

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401 Telephone: (303) 271-6130	
In re the Marriage of: Petitioner: CHRISTY HARRINGTON, n/k/a CHRISTY RYAN and Respondent: SEAN L. HARRINGTON	
Sean Harrington, <i>Pro Se</i> 197M Boston Post Road, West Suite #151 Marlborough, MA 01752	↑ COURT USE ONLY ↑ Case Number: 99DR3717 Jefferson County Case No. 30-192795-44-8A
MOTION FOR RECONSIDERATION OF AUGUST 16TH 2004 ORDER	

COMES NOW, Sean Harrington, pursuant to C.R.C.P. §§59 & 60 to submit the within Motion for Reconsideration of August 16th 2004 Order and in support thereof, states as follows:

1. On or about the 15th of August, 2004, the Respondent (“Harrington”) filed a Motion for Substitution of Judge, which he later amended and supplemented by pleading mailed on the 19th of August. Based upon a call placed into the clerk’s office on behalf of Harrington and based upon such information and belief, the Motion for Substitution of Judge has not been decided as of the date of this writing (20 August 2004).

2. Because Harrington will not waive his right to object to Judge Tidball’s authority over these proceedings, the request for relief sought herein is directed at: (a) the Judge appointed to replace Judge Tidball; or (b) the Judge appointed to preside over the case in another county after the instant case has been moved or; (c) Judge Tidball if, and only if, she has denied the Motion to Recuse by the time the instant Motion is docketed. (See Aaberg v. District Court, 136 Colo. 525, 319 P.2d 491 (1957) (Where a party seeks to disqualify a judge for bias and prejudice, and at the same time asks for affirmative relief by motion, appearance before such judge for any other purpose than to question his authority to act, waives the right to object to his authority).

3. On the 16th of August, 2004, Judge Tidball issued a written Order denying Harrington's Motion[s] filed under §60(b). Such an Order is independently appealable Sender v. Powell, 902 P.2d 947 (Colo. App. 1995); Guevara v. Foxhoven, 928 P.2d 793 (Colo. App. 1996). Although the Rules generally do not require a futile act (see Ohio v. Roberts, 448 U.S. 56, 74 (1980)), Harrington is filing the instant pleading for the reconsideration of the Order, because it is appropriate to call errors to the attention of the trial court prior to the filing of a separate Notice of Appeal In re Jones, 668 P.2d 980 (Colo. App. 1983) (“*The primary purpose of a motion to amend judgment or for new trial is to give the court an opportunity to correct any errors that it may have made.*”) At the outset, Harrington notes that the Motions denied by the 16 August Order are all *pro confesso*.

4. In the Order described in Paragraph 3, hereinabove, Judge Tidball wrote that, “the Motion is not supported by an affidavit,” and thus, “cannot be considered.” The finding evidences that the Amended §60(b) Motion was not read and that the decision of said Motion was predetermined. ¶8 of the said Motion states, “The Respondent filed an affidavit with this court, incorporated herein by reference as, “Exhibit A,” in his ‘June 1st 2004 Disclosure of Exhibits’...and, which the Respondent requests this court to take **judicial notice** of.” [emphasis in the original]; ¶9 of the Motion stated, “The Respondent filed a sworn transcription...incorporated by reference as, ‘Exhibit B,’ in his ‘June 1st 2004 Disclosure of Exhibits,’ which the Respondent requests this court to take **judicial notice** of.” [emphasis in the original] Documents and text, which are so designated as, “*Incorporated by reference, herein*,” are the same as if such text was cut-and-pasted or otherwise reproduced, word-by-word, into the target document, which the incorporation has been denoted. (see generally C.R.C.P. §10(c) (*A statement in a document may be incorporated by reference in a different part of the same document or in another document. An exhibit to a document is a part thereof for all purposes.*); see also Sparks v. Eldred, 78 Colo. 55, 239 P. 730 (1925) (“*This rule permits a document to be made a part of a pleading by attaching it as an exhibit, and in so attaching it, it amounts to the same thing as if it were set forth in the body of the pleading, as was the practice before the rule.*”) Further, A court may take Judicial Notice of any matters in its own records and files. Sakal v. Donnelly, 30 Colo. App. 384, 494 P.2d 1316 (1972). For the purposes implied in Judge Tidball's 16 August Order, the requirement of [a] supporting affidavit[s] serves to demonstrate that one, who alleges that irregularities in prior proceedings were “*unfair*,” is acting upon a basis of knowledge, not upon a suspicion or mere hope. Peoples Natural Gas Div. v. Public Util. Comm'n, 626 P.2d 159 (Colo. 1981), and where such affidavit[s] contain[s] factual allegations and a basis of knowledge upon, which the Motion rests, the requirement has been met. Aldrich v. District Court, 714 P.2d 1321 (Colo. 1986).

