erroneously, this Judge did not want to disclose his mother's health issues on the public record. Due to an improper perception created by me, I do hereby recuse myself from any and all future hearings involving Anthony B. O'Neill Sr. and/or Elonda Fair O'Neill.

IT IS SO ORDERED

Paul W. Garfinkel, Judge
Family Court, Ninth Judicial Circuit,
Charleston County

April 6, 2011
Charleston, South Carolina

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, FAMILY COURT

By
DEPUTY CLERK

RECEIVED
MAY 04 2011
OFFICE OF
DISCIPLINARY COUNSEL

State of South Carolina
The Family Court of the Ninth Judicial Circuit

PAUL W. GARFINKEL
JUDGE

MERRILYN O. JOHNSON PhD.
Administrative Assistant

100 BROAD STREET
SUITE 248
CHARLESTON, SOUTH CAROLINA 29402-0934
TELEPHONE: (843) 958-4417
FAX: (843) 958-4433
E-MAIL: pgarfinkelj@sccourts.org

April 29, 2011

The Supreme Court of South Carolina
Office of Disciplinary Counsel
P.O. Box 12159
Columbia, SC 29211

Attn: Joseph P. Turner Jr. Esq.
Assistant Disciplinary Counsel

Re: Notice of Investigation
Complainants: Anthony B. O'Neill, Esq. and Elonda Fair O'Neill
Matter Number: 11-DE-J-0051

Dear Mr. Turner,

Enclosed please find my response and verification as to the above Notice of Investigation.

Thank you very much for agreeing to an extension of time for me to respond. I really appreciate it.

Yours very truly,

Paul W. Garfinkel

STATE OF SOUTH CAROLINA

BEFORE THE SUPREME COURT

COMMISSION ON JUDICIAL CONDUCT

In the Matter of Paul W. Garfinkel,

Judge.

Matter Number: 11-DE-J-0051

VERIFICATION

I, Paul W. Garfinkel, am the responding judge in the above-captioned matter. The response to the Notice of Investigation, dated March 21, 2011, is complete and accurate to the best of my knowledge and belief.

SWORN to and Subscribed before me
This 29th day of April

Notary Public for South Carolina
My Commission expires: _____

MY COMMISSION EXPIRES
MAY 18, 2015

Paul W. Garfinkel
Family Court Judge

Attachment 1

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
COUNTY OF CHARLESTON	)	DOCKET NO. 2009-DR-10-3755
CHARLESTON COUNTY DSS	)	
Plaintiff	)	
vs.	)	
DONNA ELLISON, TYRONE BUGG, LUCIUS JONES, RICHARD OWINGS, JR., RICHARD OWINGS, SR., VERMELLE OWINGS, DEADRA WRIGHT, JOHATHAN WRIGHT, and ERLINE BRIDGEMAN	)	
Defendants	)	TRANSCRIPT OF RECORD

March 9, 2011
Charleston, South Carolina

B E F O R E:

THE HONORABLE PAUL W. GARFINKEL, JUDGE

A P P E A R A N C E S:

ABIGAIL DUFFY, ESQ.
Attorney for the Plaintiff

CAROLYN BERLIN, ESQ.
Attorney for the GAL

VINCENT NORTHCUTT, ESQ.
Attorney for the Defendant Ellison

ANTHONY B. O'NEILL, SR., ESQ.
Attorney for Defendant Bugg

MARK A. PEPER, ESQ.
Attorney for Defendant Richard Owings, Jr.

JOYCE C. HUCK, CVR
Court Reporter

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PROCEEDINGS

MR. O'NEILL: Judge, may I approach?

THE COURT: About this case?

MR. O'NEILL: Yes.

THE COURT: No, then everybody would have to approach. Let's wait, okay.

MR. O'NEILL: Well ---

THE COURT: --- no, sir. You can say whatever you need to say on the record, okay.

MR. O'NEILL: Oh well.

THE COURT: Thank you. Please proceed, Ms. Duffy.

MS. DUFFY: Thank you, Your Honor. May it please the court? This is docket number 2009-DR-10-3755, D-S-S versus Donna Ellison, who is represented by Mr. Vincent Northcutt, Tyrone Bugg, who is represented by Mr. Anthony O'Neill, Mr. Lucius Jones, Your Honor he has failed to appear today; he has been served and was sent notice.

Mr. Richard Owings, Jr., who is represented by Mr. Mark Peper, Mr. Richard Owings, Sr., Ms. Vermelle Owings; they are both present. I believe that Mr. Peper also represents them.

1 THE COURT: Is that correct, Mr. Peper?
2 MR. PEPER: Yes, Your Honor.
3 MS. DUFFY: Ms. Deadra Wright and Mr.
4 Jonathan Wright, who are both represented by
5 Ms. Veronica Small. Your Honor, I believe she
6 submitted to the court a request for a
7 continuance, and Ms. Erline Bridgeman, who is
8 un-represented.
9 Our guardian ad litem is Ms. Joy
10 Morris, and she is represented by Ms. Carolyn
11 Berlin, and present from D-S-S I have Mr.
12 Kenneth Peeples. Your Honor ---
13 THE COURT: --- all right before you go
14 any further let me make sure I've got
15 everybody. I've got a Matt Fultz representing
16 Donna Ellison also. Are you substituting for?
17 MR. NORTHCUTT: The appointment order is
18 actually in my name, Your Honor. Mr. Fultz is
19 a younger associate at my firm that has come
20 to some earlier proceedings but I am her
21 attorney of record.
22 THE COURT: All right. So you'll be
23 handling this, is that correct?
24 MR. NORTHCUTT: Yes, sir.
25 THE COURT: Is Mr. -- is Tyrone -- Mr.

1 O'Neill, is your client here?

2 MR. O'NEILL: He is, Your Honor.

3 THE COURT: Okay. And Lucius Jones -- is

4 Lucius Jones here? No, he's not here. Thank

5 you very much. Please continue, Ms. Duffy.

6 MS. DUFFY: It's my understanding, Your

7 Honor, that Ms. Veronica Small moved to the

8 court this morning a request for a

9 continuance. She is currently sitting on the

10 bench municipally.

11 When we got here today, Your Honor,

12 we were also informed by several other parties

13 that they would not be in agreement with our

14 recommendations. This case has been mediated

15 before and we do not believe that mediation

16 would assist in reaching a resolution at this

17 time and we would ask the court to set this

18 for a formal pretrial.

19 THE COURT: All right. I'll go down the

20 list of attorneys I have. Mr. Northcutt,

21 anything you want to say at this time?

22 MR. NORTHCUTT: Your Honor, I mean Ms.

23 Ellison's position is obvious. All three of

24 these children were in her custody at the time

25 they were taken into D-S-S ---

1 THE COURT: --- we're not going to
2 resolve the issue today. Is there anything
3 you want to say about whether or not -- about
4 the pretrial, any reason you can't come to a
5 pretrial or your clients be here?
6 MR. NORTHCUTT: No, sir.
7 THE COURT: Okay. I'm not going to
8 resolve the case on argument of counsel. That
9 would be improper. Mr. O'Neill, anything you
10 want to add at this time?
11 MR. O'NEILL: May it please the court,
12 Your Honor? I would move this court for a
13 recusal. And I'd like the record to reflect
14 my reasons, Your Honor.
15 Your Honor, in a case Burroughs
16 versus Hale, 2010-1836 following a motion for
17 recusal Your Honor issued an order ultimately
18 granting recusal. And in that order Your
19 Honor added the following language:
20 [Reading] Also this court recuses
21 itself on an additional very personal reason.
22 This court feels this additional personal
23 reason does not need to be placed on the
24 record because placing this additional ground
25 as part of the record will not serve the end

1 of justice or benefit the children who are of
2 the most concern for this court. Your Honor
3 didn't specify the court's very personal
4 reasons. And myself and my wife in the firm
5 of O'Neill and Fair believes that this court
6 harbors some animus toward Elonda Fair O'Neill
7 or Anthony O'Neill, Sr. and the firm of
8 O'Neill and Fair.
9 We believe, Your Honor, based upon
10 the plain language of your order that this
11 court cannot be fair and impartial in cases
12 where we are involved. And that the inability
13 of this court to be fair and impartial denies
14 any clients that come before this court of due
15 process and fair and impartial tribunal.
16 Now the way the Family Court
17 operates, Your Honor, we don't know way in
18 advance who the judge is. This is not the
19 kind of motion that you give notice. In fact,
20 last time we were here we had a visiting
21 judge. Today when I come in we find that we
22 have Your Honor sitting on this case. It is
23 appearing to us at my firm that this court
24 ought to recuse himself from this case and any
25 other cases, Your Honor, where we are

1 representing a party.

2 THE COURT: All right. Mr. O'Neill I

3 think it would be proper to allow the other

4 parties time to respond so I will allow you

5 time to make a motion. I'm not going to

6 respond to your motion today; I think it is

7 improperly made. The other parties have a

8 right to weigh in on it.

9 So if you want to file a formal

10 motion you are certainly entitled to do that

11 and I will hear it because obviously it

12 affects me. So, I'm not going to rule on your

13 motion. I'm going to find that the motion was

14 improperly made and all parties are entitled

15 to notice.

16 MR. O'NEILL: Very well.

17 THE COURT: Thank you very much. All

18 right Mr. Peper, I'll be glad to hear from you

19 sir.

20 MR. PEPER: Nothing further from Mr.

21 Richard Owings nor the custodial parents, Mr.

22 and Mrs. Owing, Sr.

23 THE COURT: Thank you. Let the record

24 reflect that this court received a letter a

25 fax machine indicates it was sent at 11:07

1 p.m. yesterday, but the fax machine may be in
2 error; I don't know. It says that Ms. Small
3 on behalf of her clients is requesting a
4 hearing -- to schedule a hearing. Before we
5 schedule a hearing on it we will schedule a
6 pretrial on it. Ms. Small is obviously is in
7 agreement that this matter should be set for a
8 hearing. All right Ms. Berlin, I'll be glad
9 to hear from you on behalf of the guardian?
10 MS. BERLIN: We have nothing further,
11 Your Honor.
12 THE COURT: I'm going to advise the
13 Department of Social Services to contact the
14 docketing clerk and set it for a pretrial.
15 And Mr. O'Neill, when your motion is made --
16 make your motion and we will hear it at that
17 time. Thank you.
18 MR. O'NEILL: Your Honor, may I say?
19 THE COURT: Yes, sir?
20 MR. O'NEILL: We intend to file two.
21 I'll file one in this case because that's your
22 instructions but I'm doing a generic motion
23 for all motions to come before you.
24 THE COURT: All right. We'll schedule
25 enough time for it to be heard in this case

1 and we'll give notice to everyone and in
2 general.
3 MR. O'NEILL: Thank you, Your Honor.
4 ********END OF TRANSCRIPT OF RECORD********
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1 C E R T I F I C A T E

2 I, the undersigned, Joyce C. Huck,
3 Official Family Court Reporter for the Ninth
4 Judicial Circuit of the State of South
5 Carolina, do hereby certify that the foregoing
6 is a true, accurate, and complete Transcript
7 of Record of the proceedings had and evidence
8 introduced in the trial of the captioned case,
9 relative to appeal, in the Court of Family
10 Court for Charleston County, South Carolina,
11 on the 9th day of March, 2011.
12 I do further certify that I am
13 neither of kin, counsel, nor interest to any
14 party hereto.
15
16 March 30, 2011
17
18
19 _____
20 Joyce C. Huck, CVR
21 Court Reporter
22
23
24
25

Attachment 2

FILED
2010 AUG 31 PM 2:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KEVIN E. BURROUGHS, Plaintiff, vs. TRACIE A. HALE, Defendant.	IN THE FAMILY COURT NINTH JUDICIAL CENTER CASE NO.: 2010-DR-10-1836 **Temporary Order**

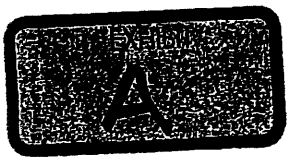
Date of Hearings: August 9, 2010 and August 26, 2010
Judge: Paul W. Garfinkel
Court Reporter: Joy C. Huck
Plaintiff's Attorney: Elonda Fair O'Neill
Defendant's Attorney: *Pro se*
Guardian *ad Litem*: Elizabeth J. Stringer

This matter came before the court on a Motion for Temporary Relief filed by the Plaintiff and initially heard on August 9, 2010. After reviewing all of the Pleadings and listening to argument by Plaintiff's counsel, this Court ordered as follows:

ONE: Temporary Custody: The Defendant is granted temporary custody of the parties' minor children.

TWO: Visitation: The Plaintiff shall be entitled to reasonable and liberal visitation. Parties are to consult with the Guardian *ad Litem* to try to resolve a visitation schedule. If there is no resolution, then both parties shall submit visitation plans to the Court for disposition. Defendant shall pick up the children and their personal property at noon (12:00 p.m.) on August 14, 2010 at Plaintiff's residence.

1/5 pwg



THREE: Visitation Provisions:

a) Neither parent to smoke or to allow others to smoke in the presence of the children in an enclosed space (home, car, etc.).

b) Neither parent to allow the boys to sleep with them in their bed.

c) Mother and Father to be restrained from the use of corporal punishment.

d) The parties' shall obtain speech therapy for their son, Micah, and they shall follow any recommendations regarding either of the children's health or mental care; and

e) For all contact between the children and Chastity's (the children's half-sister) boyfriend, Josh, to be supervised by Mother or another responsible adult; however, Mother's sister shall not act as supervisor.

FOUR: Child Support: The Plaintiff shall pay child support pursuant to the attached Child Support Guidelines. Said child support shall be paid monthly beginning on September1, 2010 and due on the first of each month thereafter.

FIVE: Reasonable Telephone Access: Each party shall be entitled to liberal and reasonable telephone access while the minor children are in the custody of the other party.

SIX: Notification of Major illness: Each party shall provide prompt and timely notification to the other party of any major illness of the minor children. Major illness shall include any illness lasting more than twenty-four (24) hours and/or requiring medical treatment.

SEVEN: Access to Records: Each party shall be entitled to full access to any records concerning the minor children, including, but not limited to, school records, daycare records, medical records, etc.

EIGHT: Addresses and Phone Numbers: Each party shall keep the other party informed of their respective addresses, specifically including their residential addresses and phone numbers; and each party shall provide written notice to the other party of any change of address.

NINE: Uncovered Medical Expenses of the Minor children: Defendant shall pay the first Two Hundred Fifty and 00/100 Dollars $250.00 per child per year of any uncovered medical/dental expenses. The parties shall pay their proportionate share according to the SC DSS Child Support Guidelines of any amount over the initial $250.00 per child per year. The defendant shall provide plaintiff with documentation of the medical statement with balance due. Both parties shall pay their proportionate share of the medical statement within 30 days of receipt of the statement.

TEN: Restraining Orders for Benefit of the Minor Children: The parties shall be temporarily restrained from:

a) Speaking ill of the other parent in the presence of the minor children and from allowing others to speak ill of the other parent in the presence of the minor children;

b) Interfering with the other parent's relationship with the minor children and from allowing others to interfere with the other parents relationship with the minor children;

c) Exposing the minor children to any overnight paramours and from exposing the minor children to overnight guests of the opposite sex whom are unrelated by blood or marriage;

d) Consuming any illegal drugs and excessive alcohol during custody/visitation periods;

e) Discussing this litigation with the minor children;

f) Exposing the minor children to any illegal and/or immoral conduct, including profanity; and,

g) Exposing the minor children to any violent conduct.

ELEVEN: Mutual Restraining Order: By agreement, the parties shall be temporarily restrained from harassing, abusing, threatening, bothering, or otherwise interfering with each other in any way whatsoever.

TWELVE: Discovery: The parties are granted full pretrial discovery pursuant to the South Carolina Rules of Civil Procedure and The South Carolina Family Court Rules.

THIRTEEN: Temporary Attorney's Fees and Costs: The issue of temporary attorney's fees and costs is held in abeyance at this time.

FOURTEEN: After issuing the instructions as outlined in paragraphs ONE through FOURTEEN, the Court was informed that the children were not transferred on August 14, 2010 as instructed in paragraph ONE above. The Court therefore amends its prior instructions and hereby orders as follows: A) Neither party shall email any judge directly and any future concerns shall be voiced through properly pleading to the Court pursuant to the Rules of Civil

Procedure and Family Court Rules of the State of South Carolina; b) the Court's main concern is that the children be enrolled in the school they will be attending pursuant to the earlier instructions and based upon this concern, Plaintiff Father shall meet Defendant Mother on Saturday, August 28, 2010 at Exit 50 off of I-77, Statesville, North Carolina at the JR Outlet between the hours of 1:30 p.m. and 2:30 p.m. to transfer the children. Plaintiff Father shall deliver at this same time all of the children's personal effects, including their clothing and school supplies.

AND IT IS SO ORDERED, ADJUDGED AND DECREED this 30 day of August, 2010 at Charleston, South Carolina.

PAUL W. GARFINKEL
CHARLESTON COUNTY
FAMILY COURT
NINTH JUDICIAL CIRCUIT

Attachment 3

The Toughest Nut: Handling Cases Pitting Unrepresented Litigants Against Represented Ones

By Russell Engler

ABSTRACT

Cases pitting unrepresented parties against represented ones present immense challenges for family law judges. This article discusses the governing law, including the Canons of Judicial Conduct and cases applicable to the scenario, before turning to materials providing guidance for judges, including articles, protocols, guidelines, and bench guides. The article concludes by broadening the frame, since judges do not act in a vacuum. Solutions to the dilemmas facing judges involve not only judicial techniques, but initiatives to ensure that the litigants appearing before the judges are better able to handle their cases and an expansion of the availability of counsel.

INTRODUCTION

A case that has both unrepresented and represented parties presents immense challenges to the legal system. The problems facing judges when all parties appear without lawyers ("pro se") generally are compounded in these "mixed" cases. Where all parties are unrepresented, judges may resort to more relaxed procedures without appearing to favor one party over the others, since the procedures equally affect both sides. Where only one party is unrepresented, however, judges face what seems to be an insoluble dilemma. If the judge handles the case as if both sides have counsel, the unrepresented litigant is at a distinct disadvantage, particularly where the lawyer for the opposing party deliberately tries to take advantage of the unrepresented litigant's unfamiliarity with the substantive law and procedures. Where judges attempt to avoid a miscarriage of justice and enable the unrepresented litigant to have her case heard, the represented party and his lawyer may perceive the efforts as actions favoring one side over the other.

Russell Engler is a Professor of Law and Director of Clinical Programs at New England Law | Boston. He has published articles on a range of topics, including Civil Gideon, Unrepresented Litigants, Access to Justice, Judicial Ethics, and Legal Education. Correspondence: rengler@nesl.edu

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Judges handling family law[1] cases confront this dilemma daily. Most family law cases involve at least one party without counsel, and often two.[2] Counsel's presence not only creates challenges for the judges in terms of how to handle their role, but also dramatically impacts the outcome of cases. Studies consistently show that representation is an important variable affecting case outcomes,[3] including in the area of domestic relations.[4] Where a represented party faces an unrepresented party, the likelihood of a sole-custody award to the represented party increases in comparison to cases in which both parties are represented or neither party is represented.[5] Represented parties seeking alimony or child support are more likely to obtain financial awards, while litigants seeking restraining orders are more likely to obtain them with representation.[6] Most divorce cases settle, raising challenges for judges faced with the product of unmonitored, hallway negotiations potentially rife with ethical violations committed by overreaching lawyers in their interactions with unrepresented, adverse parties.[7]

The increasing focus on the dilemmas facing not only judges, but court-connected mediators, clerks, and other court personnel in cases involving unrepresented litigants, occurs against the backdrop of unmet legal needs. Legal needs studies consistently show that 70% to 90% of the legal needs of the poor go unaddressed.[8] Many unmet legal needs involve housing, family, and consumer issues.[9] Legal services offices only represent a fraction of eligible clients seeking assistance.[10] The recent economic downturn has exacerbated the problem by increasing the numbers of those in need of legal assistance

1 In this article, the use of the term "family law" excludes juvenile cases, which often involve a right to counsel, and focuses on what are often referred to as "domestic relations" cases. For a thoughtful discussion of access to justice issues in courts that handle juvenile cases, see Jay D. Blitzman, *Access to Justice in Juvenile Court*, 93 MASS. L. REV. 230 (2010).

2 Russell Engler, *And Justice for All–Including the Unrepresented Poor: Revisiting the Role of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 2047-2052 (1999); John M. Greacen, *Self-Represented Litigants and Court and Legal Services Responses to Their Needs: What We Know*, at 3-6 (2002) (available online at http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/SRLwhatweknow.pdf). For an edited version of the article, see John M. Greacen, *An Administrator's Perspective: The Impact of Self-Represented Litigants on Trial Courts—Testing Stereotypes Against Real Data*, 41 JUDGES J. 32 (2002). Surveys of litigants in New York City found that 75% of the litigants in the New York City Family Court and 90% of the tenants in Housing Court appeared without counsel. *Self-Represented Litigants: Characteristics, Needs, Services, The Results of Two Surveys*, Office of the Deputy Chief Administrative Judge for Justice Initiatives (Nov. 2005).

3 *See* Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L. J. 37 (2010).

4 *Id.* at 51-53. Regarding my use of the terms "family law judges" and "domestic relations judges," see note 1, *supra*.

5 *Id.* at 53.

6 *Id.* at 53-54.

7 *See* ABA Model Rule of Professional Conduct, 4.3; Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 122-130 (1997).

8 LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, A REPORT OF THE LEGAL SERVICES CORPORATION (Sept. 2005), *available at* http://www.lsc.gov/JusticeGap.pdf. Virtually "all of the recent state studies found a level of need substantially *higher* than the level" found in a 1994 American Bar Association study. *Id.* at 13 (emphasis in original).

9 *Id.*

10 *See* Alan W. Houseman, *The Future of Legal Aid: A National Perspective*, 10 U.D.C. L. REV. 35, 43-46 (2007).

while decimating the budgets of legal services providers, forcing the programs to downsize.[11] The past 15 years have seen an array of responses to the flood of unrepresented litigants,[12] the increased use of state Access to Justice Commissions,[13] and a revitalized movement seeking to establish an expanded civil right to counsel.[14]

This article explores the troublesome scenario for family court judges involving cases pitting unrepresented parties against represented ones. Part I discusses the governing law, involving the Canons of Judicial Conduct, cases discussing the judicial role, and cases involving discipline and reappointment of judges. Part II turns to the growing body of materials designed to provide guidance for the judges, including articles, protocols, guidelines, and benchguides. Part III broadens the frame, to underscore the point that judges do not act in a vacuum. Solutions to the dilemmas facing judges involve increased focus on techniques that judges can use effectively to manage their cases, but the solutions also involve initiatives to ensure that the litigants appearing before them can handle their cases and an expansion of the availability of counsel. The article therefore closes by articulating a comprehensive approach to providing meaningful access to justice.

I. THE LAW GOVERNING THE JUDICIAL ROLE

A. The Judicial Code and Caselaw[15]

The guidance in the Canons of Judicial Conduct comes from general language applicable to judges in all cases. Judges are required to "Uphold the Integrity and

11 LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS, AN UPDATED REPORT OF THE LEGAL SERVICES CORPORATION, at 5 (Sept. 2009), http://www.lsc.gov/pdfs/documenting_the_justice_gap_in_america_2009.pdf ("The current economic crisis, with its attendant problems of high unemployment, home foreclosures and family stress has resulted in legal problems relating to consumer credit, housing, employment, bankruptcies, domestic violence and child support, and has pushed many families into poverty for the first time."); *Id.* at 6 ("While a long-term trend of increased state funding for civil legal aid has continued, budget crises have put this funding at risk in some states. Revenues from state Interest on Lawyers' Trust Accounts (IOLTA) programs rose in some states with new revenue enhancement techniques, but have recently fallen precipitously in many states as a result of low interest rates and the declining economy, reducing trust account deposits."); David Riley, *Free legal services suffering as demand rises*, METROWEST DAILY NEWS, June 28, 2009 (describing increased demand for legal services, combined with cutbacks affecting legal services offices in Massachusetts, including MetroWest Legal Services), *available at* http://www.metrowestdailynews.com/news/x768070132/Free-legal-services-suffering-as-demand-rises; Jimmie B. Gates, *Legal Program for Poor May See Layoffs, Cutbacks*, THE CLARION-LEDGER, June 29, 2009, at A5 (describing a similar impact to a program in Mississippi).

12 *See, e.g.*, Engler, *supra* note 2; JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS, AMERICAN JUDICATURE SOCIETY & STATE JUSTICE INSTITUTE (1998) [hereinafter MEETING THE CHALLENGE].

13 Although only five states had Access to Justice Commissions in 1999, the number had increased to 23 by June 2006. More than a dozen additional states had an active committee of the state bar or bar association that is charged with the broad access to justice function. *See Access to Justice Partnerships, State by State*, SPAN ACCESS TO JUSTICE SUPPORT PROJECT, at 1 (May 2005), *available at* http://www.nlada.org/DMS/Documents/1113666733.35/NLADA-AccessToJustice%239.pdf.

14 For one summary of recent activity, see Engler, *supra* note 3 at 43-44.

15 For a more detailed exploration of the following sections, see Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J. L. ETH. & PUB. POL'Y 367 (2008).

Independence of the Judiciary," and to "Avoid Impropriety and the Appearance of Impropriety."[16] The concepts are intertwined with the obligation that judges act in a manner that promotes public confidence in the "independence, integrity and impartiality" of the judiciary.[17] Judges must perform their duties "impartially, competently and diligently,"[18] "fairly" and "without bias or prejudice," while remaining "patient, dignified and courteous."[19]

The text of the Canons and Commentary provides little direct guidance as to how active or passive a judge should be in handling cases involving unrepresented litigants: "In sum, the Canons of Judicial Ethics require judges to remain fair and impartial and to maintain the appearance of fairness and impartiality, but give no further guidance about the meaning of those terms when unrepresented persons appear in court."[20]

To provide some guidance where unrepresented litigants appear, the ABA House of Delegates in 2007 added a new comment to Rule 2.2, regarding Impartiality and Fairness: "It is not a violation of this Rule . . . for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."[21] By the summer of 2010, ten states had adopted the ABA comment or comparable language.[22]

16 *See* American Bar Association, Model Code of Judicial Conduct, Canon 1 (2007) (formerly Canons 1 and 2), *available at* http://www.abanet.org/cpr/mcjc/toc.html.

17 *Id.* Rule 1.2, (formerly Canon 2A).

18 *Id.* Canon 2, (formerly Canon 3).

19 *Id.* Rules 2.2, 2.3(A) and 2.8(B), respectively. These phrases previously were codified in various clauses of Canon 3.

20 Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough, & Richard Zorza, *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGES' J. 16 (Winter 2003) [hereinafter *Judicial Techniques*].

21 *See* ABA MODEL CODE OF JUDICIAL CONDUCT *at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf. The changes to the Code were approved on Feb. 12, 2007. *See* http://www.abanet.org/judicialethics/approved_MCJC.html.

22 Eight states (Arkansas, Arizona, Hawaii, Indiana, Minnesota, Nevada, Utah, Wyoming) have adopted that exact language (except that Arizona uses the term "self-represented" rather than pro se). E-mail from Cynthia Gray, Director, Center for Judicial Ethics, American Judicature Society, to author, dated Feb. 11, 2010. Montana not only adopted a variation on the ABA language but also added the following language as a comment to Rule 2.5, covering Competence, Diligence and Cooperation:

> In accomplishing these critical goals in the increasing number of cases involving self-represented litigants, a judge may take appropriate steps to facilitate a self-represented litigant's ability to be heard.

Montana Code of Judicial Conduct, Rule 2.5, Comment [4], *available at* http://fnweb.mt.gov/idmws/custom/SLL/SLL_FN_BLOG.asp?IDMID=003798694 (visited July 6, 2010). Ohio similarly adopted its own language, in addition to the ABA language:

> The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard. By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making referrals to any resources available to assist the litigant in the preparation of the case.

Ohio Rules of Judicial Conduct, Rule 2.6, Comment 1A, *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/conduct/judcond0309.pdf (March 1, 2009). As of this writing, New Hampshire is in the process of adopting the language in the rule as well. Author conversation with Chief Justice Broderick, April 1, 2010; e-mail to author from David Peck, Secretary, New Hampshire Advisory Rules Committee, Aug. 9, 2010.

The new language continues a consistent trend encouraging judges to make reasonable accommodations to unrepresented litigants as a matter of fairness, but hardly resolves the difficult questions facing judges daily. Nor do the existing decisions do more than provide general guidance. Decisions interpreting the judicial role where unrepresented litigants are involved draw from the basic principles in the Canons requiring that judges remain impartial and neutral, while being fair and providing justice. Some decisions emphasize that unrepresented litigants must play by the same rules as represented parties and can expect no special treatment.[23] Some caution that the judge may not play the role of the unrepresented litigant's advocate or attorney.[24] Others suggest that judges must assist the unrepresented litigant to avoid a miscarriage of justice, and must do so in construing pro se pleadings.[25]

Drawing lessons from the decisions is complicated by two problems. First, although most cases settle, the published decisions often focus on the judge's role in construing pleadings or conducting trials, providing little guidance on other tasks that occupy the attention of judges in civil cases. Second, the cases recycle general language without regard to the context of the case. Language from criminal proceedings, where the defendant enjoys a constitutional right to appointed counsel, or from decisions involving vexatious plaintiffs, is applied to other fact patterns without any analysis as to whether application is appropriate.[26]

The language of the New Hampshire Supreme Court over 30 years ago remains an apt articulation of the predicament facing judges: "The proper scope of the court's responsibility to a pro se litigant is necessarily an expression of careful exercise of judicial discretion and cannot be fully described by specific formula."[27]

Yet an intermediate Illinois appellate court decision only five years later rings true as well. Faced with the thorny predicament of a trial between skilled counsel and a legally unsophisticated, unrepresented party, the trial court intervened periodically, trying to avoid a miscarriage of justice. The represented party appealed, contending that the trial judge had overstepped his bounds. A divided panel affirmed the decision, observing: "The heavy responsibility of ensuring a fair trial in . . . a situation [involving a pro se litigant] rest[s] directly on the trial judge. The buck stops there. . . ."[28]

Decisions involving discipline and reappointment provide further evidence that the trend is toward providing assistance to those without counsel, as opposed to refusing to do so. There are few reported decisions in the area, but virtually all decisions in which judges are disciplined or not reappointed involve harsh, demeaning, and abusive treat-

23 *See, e.g.*, Engler, *supra* note 2, at 2013, n.122.

24 *Id.* at 2013, n.123.

25 *Id.* at 2013-14, n.124; *Judicial Techniques, supra* note 20, at 20 ("All federal and virtually all state courts have precedents that papers submitted by persons representing themselves will be subject to a different standard of judicial review than filings submitted by lawyers").

26 For a more detailed analysis of the case law, see Engler, *supra* note 2, at 2013-14, n.124; *Judicial Techniques, supra* note 20, at 20.

27 Austin v. Ellis, 408 A.2d 784, 785 (N.H. 1979).

28 Oko v. Rogers, 446 N.E.2d 658, 661 (Ill. App. 3d 1984). As the authors of *Judicial Techniques* observe, "[t]his is the only case we found that is directly on point for the issue addressed in this article." *Judicial Techniques, supra* note 20 at 42.

ment by the judge toward those without counsel.[29] With rare exception, judges are not penalized for attempting to level the playing field.[30]

II. GUIDANCE AND GUIDELINES

A. Guidance

1. Meeting the Challenge

Unrepresented litigants were hardly a new phenomenon in the 1990s, but that decade saw the beginnings of concrete steps to move the conversations about how to handle the surge of "pro se litigation" from the shadows into the open. No uniform rules or guidelines assisted judges as they grappled with their caseloads. One survey reported that, according to "91% of the judges . . . their courts had no general policy addressing the manner in which pro se litigants should be handled in the courtroom or in the litigation process generally."[31]

One effort to provide much-needed guidance was the 1998 publication of *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook for Judges and Managers*, by the American Judicature Society (AJS) and State Justice Institute (SJI). The volume included ten pages of Judicial Attitudes and Strategies, informed by judges' responses to survey questions. The responses revealed a wide array of practices. Not surprisingly, the more that judges distrusted unrepresented litigants and felt the litigants were trying to take advantage of the legal system and pursue hidden agendas, the less likely the judges were to feel any obligation to help. The more that judges felt that the absence of counsel was depriving litigants of access to justice, the more likely the judges were to help.[32]

Some judges felt that it was harder to maintain control over the proceeding where both parties were unrepresented, but others felt that those cases were easier.[33] Judges in this camp explained their views with comments such as:

29 Kerry Hill, *Meeting the Challenge of Pro Se Litigation: An Update of Legal and Ethical Issues* (August 2000), http://www.ajs.org/prose/pro_legal_ethical.asp; *Matter of New York State Comm. on Jud. Conduct v. Williams* (2001), *available at* http://www.scjc.state.ny.us/Determinations/W/williams,_edward_(1).htm (judge admonished for entering judgment for the plaintiff in an eviction case without permitting the self-represented tenant an opportunity to be heard on the contested issue of rent abatement); *Matter of New York State Comm. on Jud. Conduct v. Assini* (2005), *available at* http://www.scjc.state.ny.us/Determinations/A/assini,_jo_anne.htm (judge disciplined for failure to inform indigent litigants of their right to assigned counsel and speaking to self-represented litigants in an "intemperate, demeaning manner").

30 An extreme case is *Inquiry Concerning Judge D. Ronald Hyde, No. 166*, (Commission on Judicial Performance, 1973). Judge Hyde aggressively took the side of partisan for one litigant, after observing the other party openly threaten to slit her throat, by preparing pleadings and arranging for them to be served by his deputy. The Commission concluded that the judge's behavior had "embroiled" him in the matter, evidenced a lack of impartiality, and constituted prejudicial misconduct. *Id.*, discussed in HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A NATIONAL BENCH GUIDE FOR JUDICIAL OFFICERS, SELF-REPRESENTED LITIGATION NETWORK [hereinafter NATIONAL BENCH GUIDE], 3-13- 3-14 (2008) *available at* http://www.selfhelpsupport.org/library/folder.42613-Communication_Protocol [registration/log-in at selfhelpsupport.org required].

31 MEETING THE CHALLENGE, *supra* note 12, at 121.

32 *Id.* at 51-57; Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13 (July-August 1998).

33 *Id.* at 54.

- "Not nearly as many problems. Both parties are free to discuss the matter in open court . . ."
- "When all the parties are pro se, I find it easier to resolve. . . ."
- ". . . both sides are on equal footing."[34]

For these judges, cases involving a represented party against an unrepresented one presented the greatest challenge to maintaining impartiality. Judges referred to the "perception of bias" when the court takes over the questioning, and found themselves on the "horns of a dilemma" about whether they assisted the pro se litigant or ruled in favor of an attorney.[35] On the one hand, attorneys get impatient when judges take the time to explain technical objections to pro se litigants at trial. On the other hand, judges "observe that some lawyers take advantage of the fact their opponent is self-represented."[36] The judges' concerns are framed in terms of impartiality whether they assist or refrain from assisting, but "some judges look beyond the issue of impartiality and voice concern regarding whether justice has been done."[37]

2. *Judicial Techniques for Cases Involving Self-Represented Litigants*

Guidance for judges appeared with increasing regularity in the decade after publication of *Meeting the Challenge*. In 2003, *Judicial Techniques for Cases Involving Self-Represented Litigants* "attempt[ed] to stimulate a national dialogue about how judges can best structure and manage their courtrooms to accommodate the needs of self-represented litigants."[38] After reviewing the ABA Code of Judicial Conduct, and protocols developed in Minnesota, the authors summarized over 25 published decisions from around the country, attempting to organize the guidance emerging in case law. Their proposed synthesis of judicial techniques starts with general principles, followed by specific recommendations for handling cases involving two unrepresented parties and then cases involving both represented and unrepresented parties.

The principles gleaned from the synthesis advise judges to prepare for cases involving unrepresented litigants, to provide guidelines, to conduct proceedings in a structured fashion, but in an informal atmosphere, and to ask questions.[39] Where only unrepresented parties are involved, judges can swear in both parties at the outset, but otherwise avoid the distinction between argument and testimony, while maintaining strict control over the proceedings and remaining alert to power imbalances.[40] In cases involving both represented and unrepresented parties, the authors report that "[m]ost trial judges find cases with unequal resources most difficult." The authors urge judges (1) to convince the

34 *Id.*
35 *Id.* at 53.
36 *Id.*
37 *Id.*
38 *Judicial Techniques, supra* note 20 at 16.
39 *Id.* at 45-46.
40 *Id.* at 46-47.

attorney of the benefits of proceeding informally; (2) to overrule objections likely to waste judicial resources; (3) to set special ground rules for conducting the proceeding under the rules of evidence; and (4) to use leading questions as prompts. The authors also recommend that judges offer the unrepresented litigant a continuance if necessary to allow the unrepresented litigant to obtain assistance.[41]

3. *Reaching Out or Overreaching*

The 2005 AJS/SJI publication *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*[42] also offers a synthesis of the case law. The author first acknowledges that "[u]ncertainty among trial judges about how to treat self-represented litigants is understandable given the mixed signals sent by appellate courts."[43] Case after case insists that "self-represented litigants are held to the same standard as attorneys," but also "describes exceptions to that rule. . . ."[44]

> One way to reconcile these competing holdings affirms that attorneys and self-represented litigants are held to the same standard—courts should be lenient with both when appropriate to promote the goal of deciding cases on the merits.[45]

Reaching Out or Overreaching urges a more active judicial role than *Judicial Techniques*. The former document covers all stages of the proceeding, with guidance on explaining the process, instructing self-represented litigants regarding procedural actions, asking questions, and handling evidence. Regarding settlement, the best practices advise judges to "engage in allocution to determine whether the self-represented litigant understands the agreement and has entered into it voluntarily"; this process includes determining "that any waiver of substantive rights is knowing and voluntary."[46] Regarding hearings, the Best Practices advise the use of pre-hearing practices that include explaining the process and ground rules,[47] before discussing how judges may examine witnesses and otherwise ensure that their hearings provide a meaningful opportunity for all litigants to be heard.[48]

41 *Id.* at 47-48.

42 CYNTHIA GRAY, REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS, AMERICAN JUDICATURE SOCIETY AND STATE JUSTICE INSTITUTE (2005), *available at* http://www.ajs.org/prose/pdfs/Pro%20se%20litigants%20final.pdf [hereinafter REACHING OUT OR OVERREACHING].

43 *Id.* at 5.

44 *Id.* at 5-6. As the author, Cynthia Gray, notes, often it is within the same case that both the rule and exception are announced. *Id.*

45 *Id.* at 6.

46 *Id.* at 54 (Proposed Best Practices 25 & 26).

47 *Id.* at 55 (Proposed Best Practices 27-30). These steps include explaining the elements and the burden of proof, explaining the kinds of evidence that can and cannot be considered, and trying to get all parties to agree to relaxed rules of procedure so the hearing can proceed informally. *Id.*

48 *Id.* at 55 (Proposed Best Practices 34-38). The Proposed Best Practices advise judges to question witnesses when the facts are confused, undeveloped, or misleading, follow the rules of evidence generally but use discretion and overrule objections on technical matters, not allow counsel to bully or confuse self-represented litigants, and take other steps necessary to prevent obvious injustice. *Id.*

The underlying premises of the recommended practices are that (1) the judge is more than a mere arbitrator, referee, or moderator; (2) the judge can control the orderly presentation of evidence; (3) cases should be decided on the merits; and (4) the rules of procedure should work to do substantial justice. The document concludes:

> Without raising reasonable questions about impartiality, judges *should* exercise discretion:
> - To make equitable, procedural accommodations
> - To provide self-represented litigants reasonable opportunity to have cases fully heard.[49]

Supporting the thesis that judges should make equitable, procedural accommodations and provide self-represented litigants a reasonable opportunity to have cases fully heard, the author urges avoiding the appearance of bias in favor of represented parties and attorneys. Responding to the suggestion that assistance to unrepresented litigants might create the appearance of bias in their favor, the author emphasizes the importance of exhibiting respectful demeanor to all participants as the "primary method of ensuring self-represented litigants do not experience or perceive bias.[50] The goal of exhibiting respect is enhanced by "refraining from harping on a litigant's pro se status" and by addressing self-represented litigants " 'with titles connoting equal respect to that afforded opposing counsel.' " The author cites decisions from two state Commissions on Judicial Conduct cautioning judges against acting in ways that create the appearance that lawyers or represented parties have special positions of influence.[51]

4. *A National Bench Guide for Judges*

Building on the guidance from publications such as *Judicial Techniques* and *Reaching Out or Overreaching*, California developed a bench guide for judges.[52] The California Guide became the template for the 2008 National Bench Guide, entitled *Handling Cases Involving Self-Represented Litigants*.[53] Chapter 3 of the National Bench Guide covers the Law applicable to a Judge's "Duties in Dealing with Self-Represented Litigants," includ-

49 *Id.* at 89 (final Power Point slide) (emphasis in original).

50 *Id.* at 17.

51 *Id.* at 17-18, nn. 68-69, citing decision from the Wyoming Commission on Judicial Conduct and Ethics and the Alabama Judicial Inquiry Commission.

52 The California Bench Guide was promulgated in 2007. *See* STATE JUSTICE INSTITUTE AND JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, HANDLING CASES INVOLVING SELF-REPRESENTED LITIGANTS: A BENCHGUIDE FOR JUDICIAL OFFICERS (Jan. 2007) [hereinafter CA BENCH GUIDE], *available at* http://www.nlada.org/DMS/Documents/1176151729.08/CA%20pro%20se%20Benchbook.pdf. Chapters of the Guide are included in the conference materials for the California Conference on Self-Represented Litigants, held in San Francisco, May 14-18, 2007, and available online at http://www.courtinfo.ca.gov/programs/equalaccess/2007Materials.html.

53 NATIONAL BENCH GUIDE, *supra* note 30. New York developed a draft guide in 2008, based on the California guide, which was not released in final form, in light of the release of the National Bench Guide. For reference to the New York draft guide, see *Expanding Access to Justice in New York State: A Ten-Year Report Prepared by the Office of the Deputy Chief Administrative Judge for Justice Initiatives* 27 (March 2009) [hereinafter *New York Bench Guide*], *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=158 (A copy of the draft bench guide is on file with the author).

ing the law relevant to judicial ethics.[54] After explaining that the ethical rules support access and neutrality, and after discussing the right to self-representation, the guide includes a section urging judges to consider self-represented status when exercising discretion and reminding judges that self-represented litigants are afforded much latitude but have no greater legal rights.[55]

The Bench Guide sets the context by discussing who self-represented litigants are and what they face when they come to court, as well as the general need to expand access to court without compromising neutrality.[56] The Bench Guide then turns to specific techniques for evidentiary challenges, caseflow management, courtroom and hearing management, and settling cases[57] before covering special due process considerations, communication tools, avoiding unintended bias, and addressing litigant mental health issues in the courtroom.[58]

B. Guidelines and Protocols

Some states have adopted protocols or guidelines to assist judges who handle cases involving unrepresented litigants. Minnesota, followed by Idaho, developed proposed protocols in the mid-1990s focusing entirely on evidentiary hearings. The ten protocols include explaining the process, the elements, the kinds of evidence and limits of kinds of evidence that can be used, and which party has the burden of proof. The protocols also include verifying that the parties understand they have the right to be represented by an attorney and that they understand the process, and cautioning judges to "avoid the appearance of advocacy" when they question witnesses.[59] The protocols do not distinguish between cases involving only unrepresented litigants and those pitting an unrepresented party against a represented one.

In 2006, Massachusetts promulgated its Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, which apply to all phases of the court's operation.[60] Regarding pre-hearing interaction, the Guidelines encourage judges to make reasonable efforts to ensure that litigants understand the trial process and authorize judges to explain the elements of claims and defenses as they would to a jury.[61] At trial, judges may provide self-represented litigants with the opportunity to present their cases meaningfully, and

54 NATIONAL BENCH GUIDE, *id.*, Chapter 3.

55 *Id.*

56 *Id.* Chapters 1 & 2.

57 *Id.* Chapters 4-7.

58 *Id.* Chapters 8-11.

59 *Judicial Techniques*, *supra* note 20 at 18.

60 *Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants* (April 28, 2006) [hereinafter *MA Guidelines*], *available at* http://www.mass.gov/courts/judguidelinescivhearingstoc.html. The drafters recognize that the "issues and challenges presented by self-represented litigants may vary in different court departments" and judges therefore "are encouraged to use the Guidelines in a way that best suits the needs of their court and the litigants before them." *Introduction*, *id.*, at http://www.mass.gov/courts/admin/ji/judguideselfrep_comment_intro.html.

61 *Id.* (Guideline 2.1 & Commentary).

may ask questions to elicit general information and obtain clarification; where all parties are self-represented, judges may have the parties stipulate to proceed informally.[62] Finally, in approving settlements:

> Judges should review the terms of settlement agreements, even those resulting from ADR, with the parties. Judges should determine whether the agreement was entered into voluntarily. If there are specific provisions through which a self-represented litigant waives substantive rights, judges should determine, to the extent possible, whether the waiver is knowing and voluntary.[63]

The Commentary provides that when assessing whether a waiver of substantive rights is "knowing and voluntary," the judge may consider how the phrase is used in the context of informed consent: "i.e., the agreement by a person to a proposed course of conduct after receiving adequate information and explanation about the material risks and reasonably available alternatives to the proposed course of conduct."[64]

The Guidelines apply uniformly to cases in which both sides are without counsel and cases in which one side has a lawyer, but the Commentary often refers explicitly to the latter circumstance. Thus, the commentary encourages judges to make litigants aware of the consequences of proceeding without an attorney, and to "explain that counsel for the opposing party does not represent the self-represented litigant and may not advise the self-represented litigant . . ."[65] "It may be particularly helpful for the judge to provide the opportunity for the parties to discuss settlement in the presence of the judge in cases where one party is self-represented and the other party has an attorney"; "[i]n such cases, the self-represented litigant may be afraid to deal with the attorney for the opposing party outside of court. . . ."[66] Regarding application of the rules of evidence, the judge should be the "directing and controlling mind at the trial" whether the parties are represented or not:[67]

> While this does not mean that the judge must become a lawyer for a self-represented litigant, the judge should recognize when opposing counsel is "engaging in improper tactics and taking advantage of the [self-represented litigant's] unrepresented status" and "promptly intervene[], not to be of assistance to the [self-represented litigant], but to assert a judge's traditional role of making sure that all parties receive a fair trial."[68]

The Minnesota and Massachusetts guidelines and protocols apply statewide, but other protocols target specific contexts in which unrepresented litigants typically face represented parties. For example, the Administrative Judge of the Civil Court of the City of New York has issued advisory notices guiding judicial practices in approving stipulations

62 *Id.* (Guideline 3.2 & Commentary).

63 *Id.* (Guideline 3.4).

64 *Id.* (Commentary to Guideline 3.4, citing ABA Model Rules of Professional Conduct 1.0(e) (2003)).

65 *Id.* Commentary to Guideline 1.3.

66 *Id.* Commentary to Guideline 2.2.

67 *Id.* Commentary to Guideline 3.2, quoting Commonwealth v. Sapoznik, 28 Mass. App. Ct. 236 (1990).

68 *Id.*

in landlord-tenant and debt collection cases, in which the defendants typically are without counsel. In the landlord-tenant context, case law allows for liberal vacatur of stipulations when the terms are inequitable.[69] Advisory Notice 1 therefore "strongly advises" housing court judges that stipulations involving self-represented litigants should not be approved unless the court is convinced that the pro se litigant understands the terms of the stipulation and has conducted an allocution on the record. While no specific format for the allocution is mandated, "minimum guidelines" include ensuring that the pro se litigant understands the terms of the stipulation, the effect of non-compliance, that he or she may try the case, his or her claims and/or defenses, and all available options.[70] Advisory Notice 9 directs judges handling consumer debt cases, before "so ordering" stipulations, to ascertain particular facts on the record, including whether the plaintiff is licensed, when the debt was incurred and whether it is time-barred, whether defendant acknowledges the debt, understands the remaining provisions, and whether the defendant's income is exempt from garnishment.[71]

C. The Importance of Judicial Education and Training

Education, training, guidelines, and protocols are important tools in accelerating the transition in judicial attitudes. Sharing techniques that work and incorporating the techniques as part of judicial education and training embolden judges who might otherwise feel isolated and fearful to use these techniques. Individual judges prepared to exercise their discretion in ways that seek to protect vulnerable unrepresented litigants will find invaluable tools in the documents discussed here. Building on this literature, the Self-Represented Litigation Network developed a model curriculum for training judges.[72] The curriculum materials, available online at SelfHelpSupport.org, include a guide to the materials, optional activities, videos, and resources.[73] All 32 video clips relate to the topic of Best Practices in Self-Represented Litigation in the Courtroom, but the three videos in Part Fourteen focus directly on "Cases with One Side Represented."[74] Adopting protocols that support and guide the active judicial role is also crucial.[75]

69 *New York Bench Guide*, *supra* note 53, at 3-17.

70 *Id.* at 3-18-19.

71 *Id.* at 3-16.

72 For a description of the curriculum, see Richard Zorza, *New Curriculum Helps Promote Access for the Self-Represented*, FUTURE TRENDS IN THE STATE COURTS, 2008, *available at* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/accessfair&CISOPTR=125.

73 *See* CURRICULUM ON JUDICIAL LEADERSHIP IN ACCESS TO JUSTICE FOR THE SELF REPRESENTED, HANDBOOK OF OPTIONAL ACTIVITIES, SELF-REPRESENTED LITIGATION NETWORK (2008), *available at* http://www.selfhelpsupport.org/library/folder.169512-CURRICULUM_RESOURCE_MATERIALS [registration/log-in at selfhelpsupport.org required].

74 *See Best Practices in Self-Represented Litigation in the Courtroom: Videos for the Courtroom Curriculum*, Self-Represented Litigation Network (2008), Videos 25-27, *available at* http://www.selfhelpsupport.org/library/folder.169512-CURRICULUM_RESOURCE_MATERIALS [registration/log-in at selfhelpsupport.org required].

75 Protocols restricting more active judges, rather than providing guidance to judges in their efforts to provide needed help, would be worse than the absence of protocols in the first place.

III. THE ROLE OF JUDGES AND ACCESS TO JUSTICE

A. Rethinking the Judge's Role

Judges' ability to use a full range of techniques for managing their cases involving unrepresented litigants depends on their ability to re-think the nature of the judicial role in the first place. As the survey results reported in *Meeting the Challenge* reveal, "[m]any judges equate impartiality with passivity."[76] Even judges inclined to provide some assistance felt constrained by their understanding of impartiality.[77]

A crucial step in providing meaningful access to justice in civil cases for parties without counsel requires revising our notion of impartiality.[78] Impartiality does not equal passivity. To the contrary, a system that favors parties with lawyers over parties without lawyers, without regard to the applicable law and the facts of a case, is a partial, rather than impartial system. Given the realities of many of our courts, our traditional understanding of the roles frustrates rather than furthers the goal of fairness and justice. Faced either with abandoning the goal or changing the roles, we should change the roles.[79]

To avoid having a system that penalizes parties without lawyers, the courts generally, and judges specifically, must be prepared to play active roles to maintain the system's impartiality: the judge "must be as active as necessary to ensure that the legal system's promise of fairness and substantial justice is not frustrated by the litigant's appearance without a lawyer."[80] This concept is easier to accept where all sides are unrepresented, and more challenging where one side is represented. Yet, the latter scenario is the one in which the judge's active role is most important. As long as the judge is equally prepared to help all sides as needed, the problem is not one of impartiality, but the appearance of impartiality. The solution is to provide clear guidelines and explanations, not to require the judges to sit back passively regardless of the unfairness of process or outcome that follows.

Other authors support these themes. Dr. Jona Goldschmidt's 2002 article flatly rejects the idea that impartiality equals passivity, and urges judges to be far more active in the adversary process.[81] Richard Zorza, one of the four authors of *Judicial Techniques*, also argues for an active judicial role. His core thesis is that "our focus on the appearance

76 MEETING THE CHALLENGE, *supra* note 12, at 53.

77 *Id.*

78 Engler, *supra* note 2, at 2028. I rejected the notion that the active role amounts to a violation of the duty to remain impartial: "the call for judges to provide vigorous assistance to unrepresented litigants is consistent with the need for impartiality." *Id.*

79 Engler, *supra* note 2, at 2028; *Cf.*, REACHING OUT OR OVERREACHING, *supra* note 42, at 48 ("The adversary system is not ensconced in the code of judicial conduct, nor is the primary purpose of the code to protect the formalities of the adversary system").

80 Engler, *supra* note 2, at 2028.

81 Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36 (2002). Goldschmidt, co-author of *Meeting the Challenge*, proposes guidelines for judges and court personnel consistent with the principle that impartiality does not equal passivity. The authors of *Judicial Techniques*, while agreeing that judges cannot maintain a passive role, "do not necessarily espouse all [of Dr. Goldschmidt's] recommendations for a more active role for judges and court staff." *Judicial Techniques*, *supra* note 20, at 45.

of judicial neutrality has caused us improperly to equate judicial engagement with judicial nonneutrality, and therefore to resist the forms of judicial engagement that are in fact required to guarantee true neutrality."[82]

Zorza explains that "[j]udicial neutrality and judicial passivity are very different, and should not be confused"; the "appearance of neutrality" and "true neutrality" are very different in the pro se context, "and true neutrality often requires a form of engagement that may seem inconsistent with traditional expectations for the appearance of neutrality."[83] The apparent contradiction "can be resolved by the development of a transparent style of judging, in which judicial engagement is demonstrated to be in the service of true neutrality."[84]

Professor Russell Pearce urges a model of the judge's role closer to the inquisitorial system where needed to provide access to justice for those without counsel: "Rather than serving as a passive umpire, judges should be active umpires responsible for remedying process errors that would deprive the court of relevant evidence and arguments and that would ensure informed consent to settlements."[85]

Focusing on the intractable scenario of the New York City Housing Courts, where the typical case pits a represented landlord against an unrepresented tenant, Professor Paris Baldacci urges use of three types of models for change: (1) adopting a "more active judicial role within the strictures of the present system"; (2) "incorporating the simplified evidentiary procedures applicable to small claims actions"; and (3) "adopting an administrative procedure or inquisitorial model in which the judge bears an affirmative duty to develop the factual record and identify the controlling law."[86]

The attitude shift that requires judges to rethink their notions of impartiality carries with it the need to rethink how we interpret the actions of unrepresented litigants in court. The operation of many of our courts still depends on an assumption that parties without counsel are "choosing" to "self-represent." The traditional model also assumes that their choices along the way, such as whether to settle or go to trial, what witnesses and evidence to produce or on what terms to settle, are "voluntary" if they are understood and not the product of coercion. Yet, in a world with a widely documented shortage of lawyers for poor and moderate income litigants in civil cases, courts must recognize that a litigant's appearance without counsel is most often compelled, not voluntary. Regarding the individual decisions that litigants make, we should use a standard akin to

82 Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations and Implications*, 17 GEO. J. LEGAL ETHICS 423, 425 (2004).

83 *Id.* at 426.

84 *Id.*

85 Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 977 (2004).

86 Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659 (2006). While acknowledging that the various proposals "challenge our adversarial system's received traditions of judicial passivity and impartiality, narrowly understood," Professor Baldacci proposes, "as have other commentators, a more active, inquisitorial-based role for Housing Court judges." *Id.* at 696.

"informed consent," accepting as voluntary only the choices made by litigants who are aware of their options and advantages and disadvantages of those options.[87]

B. Judicial Leadership in Promoting Access to Justice

Altering the habits that constrain judges from assisting pro se litigants in the name of judicial ethics is a crucial component of the efforts to promote increased access to justice in the courts. Access to Justice initiatives have proliferated over the past decade, with the increase in numbers of state Access to Justice Commissions,[88] Access to Justice Conferences,[89] and articles promoting Access to Justice.[90] These initiatives typically consider the judicial role as an important piece of the puzzle.[91]

That increased access is a fundamental goal of the court system is underscored by resolutions adopted at the turn of the century. In 2001, the Conference of Chief Justices (CCJ) promulgated Resolution 23, entitled "Leadership to Promote Equal Justice," which resolved in part to "[r]emove impediments to access to the justice system, including physical, economic, psychological and language barriers. . . ."[92] In 2002, the CCJ and Conference of State Court Administrators (COSCA) jointly resolved that "courts have an affirmative obligation to ensure that all litigants have meaningful access to the courts, regardless of representation status."[93]

The National Bench Guide underscores the importance of judicial leadership in promoting Access to Justice, dedicating the final chapter to the topic:

87 *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.0(E) (2002) (defining "informed consent"). The Massachusetts Guidelines encourage judges to consider the standard of informed consent in determining whether waivers of rights by unrepresented litigants in settlement agreements are "knowing and voluntary." *See* note 64, *supra* and accompanying text.

88 *See* note 13, *supra*.

89 *E.g.*, Eastern Regional Conference on Access to Justice for the Self-Represented Litigant (White Plains, NY, 2006); the New York State Unified Court System Access to Justice Conference (Albany, NY, 2001); Paul Marvy, *"To Promote Jurisprudential Understanding of the Law": The Civil Right to Counsel in Washington State*, 40 CLEARINGHOUSE REV. 180 (July-Aug. 2006) (discussing Access to Justice Conferences in Washington State).

90 Two resources full of materials are the American Bar Association Standing Committee on Legal Aid and Indigent Defendants (SCLAID) Resource Center *at* http://www.abanet.org/legalservices/sclaid/atjresourcecenter/home.html, and Access to Justice Folder on selfhelpsupport.org *at* http://www.selfhelpsupport.org/library/folder.39809-Access_to_Justice. The Summer 2008 issue of *The Judges Journal* is dedicated to articles on Access to Justice. *See also, Best Practices in Court-Based Programs for the Self-Represented: Concepts, Attributes, Issues for Exploration, Examples, Contacts, and Resources*, prepared and distributed by the Self-Represented Litigation Network (2008 edition), *available at* www.srln.org; *see also* http://contentdm.ncsconline.org/cgi-bin/showfile.exe?cisoroot=/accessfair&CISOPTR=122.

91 *See* notes 89-90, *supra*.

92 CONFERENCE OF CHIEF JUSTICES, RESOLUTION 23 (2001), *available at* http://ccj.ncsc.dni.us/AccessToJusticeResolutions/resol23Leadership.html. Resolution 23 was preceded two years earlier by a position paper issued by the Conference of State Court Administrators (COSCA): "The threshold question in determining how to respond is whether the courts have an obligation to address the needs of self-represented litigants at all. The answer should be yes." CONFERENCE OF STATE COURT ADMINISTRATORS, POSITION PAPER ON SELF-REPRESENTED LITIGATION (Aug. 2000), *available at* http://cosca.ncsc.dni.us/WhitePapers/selfreplitigation.pdf.

93 CONFERENCE OF CHIEF JUSTICES, RESOLUTION 31 (2002). The joint resolution also endorsed COSCA's Position Paper on Self-Represented Litigation. *Id. Available at* http://cosca.ncsc.dni.us/Resolutions/CourtAdmin/resolutionSelfRepresentedLitigants.html (last visited July 14, 2010).

> In the end, it is simple: judicial leadership is indispensible.
>
> Court systems are highly complicated organizations, perhaps appropriately not conducive to rapid transformative change. Judges are often the only players with the credibility, reputation, and leverage to build the momentum needed to increase access for the self-represented—and indeed for all people.[94]

Judicial engagement in the overall functioning of the justice system is critical "to expand services and resources that will allow the system to work effectively and to build resources so that cases involving self-represented litigants can truly be decided on the law and facts of the case."[95] Undertaking the leadership role "reinforces the public's understanding of the court's commitment to access and neutrality. . . ."[96]

Richard Zorza's writings suggest comprehensive approaches to making our courts more accessible for parties without counsel. Almost a decade ago, his volume *The Self-Help Friendly Court* offered a vision of courts "Designed from the Ground Up to Work for People Without Lawyers," in the words of his subtitle.[97] The volume identifies vision, barriers, and approaches to guide the re-design before turning to the physical and technological environment, and "rethinking the process step-by-step."[98] Underscoring the way in which the roles of individuals are tied to the court's processes, Zorza suggests separate procedures for "Truly Uncontested Cases" and then a separate docket for "Mixed Cases—Self-Help and Represented Together."[99] He concludes with an urgent warning: without courts that "are practically and effectively accessible," we jeopardize the vision of our courts as "impartial institution[s]" that stand "ready to enforce fairness in transactions and interactions."[100]

By 2010, Zorza discusses more urgently the need to transform our courts "into access to justice institutions."[101] He identifies key trends that challenge our traditional notion of the courts, including the increasing cost of counsel, rendering counsel unaffordable, the increasing need for institutions to resolve conflict, the high expectations of the public as to accessibility and the increasing complexity and cost of the processes.[102] Faced with the unacceptable trend of having our courts become even more complicated, expensive, and difficult to navigate, Zorza points to a transformation, underway in some respects, in which the courts are simpler and more accessible, the accessibility to lower cost counsel is increased, and subsidized counsel are available to those who cannot navigate even a simplified court system.[103] Key components to an integrated system include access to a "problem-solving gateway" to set individuals on the path best suited

94 NATIONAL BENCH GUIDE, *supra* note 30, at 12-1.

95 *Id.*

96 *Id.*

97 RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS, THE NATIONAL CENTER FOR STATE COURTS (2002).

98 *Id.* Chapters 1-15.

99 *Id.* Chapters 16-17.

100 *Id.* at 135.

101 Richard Zorza, *Courts in the 21st Century: The Access to Justice Transformation*, 49 JUDGES J. 14 (2010).

102 *Id.* at 14-16.

103 *Id.* at 16-18. Increasing the availability of counsel and reducing the cost of counsel includes "allowing lawyers to represent litigants for limited purposes. . . ." *Id.* at 16. *See also*, nn 112-116 *infra*, and accompanying text discussing limited assistance representation.

to resolve their disputes; developing "truly alternative dispute resolution mechanisms"; using "Engaged and Proactive Caseflow Management"; having judges take more active roles in the fact-finding and case development process; and having the courts take more action to ensure compliance.[104] Illustrating the manner in which the transformation is under way, Zorza includes a list of "15 Techniques for Saving Time in Tough Times," many of which are included in the Judicial Education Curricula developed by the Self-Represented Litigation Network.[105] Zorza underscores the crucial role of judicial leadership and integrated management of the whole system.[106]

Regardless of one's reaction to the details of Zorza's approaches, his vision illustrates crucial components of needed change to promote increased access to the courts. Any discussion of the role of particular actors, such as judges, cannot be pursued in isolation, but must recognize the reality that the actors' roles are inter-connected, and that context matters. Judges are part of a system. Judges can, and often must, employ a range of techniques to promote increased access and enhance fairness. Yet, how active a judge must be depends in part on how much assistance the litigant receives before appearing before the judge. The more that clerks and other personnel are permitted to provide extensive assistance, supplemented by creative and effective assistance programs, the less the judge must do, while nonetheless retaining overall responsibility for the fairness of the proceeding. Similarly, what is necessary and proper for a judge in the context of a high-volume court flooded with unrepresented litigants may be different from what seems proper in a different setting. The range of judicial actions is appropriate and consistent with the Canons of Judicial Conduct.

C. The Judicial Role as Part of a Comprehensive Access to Justice Strategy

The preceding section underscores the importance of understanding the judge's role in the context of an overall court system that offers the promise of fairness and justice, but faces immense challenges with unrepresented litigants flooding the court. Yet, even expanding the lens to focus on the overall court system limits the solutions that must be considered to meet the demands of many of our courts in the 21st century. Our vision of how judges should handle their roles, and how the courts in general should function, must be shaped by an overarching Access to Justice strategy.

I articulate elsewhere a three-pronged approach to such a strategy, involving:

(1) The expansion of the roles of the court system's key players, such as judges, court-connected mediators, and clerks, to require them to assist unrepresented litigants as necessary to prevent a forfeiture of important rights;

104 *Id.* at 18-19, 34. Regarding "Court-led Compliance," Zorza writes:

> Litigants today face often insurmountable barriers to enforcing court rulings. The twenty-first-century court will take more action to ensure compliance, including the creation of self-executing judgments, the provision of support services for enforcement, and gathering and providing litigants with the information they need for compliance. Technology will make this much easier.

Id. at 34.

105 *Id.* at 17-18. The curricula are available on www.self-helpsupport.org.

106 *Id.* at 35.

(2) The use of assistance programs, rigorously evaluated to identify which most effectively protect litigants from the forfeiture of rights; and
(3) The adoption of a civil right to counsel where the expansion of the roles of the key players and the assistance programs do not provide the necessary help to vulnerable litigants.[107]

The preceding portions of this article have focused on Prong 1 of this three-pronged Access to Justice strategy. The primary purpose of the article has been to focus on the judicial role where cases involve both represented and unrepresented parties, but the discussion underscores the reality that true solutions to the dilemmas facing judges involve more than a discussion of permissible techniques. The details of the judicial role must be navigated as part of a broader discussion that makes the courts more accessible at every turn to parties without counsel. Part III to this point has explained the need to move toward some concept of access to justice or problem-solving courts in a way that affects not only the judges, but all the players in the system, the flow of the cases, the physical and technological features of the court, and the leadership from Chief, Presiding, or First Justices in the court.

These changes alone, however, comprise only one part of a comprehensive strategy. Prong 2 of the analysis involves assistance programs beyond the work of court personnel and short of full representation by counsel. Programs across the country, including telephone hotlines, self-help centers, pro se offices, advice-only clinics, and court-annexed limited legal services programs, now assist unrepresented litigants in the courts.[108] Courts handling domestic relations matters have been in the forefront of facilitating unbundled legal services, often called discrete task representation or limited assistance representation.[109] The innovative programs provide an important component in the strategy to increase access to justice. Yet, a comprehensive Access to Justice strategy requires that we evaluate the programs carefully. Evaluation tools must identify which programs help stem the forfeiture of rights and which only help the courts run more smoothly without affecting case outcomes.[110] Programs not affecting case outcomes may be worthwhile, but are not a solution to the problem of the forfeiture of rights due to the absence of counsel.

107 *See, e.g.*, Russell Engler, *Towards a Context-Based Civil Gideon Through Access to Justice Initiatives*, 40 CLEARINGHOUSE REV. 196 (July-Aug. 2006); For a discussion of the importance of understanding the civil Gideon initiative as an exercise in effectuating social change rather than framing legal claims, see Russell Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, 15 TEMPLE POLITICAL & CIV. RIGHTS L. REV. 697 (2006).

108 *See* Engler, *supra* note 2, at 1998-2007.

109 *See* Engler, *supra* note 2, at 1998-2007. General resources on unbundling are available on the American Bar Association's Web site at the Pro Se/Unbundling Resource Center *at* http://www.abanet.org/legalservices/delivery/delunbund.html (updated Sept. 20, 2010). For one recent description of the trend, see Cynthia K. Heerboth, *The Non-Traditional Practice of Law: The New Reality*, PRECEDENT (Summer 2010), *available at* http://members.mobar.org/pdfs/precedent/aug10/non-traditional.pdf. For a description of the pilot Limited Assistance Representation (LAR) programs in Massachusetts, see MASSACHUSETTS SUPREME JUDICIAL COURT STEERING COMMITTEE ON SELF-REPRESENTED LITIGANTS, ADDRESSING THE NEEDS OF SELF-REPRESENTED LITIGANTS IN OUR COURTS: FINAL REPORT AND RECOMMENDATIONS 12-23 (Nov. 21, 2008), *available at* http://www.mass.gov/courts/sjc/docs/self-rep-final-report.pdf.

110 For a discussion and analysis of the studies, *see* Engler, *supra* note 3, at 66-73.

Family law judges are likely to be familiar with limited assistance programs, since the family law scenario has triggered innovation and leadership in the experimentation and development of such programs. Early writings in the area explored the efficacy of lay assistance in uncontested divorces in Connecticut in the mid-1970s.[111] In the Maryland Family Law Assisted Pro Se Experiment, law students, supervised by lawyers, assisted 4,400 people over a 17-month period in the 1990s.[112] More recent reports, such as those from the Family Law Access Partnership Program (FLAPP),[113] the Self Help Access Center Sonoma County,[114] and three pilot programs involving Family Law Information Centers in California,[115] typically reveal that many litigants received assistance, were positive about their experiences and the outcomes received, and followed through on the advice given. The reports, however, do not include specific data measuring the success of case outcomes beyond the clients' reports.

The absence of evaluations that measure case outcomes is a barrier to developing an overall Access to Justice strategy. The goals achieved, of assisting litigants and producing high levels of satisfaction not only among users of the assistance programs but often among judges, clerks, and other court personnel, suggest that the programs play important roles in allowing the courts to function more smoothly and ameliorating the experience for litigants. Yet, we know from other studies that the presence of a lawyer is a key variable in impacting case outcomes.[116] Absent more disciplined evaluation of limited assistance programs, we are comparing apples to oranges: a program that

111 Ralph C. Cavanaugh & Deborah L. Rhode, *Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis*, 86 YALE L.J. 104 (1976) (critiquing the stated justifications for the unauthorized practice of law restrictions in the pro se divorce area and finding no substantial benefit from lawyers in the pool of cases studied, where the litigants largely agreed on custody, financial issues, and the need for the dissolution).

112 Michael Millemann et al., *Rethinking the Full-Service Legal Representational Model: A Maryland Experiment*, 31 CLEARINGHOUSE REV. 1178, 1178 (1997) (describing "an experimental project in which law students provide legal information and advice to otherwise unrepresented parties in family law cases"). Millemann concluded that consumer satisfaction was highest when largely mechanical justice was involved, in the sense of helping people complete paperwork needed to perform relatively simple tasks. *Id.* at 1186. The level of satisfaction dropped slightly when limited discretion was involved, as in applying the "material change of circumstances" test to support modification orders, and was at its lowest when more complex judgments were involved, such as the "best interests of the child standard" for custody cases. *Id.*

113 Ken Smith, *Evaluation Review*, summarizing *Family Law Access Partnership Project (FLAPP): Outcomes Evaluation Report for 2001 Grant Year* (undated document, on file with author) (reporting an 80% success rate). The project, which provided assistance at facilitator locations in Riverside, California, found a high level of success in terms of the percentage of clients reporting that they obtained the outcome they sought and dollar benefits achieved in terms of child support. *Id.*

114 IOLTA INFO. SERVS. & SONOMA COUNTY LEGAL AID, SHAC: THE FIRST SIX MONTHS (2001), *available at* http://www.calegaladvocates.org/search/download.94544. The program was implemented in mid-2000.

115 JUDICIAL COUNCIL OF CALIFORNIA, ADMINISTRATIVE OFFICE OF THE COURTS, A REPORT TO THE CALIFORNIA LEGISLATURE—FAMILY LAW INFORMATION CENTERS, AN EVALUATION OF THREE PILOT PROGRAMS, (2003), *available at* http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/FLICrpt.htm. According to the report, the programs served a large number of litigants (45,000 for the fiscal year studied), customer satisfaction was high (78% to 95% satisfied, depending on the question), and most judges were extremely satisfied with the program as well. *Id.*

116 *See generally*, Engler, *supra* note 3.

increases satisfaction may or may not stem the forfeiture of important rights that often occurs when litigants must proceed without counsel.

Prong 3 of the Access to Justice strategy addresses this concern directly. When revising the roles of judges, mediators, and clerks, and when using assistance programs short of full representation proves insufficient, we can no longer accept the denial of access and routine forfeiture of rights as acceptable outcomes. In these instances, we must recognize and establish a right to counsel in civil cases. In 2006, the American Bar Association unanimously adopted Resolution 112A, which urged the provision of "legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health, or child custody, as determined by each jurisdiction."[117] The contours of the expanded civil right to counsel are among the pressing issues facing those attempting to tackle the various problems involved with the flood of unrepresented litigants in the court.

Recognizing that an expanded right to counsel is part of an overarching Access to Justice strategy illustrates how the scope of the right to counsel directly depends on the effectiveness of the first two prongs in the Access to Justice program. Where steps short of full representation protect litigants from the devastating outcomes that might occur where their basic human needs are at stake, a right to counsel might not be needed. As a result, the more that judges, mediators, clerks, and assistance programs effectively stem the forfeiture of rights due to the absence of counsel, the smaller will be the pool of cases in which counsel is needed. Where nothing short of full representation can provide the needed assistance, the right to counsel must attach.

The details of this conversation may seem far afield from the problems facing individual judges in cases with unrepresented litigants and represented parties, but it takes little imagination to connect the conversations. I have argued elsewhere that starting points for an expanded civil right to counsel should include custody cases pitting represented parties against unrepresented ones and/or cases in which domestic violence is involved.[118] The ABA Resolution recognizes that child custody cases are among the list of cases involving basic human needs calling for protection. The subset of custody cases pitting represented parties against unrepresented ones is so challenging for judges precisely because of the imbalance of power, skill, and knowledge between the parties in court; in this sense, the scenarios represent a breakdown of the adversary system that expects the rough equality between the parties. A power imbalance also exists where domestic violence is involved, even if neither side has counsel.

117 The ABA House of Delegates adopted the Resolution on Aug. 7, 2006, at its Annual Meeting. *See* http://abanet.org. For the text of the resolution proposed by the ABA Task Force on Access to Civil Justice, which was modified only slightly before adoption by the House of Delegates by the adoption of the final five words ("as determined by each jurisdiction"), see ABA REPORT TO THE HOUSE OF DELEGATES (2006) 1, *available at* http://abanet.org/leadership/2006/annual/onehundredtwelvea.doc.

118 Engler, *Shaping a Context-Based Civil Gideon from the Dynamics of Social Change*, *supra* note 107, 710-713.

Given the importance of the interests at stake, custody cases have remained a focus of right-to-counsel initiatives. The failed attempt to create a broad-based civil right to counsel in *Lassiter v. Department of Social Services* arose in the context of the termination of parental rights;[119] most states have created the right by statute, despite the Supreme Court's decision.[120] Advocates in New York tried to create a right to counsel in divorce cases in the 1970s,[121] while more recent litigation in Maryland,[122] Wisconsin,[123] Washington,[124] and Alaska[125] has focused on private custody cases.[126]

Judges faced with "mixed" cases should use the techniques discussed in the articles, Bench Guide, and protocols discussed above. The techniques' effectiveness might be enhanced to the extent that litigants have benefited from advice and assistance prior to appearing in court. Yet, the greater the power imbalance, the greater the likelihood that these steps alone will not be enough.[127] The most powerful tool for judges in this scenario would be the authority to appoint counsel for the unrepresented party on the low end of the power imbalance. Many judges might be surprised to learn that a reading of the text of *Lassiter*[128] supports such a case-by-case analysis. In lieu of establishing a categorical right, *Lassiter* mandated a due process, *Matthews v. Eldridge*[129] analysis, involving a balancing of the private interest at stake, the risk that the decision will lead to erroneous decisions, and the government's interest.[130] In a parallel to the ethical rules covering judges, where the informal understanding that impartiality equaled passivity, the accepted understanding of *Lassiter* bears revisiting.[131] State statutes and constitutions

119 452 U.S. 18 (1981) [hereinafter *Lassiter*].

120 *See* Laura K. Abel & Max Rettig, *State Statutes Providing for Right to Counsel in Civil Cases*, 40 CLEARINGHOUSE REV. 245 (2006). As Abel and Rettig observe, most state right-to-counsel statutes and court rules fall into three broad categories: "family law matters, involuntary commitment, and medical treatment." *Id.*

121 In re Smiley, 36 N.Y.2d 433, 369 N.Y.S.2d 87 (1975).

122 Frase v. Barnhart, 840 2d 144, 379 Md. 100 (2003).

123 Kelly v. Warpinski, Memorandum in Support of Petition Requesting that the Supreme Court Take Jurisdiction of an Original Class Action for Declaratory Judgment, at 23 (filed Nov. 17, 2004). A summary of the case is reported at 39 CLEARINGHOUSE REV. 769 (March-April 2005).

124 King v. King, 162 Wash.2d 378, 174 P.3d 659 (2007).

125 Gordanier v. Jonsson, No. 3AN-06-8887 CI (ALASKA SUP. CT., Aug. 14, 2007), *available at* http://brennan.3cdn.net/24e29a076e0af9fe15_63m6iyh9e.pdf.

126 Scholarly efforts to craft the basis for a right to counsel also focused on family law areas. *See, e.g.*, William S. McAninch, *A Constitutional Right to Counsel for Divorce Litigants*, 14 J. FAM. L. 509 (1975-76); Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 TOURO L.REV. 247 (1997).

127 *See* Engler, *supra* note 3 at 78-79.

128 *Lassiter*, *supra* note 119.

129 424 U.S. 319 (1976).

130 *Id.; see also Lassiter*, 424 U.S. at 27-32.

131 For an argument that a proper reading of *Lassiter* required appointment of counsel in private termination proceedings in Texas, see Chad Baruch and Ike Vanden Eykel, *Texas Family Law Goes to Washington*, THE COLLEGE BULLETIN at 4 (Summer 2010) (discussing the cert denial by the U.S. Supreme Court in Rhine v. Deaton, __ US __, 130 S.Ct. 1281 (2010).

arguably support a similar result.[132] The case for a civil right to counsel is a conversation for another day, but the salient point here is that appointment of counsel is a potent and necessary tool for judges who handle domestic relations cases, if they are to be able to respond to the most troublesome scenarios that face them.

CONCLUSION

Cases pitting unrepresented parties against represented ones require an array of responses. Unless individual judges, and the court system, reject the notion that impartiality requires passivity, and adopt an active and engaged role, represented parties will continue to use the system to their advantage. The shift in our understanding of the judicial role, and of all the key players, increases access to justice and furthers the underlying goal of our justice system to be fair and just. The past decade has seen the development of materials and ideas that increase the tools available to judges in handling these cases. Considering that deeply-rooted habits are slow to change, the change over the past decade has been dramatic.

Yet, the solution to the problem does not lie in the hands of judges alone. Absent a coherent, integrated Access to Justice strategy involving coordination between those inside and outside the judiciary, the solutions to the problem will remain limited. The active role for key players in the court must be supported by actions of judicial leaders, enhanced by robust and effective assistance programs, and with the availability of counsel to represent the most vulnerable litigants. Only then will the problems facing judges be ameliorated and, more importantly, will the least powerful in our legal system obtain the help they need to stem the forfeiture of rights that flows from their status as unrepresented litigants.