5. For the reasons more fully set forth in Paragraph 4, hereinabove, Judge Tidball is continuing her well-established pattern in the instant case of applying a highly technical or unlawful interpretation of the Rules to Harrington to “*eliminate the trial of cases.*” (See Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 506 (4th Cir. 1977); see also Swan v. Zwahlen, 131 Colo. 184, 280 P.2d 439 (1955) (“*The rules indicate clearly a general policy to disregard narrow technicalities and to bring about the final determination of justiciable controversies without undue delay.*”) and C.R.C.P. §11(f) (“*All pleadings shall be so construed as to do substantial justice.*”)

6. Further, Judge Tidball wrote in her order, “even if the facts were supported by an affidavit, Respondent has not shown how the evidence is material or how it might change the outcome of the Court’s May 2004 Order,” (citing Southeastern Colo. Water Conservancy Dist. V. O’Niell, 817 P.2d 500, 505-06 (Colo. 1991)). This is simply not the case: Harrington clearly established, through his two (2) separate affidavits, that the Special Advocate is biased and has evidenced venal motives through unethical conduct and words and civil rights violations. In ¶¶ 10 ~ 11 of the said Motion, Harrington argued why bias, unethical conduct and venal motives are intolerable because they affect the fundamental fairness of the proceedings, impermissibly chill Harrington’s First Amendment petitioning rights and demonstrate an incompetence and unwillingness on the part of Fyfe to fulfill the charter of the Special Advocate (“SA”). A Special Advocate functions as an, “*arm of the judicial officer*,” Bush v. Rauch, 38 F.3d 842, 847 (6th Cir. 1994) (see also Gardner v. Parson, 874 F.2d 131, 146 (3d Cir. 1989) (S.A. is as an “*actual functionary or arm of the court*.”) Therefore, like a judicial officer, he must be governed by similar standards of ethics and requirements of impartiality. A trial before a biased judge is a structural defect (see People v. Baenziger, ___ P.3d ___ (Colo. App. 2004)) ergo, a proceeding in which an arm of the court is infected by bias or venal motives requires that the infection be removed or remedied to protect the fundamental fairness of the proceedings. One such reason for this is because, “*there is a risk of injury to a parent when a therapist expresses concern about poor parenting of one kind or another. The risks could include diminished parenting time, or in the extreme case, perhaps a change in custody. Those risks are real and potentially very damaging to the parent.*” Ryder v. Mitchell 54 P.3d 885, 889 (Colo. 2002). Further, the Colorado Supreme Court acknowledged the public importance¹ of the “*social utility*” of the role *Id.* Respondent also notes that, prior to the enactment of House Bill 1251 on July 1st, 2004, which amended C.R.S. §12-43-215(7), ethical oversight of court-appointed Special Advocates under Title 14 belonged entirely to the trial court and the caprice of individual judges. The fact that this trial court could provide the only remedy available to protect the rights of the parties subject to Fyfe’s malfeasance, underscores the importance of the sacred duty of oversight and [actual] consideration of parties’ claims of impropriety when raised and supported by affidavit. Judge Tidball’s order is completely devoid of any *indicia* that an inquiry of any kind had been applied to determine actual or foreseeable injury and, in fact, one could reasonably infer from Judge Tidball’s 16 August Order that she believes there could be no harm, injury or cause for concern if a Special Advocate conditions a positive outcome, guarantee of parenting time or the completion of his court-ordered work on the an implied waiver of suit or withdrawal of a grievance with the licensing board. It should also be noted that Fyfe included the issue of his fee disagreement and the filing of the grievance as among his findings (take **Judicial Notice** of p. 6, lines 34 – 40 of Fyfe’s 11June04 SA Report, incorporated herein by reference) that Harrington is an unfit parent, which clearly constitutes retaliation for First Amendment petitioning activities, a violation of 42 U.S.C. §1983 (see Board of County Commissioners, Wabaunsee

¹ C.R.S. §12-43-101 (Legislative Declaration) The purpose of regulation of therapists and psychologists is, “to safeguard the public health, safety, and welfare of the people of this state and in order to protect the people of this state against the unauthorized, unqualified, and improper application of psychotherapy, psychology, social work, marriage and family therapy, and professional counseling.”