132 "There are ten states that currently provide judges with general discretionary power to appoint lawyers for indigent litigants in any type of civil case." Frederic B. Rogers, *Court-Appointed Counsel in Civil Cases: Why and When?* THE JUDGES J. 22, 23 (2001). The states identified by Judge Rogers are California, Kentucky, and West Virginia (statute), Indiana, Lousiana, Mississippi, Missouri, New York, South Carolina (inherent power), and Florida (court rule). *Id.* at 23, n.8. King v. King, *supra* note 124, is one example of litigation in which state due process claims were among those pressed in court. In New York, the poor persons' statute arguably is a source of authority for appointment. *See* Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL'Y & ETH. 699, 721-23 (2006). For a general discussion of the right to counsel and state due process analysis, see Michael Millemann, *The State Due Process Justification for a Right to Counsel in Some Civil Cases*, 15 TEMPLE POL. & CIV. RIGHTS L. REV. 733 (2006).

Attachment 4

ELIZABETH STRINGER

ATTORNEY AT LAW

753 Folly Road (Zip 29412)
Post Office Box 12370
Charleston, S.C. 29422-2370
(843) 795-1331- Fax 762-0144
liz@stringerlaw.us

April 4, 2011

Judge Paul W. Garfinkel
Charleston County Family Court
100 Broad Street
Charleston, SC

VIA EMAIL AND COURIER

Re: Kevin Burroughs vs. Tracie Hale
Case No. 2010-DR-10-1836

Dear Judge Garfinkel:

Please find enclosed a copy of my Affidavit regarding the events in the above-referenced matter. Please let me know if you want me to send it directly to the Commission.

With best regards, I am

Very truly yours,

Elizabeth J. Stringer

Enclosure

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KEVIN BURROUGHS, Plaintiff, vs. TRACIE HALE, Defendant.	))))))))))))	IN THE FAMILY COURT FOR THE NINTH JUDICIAL CIRCUIT C.A. NO.: 2010-DR-1836 AFFIDAVIT OF GUARDIAN *AD LITEM* , ELIZABETH J. STRINGER

ELIZABETH J. STRINGER, ESQUIRE, being duly sworn hereby states:

I am in receipt of the letter addressed to the Commission on Judicial Conduct regarding the Honorable Paul Garfinkel, dated March 12, 2011 from Mr. Anthony B. O'Neill, Sr. and Mrs. Elonda Fair O'Neill. On July 12, 2010, I was appointed Guardian *ad Litem* for the minor children in the above-referenced case. As such, I am mentioned in the letter to the Commission and feel it necessary to state the facts as I know them to be true.

After the initial Temporary Hearing on July 12, 2010, I was required to submit an initial report at a subsequent hearing scheduled for August 9, 2010. I submitted the attached Preliminary Report on August 9, 2010 (See Exhibit A). This second temporary hearing was held in front of the Honorable Paul W. Garfinkel. On August 12, 2010, instructions for the order were sent to me by Judge Garfinkel via fax and I was asked to draft the Order. These instructions provided that Defendant Mother, Ms. Hale, was to pick up the children on Saturday, August 14, 2010 at noon from Plaintiff Father, Mr. Burroughs to obtain temporary custody (Please see Exhibit B).

On August 14, 2010, I send a draft of the Temporary Order to both Plaintiff's attorney, Elonda Fair O'Neill and the Defendant Ms. Hale who was acting *pro se* (please see attached Email, Exhibit C). I received an email on August 14, 2010 from Ms. Hale that Mr. Burroughs was refusing to allow her to have the children pursuant to the judge's instructions. (See Email, Exhibit D). On August 17, 2010, I incorporated certain changes requested by Mrs. O'Neill and resent the corrected Temporary Order. On August 18, 2010, I received an email from Ms. Hale requesting a correction to the Order and stating that Ms. Hale had been informed again by Mr. Burroughs that he was not going to turn over the children. I forwarded the email from Ms. Hale to Ms. O'Neill asking her to advise (as to whether Mr. Burroughs was going to turn over the children to Ms. Hale pursuant to the Judge's instructions and the Order which had yet to be signed) (Please see Exhibit E containing this email). Ms. Hale thereafter sent certain emails directly to Judge Garfinkel due to her concern that Mr. Burroughs would not release the children to her pursuant to his instructions. Ms. Hale stated her concern that the children were to start school August 19, 2011.

Due to receiving these emails from the Defendant, Judge Garfinkel called me to arrange a conference call with Mrs. O'Neill and the Defendant, Ms. Hale. On August 18th, I attempted (with assistance by my office) to arrange this conference call. During this time, Judge Garfinkel was out of town (in Columbia). In attempting to arrange this call two difficulties arose. The first was that Ms. Hale's work schedule did not allow her to have a conference call during the available times on August 18-20th. The second difficulty was that Mrs. O'Neill

could not be available for a conference call on Monday the 23rd or Tuesday the 24th. During all of this, Judge Garfinkel asked me to call Mrs. O'Neill to determine if she had read Ms. Hale's emails. Mrs. O'Neill informed me during this phone call that she was uncomfortable with answering my question and felt this was all forbidden *ex parte* communication. I also asked her during this phone call if Mr. Burroughs was going to release the children to which she responded that he did not have to as the Order had not been signed. This conversation was very frustrating (I remember stating to Mrs. O'Neill to please "not shoot the messenger" as I was simply trying to set up a conference call per the Judge's request). After this phone call, I sent the attached email (Exhibit F) to Judge Garfinkel. This was copied to both Mrs. O'Neill and Ms. Hale. Later that day (August 18, 2011), Mrs. O'Neill asked for a correction on the medical bills section of the Order which I corrected and resent to the Judge and the parties. (See Exhibit G).

On August 23, 2011, Judge Garfinkel emailed Mrs. O'Neill that she had received two emails from Ms. Hale and that it was his understanding that she had read both and that if this was not correct for her to advise immediately. (This Email is attached as Exhibit H). Because Mrs. O'Neill did not want to participate in a phone conference off the record, on August 25, 2011, Judge Garfinkel asked that I set up a phone conference/hearing (as this would be on the record) whereby Ms. Hale would need to be available via phone with a notary present. I sent to Ms. Hale instructions regarding this phone call (regarding having a notary) which is attached as Exhibit I. My understanding of this "hearing" was

that it was to clarify the Temporary Order because the date for the transfer had passed and clarify the situation. I notified Mrs. O'Neill, Judge Garfinkel, Plaintiff Father and Defendant Mother that we were all available for the 1:45 hearing and that Defendant Mother would be available and have a notary present (please see Exhibit J).

On August 26, 2011, Mrs. O'Neill and myself met at the courthouse with Ms. Hale available via phone. At this time, Judge Garfinkel admonished Ms. Hale for her *ex parte* communication. He also changed the time for the transfer of the children due to Mr. Burroughs refusal to transfer the children. This was done via an Interim Bench Order which required transfer on Saturday, August 28, 2010 at Exit 50 on I-77. On August 27, 2010, I received an email from Mrs. O'Neill stating that Mr. Burroughs could not drive due to having had knee surgery in the morning. Ms. Hale, who lives in West Virginia, and I discussed her travelling the entire distance to South Carolina and back. She did this and retrieved the children.

On March 7, 2011, I received a phone call from Mrs. O'Neill demanding that I remove myself as Guardian *ad Litem* as she feels I have been less than neutral in my actions. I do not feel I have in any way been less than neutral. Perhaps I should be faulted for trying to negotiate the transfer of the children pursuant to the judge's instructions (even without a signed Court Order). I simply wanted to avoid complications and have the children enrolled in school on time. If you have any questions regarding my conduct or regarding the events of this case, I will endeavor to help in any way I can. Thanking you,

Elizabeth J. Stringer, Esquire

Sworn to me this 4th day of April, 2011.

Notary Public for the state of: SC
My commission expires: 1/7/2018

Omitted

EXHIBIT A

S.C. Gardian ad Litem Preliminary Report and Reccomendations
Gardian ad Litem: Elizabeth A. Stringer
Date of Report: August 4, 2010

EXHIBIT C

Elizabeth J. Stringer

From: Elizabeth J. Stringer
Sent: Saturday, August 14, 2010 6:00 PM
To: 'fair@mojustice.com'; 'Tracie Hale'
Attachments: Temporary Order.rtf

Elonda and Tracie,

As promised, attached is a draft of the Order. Please review and let me know of any necessary corrections. Also, did either of you receive the Child Support Guidelines? I did not. Liz

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
	)	NINTH JUDICIAL CENTER
COUNTY OF CHARLESTON	)	CASE NO.: 2009-DR-10-2041
	)	
KEVIN E. BURROUGHS,	)	
	)	
Plaintiff,	)	**Temporary Order**
	)	
vs.	)	
	)	
TRACIE A. HALE,	)	
	)	
Defendant.	)	
	)	

Date of Hearing: December 14, 2009
Judge: Paul W. Garfinkel
Court Reporter: Joy C. Huck
Plaintiff's Attorney: Elonda O'Neill
Defendant's Attorney: *Pro se*
Guardian *ad Litem*: Elizabeth J. Stringer

This matter came before the court on a Motion for Temporary Relief filed by the Plaintiff. After reviewing all of the Pleadings and listening to argument by Plaintiff's counsel, this Court orders as follows:

ONE: Jurisdiction and Venue: Based upon the evidence and my review of the file, I find that jurisdiction and venue are proper and the parties and subject matter are properly before me.

TWO: Temporary Custody: The Defendant is granted temporary custody of the parties' minor children.

THREE: Visitation: The Plaintiff shall be entitled to reasonable and liberal visitation. Parties are to consult with the Guardian *ad Litem* to try to resolve a visitation schedule. If there is no resolution, then both parties shall submit visitation plans to the Court for disposition. Defendant shall pick up the children

and their personal property at noon (12:00 p.m.) on August 14, 2010 at Plaintiff's residence.

FOUR: Visitation Provisions:

a) Neither parent to smoke or to allow others to smoke in the presence of the children in an enclosed space (home, car, etc.).

b) Neither parent to allow the boys to sleep with hem in their bed.

c) Mother and Father to be restrained from the use of corporal punishment.

d) The parties' son, [redacted], to obtain speech therapy and for the parents to follow any recommendations regarding either of the children's health or mental care; and

e) For all contact between the children and [redacted] (the children's half-sister) boyfriend, Josh, to be supervised by Mother or another responsible adult; however, Mother's sister shall not act as supervisor.

FIVE: Child Support: The Plaintiff shall pay child support pursuant to the attached Child Support Guidelines. Said child support shall be paid monthly beginning on September1, 2010 and due on the first of each month thereafter.

SIX: Reasonable Telephone Access: Each party shall be entitled to liberal and reasonable telephone access while the minor children are in the custody of the other party.

SEVEN: Notification of Major illness: Each party shall provide prompt and timely notification to the other party of any major illness of the minor children. Major

illness shall include any illness lasting more than twenty-four (24) hours and/or requiring medical treatment.

EIGHT: Access to Records: Each party shall be entitled to full access to any records concerning the minor children, including, but not limited to, school records, daycare records, medical records, etc.

NINE: Addresses and Phone Numbers: Each party shall keep the other party informed of their respective addresses and phone numbers; and each party shall provide written notice to the other party of any change of address.

TEN: Uncovered Medical Expenses of the Minor children: All of the uncovered medical expenses of the minor children shall be temporarily divided pursuant to the South Carolina Child Support Guidelines, with the Defendant being responsible for the first two-hundred and fifty and no/dollars ($250.00) per child, per year in any additional uncovered medical/dental expenses divided between the parties (please see the attached Child Support Guidelines).

ELEVEN: Restraining Orders for Benefit of the Minor Children: The parties shall be temporarily restrained from:

a) Speaking ill of the other parent in the presence of the minor children and from allowing others to speak ill of the other parent in the presence of the minor children;

b) Interfering with the other parent's relationship with the minor children and from allowing others to interfere with the other parents relationship with the minor children;

c) Exposing the minor children to any overnight paramours and from exposing the minor children to overnight guests of the opposite sex whom are unrelated by blood or marriage;

d) Consuming any illegal drugs and excessive alcohol during custody/visitation periods;

e) Discussing this litigation with the minor children;

f) Exposing the minor children to any illegal and/or immoral conduct, including profanity; and,

g) Exposing the minor children to any violent conduct.

TWELVE: Mutual Restraining Order: By agreement, the parties shall be temporarily restrained from harassing, abusing, threatening, bothering, or otherwise interfering with each other in any way whatsoever.

THIRTEEN: Discovery: The parties are granted full pretrial discovery pursuant to the South Carolina Rules of Civil Procedure and The South Carolina Family Court Rules.

FOURTEEN: Temporary Attorney's Fees and Costs: The issue of temporary attorney's fees and costs is held in abeyance at this time.

AND IT IS SO ORDERED, ADJUDGED AND DECREED this _____ day of _____, 2010 at Charleston, South Carolina.

_____
PAUL W. GARFINKEL
CHARLESTON COUNTY
FAMILY COURT
NINTH JUDICIAL CIRCUIT

EXHIBIT D

From: Tracie Hale [mailto:tracie2592@hotmail.com]
Sent: Saturday, August 14, 2010 12:37 PM
To: Elizabeth J. Stringer
Subject: judges instructions

Ms. Stringer,
I am sorry to be bothering you but I have a few questions.

I hope you don't mind my asking:

1. Will an appeal effect the instructions in the temporary order? Kevin states he is going to file an appeal on this order and states that he doesn't have to let me have the children. He claims that you lied in the discovery process and that the Judges instructions are not going to stand.

2. What is the difference between a TEMPORARY ORDER vs. FINAL ORDER? And what are the steps to be taken prior to a FINAL ORDER?

3. Will his filing an appeal prolong or prevent my getting [redacted] and [redacted] back home in a timely fashion? School starts on August 19, 2010 (Thursday) and I have yet to take them shopping for their school clothes. Their routine is messed up because I usually have them going to bed on their school routine approx. 2wks prior to school starting. Considering I can not get them until I have the actual order in hand I fear that they are going to be late in starting school. I had hoped that Kevin would adhere to the Judges instructions but he is not going to do that.

Once again, I am sorry for bothering you with these questions.

Sincerely,

Tracie Hale

EXHIBIT E

Elizabeth J. Stringer

From: Elizabeth J. Stringer
Sent: Wednesday, August 18, 2010 8:23 AM
To: 'Elonda Fair O'Neill, Esq.'
Subject: FW: temporary order

Elonda, I hope that the below is not true? Please advise. Liz

---

From: Tracie Hale [mailto:tracie2592@hotmail.com]
Sent: Wednesday, August 18, 2010 12:59 AM
To: Elizabeth J. Stringer; fair@mojustice.com
Subject: RE: temporary order

Ms. Stringer,

Please review this document again as I have found that the case number is incorrect. The docket number that is attached to this case is as follows, "2010-DR-10-1836" Please correct this as soon as possible so that it isn't kicked back by the judge. There have been way too many delays as is.

Also, I am e-mailing the Judge because I have made several attempts at conversations with Kevin and as of yesterday he has informed me once again that I am not getting the children. Not only has he gone against the Judges directions with my getting the children on Saturday 14 August 2010, He stated that he is sending them to school at Drayton starting today Wednesday 18 August 2010.

I hope that this order is signed promptly so that I may go pick up Micah and Devon and bring them home.
Thank you,
Tracie Hale

Subject:
Date: Tue, 17 Aug 2010 15:41:29 -0400
From: elizabeth@stringerlaw.us
To: fair@mojustice.com; tracie2592@hotmail.com

Elonda, I believe I have incorporated your changes. You deleted the division after the initial $250.00 in uncovered medical expenses is paid per child, yearly. I clarified that. Please let me know if this is ready to send to the Judge. Thanks, Liz

EXHIBIT F

Elizabeth J. Stringer

From: Elizabeth J. Stringer
Sent: Wednesday, August 18, 2010 5:00 PM
To: 'Paul Garfinkel'
Cc: 'Elonda Fair O'Neill, Esq.'; 'Tracie Hale'
Attachments: Temporary Order.rtf

Judge Garfinkel,

I called Mrs. O'Neill per your instructions to inquire if she received the earlier email from Ms. Hale. Mrs. O'Neill does not feel comfortable with answering that question or with any ex parte communication between you and me. Mrs. O'Neill stated that she wants all future communication to be on the record. At this point, I have attached the Order which has been circulated and which I believe all parties approve. I did not receive a copy of the Child Support Guidelines to attach. Please advise. Thanking you, Liz Stringer

EXHIBIT G

Elizabeth J. Stringer

From: Elizabeth J. Stringer
Sent: Wednesday, August 18, 2010 5:42 PM
To: 'Paul Garfinkel'
Cc: 'Elonda Fair O'Neill, Esq.'; 'Tracie Hale'
Attachments: Temporary Order.rtf

Judge Garfinkel,

Mrs. O'Neill asked for a rewording of the unpaid medical bills section which I have rewritten accordingly.
Thanking you, Liz Stringer

EXHIBIT H

From: Garfinkel, Paul W. [redacted]
Sent: Monday, August 23, 2010 3:27 PM
To: 'Elonda C. Fair' (fair@mojustice.com)
Subject: Burroughs v Haile
Importance: High

Please be advised I have received 2 emails from the Defendant. It is my understanding that last week during my absence you acknowledged to Ms Stringer you have read both. If this is not correct, please advise immediately. If I do not hear from you by noon, August 25, I will read the 2 emails because that would not then constitute ex parte communication.

Also, please advise by the above mentioned date & time if you have any objections to the proposed order as drafted by the GAL.

pwg

EXHIBIT I

Elizabeth J. Stringer

From: Elizabeth J. Stringer
Sent: Wednesday, August 25, 2010 12:25 PM
To: 'Tracie Hale'
Subject: RE:

Tracie—Any notary will do. This is to finalize the Order and is VERY important. Let me know because I have to notify the judge if you are going to have a notary. Liz

---

From: Tracie Hale [mailto:tracie2592@hotmail.com]
Sent: Wednesday, August 25, 2010 12:23 PM
To: Elizabeth J. Stringer
Subject: RE:

I can be available for phone conf. but I don't know how I will be able to get to a notary. Is this why the order has not been finalized?

Subject:
Date: Wed, 25 Aug 2010 12:20:52 -0400
From: elizabeth@stringerlaw.us
To: tracie2592@hotmail.com
CC: karen@stringerlaw.us

Tracie—

Can you be available tomorrow via phone for a hearing at 1:45 p.m. You will need a notary near you in case you need to be sworn in. Thanks! Liz

EXHIBIT J

Elizabeth J. Stringer

From: Elizabeth J. Stringer
Sent: Wednesday, August 25, 2010 12:29 PM
To: 'Elonda Fair O'Neill, Esq.'; 'Garfinkel, Paul W.'
Cc: 'Kevin Burroughs'; Tracie Hale
Subject: RE: Burroughs v Haile

Judge Garfinkel,

Ms. Hale is available via her cell phone tomorrow and will make certain she has a notary available. See you all tomorrow at 1:45. Thanking you, Liz

---

From: Elonda Fair O'Neill, Esq. [mailto:fair@mojustice.com]
Sent: Wednesday, August 25, 2010 12:03 PM
To: 'Garfinkel, Paul W.'
Cc: Elizabeth J. Stringer; 'Kevin Burroughs'; Tracie Hale
Subject: RE: Burroughs v Haile

Elonda Fair O'Neill, Esquire
Law Offices of O'Neill & Fair
1847 Ashley River Road, Suite 200
Charleston, South Carolina 29407
843.763.3900 Ext 4 * 843.763.7996 Fax
*Also licensed in CA
www.mojustice.com

From: Garfinkel, Paul W. [[redacted]]
Sent: Monday, August 23, 2010 3:27 PM
To: 'Elonda C. Fair' (fair@mojustice.com)
Subject: Burroughs v Haile
Importance: High

Please be advised I have received 2 emails from the Defendant. It is my understanding that last week during my absence you acknowledged to Ms Stringer you have read both. If this is not correct, please advise immediately. If I do not hear from you by noon, August 25, I will read the 2 emails because that would not then constitute ex parte communication.
Also, please advise by the above mentioned date & time if you have any objections to the proposed order as drafted by the GAL.
pwg

Attachment 5

From: Garfinkel, Paul W. [redacted]
Sent: Monday, August 23, 2010 3:27 PM
To: 'Elonda C. Fair' (fair@mojustice.com)
Subject: Burroughs v Haile
Importance: High

Please be advised I have received 2 emails from the Defendant. It is my understanding that last week during my absence you acknowledged to Ms Stringer you have read both. If this is not correct, please advise immediately. If I do not hear from you by noon, August 25, I will read the 2 emails because that would not then constitute ex parte communication. Also, please advise by the above mentioned date & time if you have any objections to the proposed order as drafted by the GAL.
pwg

Attachment 6

State of South Carolina
The Family Court of the Ninth Judicial Circuit

PAUL W. GARFINKEL
JUDGE

100 BROAD STREET
SUITE 246
CHARLESTON, SOUTH CAROLINA 29401-2275
TELEPHONE: (843) 958-4417
FAX: (843) 958-4433
E-MAIL: pgarfinkel@ccjd.state.sc.us

MEMORANDUM

TO: Elonda O'Neill, Esq. & Tracie Hales & Elizabeth Stringer, Esq.

FAX: (843)763-7996 (304) 656-7145 (843) 762-0144

FROM: Paul W. Garfinkel (PW)

RE: Burroughs v Hales, Case # 10-DR-10-1836

DATE: 8/12/2010 HEARING DATE: 8/9/2010

I would like for the Guardian ad Litem (Elizabeth Stringer, Esq.) to prepare a temporary Order in the above case incorporating the following findings and ruling. Please feel free to supplement the Temporary Order with necessary facts and background supported by the evidence, as the following is a "bare bones' synopsis.

FINDINGS:

1. JURISDICTION AND VENUE: Based upon the evidence and my review of the file, I find that jurisdiction and venue are proper and the parties and subject matter are properly before me.

2. TEMPORARY CUSTODY: The Defendant is granted temporary custody of the parties minor children.

3. VISITATION: The Plaintiff shall be entitled to reasonable and liberal visitation. Parties to consult with Guardian ad Litem to try to resolve. If no resolution then both parties to submit visitation plans to Court for disposition.
   a) Neither parent to smoke or to allow others to smoke in the presence of the children in an enclosed space (home, car, etc.).
   b) Neither parent to allow the boys to sleep with them in their bed.
   c) Mother and Father to be restrained from the use of corporal punishment.
   d) Micah to obtain speech therapy and for the parent's to follow any recommendations regarding either of the children's health or mental care; and
   e) For all contact between the children and Chastity's boyfriend, Josh, to be supervised by Mother or another responsible adult, however shall not be Mother's sister.

4. TEMPORARY CHILD SUPPORT: The Plaintiff shall pay child support pursuant to the attached Child Support Guidelines. Said child support shall be paid monthly beginning September 1, 2010. Please attach Work Sheet A.

5. REASONABLE TELEPHONE ACCESS: Each party shall be entitled to liberal and reasonable telephone access while the minor children are in the custody of the other party.

6. NOTIFICATION OF MAJOR ILLNESS: Each party shall provide prompt and timely notification to the other party of any major illness of the minor children, major illnesses shall include any illness lasting more than 24 hours and/or requiring medical treatment.

7. ACCESS TO RECORDS: Each party shall be entitled to full access to any records concerning the minor children, including, but not limited to, school records, medical records, daycare records, etc.

8. ADDRESSES AND PHONE NUMBERS: Each party shall keep the other party informed of their respective addresses and phone numbers; and each party shall provide written notice to the other party of any change of address.

9. UNCOVERED MEDICAL EXPENSES OF THE MINOR CHILDREN: All of the uncovered medical expenses of the minor children shall be temporarily divided pursuant to the South Carolina Child Support Guidelines, with the Defendant being responsible for the first TWO HUNDRED AND FIFTY DOLLARS ($250.00) per child per year and any additional uncovered medical/dental expenses divided between the parties (see Child Support Guidelines).

10. RESTRAINING ORDERS FOR BENEFIT OF THE MINOR CHILDREN: The parties shall be temporarily restrained from (1) speaking ill of the other parent in the presence of the minor children and from allowing others to speak ill of the other parent in the presence of the minor children; (2) interfering with the other parent's relationship with the minor children and from allowing others to interfere with the other parents relationship with the minor children; (3) exposing the minor children to any overnight paramours and from exposing the minor children to overnight guests of the opposite sex whom are unrelated by blood or marriage; (4) consuming any illegal drugs and excessive alcohol during custody/visitation periods; (5) discussing this litigation with the minor children; (6) exposing the minor children to any illegal and/or immoral conduct, including profanity; and (7) exposing the minor children to any violent conduct.

11. MUTUAL RESTRAINING ORDER: By agreement, the parties shall be temporarily restrained from harassing, abusing, threatening, bothering, or otherwise interfering with each other in any way whatsoever.

12. DISCOVERY: The parties are granted full pretrial discovery pursuant to the South Carolina Rules of Civil Procedure and The South Carolina Family Court Rules.

13. TEMPORARY ATTORNEY'S FEES AND COSTS: The issue of temporary attorney's fees and costs is held in abeyance at this time.

14. DEFENDANT shall pick up children and their personal property at noon on August 14, 2010 at Plaintiff's residence.

Attachment 7

Garfinkel, Paul W.

From:	Tracie Hale <tracie2592@hotmail.com>
Sent:	Wednesday, August 18, 2010 1:46 AM
To:	Garfinkel, Paul W.
Subject:	FW: Directions re: Burroughs vs. Hale

From: tracie2592@hotmail.com
To: [redacted]
Subject: Directions re: Burroughs vs. Hale
Date: Wed, 18 Aug 2010 01:39:08 -0400

Judge Garfinkel,

RE:
Case: Burroughs vs. Hale
Docket No.: 2010-DR-10-1836

I, Tracie Hale am writing you because you have reviewed the facts and findings in the case that I am involved in where Kevin Burroughs is trying to assume custody of our children because of my moving back to WV, children that I have raised from the time of their birth.

On Thursday August 12, 2010 you faxed Ms. O'Neil (plaintiffs attorney), Ms. Stringer (Guardian at Litem), and myself a copy of your decision and instructions of how the TEMPORARY ORDER was to be drafted. In these instructions you stated that I was to be able to pick up the children and their belongings at the Plaintiff's residence on Saturday August 14, 2010 by 1200pm Noon. However, on Friday when I call to make the arrangements with Mr. Burroughs for my getting the children he stated, "There was no way I was getting the children because your instructions were not the order and that I would not get them until he has a order in hand signed by the judge". As of Tuesday, August 17, 2010 at approx. 630pm when I was on the phone with our youngest son Devon, he informs me that they are starting school in Drayton Hall on Wednesday August 18, 2010. School is to start here in West Virginia on Thursday August 19, 2010 and I still can not get the children because Kevin refuses to allow me to pick them up with out the order.
I have been in contact with Ms. Stringer and she is working on drafting the TEMPORARY ORDER however the Plaintiff's Attorney Ms. O'Neil has been reviewing and making corrections which is causing a delay in the process.

Please advise me on how I can move this process along and get the children home so that there will not be a major delay with their starting school here in West Virginia. I have no doubt that these actions by Mr. Burroughs and his Attorney are deliberate in nature and are an attempt to prolong this entire process.

Sincerely,
Tracie Hale

Garfinkel, Paul W.

From: Tracie Hale <tracie2592@hotmail.com>
Sent: Friday, August 20, 2010 10:42 AM
To: Garfinkel, Paul W.
Subject: Temporary order for Burroughs vs. Hale

Sear Sir,

I am writing to ask if the TEMPORARY ORDER in case # 2010-DR-10-1836 Burroughs vs. Hale as well as the Child Support worksheet has been completed for you to sign?
My last communication with Ms. Stringer was on Tuesday 17 August. I have been unable to get through to her office number and the e-mails I have sent has been undeliverable.
I only ask because I would like to come pick up Micah and Devon so that we can get back into their routine and most importantly into the school that they will be attending but I am unable to do so without the signed order.

Thanking you,
Tracie Hale

Attachment 8

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
COUNTY OF CHARLESTON	)	DOCKET NO. 2010-DR-10-1836
KEVIN E. BURROUGHS	)	
Plaintiff	)	
VS.	)	
TRACIE A. HALES	)	
Defendant	)	
	)	TRANSCRIPT OF RECORD

August 26, 2010
Charleston, South Carolina

B E F O R E:

THE HONORABLE PAUL W. GARFINKEL, JUDGE

A P P E A R A N C E S:

ELONDA FAIR O'NEILL, ESQ.
Attorney for the plaintiff

ELIZABETH STRINGER, ESQ.
Guardian ad Litem

TRACIE A. HALES
Pro se defendant (via telephone)

JOYCE C. HUCK
Court Reporter

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1 PROCEEDINGS

2 [From the bench immediately prior to the
3 commencement of the hearing the court
4 established telephone connection with the
5 defendant for purposes of allowing her
6 participation in the hearing]

7 THE COURT: All right. This is the case
8 of Kevin Burroughs as plaintiff versus Tracie
9 A. Hales defendant, case number 2010-DR-10-
10 1836. Present in the courtroom we have the
11 attorney for the plaintiff, Ms. Elonda Fair
12 O'Neill, we have the guardian ad litem, Ms.
13 Elizabeth Stringer, and by closed circuit
14 telephone we have the defendant, Tracie Hales.

15 Now the original purpose of this
16 hearing was a result of a conference call this
17 court asked the guardian to initiate because
18 this court had received an email from Ms.
19 Hales, the email -- Ms. Hales the defendant.
20 The email did not indicate it had been sent to
21 the attorney for the plaintiff or the
22 guardian. The court contacted the guardian
23 merely to inquire if she had seen the email
24 and to arrange a conference call so that the
25 court prior to reading any email from the

1 defendant would know that the attorney for the
2 plaintiff had in fact received the email. The
3 court was informed that the attorney for the
4 plaintiff wished to have all conference calls
5 on the record. And that's why we are having
6 this conference call on the record. Have I
7 summarized pretty much your understanding, Ms.
8 O'Neill as to why we are here on this hearing?
9 MS. O'NEILL: Yes, Your Honor.
10 THE COURT: Okay. And is that your
11 understanding also, Ms. Stringer?
12 MS. STRINGER: Yes, Your Honor.
13 THE COURT: All right. Now, for purposes
14 of background for the purpose of this hearing
15 this court had sent instructions to the
16 guardian ad litem, to the attorney for the
17 plaintiff, and Ms. Hales, the defendant who is
18 a self-represented litigant, on its ruling
19 from the last hearing and asked the guardian,
20 or instructed the guardian to be technically
21 correct, to please draft the order resulting
22 from this court's findings. And this order
23 was not submitted. Included in the
24 instructions were that Ms. Hales, the
25 defendant could pick up the children from the

1 plaintiff where the children were then
2 residing on I believe it was this past
3 Saturday. And the emails from the defendant
4 indicated there were some problems with that.
5 At this point Ms. Hales I'm going to
6 ask you to please identify the name of the
7 notary that's with you and please have --
8 actually, is the notary there?
9 MS. HALES: Yes. She is right here
10 beside me.
11 THE COURT: All right. Madame Notary --
12 is the notary public there?
13 MS. HALES: Yes. The notary public is
14 here.
15 THE COURT: Okay. Could you ask her to
16 come to the phone, please?
17 MS. HALES: Yes.
18 [Whereupon, Ms. Hales complies]
19 MADAME NOTARY: Yes?
20 THE COURT: Are you the notary public?
21 MADAME NOTARY: Yes, sir. My name is
22 Leslie L-E-S-L-I-E, McComas M-C-C-O-M-A-S.
23 THE COURT: I'm sorry. M-C -- would you
24 spell that again because you went a little too
25 fast for me? M-C--

1 MADAME NOTARY: M, M as in monkey,
2 C-C-O-M-A-S.
3 THE COURT: O-M-A-S.
4 MADAME NOTARY: Yes, sir.
5 THE COURT: And you are ---
6 MADAME NOTARY: --- and that is through
7 McDowell County Correctional.
8 THE COURT: McDowell? Spell McDowell,
9 please.
10 MADAME NOTARY: McDowell,
11 M-C-D-O-W-E-L-L.
12 THE COURT: Okay. And you are a notary
13 public for the State of West Virginia?
14 MADAME NOTARY: For the State of West
15 Virginia. Yes, sir.
16 THE COURT: And do you have a commission
17 date when your commission expires?
18 MADAME NOTARY: Yes, sir.
19 THE COURT: And when ---
20 MADAME NOTARY: --- it's ---
21 THE COURT: --- would that be?
22 MADAME NOTARY: We're overlapping. I'm
23 sorry.
24 THE COURT: Okay. When does your notary
25 public commission expire for the State of West

1 Virginia?

2 MADAME NOTARY: September 27th, 2011.

3 THE COURT: Okay, very good. And you are

4 there within sight and sound of Ms. Tracie

5 Hales?

6 MADAME NOTARY: Yes, sir.

7 THE COURT: Good. Now, are we on a

8 conference phone or just an individual phone

9 that's going back and forth? What is the

10 method of communication?

11 MADAME NOTARY: She is on her personal

12 cell phone.

13 THE COURT: Okay. So you have to hand

14 the phone back and forth, is that correct?

15 MADAME NOTARY: Yes, sir.

16 THE COURT: All right. Let me ask if

17 either of the parties here in the courtroom

18 have any questions that they want to ask you

19 at this time. Ms. O'Neill, do you have any

20 questions you want to inquire of the notary as

21 far as her commission or anything having to do

22 with her credentials as a notary?

23 MS. O'NEILL: No, sir.

24 THE COURT: All right, how about you Ms.

25 Stringer?

1 MS. STRINGER: No, Your Honor.

2 THE COURT: All right Ms. McComas, is

3 that -- am I pronouncing that correctly?

4 MADAME NOTARY: Yes, sir.

5 THE COURT: All right Ms. McComas, at

6 this point I would ask you to ask Ms. Hales to

7 raise her right hand? Would you ask her to do

8 that?

9 MADAME NOTARY: Yes, sir. Ms. Hales,

10 would you please raise your right hand? It's

11 being done.

12 THE COURT: Okay. Is it in fact raised

13 at this time? Is her right hand raised?

14 MADAME NOTARY: Yes, sir. She has it

15 raised.

16 THE COURT: All right, I'm going to ask

17 you to repeat to her exactly what I repeat to

18 you. Would you explain that that's the way we

19 are going to do it? I'm going to ask you to

20 repeat exactly what I repeat to you. Tell her

21 that's the way we're going to handle her being

22 sworn in.

23 MADAME NOTARY: Okay.

24 [Whereupon, the instructions are repeated

25 to the witness by the Notary]

1 [Whereupon, the witness is duly sworn by
2 the Court through the Notary Public]
3 THE COURT: And please give me her
4 response.
5 MADAME NOTARY: She agrees.
6 THE COURT: Okay.
7 MADAME NOTARY: Her exact response is I
8 agree.
9 THE COURT: Thank you, very much. All
10 right, would you hand the phone to her now,
11 please? And it's up to her whether you stay.
12 We just needed you to swear you in at this
13 point. It's up to her whether she wants you
14 to stay. Hand the phone to her, please?
15 MADAME NOTARY: I'm giving the phone to
16 her.
17 [Whereupon, the court reporter confers
18 with the court]
19 THE COURT: Ma'am?
20 MADAME NOTARY: Yes, sir.
21 THE COURT: Okay, is this Ms. McComas
22 again?
23 UNIDENTIFIED SPEAKER: I'm sorry?
24 THE COURT: I'm sorry, is this Ms. Hales
25 or Ms. McComas?

1 THE WITNESS: This is Ms. Hales.

2 THE COURT: All right Ms. Hales, could

3 you just hand the phone back to the notary

4 again for one moment?

5 MS. HALES: Oh, yes.

6 [Whereupon, the witness complies]

7 MADAME NOTARY: Ms. McComas.

8 THE COURT: Ms. McComas, do you in fact

9 know Ms. Hales personally or has she given

10 identification to you?

11 MADAME NOTARY: She is a co-worker that

12 has worked in the environment with me.

13 THE COURT: All right, so you know her

14 prior to this encounter today? You know her

15 by sight, is that correct?

16 MADAME NOTARY: Yes, sir.

17 THE COURT: And in fact she is Tracie

18 Hales, is that correct?

19 MADAME NOTARY: Yes, sir.

20 THE COURT: Okay, thank you. Now if

21 you'll give the phone back to her I think

22 we've taken care of all the preliminaries.

23 MADAME NOTARY: Okay, I'm handing the

24 phone back to her.

25 THE WITNESS: This is Ms. Hales.

1 THE COURT: All right, Ms. Hales?

2 THE WITNESS: Yes, sir?

3 THE COURT: First of all let me instruct

4 you that any emails -- well, let me back up.

5 Don't send me any emails in the future. Any

6 time you need to communicate with this court

7 please do so through the offices of the

8 guardian ad litem.

9 THE WITNESS: Yes, sir.

10 THE COURT: There are problems with you

11 communicating with me directly. Should an

12 absolute emergency occur, and I'm talking

13 about anything that would be defined by any

14 reasonable person as an emergency and you do

15 need to email me, please make sure that the

16 email to me clearly indicates that you are

17 copying Ms. O'Neill and the guardian ad litem.

18 Do you understand?

19 THE WITNESS: Yes, sir. I understand.

20 THE COURT: But anything short of an

21 extreme emergency do not email me at all. Do

22 you understand?

23 THE WITNESS: Yes, sir.

24 THE COURT: Okay. Now, what I want --

25 the subject of your email dealt with your

1 attempt to pick up the children I believe this
2 past Saturday. Would you explain to me
3 exactly what happened?
4 THE WITNESS: Yes, sir.
5 THE COURT: Okay, please start now and
6 tell me.
7 THE WITNESS: I'm sorry?
8 THE COURT: Please tell me what happened
9 when you came to pick up the children.
10 THE WITNESS: I called on Friday, which
11 was the 13th to get in touch with Mr. Burroughs
12 so that I could make the arrangement to pick
13 up the boys on the given time, which was the
14 14th of August at noon.
15 When I contacted Mr. Burroughs what
16 he told me was he is not turning over the kids
17 because there is not the order in effect, that
18 the only thing that he knows of was the
19 instruction, which he does not have to go by
20 because they are not the formal order.
21 And he told me that he would not
22 relinquish the kids until he received that
23 order that was filed and signed by you.
24 THE COURT: Okay. So did you come to
25 Charleston to pick up the children or was this

1 all over the telephone?

2 THE WITNESS: This was all over the

3 telephone. I had had conversations with him;

4 I'm looking at my planner. I had

5 conversations with him that Friday, which

6 would be the 13th. I had a follow-up

7 conversation with him on the 14th and his words

8 was for me to not waste my time with coming

9 because until he has the filed and signed

10 order he does not have to relinquish the kids.

11 THE COURT: Okay. I want you to be on

12 stand-by and I'm going to ask the attorney and

13 the guardian to address the issues that you

14 raised. Please tell me if you cannot hear

15 them or understand them, okay?

16 THE WITNESS: Okay.

17 THE COURT: Thank you. All right Ms.

18 O'Neill, I'll be glad to hear from you as to

19 your client's position on the issue about

20 picking up the children.

21 MS. O'NEILL: Your Honor, first of all

22 I'm going to object to this whole hearing

23 situation. You stated that the pro se

24 litigant to communicate through the GAL

25 offices, however she's a litigant. There are

1 certain rules and procedures that we have and
2 if she has a problem and there is an order in
3 effect we have a procedure in which to seek
4 redress. She's not doing that. She needs to
5 follow the procedures that we all have to
6 follow afforded by the lawmakers in South
7 Carolina. Her redress was to file a motion
8 and file it in the Clerk's office whether that
9 be ex parte, expedited, or whatever ---
10 THE COURT: --- all right. Your
11 objection is noted. We're going ---
12 THE WITNESS: --- sir ---
13 THE COURT: --- ma'am, don't say
14 anything. We're moving on with the hearing
15 for the benefit of the children. I'm
16 concerned about the welfare of the children.
17 Procedural matters come second to the welfare
18 of the children. Please continue with
19 addressing the concerns raised about picking
20 up the children.
21 MS. O'NEILL: Your Honor, as she stated
22 Ms. Hales never came to South Carolina to pick
23 up the children. She was working on September
24 the 14th (sic). She was not planning to come,
25 therefore my client when -- he had enrolled

1 them in school because school started. And
2 she works throughout the week. In fact, she
3 works from 3 p.m. to 12. And she leaves 30
4 minutes prior to that and she gets home 30
5 minutes after that.
6 You know she does not have time to
7 spend with the children at the time that they
8 are home from school. So she never drove to
9 Charleston to come and get the kids or -- so
10 my client did what he has been doing, was to
11 enroll them in school.
12 THE COURT: Okay.
13 THE WITNESS: Your Honor, if I may say so
14 I can barely hear her.
15 THE COURT: All right, I'm going to ask
16 Ms. Fair if you'll -- I'm sorry Ms. O'Neill, I
17 apologize, to come forward and -- the speaker
18 is here and I'll try to put it...
19 [Whereupon, Ms. O'Neill comes forward]
20 THE COURT: All right, Ms. O'Neill, can
21 you sort of summarize again or explain what
22 you just said?
23 MS. O'NEILL: What I stated was that Ms.
24 Hales as she stated on the phone to you just
25 now, she never came to Charleston. She never

1 drove to Charleston. She was working on
2 Saturday, September the 14th. And she works
3 from 3 p.m. to 12 p.m. And she didn't make an
4 attempt to come here and retrieve the
5 children; therefore my client went ahead and
6 put them in school.
7 I think there was a conversation and
8 really I don't know from -- I'm not a party to
9 that so I really can't testify to it. But
10 from what I understand is that she was not
11 planning on getting the kids until the
12 following weekend.
13 THE COURT: All right, Ms. ---
14 THE WITNESS: --- sir.
15 THE COURT: Ms. Hales, first let me just
16 -- okay tell me about when you told Mr.
17 Burroughs you would be coming to Charleston?
18 THE WITNESS: Yes, sir. At 11:30 a.m. on
19 Friday I had a conversation with Kevin and
20 advised him that I would be coming to get the
21 kids. I had already made the arrangements
22 with my employer as to my getting off on
23 Saturday. He -- that was when he told -- sir,
24 are you still there?
25 THE COURT: Yes, yes. Please continue.

1 THE WITNESS: Okay. That was when he
2 told me that he does not have to relinquish
3 the kids because the only thing that that is
4 is that would be instructions as to what the
5 court order would be.
6 And until he got an actual
7 notarized, signed court order from you that he
8 does not have to relinquish those kids. At 11
9 a.m. on Saturday I spoke with Kevin again.
10 And he once again told me that until -- in his
11 exact words, until I have a court order signed
12 by the judge I am not giving you the kids.
13 THE COURT: Okay.
14 THE WITNESS: Also on Saturday at 12 p.m.
15 I spoke with Kevin. Once again, we had an
16 argument ---
17 THE COURT: --- excuse me. Was that --
18 you said 12 p.m. Was that noon? I'm sorry to
19 interrupt but was that 12 p.m. noon or 12 p.m.
20 midnight?
21 THE WITNESS: It was 12 p.m. during the
22 day; 12 noon ---
23 THE COURT: --- 12 noon ---
24 THE WITNESS: --- on Sunday. We had an
25 argument over the phone because he would not

1 go along with your instructions per what the
2 order was to be. He once again told me that
3 he is not giving me the kids and he hung up on
4 me. I called back at 1:20 p.m., had another
5 conversation with Kevin and asked why is it
6 that whenever I call to talk with him he
7 claims that we need to talk this through but
8 we end up in a full blown argument. And he
9 once again said he is not giving me the kids.
10 THE COURT: All right, Ms. ---
11 THE WITNESS: --- I have ---
12 THE COURT: --- go ahead ---
13 THE WITNESS: --- I have more documented
14 conversations if you would like to know.
15 THE COURT: No, ma'am. That's fine.
16 THE WITNESS: Okay.
17 THE COURT: All right Ms. O'Neill, is
18 there anything further you want to address
19 about this matter?
20 MS. O'NEILL: Other than my initial
21 objection that my client is not here to speak,
22 to testify.
23 THE COURT: I'm not ---
24 MS. O'NEILL: --- he wasn't served any
25 notice for anything so.

1 THE COURT: All right. Ms. Hales -- let
2 me ask the guardian. Madame Guardian, have
3 you had any conversation with either party
4 regarding this issue?
5 MS. STRINGER: I've only had
6 conversations with Ms. Hales. She emailed me
7 initially to ask if the children were going to
8 go to her. I called Ms. Fair and Ms. Fair
9 told me that she was not going to discuss it
10 with me.
11 THE COURT: Okay, very good. All right,
12 now we've got to get the children ---
13 MS. O'NEILL: --- now when was that?
14 MS. STRINGER: It was on -- it was on
15 Wednesday or Thursday of last week. You said
16 you wanted everything on the record --
17 MS. O'NEILL: With ---
18 THE COURT REPORTER: --- excuse me Ms.
19 Fair, I didn't hear the last thing you said
20 ---
21 MS. STRINGER: --- I'm sorry, last week.
22 I was actually leaving town so I guess it
23 would have been Thursday. And you said you
24 didn't want -- I asked you what -- was he
25 going to give the children to her and you said

1 I don't want to discuss it with you. I want
2 it on the record.
3 MS. O'NEILL: And that was after the 14th.
4 That was the 18th?
5 MS. STRINGER: That would have been the
6 19th.
7 THE COURT: Okay ---
8 MS. O'NEILL: --- do you have any
9 knowledge that Ms. Hales came here to pick up
10 the kids?
11 MS. STRINGER: No, I don't.
12 THE COURT: Okay, thank you. I've heard
13 enough. Ms. Hales?
14 THE WITNESS: Yes, sir?
15 THE COURT: Mr. Burroughs is in fact
16 correct. He does not have to comply.
17 However, I am going to change my instructions
18 and do a -- number one for a formal order, in
19 that I am going to instruct Mr. Burroughs to
20 deliver the children to you.
21 THE WITNESS: Okay.
22 THE COURT: Okay, now will you be able --
23 tell me what day this -- as soon as you can --
24 can you receive the children on Saturday or
25 Sunday?

1 THE WITNESS: Yes, sir. Saturday would
2 be great.
3 THE COURT: All right. And about how
4 long of a drive is it, I have no idea, between
5 your home and the residence here in
6 Charleston?
7 THE WITNESS: It is an 8 hour drive from
8 Charleston, South Carolina to my actual
9 residence. But sir, I would be more than
10 willing to meet him for the exchange in a
11 public place. And I would have a witness with
12 me so that there are no argumentative
13 exchanges going on between us.
14 THE COURT: What would ---
15 THE WITNESS: --- if that pleases the
16 court.
17 THE COURT: Okay. What would be
18 approximately a halfway meeting point?
19 THE WITNESS: Charlotte, North Carolina
20 is exactly the halfway point.
21 THE COURT: Okay, that's a big place. We
22 need to have a specific place. Is there a
23 place that you're familiar that would be a
24 meeting place? I know I-77 goes through
25 Charlotte is there a...

1 THE WITNESS: There is actually a rest
2 area right outside of Charlotte. It's the
3 first rest area after Charlotte.
4 THE COURT: I think we're going to need
5 to be more specific than that. I can see
6 trouble on the horizon where you are at one,
7 he's at another one, and then we say well they
8 didn't meet. Can you give me a specific exit
9 number or?
10 THE WITNESS: No, sir. I don't know the
11 exact exit number but what I can do I do --
12 there is an area called Statesville, North
13 Carolina. It's along route 77. It is exit 50
14 and I can meet him there.
15 THE COURT: Okay. Is there a landmark
16 there, a fast food store, is there a
17 particular brand of service station; something
18 so that ---
19 THE WITNESS: --- Yes, sir. There is a
20 store, it's called J.R. Outlet.
21 THE COURT: Oh, I've heard of that. J.R.
22 Outlet, okay. So if he left here about 9
23 a.m., we won't make it too early, on Saturday
24 he should be able to get there say between the
25 hours of 1:30 and 2:30. Would that be fair?

1 THE WITNESS: Yes, sir. He would
2 probably get there closer to 2 o'clock.
3 THE COURT: All right, between 1:30 and
4 2:30. And you can be there at the same time?
5 THE WITNESS: Yes, sir.
6 THE COURT: Okay. And so that's very,
7 very kind -- all right, let me do a bench
8 order so we can get that filed today. And
9 then I'm going to ask Ms. Stringer to amend
10 the other order, okay.
11 And this is just going to be an
12 informal bench order, but it will be binding.
13 It will be binding on everybody giving you
14 custody of the children and Mr. Burroughs to
15 meet you there on Saturday, October -- I'm
16 sorry, August the 28th between the -- what's
17 that exit number again?
18 THE WITNESS: Exit 50. 5-zero.
19 THE COURT: Thank you, ma'am. All right,
20 stay on the phone please, ma'am.
21 THE WITNESS: Yes, sir.
22 MS. STRINGER: And Your Honor, there is
23 an issue with the temporary order. I just
24 want to ---
25 THE COURT: --- yes ma'am and that would

1 be?

2 MS. STRINGER: The child support

3 guidelines weren't attached and ---

4 THE COURT: --- I haven't seen the

5 proposed order yet.

6 MS. STRINGER: Okay. It should have been

7 -- it should have come over on the 18th.

8 THE COURT: I have not seen it.

9 MS. STRINGER: Okay.

10 THE COURT: What is your -- you have a

11 question regarding the instructions I have or?

12 MS. STRINGER: Well, the child support

13 guidelines weren't attached to the

14 instructions but you'd stated that they were

15 and so none of us have seen that. And Ms.

16 Fair had asked me if I had seen it ---

17 THE COURT: --- no I -- well, then maybe

18 my instructions -- I asked you to -- I

19 thought, I'm sorry, I asked you to work it out

20 and attach a child support worksheet to it.

21 MS. STRINGER: Okay, I can do that. I

22 know there is an issue as to -- isn't there an

23 issue as to the child support Elonda, as far

24 as drafting it or is there not? She filed an

25 amended financial declaration.

1 MS. O'NEILL: I mean there is -- we'll go
2 on her financial declaration ---
3 MS. STRINGER: --- okay, then I'll run
4 them.
5 THE COURT: Okay. All right, I'm having
6 to write most of this by hand. I had some of
7 it prepared in advance with the case caption
8 and some of the information on it.
9 [Whereupon, the court prepares the order]
10 THE COURT: What I am doing is I am
11 entering -- having -- I'm going to give to the
12 guardian ad litem and instruct the guardian ad
13 litem to get copies to you, Ms. Hales and Ms.
14 O'Neill is instructed to wait until she is
15 given a certified copy of the order for her
16 client today. And the order says -- the top
17 part of the order identifies the case name,
18 who everybody is, and it says as follows:
19 [Reading] The court finding that
20 the legal custody of the above named children
21 -- which are of course [redacted] and [redacted] --
22 should be placed with the defendant, Tracie
23 Hales pending execution of the written order
24 from the hearing in this matter this date and
25 -- previously held. It is therefore ordered

1 that the legal custody of the minor children,
2 Micah Burroughs and Devon Burroughs shall be
3 placed with the defendant, Tracie Hales.
4 Plaintiff shall be required to return the
5 children to defendant at exit 50 on I-77,
6 Statesville, North Carolina, J.R. Outlet
7 between the hours of 1:30 p.m. and 2:30 p.m.
8 on Saturday, August 28th, 2010.
9 Plaintiff shall also deliver all
10 personal effects of the children including,
11 but not limited to, their clothing and school
12 supplies. Upon the execution and the filing
13 of the written order from the hearing in this
14 matter this date this interim order shall be
15 of no further force and effect.
16 In other words, this is only to give
17 you actual custody of the children at this
18 time and instruct the plaintiff to return the
19 children to you. All right, do you understand
20 everything I've said, Ms. Hales?
21 THE WITNESS: Yes, sir. I do.
22 THE COURT: All right, and Ms. O'Neill
23 do you have any questions on anything that
24 I've said?
25 MS. O'NEILL: I don't have any questions,

1 but I do have objections.

2 THE COURT: All right, and for purposes

3 of the record would you state those?

4 MS. O'NEILL: The objection is the nature

5 of this hearing in itself. When I was

6 informed that this was going to be a

7 conference call, not a hearing, my client was

8 not notified to be here. This was supposed to

9 be something that was just heard on the

10 record. And from my understanding it was to

11 admonish the defendant from doing the ex parte

12 communications.

13 On the fairness my client has not

14 had a chance to be heard. And I think this

15 was scheduled maybe Monday or Tuesday of this

16 week, and that also with the instructions to

17 the pro se defendant that her recourse is to

18 engage to guardian.

19 Her recourse is to go through the

20 courts; not just the guardian. If she wants

21 to report something that's happened to the

22 kids I don't object to that. But I do object

23 to the pro se litigant using the guardian as

24 counsel for herself.

25 THE COURT: You know Ms. O'Neill, you are

1 correct. You are correct. Ms. Hales, I think
2 Ms. O'Neill is right. I'm going to change
3 what I've ordered before and if you have
4 communications that you wish to communicate,
5 please do it either by formal motion or
6 matters that you want to bring you are going
7 to be required to follow the rules. I'm going
8 to agree with Ms. O'Neill on that.
9 MS. HALES: Yes, sir.
10 THE COURT: However, for the welfare of
11 the children I think they need to be -- I
12 think nobody would disagree that children need
13 to be in school and they need to be in school
14 where they are going to remain in school.
15 And I think it sounds to me like Mr.
16 Burroughs has tried to thwart the intention of
17 this court. He is legally correct. He is
18 legally correct that he did not have to turn
19 over the children so I won't hold that against
20 him.
21 But I just want to get these
22 children in school where they need to be in
23 school. I don't think anybody is going to
24 object to that. And this is again; this is
25 pursuant to -- like I said this is a temporary

1 matter. Everybody will be heard at the final
2 hearing and decide where the children will be
3 here permanently. I'm going to instruct the
4 guardian once again to draw up a formal order
5 referencing the previously held hearing and
6 this hearing. I'm going to instruct Ms.
7 O'Neill to not leave the guardian until she
8 has been given on behalf of her client a copy
9 of this court order.
10 If there are any violations of this
11 court order, this court will be mindful to
12 seek -- to give sanctions in the strictness
13 possible form. I understand your concern, Ms.
14 O'Neill but keep in mind this is all about the
15 children; not the clients okay. Anything
16 further from you, Ms. Hales?
17 MS. HALES: No, sir.
18 THE COURT: All right, anything further
19 from you Ms. O'Neill?
20 MS. O'NEILL: Just to be clear my
21 objection to the hearing was overruled?
22 THE COURT: Pardon -- Yes, ma'am;
23 absolutely.
24 MS. O'NEILL: Okay.
25 THE COURT: Absolutely, okay.

1 MS. O'NEILL: Thank you.

2 MS. STRINGER: I have a question, Your

3 Honor.

4 THE COURT: Yes, ma'am?

5 MS. STRINGER: I need to know the family

6 portion for the health care for Ms. Hales?

7 THE COURT: Ms. Hales, do you know what

8 you pay in health insurance strictly for the

9 children, not yourself? What amount is it for

10 the children?

11 MS. HALES: The family amount is $191 and

12 some change. I'm not exactly sure of the

13 exact amount ---

14 THE COURT: --- we're not going to

15 quibble over a penny ---

16 MS. HALES: --- if you'll give me one

17 second I will look. The health insurance is

18 $191.60. On it I have myself and my 3 kids.

19 THE COURT: What would be the portion if

20 it were just you?

21 MS. HALES: The portion for just me is 70

22 plus dollars.

23 THE COURT: Well, can you give us -- be a

24 little more specific?

25 MS. HALES: Give me one second and I can

1 run in and ask.

2 THE COURT: No, no what I want you to do,

3 I don't want to delay this any longer, you

4 email that to the guardian and to Ms. O'Neill.

5 Do you have her email address?

6 MS. HALES: Yes, I do.

7 THE COURT: Okay. You email and don't --

8 you don't need to include me in that loop.

9 Send it to both and the guardian will prepare

10 a child support worksheet for that.

11 MS. HALES: Yes, sir.

12 THE COURT: All right, any further from

13 you, Madame Guardian?

14 MS. STRINGER: No, Your Honor.

15 THE COURT: All right, and I want the

16 order to specifically state that this court's

17 concern is only to get the children enrolled

18 in school on as permanent a basis as possible.

19 Okay, thank you very much. That concludes

20 this hearing.

21 MS. O'NEILL: Thank you.

22 MS. HALES: Thank you.

23 ********END OF TRANSCRIPT OF HEARING********

24

25

1 C E R T I F I C A T E

2 I, the undersigned, Joyce C. Huck,
3 Official Family Court Reporter for the Ninth
4 Judicial Circuit of the State of South
5 Carolina, do hereby certify that the foregoing
6 is a true, accurate, and complete Transcript
7 of Record of the proceedings had and evidence
8 introduced in the trial of the captioned case,
9 relative to appeal, in the Court of Family
10 Court for Charleston County, South Carolina,
11 on the 26th day of August, 2010.
12 I do further certify that I am
13 neither of kin, counsel, nor interest to any
14 party hereto.
15
16 August 26, 2010
17
18
19 Joyce C. Huck
20 Joyce C. Huck
21 Court Reporter
22
23
24
25

Attachment 9

Garfinkel, Paul W.

From: Elonda Fair O'Neill, Esq. <fair@mojustice.com>
Sent: Thursday, October 07, 2010 4:57 PM
To: jmagera@dss.state.sc.us; Garfinkel, Paul W.
Attachments: Order of Dismissal.doc

Dear Judge Garfinkel and John:
Attached is the Order of the Dismissal for the above-referenced matter.

Elonda Fair O'Neill, Esquire
Law Offices of O'Neill & Fair
1847 Ashley River Road, Suite 200
Charleston, South Carolina 29407
843.763.3900 Ext 4 * 843.763.7996 Fax
*Also licensed in CA
www.mojustice.com

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
TAMERA I. HART)
VA DIV OF CHILD SUPPORT ENF)
PO BOX 570)
RICHMOND, VA 23218-0570,)
)
Plaintiff,)
)
vs.)
)
JAMES P. HART,)
2068 Bohicket Road)
Johns Island, SC 29455)
)
Defendant.)
)

IN THE FAMILY COURT OF THE
FIRST JUDICIAL CIRCUIT
CASE NO.: 2010-DR-10-964

ORDER OF DISMISSAL

Date of Hearing:	September 2, 2010
Trial Judge:	Paul Garfinkel
Plaintiff's Attorney:	John Magera
Defendant's Attorney:	Elonda Fair O'Neill
Court Reporter:	Joyce Huck

THIS MATTER was set to be heard before me upon Defendant's Motion to Contest the Validity of Foreign Support Order.

That defendant no longer wishes to proceed with the motion. **Now therefore,**

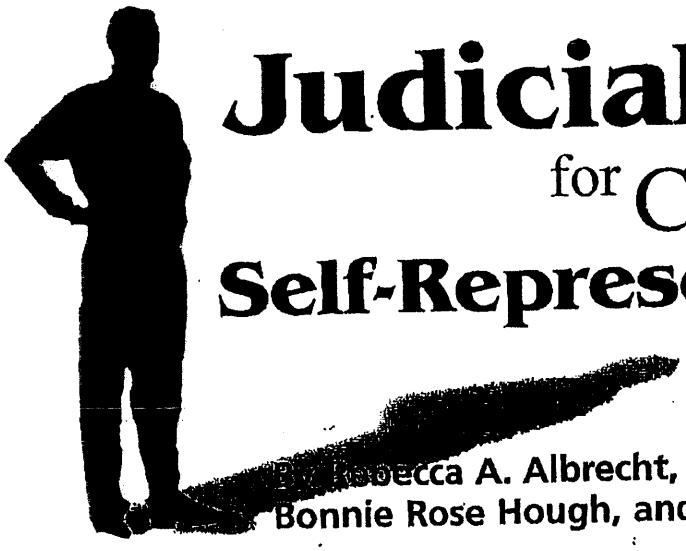
IT IS ORDERED, ADJUDGED AND DECREED that this matter be and is hereby dismissed.

AND IT IS SO ORDERED!

Paul W. Garfinkel
Family Court Judge
Ninth Judicial Circuit

Charleston, South Carolina
October , 2010

Attachment 10



Judicial Techniques for Cases Involving Self-Represented Litigants

By Rebecca A. Albrecht, John M. Greacen, Bonnie Rose Hough, and Richard Zorza

This article is an attempt to stimulate a national dialogue about how judges can best structure and manage their courtrooms to accommodate the needs of self-represented litigants. The four authors of this article have worked with and written extensively about the judiciary's response to self-represented litigants—persons choosing to appear in court without a lawyer.[1] The numbers of such persons have increased significantly during the past decade. In most states the majority of family law matters now include at least one unrepresented party. Although the situation in Maricopa County, Arizona (where one of us presides), may be extreme, it is instructive: in recent years, roughly 60 percent of all domestic relations cases involve two unrepresented parties, 30 percent of the cases have a lawyer representing one side, and only 10 percent of the cases have lawyers on both sides.

Some laypersons are able to prepare court documents and present their positions effectively in court, but many others are not. Their lack of knowledge of the law and its rules imposes burdens on the judges and court staff. Courts throughout the country have responded by providing assistance such as easy-to-use forms; simplified instructions; printed and online information about substantive and procedural law; and direct assistance from court staff, often referred to as courthouse or family law facilitators. Much has been written about these programs, and many of them have been evaluated and found to be valuable to both litigants and the courts.[2]

However, one issue of particular concern to trial court judges, and about which little has yet been written, stands out: how a judge can deal with self-represented litigants in the courtroom without departing from the judicial role as a neutral, impartial decision maker. When a party is unable to present its case to the court, how can the judge facilitate the resolution of the matter without in effect becoming the party's lawyer? When there is an imbalance of knowledge in the courtroom, particularly if one party is represented by counsel and the other is not, how can the judge manage the trial or hearing impartially? The judge appears to be caught in a dilemma. If the judge does *not* intervene on behalf of the unrepresented litigant, the party may be unable to present evidence supporting its position and manifest injustice may result. If the judge *does* intervene, he or she may be violating the duty of impartiality and denying the represented party the benefit of retained counsel.

We have been involved in many discussions of these issues with trial and appellate judges. Trial judges have no common understanding of the applicable ethical standards, case law, or practical techniques to use to ensure that justice is done in their courtrooms—and to guarantee that they have not violated or bent the rules by "leaning over the bench" to assist a floundering unrepresented party. This article examines the applicable code of ethics and case law and suggests options for trial judges seeking helpful techniques.

This is not the first article to address this issue. In 2002 Dr. Jona Goldschmidt published an article entitled "The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance" in *Family Court Review*.[3] He views judicial reluctance to assist self-represented litigants as arising from the traditional passive role of the judge in the adversary process and judges' basic antipathy, as lawyers, to self-representation. We discuss Dr. Goldschmidt's approach and recommendations later in this article. We hope that these two discussions will serve as the foundation of a rich written literature on this difficult topic—and that trial judges will participate actively in building this body of work.

As will become clear in the discussion of the case law, many judicial statements say that self-represented litigants should be held to the same rules as attorneys. For example, in promulgating a new set of forms for use in uncontested divorce and paternity cases in New Mexico, the New Mexico Supreme Court recently included the following statement: "A self-represented person must abide by the same rules of procedure and rules of evidence as lawyers. It is the responsibility of self-represented parties to determine what needs to be done and to take the necessary action."[4] Taken literally, this

Proposed Protocol to Be Used by Judicial Officers During Hearings Involving Pro Se Litigants

Editor's Note: *The following text is the product of the Pro Se Implementation Committee of the Minnesota Conference of Chief Judges.*

All federal and virtually all state courts have precedents that papers submitted by pro se litigants will face a different standard of judicial review than those submitted by lawyers.

Conference on Pro Se Litigants on March 15, 2001, Chief Justice Marshall of the Supreme Judicial Court of Massachusetts reviewed the deep historical roots of the right to self-representation in this country. In the early colonies, the right to have a lawyer was often limited, but never the right to represent oneself.[11]

All federal and virtually all state courts have precedents that papers submitted by persons representing themselves will be subject to a different standard of judicial review than filings submitted by lawyers. The courts will construe them as liberally as possible in favor of the litigant, searching them for any statement that could constitute a meritorious claim or defense.[12] On the other hand, appellate courts will not relieve a self-represented litigant of the consequences of a default, such as failure to object to an instruction or ruling by the trial court.[13] In reviewing many of the reported appellate cases, we found a rich set of judicial views on the general issue of how trial court judges should deal with self-represented litigants. Most of the cases are consistent in outcome even though they may differ in the reasoning used by the appellate court. We found only one case—from the Illinois intermediate appellate court—directly addressing this article's central issue. Here we present short summaries of some of the cases.

Newsome v. Farer, 708 P.2d 327 (1985). This case led the New Mexico Supreme Court to establish the standard contained in the instructions for the new domestic relations forms quoted earlier.[14] The court upheld the trial judge's dismissal of the plaintiff's case for Newsome's failure to attend a meeting at which the defendant was to produce documents requested by Newsome. The court dismissed Newsome's contention that he did not understand that he was required to follow the judge's directions:

> Finally, Newsome asserts his belief that he was not required to attend production of documents because the court did not affirmatively order him to do so. We view this argument as a disingenuous attempt to invoke special privilege because of his pro se status. He did not claim ignorance or misunderstanding in the trial court, and the assertion here conveniently overlooks the rule that a pro se litigant must comply with the rules and orders of the court, enjoying no greater rights than those who employ counsel. Although pro se pleadings are viewed with tolerance, a pro se litigant, having chosen to represent himself, is held to the same standard of conduct and compliance with court rules, procedures, and orders as are members of the bar. Production of documents was ordered upon Newsome's request. Even though one may not be legally trained, common sense dictates that when a party petitions the court to enforce a right to inspect public records, and the court responds by ordering that requested documents be produced, the petitioner is not then free to disregard the arrangements made to comply with the relief ordered, simply because the court did not affirmatively direct the petitioner to attend. Certainly it does not require legal training or even any great degree of intelligence to understand that documents are not ordered to be produced in a vacuum. Production necessarily implies inspection. Newsome's pro se status does not require us or the trial court to assume he must be led by the hand through every step of the proceeding he initiated. We reject his claims of compliance or excuse therefrom because of his layman's ignorance.

At the trial court, the trial judge clearly did not hold Newsome to the same standards as those for an attorney. He gave special attention to Newsome's discovery requests, fashioning an order for production of documents very close to that requested. He gave Newsome three separate hearings to attempt to explain his failure to attend the document disclosure session. The supreme court nowhere criticized the trial judge for the special accommodations given to this self-represented litigant; it merely held that he was not entitled to any more.

Bates v. Jean, 745 F.2d 1146 (8th Cir. 1984). The Federal Court of Appeals reversed a dismissal of a state prisoner's civil rights suit against a prison guard for cruel and unusual punishment on the grounds of inconsistency of special jury verdicts, even though the prisoner—representing himself—did not object to the inconsistent verdicts at trial. The court stated it "usually accord[ed] pro se litigants somewhat greater flexibility than attorneys" with regard to waiver of objections, noting that "the question of consistency of special verdicts in this case

with affidavits or by amending the complaint." In *Sopko* the court found the court's advice proper.

***Collins v. Arctic Builders*, 957 P.2d 980 (1998).** Here, the court overturned a trial court's dismissal of a notice of appeal for a procedural defect in a pro se's second attempt to comply with the appellate rules. The court stated, "We are not concerned that specificity in pointing out technical defects in pro se pleadings will compromise the superior court's impartiality."

***Wright v. Black*, 856 P.2d 477 (1993).** The trial judge expressed his intention to take evidence at a child support hearing on the paternity issue raised by the father in an earlier pleading. Neither party objected. On appeal the father claimed that his failure to object should be excused because of his lack of familiarity with court proceedings. The court held that if the litigant had "attempted to object, or even hinted that he was unprepared to handle the paternity issue, then *Breck* might apply. While we may relax formal requirements for pro se litigants, even a pro se litigant must make some attempt to assert his or her rights." (This latter point was also emphasized in *Noey v. Bledsoe*, 978 P.2d 1264 (1999), in which the court stated that pro se litigants are not excused from "making good faith efforts to assert their rights.")

***Rappleyea v. Campbell*, 884 P.2d 126 (1994).** The California Supreme Court, in an opinion written by Justice Mosk, held that a self-represented couple from Arizona would be relieved of a default judgment entered against them even though they had not sought relief within the six-month period allowed by statute to vacate a default judgment. The court reasoned that their default had been caused by the court clerk's error in quoting the filing fee for an answer—thereby causing their timely answer to be rejected for failure to enclose the proper filing fee. Justice Mosk stated:

> [M]ere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. . . . A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation.

***Gamet v. Blanchard*, 91 Cal. App. 4d 1276 (2001).** The appellate court reversed the trial judge's dismissal of the plaintiff's case, citing lack of service of the court's order allowing her counsel to withdraw the "confusing, indeed misleading, nature of the various orders and communications" from the court to the plaintiff, and the plaintiff's involuntary pro per status. The majority stated:

> We further note that pro per litigants are not entitled to special exemptions from the California Rules of Court or Code of Civil Procedure. (*Rappelyea v. Campbell, supra.*) They are, however, entitled to treatment equal to that of a represented party. Trial judges must acknowledge that pro per litigants often do not have an attorney's level of knowledge about the legal system and are more prone to misunderstanding the court's requirements. When all parties are represented, the judge can depend on the adversary system to keep everyone on the straight and narrow. When one party is represented and the other is not, the lawyer, in his or her own client's interests, does not wish to educate the pro per. The judge should monitor to ensure the pro per is not inadvertently misled, either by the represented party or by the court. While attorneys and judges commonly speak (and often write) in legal shorthand, when a pro per is involved, special care should be used to make sure that verbal instructions given in court and written notices are clear and understandable by a layperson. This is the essence of equal and fair treatment, and it is not only important to serve the ends of justice, but to maintain public confidence in the judicial system.
>
> The confusing, indeed misleading, nature of the various orders and communications that Gamet received from the trial court is particularly important in light of Gamet's (involuntary) pro per status. As noted above, pro per litigants are not entitled to any special treatment from the courts. But that doesn't mean trial judges should be wholly indifferent to their lack of formal legal training. Clarity is important when parties are represented by counsel. How much more important is it when one party may not be familiar with the legal shorthand which is so often bandied around the courtroom or put into minute orders?
>
> There is no reason that a judge cannot take affirmative steps—for example, spending a few minutes editing a letter or minute order from the court—to make sure any communication from the court is clear and understandable, and does not require translation into normal-speak. Judges are charged with ascertaining the truth, not just playing the referee. A lawsuit is not a game, where the party with the cleverest lawyer prevails regardless of the merits. Judges should recognize that a pro per litigant may be prone to misunderstanding court requirements or orders—that happens enough with lawyers—and take at least some care to assure their orders are plain and understandable. Unfortunately, the careless use of jargon may have the effect, as in the case before us, of misleading a pro per litigant. The ultimate result is not only a miscarriage of justice, but the undermining of confidence in the judicial system. (citations omitted)

Judge Bedsford, in dissent, lamented the inconsistent message being sent to the trial judges:

> My colleagues recognize in one sentence the hoary but still vigorous rule that "pro per litigants are not entitled to any special treatment from the courts," but devote several paragraphs to setting out the kinds of special treatment trial judges will be obliged to accord them under this opinion.
>
> Pro per litigants have become more common in recent years and seem destined to become a much larger portion of the trial court docket than they have been in the past. It may be time to reassess our case law regarding them. And while I agree with much that is said in the majority opinion, and might be prepared to

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(continued from page 23)

***Kelley v. Secretary, U.S. Department of Labor*, 812 F.2d 1378 (Fed. Cir. 1987).** The U.S. Court of Appeals for the Federal Circuit similarly held that a plaintiff's failure to file a court action within sixty days of notice of the government's publication of notice in the Federal Register deprived the trial court of jurisdiction to hear the case, despite the plaintiff's status as a pro se litigant.

***Waushara County v. Graf*, 480 N.W.2d 16 (1992).** Wisconsin courts limit the rule for lenient treatment of self-represented litigants to prisoners. In a case involving the appellate court's consideration of issues not raised on appeal, the Wisconsin Supreme Court wrote:

> While pro se litigants in some circumstances deserve some leniency with regard to waiver of rights, the rule applies only to *pro se* prisoners. . . . We recognize that the confinement of the prisoner and the necessary reasonable regulations of the prison, in addition to the fact that many prisoners are "unlettered" and most are indigent, make it difficult for a prisoner to obtain legal assistance or to know and observe jurisdictional and procedural requirements in submitting his grievances to a court. These concerns have not been extended to persons who are not incarcerated (internal citations omitted).

***Meyers v. First National Bank of Cincinnati*, 444 N.E.2d 412 (Ohio App. 1981).** An Ohio intermediate appellate court decision rests on the same distinction as above. The court upheld a municipal court's dismissal of plaintiff's case pursuant to its local rule requiring the submission of a memorandum in opposition to a motion to dismiss. The court wrote:

> Appellants' argument that as *pro se* civil litigants they should receive special consideration and not be bound by the same rules as civil litigants represented by counsel is against the weight of Ohio as well as national authority. *Pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors. Appellants' argument that prisoners in *pro se habeas corpus* proceedings do not have to meet the same procedural standards as those with counsel is inapplicable to the case sub judice (internal citations omitted).

***Hodgins v. State*, 1 P.3d 1259 (2000).** The courts of Wyoming apply a standard of leniency to self-represented litigants. The Wyoming Supreme Court set forth this standard: "The litigant acting pro se is entitled to 'a certain leniency' from the more stringent standards accorded formal pleadings drafted by lawyers; however, the administration of justice requires reasonable adherence to procedural rules and requirements of the court." In this case the court imposed the sanction of costs on the litigant for filing a frivolous appeal, noting that he was familiar with the rules of appellate procedure and should be held to account for violating them by filing an appeal utterly lacking in legal justification.

***Oko v. Rogers*, 466 N.E.2d 658 (Ill. App. 3d 1984).** This is the only case we found that is directly on point for the issue addressed in this article. The plaintiff, represented by counsel, sued the defendant doctor, who represented himself, for medical malpractice. The jury returned a verdict for the doctor. The plaintiff appealed, claiming among other things that the trial judge denied her a fair trial by giving assistance to the defendant in presenting his case. Because both the facts and the legal analysis in this case are important, we include lengthy quotes from both the majority and dissenting opinions:

> **Majority:** Although the defendant on numerous occasions departed from the rules of trial court practice, his excursions were usually cut short by objections which were sustained and repeated until the defendant conformed to proper procedures. The defendant was not permitted to do as he pleased. Furthermore, the trial court took steps to make sure that the defendant's unorthodox questions did not confuse the jury. Whenever necessary, the trial judge would make his own brief and limited examination of a witness in order to clarify the testimony. The court also guided the defendant through parts of his own testimony in order to avoid a long narrative on irrelevant matters.
>
> Considerable latitude must be allowed a judge in conducting a trial. The conduct and remarks of the judge are grounds for reversal only if they are such as would ordinarily create prejudice in the minds of the jury. We find that the judge remained within his proper provinces in the present case. The judge gave due consideration to the defendant's pro se status but was never reluctant to sustain the plaintiff's objections when necessary. Although the judge would carefully explain to the defendant why certain objections were being sustained, there is no evidence that he conducted the defendant's case for him or failed to remain impartial.
>
> As any judge or lawyer knows, the conduct of a jury trial with a pro se litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. There is no law that requires a litigant to have a lawyer. The lawyer for the opposing side cannot be expected to advise the opposing party who is pro se. The judge cannot presume to represent the pro se party. In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides. We believe that Judge Cerri adequately faced up to that high responsibility in this case (footnote and citation omitted).
>
> **Dissent:** At the conclusion of her examination of defendant, the trial court explained to defendant the tactical alternatives available to him—

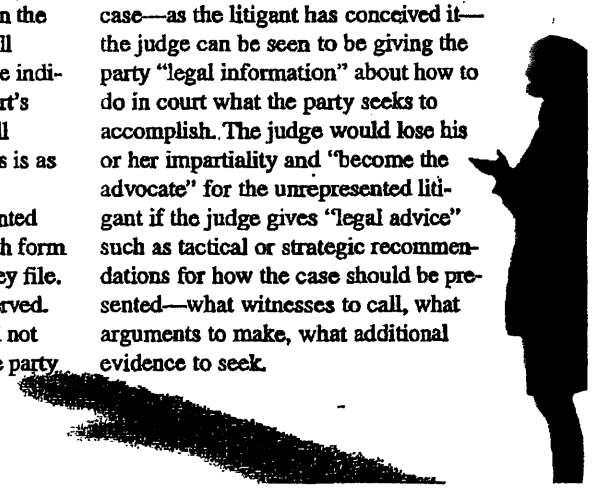
unrepresented litigant in the courtroom. The first posits a basically passive role for the judge, with the litigant bearing the burden of becoming sufficiently familiar with the law, rules of procedure, and rules of evidence to function as a lawyer. The second instructs the judge to aid the unrepresented litigant, who cannot be expected to perform as a trained lawyer would, in every way short of prejudicing the opponent. It is no accident that Minnesota is the only state to generate a protocol for judges dealing with self-represented litigants; its protocol follows from the standard articulated in its appellate case law.