County, Kansas v. Umbehr, 116 S.Ct. 2342, 2347 (1996) & Mt. Healthy City Bd. Of Educ. V. Doyle, 429 U.S. 274, 97 S.Ct. 568 (1977) (It is well-established that retaliation by a public official or a person acting under the color of the state against an individual exercising his or her First Amendment rights is a violation of 42 U.S.C. §1983.) Judge Tidball’s order, therefore, not only disregarded the actual or potential injury of Fyfe’s unethical conduct, but also disregarded Harrington’s clearly established rights. (see Boyd v. U.S., 116 US 616, 635, (1885) (“*It is the duty of the courts to be watchful for Constitutional Rights of the citizen, against any stealthy encroachments thereon.*”); Gross v. State of Illinois, 312 F 2d 257 (1963) (“*State Judges, as well as federal, have the responsibility to respect and protect persons from violations of federal constitutional rights.*”))

7. Judge Tidball also wrote in her 16 August Order, “Respondent’s Motion under C.R.C.P. 60(b) in light of newly discovered evidence must still conform with C.R.C.P. 59(d)(4).” (citing Southeastern Colo. Water Conservancy Dist. v. O’Neil, 817 p.2d 500, 505-06 (Colo. 1991)) Again, this statement evidences that Harrington’s Amended Motion was not read because, as Harrington explained in ¶4 of said Motion, the pleading is not subject to §59(d) (citing UIH-SFCC Holdings, L.P. v. Brigato, 51 P.3d 1076 (Colo.App. 2002)). This is because, as the dated affidavits plainly state, the newly discovered evidence was “created” by Fyfe’s actions on May 25th and May 28th and, thus, “*the trial court was not limited by the requirements of C.R.C.P. §59(d),*” because, “*the motion...on the grounds of newly discovered evidence...could not have been discovered in the exercise of reasonable diligence and produced,*” within the 15 days following the May 4th Order. *Id.* (citing Kennedy v. Bailey, 169 Colo. 43, 453 P.2d 808 (1969).) ¶2 of said Motion stated that, “Both the affidavits...were submitted immediately following the availability of the newly discovered evidence.” Judge Tidball’s reliance of O’Neil is not dispositive because the O’Neil court held that the “*Claimant failed to show that evidence could not have been discovered through earlier exercise of reasonable diligence, that evidence was material, or that evidence probably would have changed result.*” *Id.* As is more fully set forth in Paragraphs 6 ~ 7, hereinabove, Harrington’s Motion and two supporting affidavits squarely satisfied the, “*three part test,*” which, “*strikes the appropriate balance between the preferential status accorded to final judgments and the need to provide judicial relief in exceptional circumstances in the interest of assuring a just result.*” *Id.*

8. Upon information recently obtained by Harrington from the State of Colorado Division of Regulatory Agencies Mental Health Licensing Section and belief, Bill Fyfe has been the subject of numerous complaints of unethical conduct to the Board and is one of the exemplary motivations for the Board in lobbying to have HB1251 enacted. Prior to the enactment, there has been no method to document patterns of abuses, such as extortion, by individual court-appointed S.A.’s and, thus, they have been free to prey upon (or be involuntarily imposed upon) unsuspecting parties at the caprice of this trial court, who then discharges the profligate offender’s fees upon the victim[s]. Upon information and belief, each trial court judge has his or her own familiarity with the reputation of individual Special Advocates, which is otherwise relatively unknown, and, upon information and belief, it was Judge Tidball’s intention to release Bill Fyfe onto this Respondent.

WHEREFORE, Harrington requests that the August 16 Order be vacated, that Bill Fyfe be disqualified as Special Advocate, that Fyfe's Report be stricken from the Record that Bill Fyfe be required to reimburse Harrington \$1,422.50 plus costs, fees, pre and post judgment interest and that the May 4th 2004 Order be vacated, for declaratory relief, for other such relief as this court may deem proper in the premises and that all applications for relief be construed as no waiver of Harrington's objection to Judge Tidball's authority to preside over this case (in contradiction to his pending Motion for Substitution of Judge) and that all such applications for relief be ruled upon by the Judge appointed to replace Judge Tidball.

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of August, 2004, I mailed a true and accurate copy of the foregoing Verified Combined Motion via pre-paid first class mail addressed as follows:

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