In fact we think that these different standards have even less impact in the appellate court holdings than the above review suggests. In every case summarized above, the "majority rule" appears to be dictum. It is a formula intoned *after* the court announces its decision. The analysis in the court's ruling does not focus on the standard to which attorneys will be held. The statement that self-represented litigants will be held to the standard of an attorney seems, instead, to be merely a shorthand phrase for stating that the court will not let the unrepresented litigant use his or her status as a reason to avoid application of a particular procedural rule. The holdings of the cases summarized here can be synthesized into the following six basic propositions:

- The law must produce a consistent outcome for all litigants, regardless of their legal representation, based on the law and facts of their case. The real message behind the statement that self-represented litigants must follow the same rules as attorneys is the fundamental idea that an unrepresented litigant cannot obtain relief from the court in cases in which a party represented by an attorney would not prevail. The outcome of the matter should be directly related to the merits of a party's case. An unrepresented party must meet the same legal standards for obtaining a judicial remedy as a party represented by counsel and should receive no sympathy or other advantage because of choosing to proceed without a lawyer.
- The "hard" procedural bars—pertaining to statutes of limitations, availability of administrative remedies, and time limits for filing an appeal—apply equally to unrepresented and represented litigants. Some of the cases do not support this principle, but the majority do. These procedural bars are fundamental rules governing the legal process. For the most part, appellate courts are uncomfortable applying them differently to different parties for any reason—and particularly not because they are or are not represented by counsel.
- "Soft" procedural bars—pertaining to contemporaneous objection, raising issues on appeal, or vacating a default judgment—can be mitigated for unrepresented litigants. The issue becomes murkier when it involves failure to preserve error by stating an objection on the record in the trial court, or in applying the standard for relief from a default judgment. Whether or not to apply these matters falls within the equitable discretion of the trial court. An appellate court can always decide an issue not raised by a party when it discovers "fundamental error." It can waive the contemporaneous objection rule for the same reason. Relief from a default judgment does not create the same degree of prejudice to the other party as overturning a decision on the merits. So, in exercising inherently equitable principles, judges are more likely to consider the ignorance and inexperience of an unrepresented party. If the unrepresented party did all that a reasonable person in the situation could do, that factor will weigh in the person's favor. If the individual appeared to scorn the court's rules and directives, the facts will weigh in the other direction. This is as it should be.
- Courts will grant unrepresented litigants enormous leeway in both form and content of the documents they file. This standard is universally observed. Of course courts cannot and will not assert a claim for a party that the party has not raised. This is the point of the Alaska cases, imposing the duty to assert individual rights on the self represented litigant.
- Judges will help assure that a litigant has an opportunity to present evidence in court, so long as the judge does not prejudice the other side in doing so. The only reported case we discovered is *Oko v. Rogers*. We repeat the majority's analysis in that case:

> As any judge or lawyer knows, the conduct of a jury trial with a pro se litigant who is unschooled in the intricacies of evidence and trial practice is a difficult and arduous task. The heavy responsibility of ensuring a fair trial in such a situation rests directly on the trial judge. The buck stops there. There is no law that requires a litigant to have a lawyer. The lawyer for the opposing side cannot be expected to advise the opposing party who is pro se. The judge cannot presume to represent the pro se party. In order that the trial proceed with fairness, however, the judge finds that he must explain matters that would normally not require explanation and must point out rules and procedures that would normally not require pointing out. Such an undertaking requires patience, skill and understanding on the part of the trial judge with an overriding view of a fair trial for both sides.

- Judicial efforts to enable unrepresented litigants to present their cases should be limited to assistance to the party in accomplishing the party's own strategy, not in suggesting a different or better strategy. So long as the judge is merely facilitating the unrepresented litigant's presentation of his or her own case—as the litigant has conceived it—the judge can be seen to be giving the party "legal information" about how to do in court what the party seeks to accomplish. The judge would lose his or her impartiality and "become the advocate" for the unrepresented litigant if the judge gives "legal advice" such as tactical or strategic recommendations for how the case should be presented—what witnesses to call, what arguments to make, what additional evidence to seek.



instructions can be perceived as favoring one party. The Minnesota Protocol on page 18 provides an excellent outline for these preliminary instructions.

• Conduct the proceeding in a structured fashion based on the required legal elements. We suggest that the judge provide the parties with an outline of the decision-making process and follow it explicitly during the proceeding. To continue with our child support example: The judge would state that the first determination is whether the court has jurisdiction to decide the case, then whether financial circumstances of the non-custodial parent have changed, and finally, if so, what change in monthly child support would be appropriate. After taking testimony on the first issue, the judge would clearly state, "Let the record show that the court has jurisdiction in this case." After hearing testimony on the non-custodial parent's changed income, the judge would conclude that phase of the proceeding with, "I find that Mr. Jones's income has increased from $X per month when child support was first established in this case in 1999 to $Y per month today." Then the judge would announce the guideline child support amount and invite the parties to give reasons, if any, for departing from them. At the end, the judge would announce the final result: "The child support guidelines call for monthly support of $Z in these circumstances. I find no reason to deviate from the guidelines. I order an increase in Mr. Jones's monthly child support from $Q to $Z."

Attorneys of course are already familiar with this outline and address all of the topics in the course of presenting the case. Using this approach will enable the judge to structure the proceeding for both parties and set clear boundaries for arguments and presentations; it will help them focus on the specific topic being addressed. Any extra time required for the judge to establish this agenda will be more than offset by the reduced time needed for the parties to present evidence and arguments.

Judges may want to use visual aids to assist the parties in understanding and following the issue outline. Richard Zorza discusses the options of flipcharts and more highly automated alternatives in his book.[18]

• Create an informal atmosphere for the acceptance of evidence and testimony. Dr. Goldschmidt recommends that the formal rules of procedure and evidence be relaxed for cases involving self-represented litigants. We agree and suggest that the judge can easily accomplish this by using informal language. By stating, "I will give each of you a chance to tell me what you think I need to know to decide each of the issues in this case," the judge can create an informal environment for accepting evidence. Any party can object at this point and insist on following the rules of evidence, but this is unlikely. In the absence of objection, the parties can waive the rules of evidence regarding following the traditional question and answer format, establishing a foundation for introducing documents and exhibits, qualifying an expert, and the like.

Generally, such an introductory statement will suffice because issues of privilege rarely arise in most matters in which litigants typically self-represent. However, judges may need to deal more explicitly with hearsay. Hearsay will be excluded if a party objects, but it is otherwise probative—if a party does not object, a judge or jury may consider hearsay evidence. Does the judge have a duty to inform the parties of this rule? The Minnesota protocol suggests that a judge do so but does not require specific notice. We suggest the judge's initial advice to the parties include such language but not that the court bring it to the attention of the parties. The initial instruction should suffice.

• Ask questions. Judges should freely ask questions of unrepresented parties and their witnesses. When judges make clear to the parties at the beginning of the hearing that they will ask questions—and explain why (to make sure they have the information they need to make a decision)—chances are minimal that their apparent impartiality could be impaired. The Minnesota protocol suggests that the judge pose questions in the most general form to avoid the appearance of leading a party or witness to a particular conclusion.

• Provide written notice of further hearings, referrals, or other obligations of the parties. Optimally, the parties will leave the courtroom with an order or minute entry documenting the next court date, the court's referral to another service or resource (such as the court's self-represented litigants support office, a courthouse facilitator program, or an alternative dispute resolution program), and any other obligations the parties may have (such as preparing and serving further papers or proposed orders).

Dr. Goldschmidt suggests that judges call witnesses and conduct "limited independent investigations" if they believe either process is necessary to discover the truth of a matter. We do not endorse this suggestion. A judge should feel free to ask questions of a witness already in the courtroom and should be prepared, in special circumstances, to continue a matter to allow a party to secure the presence of an additional witness. But we do not believe it proper for a judge to decide an additional witness is needed and to subpoena or call that witness. Nor do we think it possible for the judge to conduct an independent investigation without losing the appearance of impartiality.

Cases Involving Two Unrepresented Parties

We suggest these additional procedures for cases involving two unrepresented parties.

• Swear both parties at the beginning of the proceeding. When both parties are sworn, distinctions between their arguments and their testimony are not necessary. All statements made by the parties can now be considered as evidence. The judge should explain that the parties must remember they are

that this document is either inadmissible or something other than what it purports to be?" The lawyer thus can protect the client's interests without prolonging the process or requiring the judge to provide additional assistance to the litigant.

- Use leading questions or prompts as often as necessary to remind the unrepresented litigant to present evidence in a manner consistent with the rules of evidence. This should be a last resort but, as *Oko* illustrates, is proper. Judges should try all other approaches first because these generally produce less cumbersome, less frustrating, and less contentious hearings and trials. But if counsel refuses to cooperate with the other approaches introduced by the judge, the judge will have established on the record the need for measures to ensure the unrepresented litigant's right to be heard.
- Offer the unrepresented litigant the option of a continuance if necessary. This could mean reconvening later the same day or returning to court another day. If, for example, an unrepresented litigant does not have the witnesses present to authenticate a document or photograph and counsel insists on the need for such authentication, the judge can offer to continue the matter long enough for the litigant to contact and summon the necessary witnesses. This approach puts additional pressure on counsel to be reasonable in voicing objections and enables the judge to demonstrate doing whatever is necessary in order to maintain a level playing field within the courtroom. Counsel will have to weigh the delay and expenditure of additional time and money to return to court against the possibility of discovering weaknesses in the documents or exhibits introduced.
- Allow or help obtain assistance for the unrepresented litigant. The Minnesota protocol recognizes the potential benefit of a friend or counselor who can sit with the litigant at counsel table. The assister is not allowed to ask questions or argue on behalf of the litigant but may provide advice on the form of questions and the procedures for introducing evidence as the case proceeds. Assisters do not necessarily need court experience to provide help. If the litigant has language difficulty or is otherwise limited in literacy or comprehension of the process, a friend who is able to read and understand the materials and accurately interpret the information provided by the judge and opposing counsel would be helpful to the litigant. In extreme cases, the judge may need to adjourn the matter sua sponte and seek pro bono counsel for the unrepresented party. This is particularly appropriate when the litigant speaks a different language or is a person with mental or comprehension handicaps.

Conclusion

The challenge for the trial judge dealing with unrepresented litigants is to ensure they have a full opportunity to present their cases for resolution on the merits. The duty of impartiality requires the judge to consider all competent evidence in the possession of the unrepresented litigant. We have suggested a number of techniques to help judges accomplish that result. We believe that they are fully acceptable under both the majority and minority views of the judge's role in these types of proceedings. We invite responses to this analysis and hope it will encourage trial judges to contribute additional techniques they have found useful and effective in these situations.[19]

Notes

1. *See* John M. Greacen, *No Legal Advice from Court Personnel: What Does That Mean*, JUDGES' J., Winter 1995, at 10; J. Greacen, *Legal Information vs. Legal Advice: Developments during the Last Five Years*, JUDICATURE 84 (2001), at 198; Richard Zorza, *Reconceptualizing the Relationship Between Legal Ethics and Technological Innovation in Legal Practice: From Threat to Opportunity*; 67 FORDHAM L. REV. 2659 (1999); R. ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (National Center for State Courts 2002).

2. John M. Greacen, *What We Know and Do Not Know about Self-Represented Litigants* (California Administrative Office of the Courts, Center for Children and Families).

3. FAM. CT. REV., vol. 40, no. 1 (Jan. 2002). *See also* Russell Engler, *And Justice for All–Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* (1988).

4. Form 4A-201 B, District Court Rules of Procedure for Domestic Relations Matters, Responsibility of Self-Represented Party.

5. *Available at* www.abanet.org/cpd/mcjc/toc.html. Although the ABA Code of Judicial Conduct applies to judges only as it was adopted in the state in which the judge presides, and states often modify ABA codes in the course of adopting them, we are not aware of any state that has modified these sections in any way that would affect our analysis.

6. State of California, Commission on Judicial Performance, Inquiry Concerning Judge Fred L. Heene, Jr., No. 153 (Oct. 13, 1999).

7. ABA MODEL CODE OF JUDICIAL CONDUCT, 1-97.

8. Tom Tyler, *What Is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW AND SOCIETY REVIEW 1 (1988), at 103. On page 126, Tyler reports separately the data for uncontested and contested matters. We rely on the data for contested matters. The study found overall that the most important factor in litigants' assessments was the perception of the judge's effort to be fair.

9. 422 U.S. 806 (1975).

10. 528 U.S. 152 (2000).

11. Margaret H. Marshall, Massachusetts Conference on Pro Se Litigants (Mar. 15, 2001) (unpublished speech) (on file with author).

12. Haines v. Kerner, 404 U.S. 519, 520-21 (1972). *But see* Mmoe v. Commonwealth, 473 N.E.2d 169 (Mass. 1985) (Mass. Supreme Judicial Court reversed trial judge's denial of motion to dismiss pro se complaint following three-day hearing at which pro se litigant was allowed to supplement and clarify 35-page complaint orally).

13. Eagle Eye Fishing Corp. v. U.S. Dep't of Commerce, 20 F.3d 503 (1st Cir. 1994); Malik v. Coughlin, 506 N.Y.S.2d 844 (N.Y. Sup. 1986); Conn. Light & Power Co. v. Kluczinsky, 370 A.2d 1306 (Conn. 1976).

14. *See supra*, note 4

15. The court surmised that the appellant merely copied a brief from another case and changed a few words in an attempt to make it relevant to his case.

16. For instance, Dr. Goldschmidt urges that court staff be trained to advise litigants concerning "the elements of common causes of action, defenses, statutes of limitations, service of process, execution of judgment, and other procedural requirements," taking issue with limitations one of the authors advocated in other articles. (*See supra*, note 1.) We choose not to address those issues here because the article focuses on the role of the trial judge, not staff.

17. Dr. Goldschmidt recommends the formal rules of procedure and evidence be relaxed for cases involving self-represented litigants. We know of no state that has formally adopted this principle in its rules. However, the trial judge can choose to conduct a hearing or trial in an informal manner and signal this to the parties by stating that they will be given an opportunity to tell the judge whatever they think the judge needs to know about the matter.

18. ZORZA, THE SELF-HELP FRIENDLY COURT, *supra* note 1, at 75.

19. John M. Greacen writes a regular column in *The Judges' Journal* and will include all suggestions and comments received in response to this article in a future column. He can be reached at john@greacen.net.

Position Paper
on
Self-Represented Litigation

Conference of State Court Administrators

August 2000

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Position Paper on Self-Represented Litigation

Note: A position paper was prepared by the Policy and Liaison Committee of the Conference of State Court Administrators (COSCA) for presentation at that organization's Business Meeting on August 3, 2000, in Rapid City, South Dakota. The purpose of the paper was to generate discussion and debate, preparatory to the membership being asked to take a policy position on "self-represented litigation". The membership amended the paper and the committee's recommendations. The amended position paper and recommendations, as approved by the membership, follow.

I. Introduction and Issue Development

Self-represented litigants are by no means a new phenomenon in the courts. However, the recent surge in self-represented litigation is unprecedented and shows no signs of abating. While no single explanation can account for this national trend, the drastic reduction in funding for civil legal services has resulted in significantly fewer attorneys serving low-income individuals and is a significant contributing factor. For those with lower incomes, the impact of escalating costs of litigation can be presumed to encourage self-representation. In addition, the proliferation of information available through self-help books and on the Internet has fostered the perception that the legal process can easily be navigated without a lawyer. The impact of increasing self-representation on the courts--on court management and the administration of justice--cannot be overstated. For court managers, it manifests itself in additional demands on already limited employee time and resources, and less efficient case management. For judges, the increase represents more protracted and delayed proceedings, in addition to the fundamental dilemma of how to treat all parties fairly where one or more may be untrained in the law and court procedure. The potential impact on the public is diminished confidence in the courts, as self-represented litigants face real and perceived barriers in the pursuit of justice. The challenge facing the courts today is how to deal with this growing crisis in order to best serve the public, ensure equal access to justice for all citizens, provide for efficient case management, and maintain the integrity of the judicial process. Recognizing the significant impact self-represented litigants have on all court systems, COSCA and CCJ should assume a leadership role in both acknowledging the trend and the pursuing information to guide policymakers.

Most states have begun to recognize the magnitude of the self-represented population and its impact on their courts. The threshold question in determining how to respond is whether the courts have an obligation to address the needs of self-represented litigants at all. The answer should be yes. Not only do litigants have a constitutional right to represent themselves, but also the judicial system has the affirmative duty to ensure that all citizens have meaningful access to the courts. A court system that declines to respond to or makes access difficult for litigants without lawyers violates this duty and effectively renders the right to represent oneself meaningless, creating a two-tier system of justice. Moreover, given that many litigants appear without counsel out of necessity rather than choice--and that many do so in times of crisis, where home or family is at stake--fundamental principles of fairness and due process mandate that courts ensure meaningful access for redress.[1] And, as a purely practical matter, ignoring the trend only perpetuates the inefficiencies it creates in the system.

[1] For a complete discussion, see Jona Goldschmidt, Barry Mahoney, Harvey Solomon, & Joan Green, *Meeting the Challenge of Pro Se Litigation* 19-24 (American Judicature Society 1998).

Determining an appropriate response for a particular state or court may vary according to the magnitude of the self-represented population, its impact on a particular court or court system, and the resources available. Court systems should begin to assess self-represented litigation in their state through the collection and analysis of data. Only with this information can appropriate responses be devised that best meet the needs of the litigants and the courts, and have the support of the bar. A significant factor in formulating a response will be identifying the kinds of cases most often brought by self-represented litigants. While some cases by nature lend themselves to self-representation (e.g., in small claims court, where only a small amount of money is at issue), others involve litigants without financial resources who must turn to the courts because their safety, home, or family status is in jeopardy. While the ultimate goal may be to provide information about all court procedures, and courts generally, these areas should receive priority attention in terms of responding to self-represented litigants. The following paragraphs briefly set forth the range of possible court responses--from the minimum to "best practices"--to the increasing numbers of self-represented litigants at the various stages of the litigation process.

At the initial stage of litigation, resources that inform the litigant about the particular court and its procedures, as well as the litigation process, are essential. It is also critical at this stage that information is available to prospective litigants regarding alternative, perhaps more appropriate, means to resolve their dispute or problem. The obvious example is providing information regarding the availability through the court or another entity of mediation or other forms of alternative dispute resolution. Other examples include information regarding the availability of consumer complaint agencies (disputes with merchants), landlord tenant agencies (disputes regarding housing conditions, payment of rent), or counseling services (child custody or visitation matters). These resources can take many forms; at a minimum they should include brochures and information sheets (including frequently-asked questions and a glossary of terms), user-friendly court forms with instructions, and appropriate signage throughout the courthouse. Courts should ensure that the public has access to a law library or at least to legal reference materials, particularly state statutes and rules. Automated telephone information and response systems are another means to provide a significant amount of generic information.

In conjunction with the provision of tangible resources, courts must have knowledgeable, trained court clerks who can respond to the inevitable questions from self-represented litigants. As the court clerks are generally the first point of contact for self-represented litigants, their interactions can greatly influence the course the self-represented litigant will pursue. Accordingly, at a minimum, clerks should be formally trained on how to interact with self-represented litigants, including the extent to which they can provide legal information. All guidelines and policies should be reduced to written form and be readily available to court staff. Additionally, court systems should affirmatively seek to remove the specter of unauthorized practice of law as a disincentive to court staff providing appropriate assistance.

Often overlooked, the enforcement stage is critical to self-represented litigants. In many respects, this stage of the litigation is the most frustrating--having prevailed in court, the tangible result is still elusive. At a minimum, courts need to provide information about the enforcement of judgments and the court procedures that are available for this purpose, including court forms and instructions. This information can be made available in clerk's offices, in the self-help or resource centers or in the courtrooms and can take many formats. As a "best practice," the courts could consider adopting simplified enforcement procedures for self-represented litigants. For example, in the child support area, a court can create a process that would automatically schedule an expedited hearing upon notice of delinquent child support payments.

II. Recommendations

1. COSCA and/or CCJ should consider an affirmative response to needs of the self-represented litigant as a means for further building trust and confidence in the courts. Specifically, COSCA and/or CCJ should endorse having state court systems develop information programs which will allow litigants to make more informed decisions regarding self-representation, and for those who elect to proceed self represented, an assistance program providing at least the minimum features discussed in this position paper to be defined by the individual state.

2. COSCA should assert its leadership in this area by raising consciousness and understanding both within the courts and the public generally. Specifically, COSCA should consider adding self-represented/pro se data elements to the annual survey and publication of *Examining the Work of the Courts*. This might include making self-representation a highlighted topic for a future edition, formulating uniform definitions to be used in the survey, and encouraging states to incorporate such data elements into their data collection systems. Yet another avenue for increasing understanding is encouraging the National Center for State Courts to seek grant funding necessary for conducting empirical research into self-representation.

3. COSCA and/or CCJ should devote time on the agenda of the upcoming annual or midyear conference to exploring this issue in depth. In addition, Chief Justices and State Court Administrators should be asked to encourage the education arm within their court systems to prominently feature a program on self-representation in their training programs for judges and staff; preferably, in a format that will lead to the formulation of a plan on how to most effectively respond to the self-represented.

10. COSCA should identify strategies and protocols to assist trial court judges in managing cases and in conducting proceedings including self-represented litigants with special attention to cases in which only one of the parties is represented.

11. In that the actions above would be substantially enhanced by the support, involvement and leadership of CCJ, it is recommended that COSCA seek the involvement of CCJ in establishing and co-chairing a task force with representatives from the AJA, NACM, and ABA to develop a proposed action plan to address the above recommendations for consideration at the 2001 annual meeting of CCJ/COSCA.

ELIZABETH STRINGER

ATTORNEY AT LAW

753 Folly Road (Zip 29412)
Post Office Box 12370
Charleston, S.C. 29422-2370
(843) 795-1331- Fax 762-0144
liz@stringerlaw.us

November 13, 2012

To: South Carolina Judicial Merit Selection Commission
Post Office Box 142
Columbia, South Carolina 29202

VIA MAIL ONLY

Re: Judge Paul Garfinkel
In the Matter of: Kevin Burroughs vs. Tracie Hale, Case No. 2010-DR-10-1836

To Whom It May Concern:

To follow is an Affidavit in the above-referenced matter. If I can be of further assistance, please do not hesitate to contact me. Thanking you and

With best regards, I am

Very truly yours,

Elizabeth J. Stringer

Enclosure

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KEVIN BURROUGHS, Plaintiff, vs. TRACIE HALE, Defendant.	)))))))))))))	IN THE FAMILY COURT FOR THE NINTH JUDICIAL CIRCUIT C.A. NO.: 2010-DR-1836 AFFIDAVIT OF GUARDIAN *AD LITEM* , ELIZABETH J. STRINGER

ELIZABETH J. STRINGER, ESQUIRE, being duly sworn hereby states:

Pursuant to a request made by Jane Shuler, I sent to her on October 31, 2012 an Affidavit (with attachments) I previously sent to the Commission on Judicial Conduct after a grievance was filed against the Honorable Paul Garfinkel in the above-referenced matter. This earlier grievance was filed by Mr. Anthony B. O'Neill, Sr. and Mrs. Elonda Fair O'Neill and concerns a case to which I was the court-appointed Guardian *ad Litem* for the parties' minor children. To follow are the facts as I know them to be true with the names of the children redacted. If the Commission desires copies of any of the emails, correspondence, reports, etc. referenced herein, I will be more than happy to supply them.

At an initial Temporary Hearing on July 12, 2010, I was appointed Guardian *ad Litem* and furhter required to submit an initial report at a subsequent hearing scheduled for August 9, 2010. I submitted a written Preliminary Report at the August 9, 2010 hearing. This second temporary hearing was held in front of the Honorable Paul W. Garfinkel. On August 12, 2010, instructions for the order were sent to me by Judge Garfinkel via fax and I was asked to draft the

Order. These instructions provided that Defendant Mother, Ms. Hale, was to pick up the children on Saturday, August 14, 2010 at noon from Plaintiff Father, Mr. Burroughs to obtain temporary custody.

On August 14, 2010, I send a draft of the Temporary Order to both Plaintiff's attorney, Elonda Fair O'Neill and the Defendant Ms. Hale who was acting *pro se*. I received an email on August 14, 2010 from Ms. Hale that Mr. Burroughs was refusing to allow her to have the children pursuant to the judge's instructions. On August 17, 2010, I incorporated certain changes requested by Mrs. O'Neill and resent the corrected Temporary Order. On August 18, 2010, I received an email from Ms. Hale requesting a correction to the Order and stating that Ms. Hale had been informed again by Mr. Burroughs that he was not going to turn over the children. I forwarded the email from Ms. Hale to Ms. O'Neill asking her to advise (as to whether Mr. Burroughs was going to turn over the children to Ms. Hale pursuant to the Judge's instructions and the Order which had yet to be signed). Ms. Hale thereafter sent certain emails directly to Judge Garfinkel due to her concern that Mr. Burroughs would not release the children to her pursuant to his instructions. Ms. Hale stated her concern that the children were to start school August 19, 2011.

Due to receiving these emails from the Defendant, Judge Garfinkel called me to arrange a conference call with Mrs. O'Neill and the Defendant, Ms. Hale. On August 18th, I attempted (with assistance by my office) to arrange this conference call. During this time, Judge Garfinkel was out of town (in Columbia). In attempting to arrange this call two difficulties arose. The first was that Ms.

Hale's work schedule did not allow her to have a conference call during the available times on August 18-20th. The second difficulty was that Mrs. O'Neill could not be available for a conference call on Monday the 23rd or Tuesday the 24th. During all of this, Judge Garfinkel asked me to call Mrs. O'Neill to determine if she had read Ms. Hale's emails. Mrs. O'Neill informed me during this phone call that she was uncomfortable with answering my question and felt this was all forbidden *ex parte* communication. I also asked her during this phone call if Mr. Burroughs was going to release the children to which she responded that he did not have to as the Order had not been signed. This conversation was very frustrating (I remember stating to Mrs. O'Neill to please "not shoot the messenger" as I was simply trying to set up a conference call per the Judge's request). After this phone call, I sent an email to Judge Garfinkel stating that Mrs. O'Neill was not comfortable with answering the question as to whether she had read Ms. Hale's emails or with any *ex parte* communication. I also told Judge Garfinkel that Mrs. O'Neill was insisting on all communication being on the record. This was copied to both Mrs. O'Neill and Ms. Hale. Later that day (August 18, 2011), Mrs. O'Neill asked for a correction on the medical bills section of the Order which I corrected and resent to the Judge and the parties.

On August 23, 2011, Judge Garfinkel emailed Mrs. O'Neill that he had received two emails from Ms. Hale and that it was his understanding that she had read both and that if this was not correct for her to advise immediately. Because Mrs. O'Neill did not want to participate in a phone conference off the record, on

August 25, 2011, Judge Garfinkel asked that I set up a phone conference/hearing (as this would be on the record) whereby Ms. Hale would need to be available via phone with a notary present. I sent to Ms. Hale instructions regarding this phone call (regarding having a notary). My understanding of this "hearing" was that it was to clarify the Temporary Order because the date for the transfer had passed and to further clarify the situation. I notified Mrs. O'Neill, Judge Garfinkel, Plaintiff Father and Defendant Mother that we were all available for the 1:45 hearing and that Defendant Mother would be available and have a notary present so that she would be under oath.

On August 26, 2011, Mrs. O'Neill and myself met at the courthouse with Ms. Hale available via phone. At this time, Judge Garfinkel had the notary swear in Ms. Hale and then admonished her for the *ex parte* communication (her emails which were sent directly to Judge Garfinkel). He also changed the time for the transfer of the children due to Mr. Burroughs refusal to transfer the children. This was done via an Interim Bench Order which required transfer on Saturday, August 28, 2010 at Exit 50 on I-77. On August 27, 2010, I received an email from Mrs. O'Neill stating that Mr. Burroughs could not drive due to having had knee surgery in the morning. Ms. Hale, who lives in West Virginia, and I discussed her travelling the entire distance to South Carolina and back. She did this and retrieved the children.

On March 7, 2011, I received a phone call from Mrs. O'Neill demanding that I remove myself as Guardian *ad Litem* as she felt that I have been less than neutral in my actions. I do not feel I have in any way been less than neutral.

Perhaps I should be faulted for trying to negotiate the transfer of the children pursuant to the judge's instructions (even without a signed Court Order). I simply wanted to avoid complications and have the children enrolled in school on time. If you have any questions regarding my conduct or regarding the events of this case, I will endeavor to help in any way I can. Thanking you,

Elizabeth J. Stringer, Esquire

Sworn to me this 13 day of Nov, 2012.

Notary Public for the state of: SC
My commission expires: 7/8/20

STATE OF SOUTH CAROLINA	)	
	)	AFFIDAVIT OF ROBIN BECKMAN
COUNTY OF CHARLESTON	)	

PERSONALLY appeared before me, Robin Beckman, who after being duly sworn, deposes and states as follows:

1. I am a retired Master Deputy with the Charleston County Sheriff's Office.
2. I was employed with Charleston County Sheriff's Office from March 1999 until my retirement in November 2011.
3. Prior to my retirement, I worked in various aspects within the Sheriff's Office to include Family Court.
4. In 2005, I transferred to Family Court for the purpose of maintaining the security of the Judicial Center and security of the Judges within the Judicial Center.
5. Beginning in 2005, I was assigned to Judge P. W. Garfinkel's courtroom.

6. A large part of my duty assignment was security inside Judge Garfinkel's courtroom; therefore, I witnessed a large variety of cases, hearings, motions and rulings.

7. I have always observed Judge Garfinkel as a fair and impartial judge. I have never seen or heard Judge Garfinkel make any preconceived notions about any cases before hearing any of the evidence.

8. I have never observed Judge Garfinkel discriminating against any particular side (plaintiff/ defense), gender, age, race, ethnicity, or religion.

9. In my experience, Judge Garfinkel has always maintained order within his court and expected all parties inside the courtroom to perform their prescribed duties.

10. I was assigned in the Courts from 2005 until 2008 where I went back into patrol; however, returned to the Courts in 2009.

11. When I returned to the Court, I had the opportunity to work back with Judge Garfinkel.

12. I was extremely thankful for this because out of all of the different judges I have had contact with; I always enjoyed working with Judge Garfinkel the best due to his consistencies.

13. I never had any doubts how court was going to run that particular day.

14. Judge Garfinkel has always ran his courtroom the same when I worked with him from 2005 to 2008; in addition to, when I returned in 2009.

15. I could always count on working with the same mannerisms and consistencies when working with Judge Garfinkel.

FURTHER, THE AFFIANT SAYETH NOT!

Robin Beckman

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF BONNIE T. BRISBANE
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, Bonnie T. Brisbane, who after being duly sworn, deposes and states as follows:

1. I am an attorney licensed to practice in the State of South Carolina, having been admitted in 1982.

2. I am a staff attorney for the Department of Social Services, having been employed in this position since 2005.

3. Prior to my employment with DSS I was a staff attorney for the Neighborhood Legal Services.

4. My duties as an attorney for DSS include matters of child abuse and neglect, termination of parental rights and adult protection. My practice includes appearing in the Family Courts for the Ninth Judicial Circuit.

5. As a staff attorney for DSS I appear before the Family Court Judges multiple times each week. I estimate that I regularly appear for judicial matters before Judge Paul W. Garfinkel anywhere between two to three times per week.

6. I have appeared before Judge Garfinkel for administrative purposes and for cases involving child abuse, neglect, termination of parental rights and adult protection.

7. It has been my experience that Judge Garfinkel has always been a fair and impartial Judge. Judge Garfinkel has been fair to all parties, witnesses and attorneys treating

everyone with dignity, respect, and equality. In my experience I have never witnessed Judge Garfinkel issue a decision or a ruling for or against any person based on anything besides the facts presented and the applicable law.

FURTHER, THE AFFIANT SAYETH NOT!

Bonnie T. Brisbane

SWORN to and SUBSCRIBED to
before me this 14th day of November 2012

Notary Public for State of South Carolina
My commission expires: July 30, 2019

STATE OF SOUTH CAROLINA	)	
	)	**AFFIDAVIT OF MELISSA F. BROWN**
COUNTY OF CHARLESTON	)	

PERSONALLY APPEARED BEFORE ME, Melissa F. Brown, Esq., who, being duly sworn, swears and deposes that if she were called as a witness in the above-entitled action, she would truthfully and accurately testify as follows:

1. I am a family law attorney and my practice is primarily in Charleston, South Carolina. I am very active in family law organizations and have served in leadership roles that include Former Chair of the SC Family Law Section and current Faculty Member of the Houston Intensive Family Law Trial Institute. I am also a Fellow in the American and International Academies of Matrimonial Lawyers.

2. In my twenty years of practice here in Charleston, I have had numerous occasions to appear before the Honorable Paul W. Garfinkel in all manner of domestic actions including complex divorces, contested custody actions, emergency petitions, and DSS cases.

3. Although Judge Garfinkel and I are not social friends, I certainly respect him as an extremely intelligent, thoughtful, experienced, and extraordinarily wise jurist. When I discover that a case of mine is set for hearing before him, I know my client will have a fair hearing and will be treated with respect.

Judge Garfinkel's Knowledge of the Law

4. Judge Garfinkel is exceptionally intelligent, and he keeps current on the law. One of the great things about appearing before him is that I am quite sure he will be as knowledgeable about any given legal issue as I am. Whenever I appear before him, I know I must be prepared and correct on the law before I open my mouth. If an area of law is settled, Judge Garfinkel applies the law as it exists rather than legislate from the Bench. Where there is an open question of law, Judge Garfinkel listens to my argument, reads my memorandums and rules in accordance with sound principles of law and I am never concerned that he will issue a ruling based on prejudice or whim.

Judge Garfinkel's Respect for the Law

5. Judge Garfinkel not only adheres to established law, but he also evidences tremendous respect for the judicial system because he takes his oath of office as a sacred duty. While he is known to expect attorneys and litigants to appear before him dressed appropriately and prepared to state their cases plainly and succinctly, his demand for this respect is for the judicial process as a whole, not himself personally.

6. Whereas some judges have allowed favored attorneys great latitude and access to them for *ex parte* orders or scheduling favors, Judge Garfinkel strictly adheres to South Carolina's Code of Judicial Conduct and Rules of Court. I have actually heard him admonish attorneys who seek "special treatment" and have witnessed him insist that attorneys schedule hearings in the ordinary course through the regular channels.

7. I have also personally witnessed Judge Garfinkel recuse himself in any case where there is any possible appearance of a conflict of interest or where he believes his impartiality may have been compromised by unwitting *ex parte* communication. Some have said that Judge Garfinkel is a stickler for the rules as if that were a bad quality. I want judges to act as sticklers for the rules to preserve our system of justice, and I appreciate Judge Garfinkel personally and professionally for his adherence and respect of this system.

8. Judge Garfinkel's commitment to fairness and to our system of justice is also demonstrated by his even-handedness with regard to litigants of diverse backgrounds. He rules without regard to race, gender, ethnicity, sexual orientation, religion or socio-economic status. My appointed clients in DSS cases receive the same degree of respect and fairness from Judge Garfinkel as do my wealthier divorce clients.

Judge Garfinkel's Wisdom and Impact on the Profession

9. Judge Garfinkel has remained active in South Carolina's efforts to improve and refine the justice system particularly for the benefit of South Carolina's children. I am honored to serve on Judge Garfinkel's "Fast Track" committee whose purpose is to speed up the court process so children's lives and schedules are not unnecessarily hampered by court dockets. In that same vein, Judge Garfinkel has also spent his career working to improve how we serve the needs of South Carolina's families.

10. Just this past summer, I was privileged to receive a copy of a transcript from one of Judge Garfinkel's custody hearings. At this hearing, Judge Garfinkel wisely counseled the two parents embroiled in a messy custody fight about the need to focus on their children's needs, not their own hurts. With Judge Garfinkel's permission, I shared the transcript with my friends in the American Academy of Matrimonial Lawyers (AAML) and the American Bar Association's Family Law section. Within hours, Judge Garfinkel's words went "viral." Suddenly, I was inundated with dozens of requests to re-post Judge Garfinkel's comments on attorney websites around the country, in attorney blogs, and in Bar journals nation-wide. His wise words resonated through the bench and family court bar nation-wide, and this one instance provides a very good indication of just how influential Judge Garfinkel has become even outside this state.

11. I am honored to speak on behalf of Judge Garfinkel and endorse him without reservation or hesitation for re-appointment to the Bench.

Melissa F. Brown, Esquire
145 King Street, Suite 405
Charleston, SC 29401
SC Bar # 062875
melissa@melissa-brown.com
(843) 722-8900 (O)
(843) 722-8922 (fax)

SWORN to and subscribed before me
this 16th day of Nov, 2012.
Jacqueline F. Wood
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 8/20/2017

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

AFFIDAVIT OF RITA J. ROACHE

Personally appeared before the undersigned, who being duly sworn, deposes and states as follows:

1. I have been a member of the South Carolina Bar since 1988.

2. I am a Staff Attorney and the Family Law Unit Head with South Carolina Legal Services, a statewide law firm that provides representation in civil legal matters for persons who meet our eligibility guidelines. I have been with SCLS for twelve years.

3. Prior to joining SCLS, I was engaged in private practice.

4. My duties include representing clients in the Family Courts of Charleston, Berkeley, Dorchester, Colleton, Allendale, Hampton, Jasper and Beaufort counties. In addition, I mentor new lawyers and provide support and training for our advocates as part of my responsibilities.

5. I routinely appear before Judge Paul Garfinkel as do other members of my firm.

6. I have also worked with Judge Garfinkel on several Family Court committees.

7. It has been my pleasure to appear before Judge Garfinkel. He is well-prepared on the cases and the issues presented. He treats litigants, witnesses and attorneys with dignity and respect. I have found his decisions to be fair, equitable and based upon the law. There has never been any instance where I experienced bias toward me, another attorney or any of my clients. I firmly believe that he is a fair and impartial jurist who should continue to serve the citizens of South Carolina.

Rita J. Roache

Rita J. Roache

Sworn and subscribed before me this 14th day of November, 2012

Notary Public for South Carolina

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF JASON T. MIKELL
COUNTY OF CHARLESTON)

PERSONALLY appeared before me, Jason T. Mikelll, who after being duly sworn, deposes and states as follows:

1. I am an attorney licensed to practice in the State of South Carolina, having been admitted in November 2004.

2. I began my career in the Charleston County Public Defender's Office in 2005. In 2010, I opened Mikell Law Firm, P.A.

3. Over the course of my professional career, I have appeared before Judge Paul W. Garfinkel countless times. During my time at the Charleston County Public Defender's Office and in private practice, I have frequently appeared before Judge Paul W. Garfinkel for matters relating to juveniles and domestic disputes. I have always found him to be a fair and impartial individual.

4. I have never experienced any bias or unfair treatment directed to either myself or my clients in matters before Judge Paul W. Garfinkel. I believe his integrity on the bench is excellent and he demonstrates a willingness to hear all parties before making a decision on the facts and circumstances presented to him. Judge Paul W. Garfinkel consistently displays acts of fairness, dignity, and respect to all parties.

FURTHER, THE AFFIANT SAYETH NOT!

Jason T. Mikell

SWORN to and SUBSCRIBED to
before me this 15 day of November 2012

Notary Public for State of South Carolina
My commission expires: 3/9/2022

STATE OF NORTH CAROLINA)
) AFFIDAVIT OF JAMES FICKLING
COUNTY OF DURHAM)

PERSONALLY appeared before me, James Fickling, who after being duly sworn, deposes and states as follows:

1. I am a former Deputy Sheriff with the Charleston County Sheriff's Office.
2. I was employed with Charleston County Sheriff's Office from 2000 until my family and I moved to North Carolina in June 2010.
3. In 2004, I was assigned to Family Court for the purpose of maintaining the security of the Judicial Center and security of the Judges within the Judicial Center.
4. I routinely worked inside the courtroom of Judge Garfinkel.
5. During my six years as a Deputy Sheriff assigned to Family Court, I witnessed a large variety of cases, hearings, motions and rulings in Judge Garfinkel's courtroom.

6. I have always observed Judge Garfinkel as a fair and impartial judge.

7. I have never observed Judge Garfinkel making any discriminating comments or taking discriminatory actions against any party in a family court case.

8. In my experience, Judge Garfinkel has always maintained order within his court and expected all parties inside the courtroom to perform their prescribed duties.

FURTHER, THE AFFIANT SAYETH NOT!

James Fickling

James Fickling

DURHAM County, North Carolina

Signed and sworn to before me this day by JAMES FICKLING.
Date: 11/16/2012

Katrina T. Holland

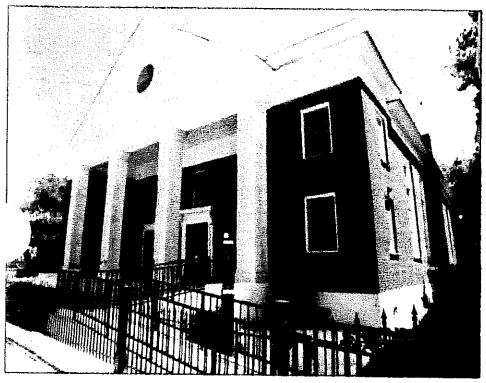
Official Signature of Notary

(Official Seal) HOLLAND
Notary Public, North Carolina
Durham County
My Commission Expires
October 07, 2017

KATRINA T. HOLLAND

Notary's printed or typed name

My commission expires: 10/07/2017



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The Reverend Joseph A. Darby, Senior Pastor

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July 17, 2012

The Judicial Merit Selection Commission
Post Office Box 142
Gressette Building
Columbia, South Carolina 29201

To the Members of the Commission:

Please accept this as a letter of recommendation for the re-election of the Honorable Paul W. Garfinkel as a Judge of the Family Court. I've known Judge Garfinkel for over ten years, and have found him to be a fair and even handed jurist who dispenses justice in a way that benefits those who appear before him.

Judge Garfinkel was instrumental in initiating a "father to father" initiative and a "Drug Court" for parents with substance abuse problems, and gave invaluable help to Department of Juvenile Justice workers with huge caseloads by helping to start an auxiliary probation officer program.

Judge Garfinkel has a remarkable blend of toughness and compassion and an evident interest in children and families. He's visible and helpful not only in the courthouse, but also in the community.

I got to know many Family Court Judges during fourteen years as a juvenile probation counselor, and have found Judge Garfinkel to epitomize the best of the profession. I celebrate his good work, and recommend him to you without reservation.

Thank you for your attention,

The Reverend Joseph A. Darby

Office: 843-723-1961 Pastor's Cell: 843-814-8764 Fax: 843-723-6320 Parsonage: 843-766-4893 E-Mail: josephdarby@bellsouth.net

RULE 21
TEMPORARY RELIEF

(a) Motion for Temporary Relief. A written motion for temporary relief, and notice of the hearing thereof, shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by order of the court. In an emergency situation, such order may be made on ex parte application.

(b) Evidence at Hearing. Evidence received by the court at temporary hearings shall be confined to pleadings, affidavits, and financial declarations unless good cause is shown to the court why additional evidence or testimony may be necessary.

(c) Service of Affidavits. Notwithstanding the provisions of Rule 6(d), SCRCP, affidavits filed at a temporary hearing need not be served on the opposing party prior to the temporary hearing.

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law.* In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law* and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require* order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require * similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability or age, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability or age, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

Examples when an ex parte communication may be expressly authorized by law include the issuance of a temporary restraining order under certain limited circumstances [Rule 65(b), SCRCP], the issuance of a writ of supersedeas under exigent circumstances [Rule 225(d)(6), SCACR], the determination of fees and expenses for indigent capital defendants [S.C. Code Ann. § 16-3-26 (Supp. 1995)], the issuance of temporary orders related to child custody and support where conditions warrant [S.C. Code Ann. § 63-17-390 (Supp. 2008)], and the issuance of a seizure order regarding delinquent insurers [S.C. Code Ann. § 38-27-220 (Supp. 1995)].

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary:

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial

duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require * similar abstention on the part of court personnel * subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary:

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 3.6 of the Rules of Professional Conduct contained in Rule 407, SCACR.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary:

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require* staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of

matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary:

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.*

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct contained in Rule 407, SCACR, should take appropriate action. A judge having knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.*

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

(4) A judge who is arrested for or has been charged by way of indictment, information or complaint with a serious crime shall inform the Commission on Judicial Conduct in writing within fifteen days of being arrested or being charged by way of indictment, information or complaint.

Commentary:

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the

judge's impartiality might reasonably be questioned, including but not limited to instances where:

Commentary:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Commentary:

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows* that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household,* has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person:

State of South Carolina
The Family Court of the Ninth Judicial Circuit

PAUL W. GARFINKEL
JUDGE

100 BROAD STREET
SUITE 248
CHARLESTON, SOUTH CAROLINA 29402-0934
TELEPHONE: (843) 958-4417
FAX: (843) 958-4433
E-MAIL: pgarfinkelj@sccourts.org

MERRILYN O. JOHNSON PhD. JD.
Administrative Assistant

Jane O. Shuler, Esq.
Chief Counsel
Judicial Merit Selection Committee
P.O. Box 142
Columbia, SC 29202

October 1, 2012

RE: Update of PDQ

Dear Ms. Shuler,

I am enclosing herewith the following which will update the information on my Personal Data Questionaire:

1) Copy of Order of Court of Appeals
2) Copy of attached Letter to Counsel
3) Copy of letter to me (and to Defendant), from State appointed attorney
4) Copy of Return to Motion filed by attorney
5) Brief of attorney representing me at the Court of Appeals

This is in reference to the answer to question 34. In reviewing my copy of the PDQ I retained, I do not see where I referenced this out in my original answer. I do not know if the submitted PDQ made mention of this or not. If not, please accept my apology. The enclosed hopefully will give you the information you need for the PDQ. If not, please advise and I will be glad to supply you with any additional information needed.

Yours very truly,

Paul W. Garfinkel

The South Carolina Court of Appeals

Harold Simmons, Jr., Appellant,

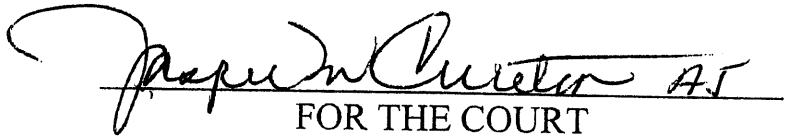
v.

Charleston County Family Court, Paul W. Garfinkel and South Carolina Department of Social Services, Pamela Brown, Respondents.

Appellate Case No. 2011-186587

ORDER

This appeal was dismissed due to Appellant's failure to serve and file a complete Record on Appeal. Appellant has filed a petition to reinstate, claiming the omission of certain documents designated by Respondents was inadvertent. Appellant has filed an amended Record on Appeal. After careful consideration of the parties' filings, Appellant's motion is granted and this appeal is reinstated.



FOR THE COURT

Columbia, South Carolina

FILED

9/12/12 AS

cc:
Harold Simmons, Jr.
James A. Stuckey, Jr.
Julie J. Armstrong

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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September 12, 2012

Harold Simmons, Jr.
1182 King St.
Charleston SC 29403

Mr. James A. Stuckey, Jr.
123 Meeting Street
Charleston SC 29401

Re: Simmons, Harold v. Charleston County
Appellate Case No. 2011-186587

Dear Counsel:

Enclosed is an order of the Court regarding your petition.

Appellant's final briefs, respondents' final briefs, and fourteen (14) copies of the record on appeal must be served and filed no more than twenty days from the date of this letter.

Very truly yours,

V. Claire Allen, Deputy

CLERK

STUCKEY LAW OFFICES, LLC

ATTORNEYS AT LAW
123 MEETING STREET
CHARLESTON, SOUTH CAROLINA 29401-2217
www.stuckeylaw.com

JAMES A. STUCKEY (SC & CA)*#
CHRISTOPHER L. MURPHY*#
ALISSA R. COLLINS

*CERTIFIED CIVIL COURT MEDIATOR
#CERTIFIED CIVIL COURT ARBITRATOR

TELEPHONE: (843) 577-9323
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E-MAIL: slo@stuckeylaw.com

CYNTHIA W. DILLARD, SENIOR PARALEGAL
SANDRA S. GARVIN, OFFICE MANAGER

September 27, 2012

The Honorable Paul W. Garfinkel
Judge, The Family Court
248 Judicial Center
100 Broad St. **PERSONAL, PLEASE**
Charleston, SC 29401

Pamela D. Brown, Esquire
Vice President, Trident Technical College
7000 Rivers Ave. **PERSONAL, PLEASE**
Charleston, SC 29423-8067

RE: Harold Simmons, Jr. vs. Charleston County Family Court, Paul W. Garfinkel, and South Carolina Department of Social Services, Pamela Brown
Court of Common Pleas, Charleston County
Appeal to the S.C. Court of Appeals

Dear Paul and Pam:

Back on December 26, 2010, Judge Roger Young granted you summary judgment in this case. Since then I have been butting heads with Simmons, and his unknown shadow legal counsel, to get his appeal to the Court of Appeals dismissed for failure to comply with the appellate rules. On June 22, 2011, we advised the Court of Appeals:

> On June 5, 2011, appellant Simmons requested an extension of 30 days to prepare his brief. (Attachment 1) The stated reason for this was "computer crash, virus. I need to gather raw materials to prepare brief." On June 13, 2011, you advised Mr. Simmons that the Court had not received his initial brief. (Attachment 2) We have been advised by court reporter Amanda K. Haffenden that the transcript of the hearing before Judge Young was delivered on May 3, 2011. Clearly Rule 208(a)(1), SCACR, provides that the Brief of Appellant should be served and filed thirty (30) days after the transcript is received. We have not been served a copy of the Brief of Appellant.

> "Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation." *Burns v. Reed*, 500 U.S. 478, 494 (1991), (Emphasis in original), citing *Forrester v. White*, 484 U.S. at 226 (1988). "Judicial immunity is an absolute
> bar in the sense that it absolutely bars litigation against the judicial officer in certain circumstances." *O'Laughlin v. Windham*, 330 S.C. 379, 385, 498 S.E.2d 689, 692 (S.C. App. 1998).
>
> Respondents strongly oppose any extension of time being granted to appellant to serve and file his Brief of Appellant and urge that his appeal be dismissed as violative of Rule 208(a)(1), SCACR.

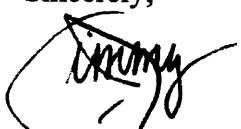
Since then we have filed four or five other motions to dismiss Simmons' appeal. One was granted, and the Court threw out his appeal, but then he filed for reinstatement, and the Court put him back on the docket.(?!)

Now the latest Order from the Court, speaking through Associate Justice Cureton, directed that we serve and file our BRIEF OF RESPONDENTS, so I am enclosing herewith a copy of it for both of you.

So we are all now moving forward with vigor, however, I'm confident that in the final analysis the Court will decide this case without oral argument, will issue an unpublished opinion affirming it, and this exercise in futility, for all of us, will finally be brought to an end.

Kindest regards.

Sincerely,



James A. Stuckey
Direct E-mail: jstuckey@stuckeylaw.com

ssg

Enclosures

cc: Ms. Nancy Stevenson (IRF Claim Nos. 58765 and 58766) **Via Email only**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 09-CP-10-4264

Harold Simmons, Jr., ... Appellant,

v.

Charleston Family Court, Paul W. Garfinkel and
South Carolina Department of Social Services,
Pamela Brown, ... Respondents.

RETURN TO MOTION TO REINSTATE

JAMES A. STUCKEY, JR.
ALISSA R. COLLINS
Stuckey Law Offices, LLC
123 Meeting Street
Charleston, SC 29401
(843) 577-9323

Attorneys for Respondents

STATEMENT OF ISSUE

By Order filed May 4, 2012, this Court granted Respondents' motion to dismiss Appellant's appeal on the grounds that he had failed to comply with the South Carolina Rules of Appellate Procedure, Rule 260(a), as asserted by Appellant repeatedly disregarding this Court's orders and the South Carolina Rules of Appellate Procedure. Appellant has now filed a Motion to Reinstate. Respondents object to the requested reinstatement.

PROCEDURAL BACKGROUND OF CASE

Pro se Appellant commenced this *pro se* action against Family Court Judge Paul W. Garfinkel and Department of Social Services attorney Pamela Brown for false imprisonment after he was incarcerated by Judge Garfinkel for failure to pay Court ordered child support. Respondent Brown represented DSS and was the prosecuting attorney in the case. Appellant did not appeal from that case, but on July 10, 2009, filed this action in the Court of Common Pleas for Charleston County for damages.

On December 26, 2010, the Honorable Roger M. Young granted summary judgment to the Respondents on the grounds of absolute judicial immunity and absolute prosecutorial immunity "since the evidence before the Court is uncontradicted and there is no genuine issue as to any material fact." (Order of Judge Young) Respondents' motion was supported by the Affidavits of Judge Garfinkel and attorney Brown.

Appellant served his Notice of Appeal on February 25, 2011, and this appeal followed. However, by Order of Dismissal filed March 30, 2011, this Court dismissed Appellant's appeal due "to the failure of appellant to provide proof of ordering the transcript and/or failure to serve

and file the Appellant's Initial Brief and Designation of Matter." (Order of Dismissal, Exhibit A)

On June 5, 2011, Appellant requested an extension of thirty days to prepare his brief. On June 13, 2011, this Court advised Appellant that the Court had not received his Initial Brief. By letter from their counsel Respondents opposed any extension of time, but Appellant was granted an extension of time in which to file his brief.

On September 13, 2011, Respondents filed their MOTION TO DISMISS asserting:

> Respondents move to dismiss this appeal by *pro se* appellant on the ground that he has violated and failed to comply with Rule 210(c), SCACR, by failing to include any of respondents' Designation of Matter in the purported RECORD ON APPEAL as required.
>
> * * * *
>
> Also, the purported RECORD ON APPEAL now served and filed by appellant is woefully deficient, does not comply with Rule 209(c), SCACR, ignores respondents' Designation of Matter, and does not form any basis for this Court to decide the issues presented and issue an opinion.

By Order filed October 17, 2011, the Honorable Jasper M. Cureton, Associate Justice, ordered:

> Respondents have filed a motion to dismiss this appeal due to Appellant's failure to include any of Respondents' designations of matter in the Record on Appeal. Within twenty days, Appellant shall serve and file an Amended Record on Appeal that includes all matter designated by Respondents. Upon receipt, or within twenty days, this Court will consider the motion to dismiss.

(Order, Judge Cureton, Exhibit B)

By letter of V. Claire Allen, deputy clerk, on October 17, 2011, appellant was advised that he must serve and file an Amended Record on Appeal within twenty (20) days, being November 7, 2011. (Exhibit C)

On November 4, 2011, Appellant mailed copies of certain documents to Respondents' counsel, apparently in attempted compliance with Judge Cureton's Order, but the purported Amended Record on Appeal did not include "all matter designated by Respondents" in their DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL in that:

a. **Requests to Admit to Plaintiff** was not included. Instead, under heading "Request to Admit to Plaintiff" appellant enclosed copies of a Motion to Compel, Interrogatories to Plaintiff, and Request to Produce to Plaintiff with a copy of the letter of respondents' counsel to the clerk of court dated March 8, 2010, a Motion and Order Coversheet, and a copy of attorney William Thrower's letter to him of January 11, 2009.

b. **Motion for Non-Response to Request for Admissions** was not included. Instead, appellant included copies of Plaintiff's Response to Defendants' Interrogatories, Interrogatories to Plaintiff, a copy of counsel's letter to him of June 23, 2011, and a copy of appellant's letter to counsel of December 9, 2010, stating "Find enclosed for service upon you Plaintiff's Response to Defendants' Interrogatories."

Respondents' counsel asserted that their motion to dismiss should be granted and Appellant's appeal should be dismissed. (Affidavit of Attorney Stuckey, Exhibit D)

On January 12, 2012, this Court issued another Order ordering:

> However, within twenty days Appellant shall comply with Rule 210 of the South Carolina Appellate Court Rules. Specifically, Appellant shall compile an Amended Record on Appeal containing all matters designated by Respondents to be included in the Record on Appeal, including the correct documents for Respondents' designated matters titled "Requests to Admit to Plaintiff" and "Motion for Non-Response to Request for Admissions." Appellant shall serve one copy of the Amended Record on Appeal on Respondents. Additionally, Appellant shall file with the clerk of this Court fourteen bound copies of the Amended Record on Appeal and one unbound copy of the Amended Record on Appeal.

(Order, Judge Lockemy, filed January 12, 2012, Exhibit E) (emphasis in original).

On March 22, 2012, Appellant served a single copy of a purported RECORD ON APPEAL on

Respondents' attorneys. Supposedly the requisite number of required copies were filed with the Court. The copy of the RECORD ON APPEAL served on Respondents was deficient, and both failed to comply with Rule 210(c), SCACR, and the two previous Orders of the Court in these respects:

> 1. The Affidavit of Pamela D. Brown for summary judgment is not included in its entirety. Only the last signature page is included.
>
> 2. The Affidavit of Paul W. Garfinkel for summary judgment is omitted in its entirety. Only the Judge's signature and a notarization, with nothing else, is included.
>
> 3. Defendants' Memorandum for Summary Judgment is not included in its entirety.
>
> 4. The Transcript of Record, pages 45-58, is not complete and does not contain the entire transcript.

(Motion to Dismiss Appeal)

On May 4, 2012, this Court filed its Order stating, "After careful consideration, Respondents' motion to dismiss is granted. *See* Rule 260(a), SCACR (providing that this Court may dismiss an appeal whenever it appears an appellant has failed to comply with the South Carolina Rules of Appellate Procedure)."

Appellant has now moved to reinstate his appeal on the grounds that the Record on Appeal, while deficient, was handed over to a Fedex office and was not fully copied.

Appellant's Motion to Reinstate his appeal should be summarily denied because Appellant has repeatedly failed to comply with the Appellate Court Rules as evidenced by the facts above. Appellant's purported appeal has been a litany of Appellant's delay and failure to comply with both the Appellate Court Rules and the Orders of this Court. The fault and blame for not complying with the applicable rules and the Orders of this Court is on Appellant, not

Fedex. Appellant is the person charged with preparing and assembling a proper RECORD ON APPEAL. Appellant is the one who signs the Certificate of Counsel certifying "that the Record on Appeal contains all material proposed to the included by any of the parties and not any other material." Rule 210(g), SCACR. Appellant, not any representative of Fedex, is the one who signed this certification on two occasions, both of which were incorrect.

A second, and perhaps more compelling, reason to deny Appellant's MOTION TO REINSTATE is that Appellant is attempting to assert and appeal issues from his previous contempt of court hearing from which no appeal was taken, and which are not before the Court in this present appeal.

A brief review of the Briefs before the Court and the purported RECORD ON APPEAL will show that this is true, and that granting Appellant's MOTION TO REINSTATE and reviving this frivolous appeal will be a needless expenditure of judicial resources and time.

In their INITIAL BRIEF OF RESPONDENTS Judge Garfinkel and attorney Brown stated the two issues on appeal:

STATEMENT OF THE ISSUES ON APPEAL

1. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE GROUNDS OF ABSOLUTE JUDICIAL IMMUNITY AND DISMISSED THIS ACTION AGAINST RESPONDENT JUDGE PAUL W. GARFINKEL.

2. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE GROUNDS OF ABSOLUTE PROSECUTORIAL/QUASI JUDICIAL IMMUNITY AND DISMISSED THIS ACTION AGAINST RESPONDENT DSS ATTORNEY PAMELA BROWN.

These issues on appeal are supported by Respondents' Designation of Matter and the RECORD ON APPEAL to be assembled by Appellant.

In opposition to the above issues of absolute judicial immunity and prosecutorial/quasi judicial immunity Appellant has stated in his FINAL BRIEF the issues on appeal to be:

Arguments

I. BECAUSE ONE FAMILY COURT JUDGE CANNOT IGNORE THE ORDER OF ANOTHER FAMILY COURT JUDGE, THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

II. BECAUSE A PERSON HAS THE RIGHT TO BE CLEARLY INFORMED OF THE NATURE AND CAUSE OF THE CHARGE AGAINST HIM, THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

III. BECAUSE A COURT MAY ALSO ABUSE ITS DESCRETION WHEN THE RECORD CONTAINS NO EVIDENCE TO SUPPORT ITS DECISION, THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

IV. BECAUSE A PERSON SHALL NOT BE IMPRISONED FOR A DEBT EXCEPT IN THE CASE OF FRAUD, THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

V. BECAUSE A DEFENDANT MUST RECEIVE CREDIT AGAINST HIS OR HER JAIL TERM, THE COURT ERRED IN ITS DECISION TO GRANT THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

(Final Brief of Appellant, p. I.)

None of the above five issues are supported by the purported RECORD ON APPEAL to be submitted by Appellant, are not mentioned in the Order of Judge Young appealed from, and are not before the Court.

CONCLUSION

The two Respondents in this case, Family Court Judge Paul W. Garfinkel and S.C. Department of Social Services staff attorney Pamela Brown, are supposedly immunized from

actions such as asserted herein by the established longstanding doctrines of both judicial and prosecutorial immunity. However, despite those immunities and summary judgment granted to them, Appellant continues to pursue this frivolous case and appeal and continually harass them by wilfully failing to comply with both the Appellate Court Rules and the Orders of this Court.

Appellant's motion to reinstate should be denied because his appeal was dismissed for repeated failure to comply with the Orders of this Court and the Appellate Court Rules, after granting he was granted extensive leeway and opportunities to comply and remedy his omissions. Additionally, Appellant's entire appeal is frivolous because it does not assert or address any proper issues on appeal before this Court. If the Court somehow determines to give Appellant a third or fourth bite at the judicial apple and reinstate his *pro se* appeal this case will ultimately then be decided for Respondents, without oral argument, and in an unreported case of no precedential value. It would be unfortunate to expend additional time and judicial resources to award Appellant for his derelictions.

Accordingly, Appellant's MOTION TO REINSTATE should be denied.

Respectfully submitted,

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Attorneys for Respondents

May 24, 2012

Charleston, South Carolina

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CYNTHIA W. DILLARD, SENIOR PARALEGAL
SANDRA S. GARVIN, OFFICE MANAGER

September 27, 2012

The Honorable V. Claire Allen, Deputy Clerk
The South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

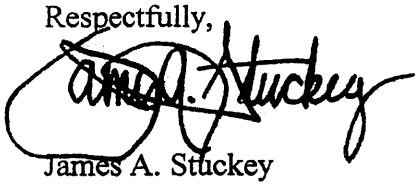
RE: Simmons, Harold vs. Charleston County
Case # 2011186587

Dear Clerk of Court Allen:

Please find enclosed the original and fifteen (15) copies of our BRIEF OF RESPONDENTS and Certificate of Service of Sandra S. Garvin proving service of a copy of the Brief on Appellant Harold Simmons, Jr. today. Please return a file-stamped copy of this letter to me in the stamped self-addressed envelope enclosed for your convenience.

Kindest regards.

Respectfully,



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Direct E-mail: jstuckey@stuckeylaw.com

ssg

Enclosures

cc: The Honorable Paul W. Garfinkel
Ms. Pamela Brown
Ms. Nancy Stevenson (IRF Claim Nos. 58765 and 58766)
(with Enclosures)

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SANDRA S. GARVIN, OFFICE MANAGER

September 27, 2012

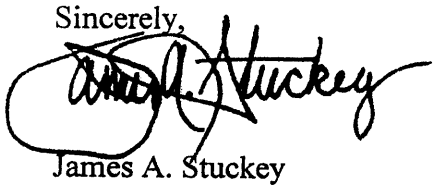
Mr. Harold Simmons, Jr.
1182 King St.
Charleston, SC 29403

RE: Harold Simmons, Jr. vs. Charleston County Family Court, Paul W. Garfinkel, and South Carolina Department of Social Services, Pamela Brown
Appeal to S.C. Court of Appeals
Civil Action No. 2009-CP-10-4264

Dear Mr. Simmons:

I serve on you herewith a copy of the BRIEF OF RESPONDENTS, Certificate of Counsel, and the Certificate of Service of Sandra S. Garvin proving service on you today.

Sincerely,



James A. Stuckey

ssg

Enclosures

cc: The Honorable Paul W. Garfinkel
Pamela D. Brown, Esquire
Ms. Nancy Stevenson (IRF Claim Nos. 58765 and 58766)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 09-CP-10-4264

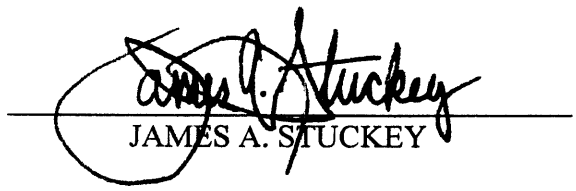
Harold Simmons, Jr., ... Appellant,

v.

Charleston Family Court, Paul W. Garfinkel and
South Carolina Department of Social Services,
Pamela Brown, ... Respondents.

CERTIFICATE OF COUNSEL

I CERTIFY that this Brief of Respondents complies with Rule 211(b), SCACR.



JAMES A. STUCKEY

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 09-CP-10-4264

Harold Simmons, Jr., ... Appellant,

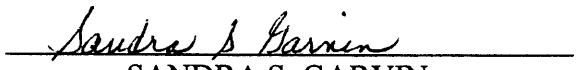
v.

Charleston Family Court, Paul W. Garfinkel and
South Carolina Department of Social Services,
Pamela Brown, ... Respondents.

PROOF OF SERVICE

I CERTIFY that I have served the Brief of Respondents on *pro se* Appellant Harold Simmons, Jr. by delivering a copy via U.S. Mail First-Class postage prepaid on the 27th day of September 27, 2012, addressed as follows:

Mr. Harold Simmons, Jr.
1182 King St.
Charleston, SC 29403



SANDRA S. GARVIN

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STATEMENT OF ISSUES ON APPEAL

1. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE GROUNDS OF ABSOLUTE JUDICIAL IMMUNITY AND DISMISSED THIS ACTION AGAINST RESPONDENT JUDGE PAUL W. GARFINKEL.

2. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE GROUNDS OF ABSOLUTE PROSECUTORIAL/QUASI JUDICIAL IMMUNITY AND DISMISSED THIS ACTION AGAINST RESPONDENT DSS ATTORNEY PAMELA BROWN.

STATEMENT OF THE CASE

Appellant Harold Simmons, Jr. commenced this *pro se* action against Family Court Judge Paul W. Garfinkel and Department of Social Services attorney Pamela Brown on July 10, 2009, for false imprisonment alleging, "On August 16, 2006 Harold Simmons Jr. Was wrong imprisons by Charleston County Judge Paul Garfinkel and South Carolina Department of Social Services Attorney Pam Brown." All of Judge Garfinkel's dealings with appellant were as the presiding judge over his cases for failure to pay court-ordered child support. Respondent Brown was the prosecuting attorney and represented DSS. Appellant complains that he was ordered to jail after being found in contempt of court for his failure to pay his child support.

The respondents pleaded the defenses of judicial immunity, the statute of limitations of S.C. Code Ann. § 15-78-110, and "judicial, or quasi-judicial" immunity under the South Carolina Tort Claims Act. S.C. Code Ann. § 15-78-60.

Respondents moved for summary judgment, supported by the affidavits of Judge Garfinkel and attorney Brown. Appellant did not present any timely contesting affidavits or evidence. Respondents' motion came before the Honorable Roger M. Young, presiding judge of the Ninth Judicial Circuit, on December 10, 2010. After hearing the presentations of the parties Judge Young ruled that the respondents were entitled to judicial and prosecutorial/quasi-judicial immunity, granted summary judgment, and dismissed this action.

Appellant served his Notice of Appeal on February 25, 2011, and this appeal followed.

ARGUMENTS

1. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE GROUNDS OF ABSOLUTE JUDICIAL IMMUNITY AND DISMISSED THIS ACTION AGAINST RESPONDENT JUDGE PAUL W. GARFINKEL.

Respondent Paul W. Garfinkel is a Family Court Judge of the Ninth Judicial Circuit. All of his dealings and contact with appellant, which precipitated this action, were through his position as presiding judge in the Family Court of Charleston County in his judicial position dealing with delinquent child support cases. In that capacity, he had jurisdiction of the cases and appellant under S.C. Code Ann. § 63-3-530, Jurisdiction in Domestic Matters. Judge Garfinkel avers that appellant was not falsely imprisoned. (R. pp. 28-31).

In his Amended Answer Judge Garfinkel pleaded the affirmative defense of judicial immunity. (R. p. 14). Judicial immunity is one of the basic common law tenets upon which our modern system of justice is built. At common law, since at least 1772, "Neither party, witness, counsel, jury or Judge can be put to answer, civilly or criminally, for words spoken in office." *King v. Skinner*, Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772), quoted in *Burns v. Reed*, 500 U.S. 478, 490 (1991).

Judicial immunity is not a defense, it is a complete immunity to being sued. Its existence is a legal issue. "Judicial immunity affords absolute immunity from suit." *Stump v. Sparkman*, 435 U.S. 349 (1978). "Judicial immunity is an absolute bar in the sense that it absolutely bars litigation against the judicial officer in certain circumstances." *O'Laughlin v. Windham*, 330 S.C. 379, 385, 498 S.E. 2d 689, 692 (1998). "Therefore, a finding of judicial immunity renders a complaint alleging judicial misconduct meritless." *McEachern v. Black*, 329 S.C. 642, 647, 496

S.E. 2d 659 (1998).

Judicial immunity is an absolute and complete bar to legal actions against judges except in three exceptions. First, no judicial immunity exists if a judge acts in the "clear absence of all jurisdiction." *Stump v. Sparkman,* 435 U.S. 349, 357 (1978). Secondly, judicial immunity extends only to judicial acts. *Forrester v. White*, 484 U.S. 219 (1988). The third limitation, which is of no concern in our present case, states judges cannot claim judicial immunity for suits seeking only prospective injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, FN 2 (1984).

South Carolina is in accord with this. "[J]udges and other officials are not entitled to judicial immunity if: (1) they did not have jurisdiction to act; (2) the act did not serve a judicial function; or (3) the suit is for prospective, injunctive relief only." *Faile v. South Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 324, 566 S.E.2d 536, 541 (2002) (internal citations omitted).

As to the acts of which appellant complains, Judge Garfinkel had jurisdiction of both the case and party. He was performing a judicial act. Appellant is not seeking any prospective injunctive relief. Accordingly, respondent Judge Paul W. Garfinkel is entitled to absolute judicial immunity and the trial court's grant of summary judgment to him should be affirmed.

2. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE GROUNDS OF ABSOLUTE PROSECUTORIAL/QUASI JUDICIAL IMMUNITY AND DISMISSED THIS ACTION AGAINST RESPONDENT DSS ATTORNEY PAMELA BROWN.

At all times alleged in appellant's Complaint respondent Pamela Brown was a staff attorney with the S.C. Department of Social Services in the Charleston County offices. In all of her dealings and contacts with appellant she was prosecuting and handling delinquent child

support cases filed against him in the Charleston County Family Court which were assigned to her. All of the proceedings were in open court, judicial, procedurally proper, and intimately associated with the judicial phase of the Family Court processes. Attorney Brown avers that appellant was not falsely imprisoned. (R. pp. 25-26).

In her Amended Answer respondent Pamela Brown pleads the defense of prosecutorial and quasi-judicial immunity. (R. pp. 25-26).

The South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10 *et. seq.*, provides, "The governmental entity is not liable for a loss resulting from: (1) legislative, judicial, or quasi-judicial action or inaction." S.C. Code Ann. § 15-78-60(1).

Absolute prosecutorial immunity "is not grounded in any special 'esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself.'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997)(quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). Prosecutors are entitled to absolute immunity from civil liability for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976). Absolute immunity is afforded prosecutors when acting "within the advocate's role." *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993).

"[T]he immunity which is extended to the judges is in like manner extended to the attorneys in the presentation of the client's case to the court or the jury." *Yaselli v. Goff*, 275 U.S. 503, 72 L.Ed. 395, 402 (1927), cited in *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496, 501 (S.C. App. 2001).

> The duties of a prosecutor fall into the exceptions enumerated by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) and § 15-78-60. The case law cited throughout this opinion clearly supports the proposition that a prosecutor's typical duties are "judicial" or "quasi-judicial" in nature. Accordingly, this Court finds a prosecutor, in his official capacity, is immune from a Tort Claims Act suit involving "judicial" or "quasi-judicial" acts, provided a defendant prosecutor raises the affirmative defense of sovereign immunity in his return. *See Tanner v. Florence City-County Bldg. Comm'n*, 333 S.C. 549, 511 S.E.2d 369 (Ct. App. 1999) (holding sovereign immunity is an affirmative defense that must be pled).

Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496, 508 (S.C. App. 2001).

Accordingly, for the reasons stated, based on applicable law, respondent Pamela Brown, acting in her capacity as a prosecuting attorney, is entitled to absolute prosecutorial/quasi judicial immunity, and the grant of summary judgment for her should be affirmed.

ADDITIONAL SUSTAINING GROUND

1. THIS ACTION WAS NOT TIMELY BROUGHT NOR FILED WITHIN THE APPLICABLE STATUTE OF LIMITATIONS PERIOD OF S.C. Code Ann. § 15-78-110, SOUTH CAROLINA TORT CLAIMS ACT, AND IS THUS TIME BARRED BY THAT PROVISION.

Appellant alleges in his Complaint filed July 10, 2009:

> Client Stated on May 8, 2006 he was arrested on a family court warrant on a rule to show cause. And on May 11, 2006 he was brought before Charleston County Judge Segars Andrews and South Carolina Department Of Social Services Attorney Pam Brown with also his workman Comp attorney Thomas White of Steinberg law frm. Who argue reasons why his client Harold Simmons Jr. should not be charged with contempt and to be release from jail. On May 11, 2006 Harold Simmons was released and was told to come back to court on August 16, 2006 for a review just to give a workman comp update report. On August 16, 2006 Harold Simmons Jr. Was wrongful imprisons by Charleston County Judge Paul Garfinkel and South Carolina Department of Social Services Attorney Pam Brown. This comes under the legal term "wrong", because of this Harold Simmons file this as follow:

* * * *

False Imprisonment Dates from-
August 16, 2006 through out October 20, 2006 to February 16, 2007

(R. pp. 6-7).

As emphasized above all of the acts of which appellant complains in this action, including "False Imprisonment Dates from- August 16, 2006 through out October 20, 2006 to February 16, 2007," occurred during the years 2006 and 2007, and ended on February 16, 2007.

Appellant did not file this action until July 10, 2009, more than two years after the last complained of event. The statute of limitations provision of the S.C. Tort Claims Act provides:

> **§ 15-78-110. Statute of limitations.**
>
> Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

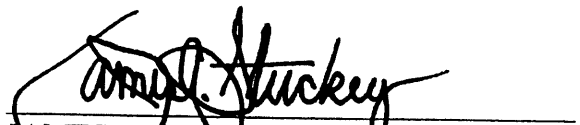
Accordingly, since the last act of which appellant complains occurred on February 16, 2007, and this action was not filed until July 10, 2009, more than two years after the complained of event, this case is additionally barred by the SCTCA statute of limitations provision set forth in S.C. Code Ann. § 15-78-110.

CONCLUSION

Based on the submitted Affidavits of respondents Judge Paul W. Garfinkel and DSS attorney Pamela Brown, which were uncontradicted by appellant by either affidavits or evidence, and for the reasons stated, in accordance with applicable law and precedent, the summary judgments granted by The Honorable Roger M. Young should be affirmed, and this appeal of the

pro se appellant should be dismissed.

Respectfully submitted,



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Attorneys for Respondents

September 27, 2012

Charleston, South Carolina

State of South Carolina
The Family Court of the Ninth Judicial Circuit

PAUL W. GARFINKEL
JUDGE

MERRILYN O. JOHNSON PhD. JD.
Administrative Assistant

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Jane O. Shuler, Esq.
Chief Counsel
Judicial Merit Selection Commission
P.O. Box 142
Columbia, SC 29202

November 2, 2012

Dear Ms. Shuler,

Please allow this letter to serve as my response to the Complaint filed against me by Elonda Fair O'Neill. By way of background, this, as is evident from the Complaint, deals with the exact same allegations raised by Mrs. O'Neill and her husband, Anthony B. O'Neill to the Supreme Court Commission on Judicial Conduct in March of 2011. The Commission, after extensive examination of the record, found no evidence of any misconduct or bias on my part.

In my previous submissions to the Judicial Merit Selection Commission, I included my response to the Commission on Judicial Conduct on this topic, but did not include the attachments referred to therein. I have now been informed that those attachments have been supplied to you by the Commission on Judicial Conduct.

I have reviewed the entire matter once again and have also reviewed the Court file here in Charleston County. I believe all of my actions as a judicial officer of this State were proper and correct. Unfortunately, there have been other occasions when I have had to issue a ruling that was adverse to the position of Mrs. O'Neill's clients, and many of these times she seemed to feel my ruling was against her personally. I can recall instances when she was employed in the Charleston County Solicitor's Office or when she was in private practice before she and her husband were married when, after an unfavorable ruling, she would slam her papers down on the counsel table or storm out of the Courtroom muttering in a "stage whisper" most unkind comments. Perhaps at that time, I should have either reprimanded or sanctioned her or even made a report to the Commission on Lawyer Conduct. I chose not to, thinking she was an inexperienced and immature attorney and surely she would change. I was incorrect. Her actions and attitude have only gotten worse. If necessary, I urge you to have a private conversation with Joyce Rueger (formerly Joyce Huck) who has been a witness to Mrs. O'Neill's conduct on many occasions while serving as a court reporter in my courtroom. Although working with me, she is <u>not</u> (emphasis added) employed by me, nor does she work at my direction. She is employed by the State of South Carolina in their Office of Court Administration. Also, John (known as Chuck) Magera, former attorney for DSS Child Support Enforcement Division, was the adverse

attorney when Mrs. O'Neill had a particularly bad violent outburst. He is now retired, but can be reached at (843) 364-2171.

The case of which Mrs. O'Neill complains had many twists and turns and the issue of child custody is always a highly emotional one, especially when the parents are not living in close proximity to each other. The parties in this case resided in South Carolina and West Virginia, respectively. To further complicate matters, Defendant/Mother was not represented by an attorney. It appears to me that Mrs. O'Neill felt that the represented party should automatically prevail. I make great effort to treat all parties equally whether formally represented or pro se. The law of this State does not require a party to have an attorney and I will always issue a ruling based upon the facts presented to me and my understanding of the applicable law. My procedure when one party does not have an attorney is the same as I saw for 25 years as a practicing attorney and was taught when I attended New Judges School in 1995. It is my understanding that my procedure is not different from other Family Court Judges.

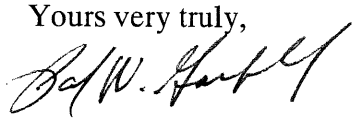
Mrs. O'Neill raises the issue of the reason for my recusal in the instant case and other cases in which she and her husband are, or would be, involved. I explained to the Commission on Judicial Conduct that my 95 year old mother's caregiver had represented to me that she and Anthony O'Neill were best of friends. Because I did not want to involve Anthony O'Neill in my mother's care and because it was not relevant to her competency as a CNA, I did not verify or be concerned about the veracity of the caregiver's statements to me. I did, as pointed out in my response, become concerned about a possible perception that <u>might</u> (emphasis added) be created, so I called the Chair of the Judicial Advisory Committee and followed his advice to the letter about the wording of my recusal Order.

In my preparation, as noted above, the Court file reveals that prior to the final resolution of the case, Mrs. O'Neill was relieved by her client as his attorney and permanent custody was awarded to the same party (Defendant) to whom I awarded temporary custody. These facts may have also contributed to Mrs. O'Neill being unsatisfied with me.

I believe my response to the Commission on Judicial Conduct fully explains my position except as to the personal animosity I feel Mrs. O'Neill possesses against me. To the credit of Mrs. O'Neill's husband, it appears that he now, after a time to reflect and review, does not feel the events should rise to a level worthy of a complaint, although, understandably, he will and does represent his wife in her Complaint.

If you need additional information, please call me at (843) 958-4417.

Yours very truly,



Paul W. Garfinkel

Court of Appeals of South Carolina.
Vanessa Anderson SHAINWALD, Appellant,
v.
Richard SHAINWALD, Respondent.

No. 1526.
Heard May 14, 1990.
Decided July 23, 1990.

Mother appealed from an order of the Family Court of Charleston County, Robert R. Mallard, J., which granted father permanent custody of children. The Court of Appeals held that: (1) although trial court should not have received and utilized guardian ad litem report without first affording parties opportunity to see report and to examine guardian ad litem and other witnesses who furnished facts contained in report, error was harmless, and (2) evidence supported custody determination.

Affirmed.

West Headnotes

[1] Infants 211 ⚷1236

211 Infants
211VII Actions
211VII(A) Role of Representative or Counsel
211k1234 Guardian Ad Litem or Next Friend
211k1236 k. Nature or status. Most Cited Cases
(Formerly 211k77)

Mental Health 257A ⚷485.1

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak485.1 k. In general. Most Cited Cases
(Formerly 257Ak485)

Guardian ad litem is representative of court appointed to assist it in properly protecting interests of incompetent person.

[2] Child Custody 76D ⚷500

76D Child Custody
76DVIII Proceedings
76DVIII(C) Hearing
76Dk500 k. In general. Most Cited Cases
(Formerly 211k19.3(3))

Infants 211 ⚷1246(1)

211 Infants
211VII Actions
211VII(A) Role of Representative or Counsel
211k1234 Guardian Ad Litem or Next Friend
211k1246 Duties, Responsibilities, and Liabilities
211k1246(1) k. In general. Most Cited Cases
(Formerly 211k85)

Extent to which guardian ad litem is permitted to testify and give opinion or recommendation in child custody case is left to sound discretion of trial judge and judge should be mindful of duty of guardian ad litem to advocate and fully protect interests of his ward.

[3] Infants 211 ⚷1235

211 Infants
211VII Actions
211VII(A) Role of Representative or Counsel
211k1234 Guardian Ad Litem or Next Friend
211k1235 k. In general. Most Cited Cases
(Formerly 211k77)

Infants 211 ⚷1246(1)

211 Infants
211VII Actions

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211VII(A) Role of Representative or Counsel
211k1234 Guardian Ad Litem or Next Friend
211k1246 Duties, Responsibilities, and Liabilities
211k1246(1) k. In general. Most Cited Cases
(Formerly 211k85)

Infants 211 ⚷1288

211 Infants
211VII Actions
211VII(B) Course of Proceedings
211k1287 Parties
211k1288 k. In general. Most Cited Cases
(Formerly 211k77)

Guardian ad litem is not adversary party in true sense and court has duty to insure that guardians ad litem perform their duties properly and in best interest of their wards.

[4] Infants 211 ⚷1241

211 Infants
211VII Actions
211VII(A) Role of Representative or Counsel
211k1234 Guardian Ad Litem or Next Friend
211k1241 k. Eligibility and qualifications in general; bond. Most Cited Cases
(Formerly 211k81)

Trial judge's duty to assure that child's best interests are protected requires as minimum that judge select competent person to serve as guardian ad litem, that he select person with no adverse interests to minor, and that person so selected is adequately instructed on proper performance of his duties. Rules Civ.Proc., Rule 17(d).

[5] Child Custody 76D ⚷423

76D Child Custody
76DVIII Proceedings
76DVIII(A) In General
76Dk422 Discovery
76Dk423 k. In general. Most Cited Cases
(Formerly 134k301)

Where record showed that parties in custody dispute were left with impression by judge that it was not necessary for guardian ad litem to furnish written report after hearing, it was error for court to receive and utilize report in making its custody determinations without first affording parties opportunity to see report and to examine guardian ad litem and other witnesses who furnished facts contained in report.

[6] Child Custody 76D ⚷923(1)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk923 Harmless Error
76Dk923(1) k. In general. Most Cited Cases
(Formerly 134k312.6(9))

Although trial court in custody dispute should not have received and utilized guardian ad litem report without first affording parties opportunity to see report and to examine guardian ad litem and other witnesses who furnished facts contained in report, error was harmless because there was other testimony or evidence to support trial judge's custody findings.

[7] Child Custody 76D ⚷53

76D Child Custody
76DII Grounds and Factors in General
76DII(B) Factors Relating to Parties Seeking Custody
76Dk52 Sexual Behavior, Orientation, or Preference of Parent
76Dk53 k. In general. Most Cited Cases
(Formerly 134k298(4))

Child Custody 76D ⚷67

76D Child Custody
76DII Grounds and Factors in General
76DII(B) Factors Relating to Parties Seeking Custody
76Dk64 Employment
76Dk67 k. As demonstrating inability to devote time to child-rearing. Most Cited Cases

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(Formerly 134k298(4), 134k298(1))

Trial court's decision to award father permanent custody of children was not an abuse of discretion in light of evidence that mother had exposed children to her adulterous relationship and that flexibility of father's work schedule best enabled him to accommodate needs of children.

[8] Child Custody 76D ⚷32

76D Child Custody
76DII Grounds and Factors in General
76DII(A) In General
76Dk32 k. Moral factors. Most Cited Cases
(Formerly 211k19.2(5))

Conduct which is immoral must also be shown to be detrimental to welfare of child before it is of legal significance in custody dispute.

****442 *454** Randall M. Chastain, Columbia, for appellant.

Lee M. Robinson, Charleston, for respondent.

PER CURIAM:
This is a child custody case. The mother was awarded temporary custody of the parties' minor children. The mother appeals an order awarding the father permanent custody of the children. She claims the trial court erred in considering the written report of the guardian ad litem, in giving too much weight to the report, and in evaluating the overall weight of the evidence. We affirm.

The parties to this suit were married for more than eleven years. The father is 45 years old and the mother is 36. They have two children ages 10 and 6. The father is a college professor. The mother was at the time of the hearing employed part-time with a local insurance agency.

The primary issue in this case is whether the trial court misused the guardian ad litem's report and recommendation. The ****443** guardian testified at trial. Prior to her testimony, she inquired whether she would be required to submit a written report. The judge made the following observation: "I think it would work best that you give us your recommendation and we don't ... and then you can follow it up with a written report and put it in this record. That will be acceptable to the Court."

***455** Near the end of the guardian's testimony, the court responded to her question whether she should submit a written report: "Well do you need other than this what's she testified to, or do you need any further written report? We've got her testimony here we can get a transcript of it. Allright. Okay." [FN1]

FN1. This statement was apparently directed toward the attorneys.

Counsel for the father then stated: "Your Honor, I would just want to ask her for the record if she's not going to submit a written report how many witnesses approximately she talked to in coming to this recommendation?"

During her testimony the guardian ad litem testified the father had incurred some difficulty in exercising his visitation rights with his children. She concluded that if custody was placed with the father she thought he would see to it that the mother would have approximately equal access to the children regardless of the provisions of the court order. She summarized her conclusions as follows: "I think based on what I know so far, I think the children would be well placed with their father only because of the issue of access. I think he would guarantee access to the mother." In her report, the guardian ad litem found there had been considerable "difficulty arranging and effecting visitation between the children and their father because the mother has exercised undue control which has limited the children's opportunities for a positive relationship with their father." She also found if the mother obtained custody she may leave the Charleston area to reside in Spartanburg. This finding was apparently based on the observation the children and the mother spent a great deal of time in the Spartanburg area.

The father also testified he had difficulty exercising visitation rights and recited an incident where one child was in Spartanburg visiting the mother's parents when he arrived at the mother's home to pick up the child. He also testified the children were at the mother's paramour's lake house on occasion when he went to pick them up. The mother kept tally on the number of times the father had the children for visita-

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tion since the separation and, according to her records, he had them 49 percent of the time.

As we read the trial court's order, he awarded the husband custody of the children primarily for four reasons: (1) the ***456** mother had exposed the children to her adulterous relationship; (2) the father, as custodial parent, would be more disposed to encouraging a relationship with the mother than the mother would toward the father if she were custodian; (3) the father had a flexible work schedule; and (4) the father's interest in the education and religious training of the children.

COURT'S RELIANCE ON THE GUARDIAN AD LITEM'S REPORT AND RECOMMENDATIONS

The mother interprets the court's direction to the guardian ad litem as a statement that there would be no written report. She contends the "report was inadequately based ... internally unclear, and makes no real analysis of the situation." The mother also contends the order of the court in its dispositive parts is almost an exact copy of the written report and depends heavily upon that report. She also argues guardians ad litem should be precluded from making custody recommendations to courts.

There is a dearth of law in this state regarding the proper role of a guardian ad litem report in a custody case. In *Collins v. Collins,* 283 S.C. 526, 324 S.E.2d 82 (Ct.App.1984), we implicitly approved the use of a guardian ad litem report to assist the judge in making a custody decision. We announced certain safeguards, however, by providing for the cross-examination of the guardian ad litem and any witnesses****444** whose testimony formed the basis of the guardian's recommendation. In the recent case of *Richmond v. Tecklenberg,* Op. No. 1478 (S.C.Ct. of App. filed April 2, 1990) (Davis Adv.Sh. No. 9 at 14), *petition for rehearing granted on other grounds,* (Davis Adv.Sh. No. 11), this court held that a family court judge did not abuse his discretion in admitting the guardian ad litem's report.[FN2]

FN2. We view as enlightening the requirements of *S.C.Code Ann.* Section 20–7–122(5) (Cum.Supp.1989) which provides that in a child abuse or neglect case the guardian ad litem will "provide the family court with a *written report ... which includes ... [the] recommendations for the case plan, the wishes of the child, if appropriate, and the subsequent disposition of the case.*" (emphasis ours)

We recognize the concern of the mother that a family court may give undue weight to the recommendations contained in a guardian ad litem's report. However, we do not think such ***457** concern should annul the long practice in this state of permitting guardians ad litem to make written reports to the court as long as the parties' rights to confrontation are protected. As stated in *Collins,* this may be accomplished by affording to the parties the right of cross-examination of the guardian ad litem and all other persons the guardian ad litem may have talked to whose testimony formed the basis for his recommendations. *Collins,* 283 S.C. at 530, 324 S.E.2d at 85.

[1] We reject the mother's somewhat novel argument that guardians ad litem should be precluded altogether from giving opinions regarding custody. We think much of the criticism of guardians ad litem stems from the failure of the bar to recognize the proper function of a guardian ad litem. A guardian ad litem is a representative of the court appointed to assist it in properly protecting the interests of an incompetent person. *Dawson v. Garcia,* 666 S.W.2d 254 (Tex.App.1984); *Clarke v. Chicago Title & Trust Co.,* 393 Ill. 419, 66 N.E.2d 378 (1946); *In re Hallstead's Estate,* 338 Pa. 257, 12 A.2d 912 (1940); *see, Blackwell v. Vance Trucking Co.,* 139 F.Supp. 103 (D.C.S.C.1956). A statement made by the court in *Bahr v. Galonski,* 80 Wis.2d 72, 83, 257 N.W.2d 869, 874 (1977), is instructive:

> The requirement that the children have independent legal representation does not in any way suggest that the parents or the trial court were unmindful of the children's welfare. Rather, it reflects the conviction that the children are best served by the presence of a vigorous advocate free to investigate, consult with them at length, marshal evidence, and to subpoena and cross-examine witnesses. The judge cannot play this role. **Properly understood, therefore, the guardian ad litem does not usurp the judge's function; he aids it.** (emphasis added)

[2][3][4] We hold the extent to which a guardian ad litem is permitted to testify and give an opinion or recommendation in a child custody case is left to the

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sound discretion of the trial judge. However, judges should be mindful of the duty of the guardian ad litem to advocate and fully protect the interests of his ward. Any exercise of discretion by ***458** the court which unreasonably interferes with the performance of that duty amounts to an abuse of discretion. Judges should also be mindful of the fact that a guardian ad litem is not in the true sense an adversary party and the court has a duty to insure that guardians ad litem perform their duties properly and in the best interest of their wards. The trial judge's duty to assure the child's best interests are protected requires as a minimum that (1) he select a competent person to serve as guardian ad litem; (2) he select a person with no adverse interests to the minor; and (3) the person so selected is adequately instructed on the proper performance of his duties.[FN3]

FN3. See Rule 17(d) SCRCP for other qualifications of a guardian ad litem.

[5] We agree with the mother that the record shows the parties were left with the impression by the judge that it was not necessary for the guardian ad litem to furnish a written report after the hearing. Thus, it was error for the court to receive and utilize the report in making its custody ****445** determinations without first affording the parties an opportunity to see the report. Likewise, there was error in not affording them the right to examine the guardian ad litem and other witnesses who furnished facts contained in the report, unless we are able to say that such facts were either cumulative to the other evidence in the case or their admission otherwise amounted to harmless error.[FN4]

FN4. The holiday visitation schedule clearly parrots the schedule recommended by the guardian ad litem. Additionally, we find no independent evidence to support the visitation schedule. However, no one objects to the holiday visitation schedule.

[6] We have thoroughly examined the report of the guardian ad litem and compared it to the court's order and conclude while some of the language contained in the order is similar to that contained in the report, we nevertheless think the court's use of the report was harmless error in view of the fact there is other testimony or evidence to support the findings of the trial judge.

The mother particularly complains about the court's use of the report on the subject of the lack of access to the children by the father if the mother should be awarded custody. She claims the court relied on the report of the guardian ad litem with regard to its findings on access. The court found there ***459** had been continuing disputes between the parties on this matter and the mother had exercised "undue control" over the children. As noted above, both the father and the guardian ad litem testified on this subject. As to the other bases mentioned above for awarding custody to the father, we do not see that the guardian ad litem's report even touches upon them.

While this court is free to find facts based on its own view of the preponderance of the evidence, the trial judge who observed the witnesses was in a better position to judge their demeanor and veracity and should be given broad discretion. *McAlister v. Patterson,* 278 S.C. 481, 299 S.E.2d 322 (1982). A bare reading of the record does not convince us there was any gross denial of the father's access to the children by the mother. We defer to the trial judge, however, on this point because of his unique position to judge the credibility of the witnesses and resolve conflicts in their testimony. *Sauls v. Sauls,* 287 S.C. 297, 337 S.E.2d 893 (Ct.App.1985).

WEIGHT OF THE EVIDENCE

[7] The mother next complains the family court erred in improperly evaluating the overall weight of the evidence, in choosing to punish the mother rather than evaluate her parental abilities fairly, and in giving too much weight to the purported protestations of religious faith on the part of the husband.

The best interest of the children is the controlling factor in all custody cases. This has been the law since at least 1853. *Ex Parte Schumpert,* 40 S.C.L. (6 Rich.) 344 (1853). The tender years doctrine is but one of a panoply of factors to be considered in awarding custody. *Jones v. Jones,* 290 S.C. 49, 348 S.E.2d 178 (Ct.App.1986). The mother argues the evidence shows she was best able to care for the children, one of which was a girl of tender years. She cites as evidence of the husband's deficiencies in child rearing the fact the girl was returned to her with sand in her vaginal area. Concern was voiced by both the guardian and the court regarding the father's lack of concern for the children's hygiene. However, the court was convinced

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from the evidence that the situation had improved. We find support for that finding.

[8] ***460** Both parties were shown to have had intimacy with third parties after their separation. Much was said during trial about the father having returned from Florida early with the children and found a man in the mother's bed. The mother claims the father set the situation up by returning early. She claims this was done for the sole purpose of disparaging her in the eyes of her children. Additionally, the court found as incredible the wife's testimony that she had not exposed the children to her adulterous relationship with her paramour. In this state, conduct which is "immoral" must also be shown to be detrimental to the welfare of a child before it is ****446** of legal significance in a custody dispute. *Langston v. Langston*, 250 S.C. 363, 157 S.E.2d 858 (1967); *Stroman v. Williams*, 291 S.C. 376, 353 S.E.2d 704 (Ct.App.1987). We think the record supports the court's finding that the mother had exposed her adulterous relationship to the children.

As to the father's work schedule, the court found its flexibility best enabled him to accommodate the needs of the children. The record supports this finding. As to the father's religious beliefs, the record leaves much to be desired in terms of the sincerity of his religious commitment and especially the regularity of church attendance. However, the record is clear that the father is concerned with the religious and educational development of his children. Otherwise, both parents were shown to be fit parents who loved their children and had much to offer them.

Admittedly the evidence is close in this case and does not clearly preponderate in favor of either party. Further, if we had the benefit of being able to judge the credibility of witnesses, we may well have awarded custody to the wife. However, the record does not reflect that the evidence is so clearly in the mother's favor to warrant a finding of an abuse of discretion by the trial court.

Accordingly, the order of the trial court is

AFFIRMED.

S.C.App.,1990.
Shainwald v. Shainwald
302 S.C. 453, 395 S.E.2d 441

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Supreme Court of South Carolina.
Anand B. PATEL, Petitioner,
v.
Nalini Raja PATEL, Respondent.

No. 25371.
Heard Aug. 7, 2001.
Decided Oct. 31, 2001.
Rehearing Denied Dec. 12, 2001.

Wife appealed from decision of the Family Court, Dillon County, Haskell T. Abbott, III, J., awarding the husband custody of children and denying wife's request for alimony. The Court of Appeals reversed, and husband petitioned for certiorari. The Supreme Court, Toal, C.J., held that: (1) in connection with developing a recommendation to family court in child custody cases, guardian ad litem shall conduct independent, balanced, and impartial investigation to determine facts relevant to the situation of the child and the family; and (2) guardian ad litem's actions and inactions so tainted decision of family court as to deny wife due process, and as such, admission of guardian ad litem's recommendation was not harmless error.

Remanded.

West Headnotes

[1] Child Custody 76D ⚷76

76D Child Custody
76DII Grounds and Factors in General
76DII(C) Factors Relating to Child
76Dk76 k. Welfare and best interest of child. Most Cited Cases

In custody case, best interest of child is the controlling factor.

[2] Child Custody 76D ⚷44

76D Child Custody
76DII Grounds and Factors in General
76DII(B) Factors Relating to Parties Seeking Custody
76Dk44 k. Primary caregiver. Most Cited Cases

Child Custody 76D ⚷48

76D Child Custody
76DII Grounds and Factors in General
76DII(B) Factors Relating to Parties Seeking Custody
76Dk48 k. Behavior of parties in general. Most Cited Cases

Child Custody 76D ⚷51

76D Child Custody
76DII Grounds and Factors in General
76DII(B) Factors Relating to Parties Seeking Custody
76Dk51 k. Relative fitness. Most Cited Cases

Child Custody 76D ⚷79

76D Child Custody
76DII Grounds and Factors in General
76DII(C) Factors Relating to Child
76Dk79 k. Age of child. Most Cited Cases

Child Custody 76D ⚷80

76D Child Custody
76DII Grounds and Factors in General
76DII(C) Factors Relating to Child
76Dk80 k. Sex of child. Most Cited Cases

Child Custody 76D ⚷81

76D Child Custody
76DII Grounds and Factors in General
76DII(C) Factors Relating to Child
76Dk81 k. Health and physical condition of child. Most Cited Cases

Child Custody 76D ⚷82

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76D Child Custody
76DII Grounds and Factors in General
76DII(C) Factors Relating to Child
76Dk82 k. Mental or emotional condition of child. Most Cited Cases

Child Custody 76D ⚷421

76D Child Custody
76DVIII Proceedings
76DVIII(A) In General
76Dk421 k. Reports and recommendations. Most Cited Cases

Family court considers several factors in determining best interests of the child in child custody case, including: who has been primary caretaker; conduct, attributes, and fitness of parents; opinions of third parties, including guardian ad litem, expert witnesses, and children; and age, health, and sex of children.

[3] Child Custody 76D ⚷77

76D Child Custody
76DII Grounds and Factors in General
76DII(C) Factors Relating to Child
76Dk77 k. Existence of factors other than best interest of child. Most Cited Cases

When determining to whom custody of child shall be awarded, all conflicting rules and presumptions should be weighed together with all circumstances of particular case, and all relevant factors must be taken into consideration.

[4] Child Custody 76D ⚷923(1)

76D Child Custody
76DXIII Appeal or Judicial Review
76Dk913 Review
76Dk923 Harmless Error
76Dk923(1) k. In general. Most Cited Cases

Guardian ad litem's actions and inactions so tainted decision of family court as to deny wife due process in child custody case, and, as such, admission of guardian ad litem's recommendation was not harmless error; guardian ad litem did not keep notes of her observations during her investigation and failed to produce written report, guardian ad litem contacted husband's counsel nineteen times, but never contacted wife's counsel, and guardian ad litem listened to phone conversation between husband and wife without wife's knowledge. U.S.C.A. Const.Amend. 14.

[5] Infants 211 ⚷1246(1)

211 Infants
211VII Actions
211VII(A) Role of Representative or Counsel
211k1234 Guardian Ad Litem or Next Friend
211k1246 Duties, Responsibilities, and Liabilities
211k1246(1) k. In general. Most Cited Cases
(Formerly 211k85)

In child custody cases, guardian ad litem functions as representative of the court, appointed to assist court in making its determination of custody by advocating for best interests of children and providing court with objective view.

[6] Child Custody 76D ⚷85

76D Child Custody
76DII Grounds and Factors in General
76DII(C) Factors Relating to Child
76Dk85 k. Present relationship. Most Cited Cases

In connection with developing a recommendation to family court in child custody cases, guardian ad litem shall: conduct independent, balanced, and impartial investigation to determine facts relevant to the situation of the child and the family; advocate for the child's best interests; attend all court hearings and provide accurate, current information directly to the court; maintain a complete file with notes rather than relying upon court files; and present to the court and all other parties clear and comprehensive written reports.

[7] Infants 211 ⚷1244

211 Infants
211VII Actions

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211VII(A) Role of Representative or Counsel
211k1234 Guardian Ad Litem or Next Friend
211k1244 k. Compensation and expenses. Most Cited Cases
(Formerly 211k83)

In consideration for their services in child custody case, guardian ad litem should receive reasonable compensation.

[8] Divorce 134 ⚷586

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(C) Spousal Support
134k567 Grounds and Defenses in Determining Existence and Amount of Obligation
134k586 k. Multiple factors. Most Cited Cases
(Formerly 134k239)

Trial court's denial of alimony to wife was improper since court overlooked several important factors when denying wife's request for alimony, such as wife's lack of employment history and earning potential, her educational needs to obtain adequate employment, her sacrifice of salaried job to work in family business, and her role as primary caretaker for children and marital home for more than 15 years.

[9] Divorce 134 ⚷573

134 Divorce
134V Spousal Support, Allowances, and Disposition of Property
134V(C) Spousal Support
134k567 Grounds and Defenses in Determining Existence and Amount of Obligation
134k573 k. Standard of living and station in life. Most Cited Cases
(Formerly 134k240(2))

Husband's deliberate choice to allow his family to live well below their means in inadequate housing should not have been used against wife in determining monthly alimony she would need to maintain the standard of living she enjoyed during marriage.

****387 *283** Robert L. Widener, McNair Law Firm, of Columbia; and John O. McDougall and Michael W. Self, of McDougall & Self, of Sumter, for petitioner.

Harvey L. Golden and J. Michael Taylor, of Golden, Taylor & Potterfield, of Columbia, for respondent.

Chief Justice TOAL.

Anand B. Patel ("Husband") was granted certiorari to review the Court of Appeals' unpublished decision in *Patel v. Patel,* Op. No.2000–UP–653 (S.C. Ct.App. filed October 26, 2000).

FACTUAL/PROCEDURAL BACKGROUND

On July 7, 1980, Husband and Nalini Raja Patel ("Wife") were married after a short engagement in Vancouver, British Columbia. Shortly thereafter, the parties moved to Chilliwack, where Husband worked as a pharmacist. The parties returned to Vancouver in 1982 and purchased a pharmacy. By this time, Wife had received her work permit, which took about two years to process, and began working in the pharmacy as a cashier or stock person. Wife worked in the pharmacy from approximately 9:00 a.m. to 6:00 p.m. She was never paid a salary.

Husband and Wife moved to Dillon, South Carolina in 1986, when Husband purchased a Days Inn Hotel. The parties lived on the premises as resident owners. Shortly after moving, their first child, Anish, was born on November 27, 1986. Husband and Wife had two more children, Ria, born on June 21, 1990, and Ashoo, born on June 22, 1992. Wife worked in the hotel with Husband until Ria was born. However, Wife did not receive a salary.

***284** The parties lived a modest lifestyle. Although the hotel business supplied a $15,000 a month income, the parties lived in a two bedroom " apartment" at the hotel. Wife slept with the three children in one bedroom, and Husband slept in the other. Their modest lifestyle allowed the parties to acquire a $2.6 million dollar marital estate.

Husband and Wife separated in October 1995. Husband then initiated this action against Wife. Pursuant to the Temporary Order issued by the family court, Husband was awarded temporary possession of the marital "quarters" at the hotel, but was required to provide suitable accommodations for Wife outside the hotel. Husband purchased a house for Wife for ap-

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proximately $75, 000. The Order also awarded Husband and Wife alternating temporary custody of the children.

A final divorce decree was issued on October 23, 1997. Under the terms of the divorce decree (1) Husband was awarded custody of the three children and child support; (2) the marital property was divided 65% to the Husband and 35% to the Wife; (3) Wife's request for alimony was denied; (4) Wife was ordered to pay $41,920.94 towards Husband's attorney's fees and costs; and (5) Wife was ordered to pay 14% of the fees and costs associated with the Guardian *Ad Litem* ("GAL").

Wife filed a Notice of Appeal on June 16, 1998. Two weeks later, Wife received a letter from Husband stating he intended to relocate with the children to Southern California. Wife filed a motion with the Court of Appeals to prevent Husband from moving with the children during the appeal. The Court of Appeals issued an Order, dated July 31, 1998, which remanded the issue to the trial court for consideration. The matter was heard on August 19, 1998, in front of the same judge who presided over the divorce proceedings. On August 25, 1998, the judge issued a ruling allowing Husband to relocate with the children to California. Husband moved with the children to California around ****388** September 6, 1998. On September 22, 1998, the judge issued a written order allowing the children to relocate. Wife filed a petition for supersedeas with the Court of Appeals. On October 20, 1998, the Court of Appeals issued an order directing Husband to return the children to South Carolina. However, after oral argument ***285** before a three-judge panel, the Court of Appeals vacated its prior order of October 20, 1998, and denied Wife's petition for supersedeas.

The Court of Appeals consolidated Wife's appeal from both the divorce decree and the Order allowing the children's removal from South Carolina. On October 26, 2000, the Court of Appeals issued an unpublished decision in which it (1) reversed the family court's custody award to Husband and ordered him to return the children to South Carolina; (2) reversed the denial of alimony to Wife and remanded the issue of her entitlement to alimony to the trial court; (3) reversed the award of attorney's fees to Husband; and (4) affirmed the equitable division award of 65% of the marital property to Husband and 35% to Wife.

Both Husband and Wife petitioned for certiorari. This Court granted Husband's petition on the issues of custody and alimony, and the issues before this Court are:

I. Did the Court of Appeals err in reversing the family court's custody decision, thereby awarding custody of the parties' children to Wife?

II. Did the Court of Appeals err in reversing the family court's denial of alimony to Wife?

LAW/ANALYSIS

I. Child Custody

Husband argues the Court of Appeals erred in reversing the decision of the family court and granting custody of the three children to Wife. We find Wife did not receive a fair hearing on child custody, and remand this case to the family court for a new hearing on child custody.

[1][2][3] In a custody case, the best interest of the child is the controlling factor. *Ingold v. Ingold,* 304 S.C. 316, 404 S.E.2d 35 (Ct.App.1991). The family court considers several factors in determining the best interest of the child, including: who has been the primary caretaker; the conduct, attributes, and fitness of the parents; the opinions of third parties (including GAL, expert witnesses, and the children); and the age, health, and sex of the children. *See* Roy T. Stuckey & F. Glenn Smith, *Marital Litigation in South Carolina* 446 (1997). ***286** When determining to whom custody shall be awarded, all the conflicting rules and presumptions should be weighed together with all the circumstances of the particular case, and all relevant factors must be taken into consideration. *Woodall v. Woodall,* 322 S.C. 7, 471 S.E.2d 154 (1996); *Ford v. Ford,* 242 S.C. 344, 130 S.E.2d 916 (1963).

The family court appointed a non-lawyer Guardian *Ad Litem* (GAL) in February of 1996 to review this case. The GAL testified at the final hearing in May of 1997, after having 15 months to review the case. As stated by the family court in its final divorce decree filed in October 1997, the GAL had "a substantial amount of personal involvement" in this case. However, the GAL's actions in this case give rise to concern. For example, the GAL did not keep notes of her observations during her investigation and failed to produce a written report. In addition, the GAL con-

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tacted Husband's counsel 19 times, but never contacted Wife's counsel. The GAL stated she had "some" telephone contact with Wife, but spoke on the phone with Husband "very frequent[ly]." After an incident with Wife, the GAL testified she did not feel comfortable enough to meet with Wife, and did not visit her from July 14 to October 21, 1996. During the time she did not feel comfortable meeting with Wife, she continued to meet with the children while in Husband's care. Furthermore, the GAL listened to a phone conversation between Husband and Wife without Wife's knowledge. The GAL also taped a conversation with Anish concerning an incident that happened while they were in Wife's custody. Finally, the GAL testified that "she was taken aback" by Wife's request that she be removed from the case. In sum, the GAL did not conduct an objective, balanced investigation. She did not afford each party a balanced opportunity ****389** to interact with her. Her method of evaluation created a high potential for bias towards Husband.

The record reveals the psychiatrist as well as the family court relied on the GAL's findings and testimony when deciding custody should be awarded to Husband. In fact, the family court explicitly stated it placed "a great deal of reliance" on the GAL's report when deciding the custody issue.

[4] After reviewing the testimony from the family court, we find Wife was not afforded a fair hearing due to the ***287** performance of the GAL appointed in this case. Furthermore, since the custody question was hotly contested, with no clear choice for custodial parent apparent from the testimony in the record, we cannot find the admission of the GAL's recommendation was harmless error. Therefore, we find the GAL's actions and inactions so tainted the decision of the family court in this case, as to deny Wife due process. U.S. CONST. amend. XIV; *South Carolina Dep't of Soc. Serv. v. Beeks*, 325 S.C. 243, 481 S.E.2d 703 (1997) (recognizing the importance of due process in a child custody case).

A guardian *ad litem,* as the later phrase suggests, is a guardian for litigation. Traditionally, GALs were lawyers appointed by the court to appear in a lawsuit on behalf of a minor or incompetent. Over time, the role of the guardian was defined by statute as well as by common law. Lay persons as well as lawyers were appointed by the court in cases to protect those the court or legislature deemed could not protect themselves. For example, GALs were appointed in cases of abuse and neglect, and in cases involving an incompetent person. The legislature has enacted some statutes regarding GALs. In the context of children, the legislature has enacted S.C.Code Ann. § 20–7–121 (Supp.2000) (creating a GAL program for children in abuse and neglect proceedings); Section 2–7–1570 (mandating the appointment of a GAL for children involved in a termination of parental rights proceeding); Section 20–7–952 (requiring a GAL in a paternity action); and Section 20–7–1732 (requiring the appointment of a GAL for children involved in an adoption proceeding).

[5] Over time, it has become the custom in this state, and many others, for the family court to appoint GALs in private custody disputes. The GAL functions as a representative of the court, appointed to assist the court in making its determination of custody by advocating for the best interest of the children and providing the court with an objective view. *Fleming v. Asbill*, 326 S.C. 49, 483 S.E.2d 751 (1997); *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). Standard setting for GALs in this "new" role has been very ad hoc. The legislature has set standards for a GAL appointed in ***288** abuse and neglect cases.[FN1] However, there has been no comprehensive or coherent approach for the setting of standards for the use of GALs in private custody disputes. The judicial, legislative, and executive branches need to take a broader look at GALs who function in this capacity. [FN2]

FN1. S.C.Code Ann. § 20–7–122 (Supp.2000) provides

> The responsibilities and duties of a guardian ad litem are to:
>
> (1) represent the best interest of the child;
>
> (2) advocate for the welfare and rights of a child involved in an abuse or neglect proceeding;
>
> (3) conduct an independent assessment of the facts, the needs of the child, and the available resources within the family and community to meet those needs;
>
> (4) maintain accurate, written case records;

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(5) provide the family court with a written report, consistent with the rules of evidence and the rules of court, which includes without limitation evaluation and assessment of the issues brought before the court and recommendations for the case plan, the wishes of the child, if appropriate, and subsequent disposition of the case;

(6) monitor compliance with the orders of the family court and to make motions necessary to enforce the orders of the court or seek judicial review;

(7) protect and promote the best interest of the child until formally relieved of the responsibility by the family court.

FN2. In July 2001, Senator Glenn McConnell, President Pro Tempore of the South Carolina Senate announced the formation of a task force to make recommendations regarding the use of GALs. To date, this task force has conducted several public hearings throughout the state.

****390** [6][7] While a more complete approach is being examined by the three branches of government, this Court will set forth some base line standards. In connection with developing a recommendation to the family court, a GAL shall: (1) conduct an *independent, balanced, and impartial* investigation to determine the facts relevant to the situation of the child and the family, which should include: reviewing relevant documents; meeting with and observing the child in the home setting and considering the child's wishes, if appropriate; and interviewing parents, caregivers, and others with knowledge relevant to the case; (2) advocate for the child's best interests by making specific and clear recommendations, when necessary, for evaluation, services, and treatment for the child and the child's family; (3) attend all court hearings and provide accurate, current information directly to the court; (4) maintain a complete file with notes rather than relying upon court files; ***289** and (5) present to the court and all other parties clear and comprehensive written reports, including but not limited to a final report regarding the child's best interest, which includes conclusions and recommendations and the facts upon which the reports are based. In consideration for their services, GALs should receive reasonable compensation.

In conclusion, because the evidence in this case does not clearly weigh in favor of either Husband or Wife as custodial parent, the untrustworthy opinion of the GAL denied Wife a fair hearing on the custody issue. Accordingly, we remand the case for a new custody hearing.[FN3]

FN3. The children in this case have been through a tremendous ordeal, and this Court hopes a final determination of custody can be made in a reasonable time. This Court's order is not an expression of preference for one party over the other as the custodial parent for the minor children.

II. Alimony

[8] Husband argues the Court of Appeals erred in reversing the family court's denial of alimony to Wife. We disagree.

The family court denied Wife's request for alimony. The court reasoned there was no need for alimony based on the following findings: (1) Wife was awarded 35% of the marital estate ($913,278), which should provide her with approximately $5,000 in living expenses per month; (2) Husband was granted custody of the children; (3) the parties had a modest standard of living during the marriage; and (4) although Wife had only a 12th grade education and had no work experience during the 15 year marriage other than working in the family business without pay and caring for the minor children, the equitable division would provide Wife with adequate monthly income so that Wife's need to become employed was "questionable."

The Court of Appeals reversed the decision of the family court and remanded for a determination of an alimony award. The Court of Appeals found Wife's lack of appropriate education, her unsalaried work in both family businesses, her role as a homemaker, and the fact the parties lived well below their means entitled her to alimony. After considering all the factors provided in S.C.Code Ann. § 20–3–130(c) (Supp.2000), we agree with the Court of Appeals.

***290** Section 20–3–130(c) sets forth thirteen factors to be considered in arriving at an award of

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alimony: (1) the duration of the marriage and the ages of the parties at the time of the marriage and separation; (2) the physical and emotional condition of each spouse; (3) the educational background of each spouse and the need for additional education; (4) the employment history and earning potential of each spouse; (5) the standard of living established during the marriage; (6) the current and reasonably anticipated income of each spouse; (8) the marital and nonmarital properties of the parties; (9) the custody of any children; (10) marital misconduct or fault; (11) the tax consequences of the award; (12) the existence of support obligations to a former spouse; and (13) other factors the court considers relevant.

[9] The family court discussed the duration of the marriage, the ages of the parties, the physical and emotional condition of each spouse, the standard of living established during the marriage, the custody of the children, the lack of marital misconduct by either****391** party, and the tax consequences. However, the family court overlooked several important factors when it denied Wife's request for alimony: (1) Wife's lack of employment history and earning potential; (2) her educational needs to obtain adequate employment; (3) her sacrifice of a salaried job to work in the family business; and (4) her role as a primary caretaker for the children and the marital home for more than 15 years. Furthermore, it was inappropriate to hold Wife to the "standard of living enjoyed during the marriage" when Husband refused to improve the quality of the living quarters and lifestyle even though there were funds to do so. Husband deliberately chose to keep his family in a two bedroom hotel apartment, made Wife and three children share a bedroom, and refused to allow them to move into a home. Husband's deliberate choice to allow his family to live well below their means in inadequate housing should not be used against Wife in determining the monthly income she would need to maintain the standard of living she enjoyed during the marriage. The family court should look at all the fruits of the marriage in determining whether alimony is appropriate.

Without alimony, Wife, who has no employment history because she was a homemaker allowing her husband to pursue ***291** a career and has considerable less education than Husband; will be required to live substantially below the standard of living Husband will enjoy. *See* McMurtrey v. McMurtrey, 272 S.C. 118, 249 S.E.2d 503 (1978), Eagerton v. Eagerton, 265 S.C. 90, 217 S.E.2d 146 (1975) (taking into account the net wealth of the paying spouse); *See also* 27B C.J.S. *Divorce* § 369 (1986) ("Permanent alimony is awarded on considerations of equity and public policy. The responsibility of the court is to provide a just and equitable adjustment of the economic resources of the parties so that they can reconstruct their lives, by attempting to insure that the parties separate on as equal a basis as possible.").

Based on the foregoing, we find the Court of Appeals correctly reversed the family court's decision to deny alimony to Wife. Accordingly, we remand the case to the family court for a determination of alimony.

CONCLUSION

Based on the foregoing reasons, we **REMAND** this case to the family court for a new custody hearing and for a determination of alimony.

MOORE, WALLER and BURNETT, JJ., and Acting Justice ALISON RENEE LEE, concur.

S.C.,2001.
Patel v. Patel
347 S.C. 281, 555 S.E.2d 386

END OF DOCUMENT

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The Supreme Court of South Carolina

COMMISSION ON JUDICIAL CONDUCT

Deborah S. McKeown
Commission Counsel

1015 Sumter Street, Suite 305
Columbia, South Carolina 29201
Telephone: (803) 734-1965
Fax: (803) 734-0363

June 27, 2011

PERSONAL AND CONFIDENTIAL

Anthony B. O'Neill, Sr., Esquire
O'Neill & Fair
P.O. Box 80549
Charleston, SC 29416

RE: Family Court Judge Paul W. Garfinkel
Matter Number: 11-DE-J-0051
NOTICE OF FINAL DISPOSITION

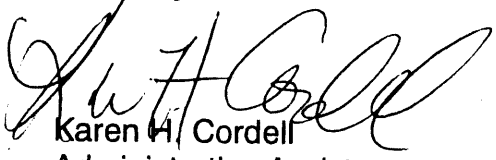
Dear Mr. O'Neill:

You previously filed a complaint with the Commission on Judicial Conduct about Family Court Judge Paul W. Garfinkel in connection with the above-referenced matter. The Commission instructed the Office of Disciplinary Counsel to conduct an investigation into your allegations.

On June 24, 2011, an investigative panel of the Commission convened to consider the recommendation of Disciplinary Counsel for disposition of this matter based on the information gathered in the investigation. As required by the Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR, the inquiries of the panel were limited to whether or not there was evidence of ethical misconduct on the part of Judge Garfinkel that would warrant further investigation or the filing of formal charges. After considering the information received from you, Judge Garfinkel's response, and the report of Disciplinary Counsel setting forth the results of the investigation, the panel voted to dismiss your complaint.

At the direction of the Commission, I am notifying you of the action taken by the Commission on this matter. This dismissal constitutes a final disposition of your complaint. As required by the rules, Judge Garfinkel is being notified of the action taken by the investigative panel by copy of this letter.

Sincerely,



Karen H. Cordell
Administrative Assistant

KHC/

cc: Family Court Judge Paul W. Garfinkel

Joseph P. Turner Jr.
Assistant Disciplinary Counsel

The Supreme Court of South Carolina
OFFICE OF DISCIPLINARY COUNSEL

Lesley M. Coggiola
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Columbia, South Carolina 29211

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Facsimile: (803) 734-1964

March 21, 2011

PERSONAL AND CONFIDENTIAL

The Honorable Paul W. Garfinkel
Family Court Judge
Family Court Judge of the Ninth Judicial Circuit
100 Broad St., Ste. 248
Charleston, SC 29401

RE: NOTICE OF INVESTIGATION
Complainant: Anthony B. O'Neill, Sr., Esquire
Matter Number: 11-DE-J-0051

Dear Judge Garfinkel:

We have received information indicating possible professional misconduct on your part. A copy of the information received is enclosed. We are required by the provisions of the Rules for Judicial Disciplinary Enforcement (RJDE), Rule 502, SCACR, to investigate this matter.

You are hereby notified that the Office of Disciplinary Counsel will investigate the allegations set forth in the enclosed complaint.

The grounds for discipline under RJDE related to this matter are found in Rule 7(a)(1) and (9). The specific provisions of the Code of Judicial Conduct, Rule 501, SCACR, that we believe are relevant to our investigation at this time are Canons 3B(7), 3E(1) and 3E(1)(a). We do not allege at this time that you violated any of the Canons, but, instead, list those Canons relevant to this investigation to afford you notice thereof. This investigation may be expanded, as provided in RJDE, if we deem appropriate.

You are required to file a written response with this office within fifteen days of the date of this letter. Your written response must address separately and with specificity whether any of the events mentioned occurred, whether you acknowledge violating the Code of Judicial Conduct, and, if so, which Canons. Your response must also include your verification that it is complete and accurate to the best of your knowledge and belief. A form is enclosed for your convenience.

You are further notified that RJDE provides that either the Office of Disciplinary Counsel or you may request that you appear to give a statement concerning this matter on the record and under oath or affirmation. If we request that you appear, we must give you twenty days notice of the date, time, and place of the required appearance. If you request an opportunity to appear, your written response to this notice must be served on our office prior to or contemporaneously with any such request.

If you have any questions regarding this notice or if you require an extension of time to respond, feel free to contact me. Please refer to the matter number set out above on all correspondence and inquiries concerning this matter.

Sincerely,

Joseph P. Turner Jr.

JPT/
Enclosure

MAR 14 2011
OFFICE OF
DISCIPLINARY COUNSEL

O'NEILL & FAIR
ATTORNEYS AND COUNSELORS AT LAW

March 12, 2011

Anthony B. O'Neill, Sr.
oneill@mojustice.com
Elonda Fair O'Neill (Also admitted in CA)
fair@mojustice.com

RECEIVED
MAR 14 2011
COMMISSION ON
JUDICIAL CONDUCT

Commission on Judicial Conduct
1015 Sumter Street
Suite 305
Columbia, SC 29201

Re: The Honorable Paul Garfinkel
Judge, Family Court of the Ninth Judicial Circuit

Dear Sir:

The information contained herein is offered as a complaint of what we believe to be judicial misconduct on the part of the Honorable Paul Garfinkel while sitting as a judge in the case outlined below. We believe that Judge Garfinkel has violated the following Canons of Rule 501 SCACR, Code of Judicial Conduct:

> 1) Canon 3 (B) (7): A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . :
>
> 2) Canon 3 (E) (1): A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might be reasonably be questioned, including but not limited to instances where:
>
> > (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding. . .

BASIS OF COMPLAINT

Action: Kevin E. *Burroughs v. Tracie A. Hale*: Case No.: 2010-DR-10-1836.

Plaintiff Kevin E. Burroughs commenced this action against Tracie A. Hale seeking custody of two minor children born of the plaintiff and defendant who were never married. The plaintiff is African-American and the defendant white. Plaintiff was represented by O'Neill & Fair and defendant proceeded *pro se.* Elizabeth Stringer was appointed guardian ad litem (GAL) for the children.

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www.mojustice.com

Temporary Hearing:

A temporary hearing was held before the Honorable Judy L. McMahon on July 12, 2010 where a second temporary hearing was ordered and the defendant directed to proceed by affidavit. (Temporary Order, July 12, 2010). **[Tab 1]** A second temporary hearing was held before the Honorable Paul Garfinkel on August 9, 2010 and following that hearing the court instructed the guardian *ad litem* to draft the temporary order. **[Tab 2, Exhibit A]** In accordance with procedures, the draft order was circulated to plaintiff's counsel who noted certain requested amendments. An order incorporating the plaintiff's requested changes was combined with proceedings held on August 26, in an order issued on August 31, 2010. **[Tab 3]** The proceeding on August 26, 2010 (which will be addressed in more detail below) was to have been simply a conference with the parties.

From the outset of this case, the trial judge had been treating the *pro se* litigant differently (*e.g.* allowing her to proceed outside of the procedural rules and excusing the failure to file an affidavit at the temporary hearing without a showing of good cause as required by Rule 21 (b) of the Family Court Rules even though she had been ordered to do so by Judge McMahon) and plaintiff felt it prudent to have all conferences with the court "on the record."

Ex Parte Communications with Court:

The defendant contacted the court by e-mail on August 17 and 18, 2010. The court then contacted the GAL to set a conference call regarding the e-mail. The GAL forwarded the e-mails to plaintiff's counsel. The court requested a conference call and plaintiff's counsel indicated that the call should be on the record. On or about August 20, the GAL informed plaintiff's counsel that the court decided against the conference call. Later, the court contacted plaintiff's counsel and indicated that he wanted a conference call to admonish the *pro se* defendant against *ex parte* communications. Plaintiff's counsel informed the court that they desired to have the conference call on the record.

In its order of March 1, 2011, "**the Order**," **[Tab 2]** (Page 4, first paragraph) the court indicates that the defendant was informed that she would have to give sworn testimony and instructions were given as to how that was to be arranged. This apparently was an additional *ex parte* communication between the court and the defendant. Plaintiff was not made aware that defendant would testify until the conference began.

Conference to Admonish Defendant to Cease Ex *Parte* Communications with Court:

A telephone conference [1]was scheduled to address the matter of *ex parte* communications with the court. While the trial judge in the Order characterizes the telephone conference as a "hearing" (Order, March 1, 2011, Page 4 paragraph 3) [**Tab 2, Exhibit E**] the transcript of record of the proceedings on August 26, 2010 indicates that the proceedings were, in fact, convened as a conference call because the court had received an e-mail from the defendant and prior to reading the email wanted to know if the plaintiff had received the e-mail. (Tr. August 26, 2010, Page 3, Line 15 – Page 4, Line 8.) [**Tab 2, Exhibit E]** During those proceedings, the court did address the issue of *ex parte* communications with defendant (Tr. August 26, 2010, Page 11, Lines 3-22) but then went on, over plaintiff's objection, to address matters that went beyond the scope of the conference call and entertained substantive matters unrelated to the purpose of the conference call. (Tr. August 26, 2010, Page 11, Line 24). The court suggests that this was proper because the defendant was allowed to testify by telephone at the previous hearing without objection by plaintiff. (The Order, Page 4, last paragraph). Whether or not the defendant testified at a prior hearing by telephone without objection, there were several objections made at the hearing on August 26, 2010. The court dismissed plaintiff's objections as to the procedure because "We're moving on with the hearing for the benefit of the children. I'm concerned about the welfare of the children. Procedural matters come second to the welfare of the children." (Tr. August 26, 2010, Page 14, Lines 14 – 18.)

Those substantive matters should have been raised in a properly filed motion with service to plaintiff rather than an e-mail. The court acknowledged that the *pro se* litigant was required to file a formal motion and follow the rules (Tr. August 26, 2010, Page 27, Line 25 – Page 28, Line 8); but, by entertaining matters raised in the e-mail, the court, while ostensibly convening a conference call to take up *ex parte* communications, went on to address other issues not raised by formal motion and the result was to encourage the *pro se* litigant to continue *ex parte* communications which she has done.[2]

Ex Parte Communication with the GAL:

At the behest of the judge, the GAL contacted plaintiff's counsel, Elonda O'Neill, regarding e-mails sent by the *pro se* litigant and inquired as to whether counsel had read the e-mails. On August 18, 2010 the GAL e-mailed the court relaying that plaintiff's counsel was "uncomfortable with any *ex parte* communication between [the court] and me" **[Tab 5, e-mail**

---

[1] The court uses the terms "phone conference" and "hearing" to refer to the proceedings. (Order March 1, 2011, Page 4 first paragraph [phone conference], second paragraph [phone conference], fourth paragraph [hearing], fifth paragraph [phone conference], and Page 5 second paragraph [phone conference].

[2] E-mail from *pro se* litigant to trial judge dated January 23, 2011, requesting permission to participate in a forthcoming hearing by telephone. (Exhibit A, January 23, 2011); E-mail from *pro se* litigant to judge dated March 2, 2011, subject: Request for No Communications. (Exhibit B, March 2, 2011). [**Tab 5**]

from Stringer to the court.]. The GAL and the judge then had a conversation where, according to the order of March 1, 2010 ". . . Mrs. O'Neill told her [the GAL] she had definitely (emphasis added) read the emails but, then proceeded to be somewhat rude and somewhat less than professional in her conversational tone."

Upon receiving these representations from the GAL the court decided that it needed to take action as it wrote in the Order:

> *Based upon this judge's concern about Mrs. O'Neill's comments to the GAL, I took it upon myself to also send an email to Mrs. O'Neill [ ] a copy of Defendant's emails."*

Several important things appear from the Order: (1) the court held an *ex parte* conversation with the GAL; (2) the conversation between the court and the GAL went beyond administrative matters or other recognized exceptions to the rule against *ex parte* communications or other communications and entered a zone where the subject of discussion was the plaintiff's counsel; (3) during the conversation with the court, the GAL made representations to the court that plaintiff's counsel was "somewhat rude and somewhat less than professional in her conversational tone." (The Order, March 1, 2011, Page 3, first paragraph) [**Tab 2**]; (4) the court accepted the representations of the GAL; and (5) the court, without contacting Mrs. O'Neill for her side of the story, so to speak, decided to take action. ("*Based upon this judge's concern about Mrs. O'Neill's comments to the GAL, I took it upon myself to also send an email to Mrs. O'Neill (attached hereto as Exhibit B) a copy of Defendant's emails. (sic)).*

This is the inherent danger of *ex parte* communications. Apparently, the court was of the opinion that *ex parte* communications with the GAL are outside the ambit of the prohibition against *ex parte* communications. Cannon 3 (E) (1) recognizes no such exception. (*A judge shall not initiate permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the* ***parties*** (emphasis added) *concerning a pending or impending proceeding.*) In this case, the order makes it clear that those *ex parte* communications colored the court's opinion as to the tone and substance of the conversation. This is so much so that the court in its order, issued almost six (6) months after the conversation with the GAL, added emphasis to the word "definitely." (Order - March 1, 2011, Page 3, top paragraph, ". . . definitely (emphasis added). . ."

Had the conversation with the GAL been limited to scheduling, administrative or other benign matters, it could possibly fit into one of the exceptions to the rule against *ex parte* communications. However, once the conversation took the direction where the GAL was offering up personal criticisms of plaintiff's counsel, it exceeded the bounds of propriety and moved to a sphere charged with injudiciousness.

Motion for Recusal:

Plaintiff subsequently moved that the court recuse itself based upon three grounds: (1) the court was engaged in *ex parte* communications, (2) the court took the bench with an order previously drafted, and (3) the court converted a procedural conference into an adversarial hearing without notice. Following the hearing on plaintiff's motion for recusal, the court issued a most curious order which in one sentence both (1) denied the motion for recusal and (2) granted the motion for recusal.[3] The Order contained even more disturbing language as a ground for granting the motion for recusal. It reads:

> *Also, this court recuses itself for an additional, very personal reason. This Court feels this additional personal reason does not need to be placed on the record because placing this additional ground as part of the record will not serve the ends of justice or benefit the children who are of the most concern to this court.* (the Order, March 1, 2011, Page 6, last paragraph). [**Tab 2**]

The court did not specify the "very personal reason" and offered as an explanation for not publishing the reason the notion that it would "not serve the ends of justice nor benefit the children who are of the most concern to this Court." Complainants disagree with this assertion because the ends of justice would seem to dictate that the court set forth its reasons for judicial action and the motion for recusal in no way touches upon the "benefit of the children."

The court left it to complainants here to speculate as to the very personal reason referred to in the Order. Assuming *arguendo* that the statement by the court that prior to this case it had never met nor knew anyone who knows the parties (the Order, Page 5, last paragraph) that does not answer the question whether the court was biased or unfair to plaintiff. In fact, it begs the question and we are only able to speculate. Is the very personal reason an indication that court harbors an impermissible animus to Elonda Fair O'Neill or to Anthony B. O'Neill, Sr., or to the firm O'Neill & Fair? Or, as complainants' client posits, is the "very personal reason" an indication of an animus toward the plaintiff in the action, Kevin Burroughs, based upon the fact that he is African-American and the defendant, Tracy Hale, is white? We think, at a minimum, the court needed to provide the reasons it characterized in its order as a "very personal reason."

In the Order the court addressed plaintiff's assertion that the court took the bench with an order that had been previously drafted. (See, Tr. January 31, 2011, Page 9, Line 25 - Page 12, Line 4; Page 15, Line 9). [**Tab 2, Exhibit E**] The court argues that "five (exact number unknown) drafts

---

[3] "After review of the allegations in Plaintiff's Motion and the arguments presented by counsel this Court will, respectfully deny Plaintiff's Motion for recusal for the reasons requested; however, despite the allegations and arguments therein failing to convince the Court that it should recuse itself from further matter in this case, this judge does hereby recuse myself from further hearing in this matter based on two factors."

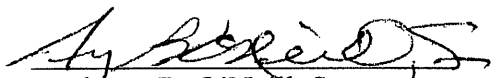
of orders that might reflect possible outcomes of the hearing and some blank order forms with only the case caption on them had been prepared in anticipation of possible outcomes. . ." Since this was to have been a conference to address the issue of *ex parte* communications from the *pro se* defendant to the court, we can think of no reason for five orders to have been prepared and plaintiff finds that assertion to be highly unusual and less than persuasive.

Based upon the plain language of the Order, the court has admitted to an impermissible *ex parte* conversation with the GAL that colored the court's opinion of plaintiff's counsel. Furthermore, summarily converting a conference to a hearing without notice was prejudicial and calls into question the fairness and impartiality of the court. Complaints assert that it is an indication, as stated above, that there is likely some unstated animus flowing from the court to complainants or their client.

Because of the admissions by the judge in the Order, complainants believe that the transgressions of the trial judge are substantial and that they therefore have an obligation to make this report. Accordingly, complainants request that the matters alleged herein be investigated.

If you require additional information, please let us know.

Sincerely yours,


Anthony B. O'Neill, Sr.

Elonda Fair O'Neill

Attachments: TAB

Temporary Order entered July 12, 2010..... 1

Order granting plaintiff's motion for recusal entered March 1, 2011 with exhibits 2

Exhibit A	Bench Memorandum
Exhibit B	e-mail from Court to Elonda Fair
Exhibit C	e-mail from Elonda O'Neill to Court, the GAL, and parties
Exhibit D	e-mail from Tracie Hale to the court (August 18, 2010) e-mail from Tracie Hale to the court (August 20, 2010)
Exhibit E	Transcript of Record, August 26, 2010

Temporary Order entered August 31, 2010..... 3

Motion for Recusal..... 4
(Redacted as to matters pertaining to Motion for Reconsideration)

Transcript of Record January 31, 2011..... 5

e-mail from Tracie Hale to Paul W. Garfinkel, dated January 23, 2011..... 6

e-mail from Tracie Hale to Elonda O'Neill, Elizabeth Stringer and pgarfinkel@sccourts.org dated March 2, 2011 6

e-mail from Elizabeth J. Stringer to Paul Garfinkel, Elonda O'Neill and Tracie Hale, August 18, 2010..... 6

STATE OF SOUTH CAROLINA

BEFORE THE SUPREME COURT

COMMISSION ON JUDICIAL CONDUCT

In the Matter of Paul W. Garfinkel,

Judge.

Matter Number: 11-DE-J-0051

In response to your Notice of Investigation dated March 21, 2011, let me state at the very outset I do not (emphasis added) feel that I have violated any Canon(s) of the Code of Judicial Conduct. I do believe the Complainants are using this process to have me permanently recused from hearing any cases in which they are involved. In my opinion this is being done because I have had to repeatedly warn them about the possibility of dismissing their hearings because of their continued late arrival for commencement of hearings, and for their lack of preparedness for actual hearings. Admittedly, I have almost always privately warned them because I did not want to embarrass them in front of their clients. It is my firm belief that as recently as March 2011 in a hearing in which Mr. O'Neill represented a party, he attempted to create a situation that would have had me involved in an *ex parte* communication, thus giving credence to his allegation that this type of action is a pattern of conduct of mine (Attachment 1, Transcript March 9, 2011, p.3, lines 1-10). On a few occasions I recall having no choice but to admonish them in open court, when I felt their conduct was totally inappropriate. Once, during a private "in chambers" meeting Mr. O'Neill called me a "racist", which, admittedly he later retracted in another private "in chambers" meeting. Now I see he has raised this spurious allegation once again. I will address this later in my response.

Temporary hearing:

As far as the details of what occurred, I will try to explain. At the hearing before me on August 9, 2010, I do not recall whether or not I allowed Mrs. Hale, the Defendant, to testify. It appears from the opening paragraph of the Order resulting from that hearing [and August 26, 2010 hearing](Attachment 2), I only allowed Mrs. O'Neill to speak, but, if I did allow Mrs. Hale to testify it was done for several very important reasons. First, I felt it was important for me to hear from a mother as to what her position was regarding the welfare of her own children and, second, I did not feel a co-equal judge could bind me as to the kind of hearing I should conduct-affidavits only or with testimony. I felt that Defendant, Mrs. Hale, should be allowed to give a brief statement as to the welfare of the children and who would be the best custodial parent, even *pendente lite.* A parent's rights as to their children's welfare justifies a finding of good cause. Perhaps, this finding should have been articulated in the Temporary Order. After a review of the

Court file, it does not indicate whether or not Defendant was ever served with Judge McMahon's Order, thus giving her notice of the type of hearing that had been ordered (affidavits only). It should be noted that Complainants acknowledged on page 2, paragraph 1, of their complaint that the Order resulting from the August 9 and August 26, hearings incorporated their changes to the draft Order. The language specifically states what I used in my deliberation and in issuing my decision.

Our Code of Judicial Conduct is based upon the ABA Canons of Judicial Conduct. In a newly published article (Attachment 3) the following language appears, "It seems, the Canons of Judicial Ethics require judges to remain fair and impartial and to maintain the appearance of fairness and impartiality, but give no further guidance about the meaning of these terms when unrepresented persons appear in Court."[1] I have found the contents of the attached article directly on point to the issues raised herein.

An unrepresented party who happens to be a parent should be able to indicate what would be in the children's best interest This has always been my interpretation of a possible meaning of "good cause" as is stated in Rule 21(b), SCRFC. Hence, we have a party, who for reasons unknown to any of us has chosen to represent herself. She may or may not know she is supposed to use affidavits (the record does not indicate Plaintiff's attorney served the Order on Defendant). Complainants seem to indicate that a mother should be barred from telling a Court how she feels about her children's wellbeing. This would be almost an absurdity and not the purpose of a Family Court.

Ex Parte Communications with Court:

This Judge cannot prevent anyone (including parties) from sending emails to the Court. This Court took all possible precautions to make sure Complainant received and read the emails even before I read them myself. I did this out of an abundance of caution so that if Complainant needed to respond to anything contained in the emails, she could be prepared.

It was when I contacted the Guardian ad Litem (hereafter GAL) to determine if she was able to determine whether or not Complainant had read Defendant's emails, that the GAL gratuitously spoke of Mrs. O'Neill in unflattering terms and informed me she couldn't ascertain from Mrs. O'Neill if the emails had been read by her. That is when I decided to forward them on to Mrs. O'Neill. Throughout this period of time I did not know the contents of the emails.

For your use and benefit, I am enclosing an affidavit the GAL prepared at my request (Attachment 4). My instructions to her for the preparation of this affidavit were to only set out the salient points she felt were important for an impartial person to know about what had transpired from the time of the first hearing before me to the conclusion of the hearing/conference call. This can be verified by her.

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[1] Juvenile and Family Court Journal 62. No. 1 (Winter) p.10-31. "The Toughest Nut! Handling cases pitting unrepresented litigants against represented ones". Russell Engler, National Council of Juvenile and Family Court Judges, 2011 (attached herewith).

As can be seen from the GAL's affidavit (Attachment 4, page 3), Mrs. O'Neill's statement I had a conversation with Defendant to arrange the conference call was totally and absolutely incorrect! As strictly an administrative matter I had Mrs. Stringer arrange the call and she, in her affidavit, states that Complainant's client (Plaintiff) was made aware of the conference call. Please note in the last sentence on page 3 of Mrs. Stringer's affidavit, she states the purpose of the call/hearing was not only to admonish Defendant, but also (emphasis added) to clarify problems that were created by the date contained in the instructions for the Temporary Order.

On this topic, let me add Complainants refer to an email being sent to this Judge in March of this year. This was after this Court recused itself and the email referred to, has, to this date never been read by this Judge.

Conference to Admonish Defendant to cease *ExParte* Communications with the Court:

As to the hearing/conference call, let me state my usual definition of the latter – "A conference call is usually a telephone call in which attorneys representing parties, self represented parties and the GAL if appropriate, participate, and all participants therein feel a court reporter's record is not necessary." Usually "conference calls" deal with administrative (not substantive) matters such as scheduling I have also used conference calls to deliver instructions for Orders on matters under advisement. (It was my recollection that when Mrs. O'Neill was contacted on August 20, 2010, as is indicated on page 2, paragraph 4 of her letter of complaint, it was to inform her that her request to be "on the record" would be granted and that I would allow Mrs. Hale to participate so long as she gave sworn testimony in the same manner as she had previously done and is customary in out of state depositions). The GAL was instructed on my requirements for Mrs. Hale to participate and she communicated that to Mrs. Hale. At that point in time, I had not read Mrs. Hale's emails, as is evidenced by a copy of an email sent to Mrs. O'Neill on August 23, 2010 (Attachment 5). As is stated in my Order on Plaintiff's Motion for Recusal, I always (emphasis added) have self represented parties give sworn testimony on all substantive issues or issues that may become substantive issues. The complainants are correct when they state the original stated purpose of the conference call was to admonish Defendant about sending me emails, because at the time of Mrs. O'Neill's request that a record be made of the call, I was not aware of the contents of Defendant's emails, or the problems created for the children mentioned therein. In asking the GAL to review her file, she reports my statement also said something to the effect that, if necessary, we would deal with other matters, also (Attachment 4). Mrs. O' Neill, who had presumably read the emails, obviously realized that a serious problem existed regarding the pick-up of the children because the pick-up date in my instructions (see Attachment 6) and subsequent Order (Attachment 2) had already passed and, it further appears that Mrs. O'Neill's client did not transfer custody based upon a conversation he had with Mrs. O'Neill.

As can be seen from defendant's email (Attachment 7), the children were to have started school on August 19, 2010, and this issue needed (emphasis added) to be addressed as soon as possible for the welfare of the children. As can be seen from my instructions of August 12, 2010 (Attachment 6), both parties (and Plaintiff's attorney) knew Defendant would be having *pendente*

lite custody. This was no surprise to anyone and delaying their entry into an entirely new school in a new city and state can be a serious problem.

This Court dealt with the admonition about emails to this Court and the pick-up issue solely for the welfare of the children. Please note (Tr. August 26, 2010) as is stated in my Order of March 1, 2011, I reversed my initial ruling to agree with Mrs. O'Neill on how Defendant was to communicate with the Court in the future. This to me indicates my willingness to be fair to both sides, as is required. At the August 26, 2010, hearing when I realized after Complainant's objections, that my initial instructions would have been perceived as being prejudicial to Plaintiff, I changed my ruling. It should be noted Complainants objection was, in effect sustained. The ruling for the pick-up of the children (not custody) was made on what was best for the children and the parties, not on any comment made by the GAL.

After I read Defendant's emails (Attachment 7) and knowing Mrs. O'Neill did not want to have any "off the record" conversations, I felt that I had no choice but to deal with the matters at hand. It should be noted the only change from my original instructions after the temporary hearing held and the second conference/hearing, dealt with the transfer of the children. This Judge had previously by its instructions, notified the parties, Complainant and the GAL, that Defendant would be the custodial party, *pendente lite*. When the Complainant objects to this Court changing the transfer date of the children from Plaintiff to Defendant, it demonstrates her and her client's total lack of regard for the welfare of the children. Having presided over thousands of hearings in almost sixteen years on the bench, I found the statement in *Joiner v. Rivas*, 342 S.C. 102,107, the true lynchpin on how a Court should handle these issues. "Procedural rules are subservient to the Court's duty to zealously guard the rights of children". Complainant is/was fully aware that at the time of this hearing/conference, motions in this Court were being scheduled many months after the filing date. Would Complainant suggest it would have been better for the children for the Defendant to learn how to file a formal motion and for the children to wait here and later, start school in a new state? These are the procedural rules I tried to explain to Complainant (Tr. August 26, 2010, lines 14-18).

In the transcript of the August 26, 2010 hearing one thing is readily apparent. The Complainant did not object to Defendant testifying or her client not being present until almost the conclusion of the hearing (Tr. August 26, 2010, p. 26, line 25[Attachment 8]). When this Court announced the purpose of the call/hearing (p.4, line 13) Complainant did not object.

The reason I have approximately five different case captioned Orders on the Bench with me and with varying provisions (including a blank Order form) was to have an expeditious resolution for the sake of the children. I do recall thinking that, although Defendant made a trip down from West Virginia on a wrong assumption (that the instructions gave her the right to pick-up the children) and she was a salaried employee of the state, it would not be inequitable for the Plaintiff to deliver the children because he was self-employed. The delivery date was a weekend and Defendant's job required some weekend work whereas Plaintiff, as the owner of his own business, could work his own hours. Lastly, I felt taking the children to Defendant might give him an opportunity to see where the children would be living and under what conditions. This

was a problem he raised at the original hearing. It may have been better if I had initially ordered that the Plaintiff deliver the children because Defendant claims to have ended their relationship because Plaintiff was abusive. In hindsight, I should not have originally made her return to where the alleged abuse may have occurred. If anything, Defendant should have complained about that.

As stated earlier, the differing versions of proposed Orders I had on the bench most probably included, an Order of Dismissal if the parties so desired, an Order of Continuance should that have been necessary, an Order for Defendant to return for the pick-up, an Order for Plaintiff to deliver children to Defendant and, perhaps a totally blank Order with only the case caption on it. I have found the practice of having bench orders prepared in advance to be helpful and this is the first time in almost sixteen years of judicial service where this practice has been criticized. I am in my office by 8:15am preparing for these various contingencies. As a matter of fact every courtroom in Family Court in Charleston County has a stand up file with form orders already on the bench (filling in the blank and check off) and the presiding judges are encouraged to use them when issuing a ruling from the bench, even though a more detailed Order will follow (as was the case here). Not having a law clerk causes me to have to do a lot of things that, otherwise might be delegated to a law clerk. These hearings are set for only 15 minutes from start to finish.

ExParte Communications with the GAL:

As to the *ex parte* communication allegation with the GAL, let me refer all to one of the leading cases in South Carolina dealing with private custody matters, *Shainwald v Shainwald*, 302 S.C. 453,458 (1990) which it states "a Guardian ad Litem is not a party in the true sense an adversary party and the court has a duty to insure that guardians ad litem perform their duties properly and in the best interest of their wards." Also, the seminal and much quoted case of *Patel v Patel*, 347 S.C. 281,287 (2001) states, "The GAL functions as a representative of the court appointed to assist the court in making its determination of custody by advocating for the best interest of the children and providing the court with an objective view."

There is legislation dealing with the role, duties and credentials of Guardians ad Litem in private cases. This legislation (originally S.C. Code §20-7-122 now §63-11-510, et seq.) only allows guardians ad litem the right "to make motions necessary to enforce the orders of the court or such judicial review." Nowhere is the GAL required to file or respond to any pleadings. Also worthy of note, is the fact that this writer cannot find any private custody case reported (or unreported) case in which the GAL was listed or referred to as a party by the Court of Appeals or our Supreme Court. As recently as 2009, in *Loe v Mother, Father and Berkeley County Department of Social Services*, the GAL's name was listed under "attorneys and Law Firms" but did not include the GAL's name as a party in the case. (382 S.C. 457,675 reh'g denied (May 4, 2009) cert. denied (Nov 5, 2010).

The logistics and actual facts of this particular matter also presented this judge with a conundrum. I had received 2 emails (Attachment 7) from the Defendant while attending the annual judicial conference in August, 2010. On my Blackberry I can tell who is sending me

emails without actually reading/opening the mail itself. Knowing of the animosity existing between Plaintiff and Defendant, I was concerned and wanted to make sure the children were safe. I contacted the GAL to ask her if I could forward the emails to her and for her to also forward them onto Mrs. O'Neill. I also asked her to tell Mrs. O'Neill that I would not read them until I was certain she had read them. I further told the GAL I would verify all of this upon my return to work on the following Monday. I utilized the GAL because I felt she was a neutral person of interest and her charge was to be only concerned with the welfare of the children of the parties. I also had great confidence in the work of this particular GAL in that she has done, and continues to do, excellent work in her role as a GAL. If I had called Mrs. O'Neill this would not have been fair to the Defendant. If I had called Defendant, this would not have been fair to the Plaintiff. The GAL was, in my view, a neutral person to facilitate a possible resolution of the problem and my requests to her and her subsequent conversation with me were only dealing with procedural (not substantive) issues.

Upon my return on Monday, the GAL informed me that she forwarded the emails to Mrs. O'Neill who would not confirm whether or not she read them. That is why I also sent them to her. The GAL then gratuitously added that Mrs. O'Neill's conduct to her was less than professional. As an aside, I, too, have had similar problems with Mrs. O'Neill and have seen her in situations wherein I felt she had distorted the truth of the matter, but not to the extent I should report her for a violation of our Code of Professional Conduct. At the time I do remember thinking Mrs. O'Neill might deny reading the emails, and, therefore, I too sent them to her (Attachment 5) There would have been no other reason for me to do this except based on my past experiences with Mrs. O'Neill. In my almost16 years on the bench I can tell you Complainants are most probably the only attorneys I feel I must insure these types of matters are done. This has been part of the "in chambers" conversations referred to earlier I have had with Complainants.

The GAL's comments to me in no way affected my decision in any aspect of this case. I honestly felt it must be a personal matter between them. I included in my Order the GAL's comments to me about Mrs. O'Neill's lack of professionalism to her to, hopefully, call attention to Mrs. O'Neill that the GAL had, in fact, made a less than flattering remark about her to me, and to indicate in a somewhat less than subtle way, that if this was correct, it should not have been done. I still do not know, nor do I care to know, if it is true. I felt this was the only way Mrs. O'Neill would know how the GAL felt and this might possibly affect the Guardian's view of the case.

Motion for Recusal:

As to the allegations in the letter of complaint that the "very personal reason" stated in my Order filed from the January 31, 2011 hearing (filed March 1, 2011) must indicate "an impermissible animus to Elonda Fair O'Neill or to Anthony B. O'Neill Sr. or to the firm of O'Neill and Fair" or "an animus toward the Plaintiff in the action, Kevin Burroughs, based upon the fact that he is African American and the defendant, Tracy Hale, is white." is blatantly, totally and absolutely false and, I might add, absurd.

I will be glad to explain in this context my reason(s) for recusing myself for a "very personal reason." On October18, 2010, my 95 year old mother fell and after the subsequent surgery and in-hospital rehabilitation, she had to have nursing care 24 hours a day, 7 days a week. My family was able to hire a wonderful woman who agreed to not only work and be my mother's nurse every day from 7:00am to 3:00pm, 7 days a week, but also took charge of finding 2 other women, each of whom would work 8 hours a day, 7 days a week. The original nurse also agreed she would be responsible for preparing written instructions for the other caretakers as well as covering any shifts they did/could not work and prepare lists of items we would need to have on hand for the nurses to use in my mother's care. Upon arriving on the job on the first day of many, many days thereafter, the nurse in charge would make comments that I'm sure were meant to further endear her to me. These comments were something like "Judge, I'm sure you know the lawyer Tony O'Neill. He's my lifelong friend" or "Judge, did I ever tell you Tony O'Neill is like a brother to me?" These comments and similar ones were made on no less than 15 occasions. Even though I told her I did not want to discuss any lawyer with her, she kept the comments coming for the longest time. It was only when I totally did <u>not</u> respond, did she quit making these remarks. I do not know if she ever discussed any of this with Mr. O'Neill.

I felt very uncomfortable having these above facts known by members of the public because I did not want Anthony O'Neill or Elonda O'Neill to feel they might have an advantage in front of me because of their closeness to my mother's primary caregiver, nor did I want my mother's health issues to be a matter of public record. As an aside, immediately prior to the events complained of and for a few years before, I had formed what I considered to be a professional friendship with Anthony (Tony) O'Neill. It was not uncommon for us to exchange information about books we had read and, even after Mr. O'Neill attended the inauguration ceremony of President Obama, he was kind enough to bring me back a small, inexpensive souvenir of this event.

After reflecting upon what I perceived to be a dilemma, I called Cam Lewis to ask for advice. He told me if I felt uncomfortable – FOR ANY REASON hearing cases involving the O'Neills I should recuse myself and I <u>didn't have to state a reason</u>. I told him I wanted <u>to make sure</u> it did not appear to have anything to do with the attorneys or the case itself, but only for personal reasons. He said, "so put it is for personal reasons." I followed his advice to my obvious detriment. It most probably would have been wiser in hindsight for me to say "personal, family reasons".

I want to make certain it is understood that I bear no ill will toward Complainants nor did I know, or ever heard of, either Plaintiff or Defendant prior to the first hearing before me. The race of the parties has not, nor will it ever, affect my best professional judgment in any matter before me. Other than this allegation and the allegation originally made by Mr. O'Neill (referred to in the beginning of this letter) I have never had any reason to suspect or believe that anyone, at any time, would feel I was biased in favor of or against any group, race, religion, nationality or any other group. I invite you to make an independent investigation of anyone with whom I work, now or in the past, or have ever known personally or professionally.

The courts of this state have rules many times on the subject of judicial disqualification. The South Carolina Court of Appeals and Supreme Court have held:

1) In seeking disqualification of a judge, the moving party must show evidence of bias or prejudice. *Patel v. Patel*, 359 S.C. 515,524 (2004);

2) Allegations alone will prove legally insufficient. *Patel v. Patel*, 359 S.C. 515,524 (2004);

3) "A judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." *Patel v. Patel*, 359 S.C. 515,524 (2004).

4) When a party offers no evidence to support his claim of impartiality, the trial judge may properly deny a motion calling for recusal. *Simpson v. Simpson*, 660 S.E.2nd 274 (S.C. App. 2008);

5) Without evidence of either judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Appellate Court Rule 501, Code of Judicial Conduct, Canon 3(E)(1)(a). *Koon v. Fares*, 379 S.C. 150, (2008);

6) "The fact that a trial judge ultimately rules against a litigant is not proof of prejudice by the judge, even if it is later held the judge committed error in his rulings." *Mortgage Electronic Systems, Inc, v. White*, 682 S.E.2nd 498 (S.C. Ct. App. 2009);

7) "The mere fact that a judge includes an issue not raised by the parties when ruling on an issue does not indicate bias or prejudice such that the judge should be disqualified". *Doe v. Howe*, 626 S.E.2nd 25 (S.C. Ct. App. 2005).

8) "If no evidence is presented other than prior appearances by party which resulted in adverse rulings by judge, judge is not required to recuse himself." Appellate Court Rule 501, Code of Judicial Conduct, Canon 3 (E)(1)(a). *State v. Jackson*, 353 S.C. 625 (Ct. App. 2003);

9) When considering recusal, "a judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned." *State v. Cheatham*, 349 S.C. 101, (Ct. App. 2002); and finally,

10) In order to "warrant disqualification of a judge, the alleged bias must be personal, as distinguished from judicial, in nature." Appellate Court Rule 501, Canon 3C.1, Code of Judicial Conduct (1996). *Parker v. Shecut*, 340 S.C. 460, (Ct. App. 2000).

Please allow me to introduce into this record two items (Attachment 9) that demonstrate that it was not until after the ruling on the Motion for Reconsideration of the temporary hearing became the law of the case (pending a change of circumstances or final hearing), that Complainants felt I could not be fair or was biased against them or their clients. They continued to have other matters brought before me in the interim between the conference call hearing and the ruling denying their Motion for Reconsideration of my ruling resulting from the August 9,

2010 hearing. The attachments were the only ones I could easily find, but, I am confident if I had time to do a complete search of every hearing held before me during the applicable period, I could find other examples to illustrate this point.

I feel I have fairly and honestly answered Complainants allegations and will close by saying I do not believe I have violated any provision of the Code of Judicial Conduct and the accompanying Canons. For your use and benefit, I have attached (Attachment 3) a copy of an article that appeared in the most recent issue of the journal published by the National Council of Juvenile and Family Court Judges. It is an excellent article dealing exactly with the issues raised. In addition to the article mentioned herein, I also enclosed the (2) additional items that may be of assistance to you in understanding the dilemma faced by this Judge and every Judge in similar situations (Attachment 10).

I am troubled by what may be a pattern of conduct on behalf of the Complainants to remove judges who have ruled against them, and, therefore, only have hearings in front of judges who they view as "friendly". During the time period commencing when former Judge Segars-Andrews nomination was declined by the Judicial Merit Selection Committee and the time her then current term had not expired, she was asked by Anthony O'Neill to recuse herself from hearing any cases in which he or his wife were acting as counsel because he had made it publically known that he felt she should not be re-elected. Right after this occurred, he told me of his request to her. I must admit I did not believe it to be true. When I asked him if the information was correct, he replied, "she doesn't rule correctly because in the last number (exact number unknown) of hearings in front of her involving him or his wife, she has ruled against them". I still had my doubts about the veracity of his statements until I later verified them with Judge Segars-Andrews. This, I found to be quite troublesome.

If there is anything further needed from me I will be glad to provide it. I thank you in advance for your review of this matter and I am confident you decision will be a fair and honest one.

Paul W. Garfinkel
Family Court Judge

April 29, 2011