

DISTRICT COURT, JEFFERSON COUNTY, COLORADO 100 Jefferson County Parkway Golden, Colorado 80401 Telephone: (303) 271-6190	<hr/> ▲ COURT USE ONLY ▲ <hr/> trial court case No. 99 DR 3717
In re the Marriage of: Petitioner: CHRISTY RYAN and Respondent: SEAN HARRINGTON	
Sean L Harrington P.O. Box 351855 Westminster, CO 80035	
FATHER’S REPLY TO FYFE’S OPPOSITION TO FATHER’S MOTION FOR SUBSTITUTION OF	

Sean L. Harrington submits the within *REPLY IN SUPPORT OF HIS MOTION PURSUANT TO RULES 97 & 98* and, as grounds therefor, states as follows:

1. First, father does not waive his objection to the nonparties Wilson and Fyfe in this domestic relations matter. *See Hercules Equip. Co. v. Smith*, 138 Colo. 458, 335 P.2d 255 (1959) (quoting 67 C.J.S. Parties § 64, p. 1001) (A nonparty who, without leave of court, files motions and pleadings but who does not file a petition to intervene pursuant to Rule 24 is a mere interloper who acquires no rights by such unauthorized action, unless objections thereto are waived). Whether recusal is required under the appearance standard was a question for the court. Neither Wilson nor Fyfe are under any obligation to respond to father’s recusal motion or defend the actions of the attorney representing the First Judicial District. *See In re Estate of Scott*, 577 P.2d 311, 312 (1978) (All three elements of the general rule -- a property interest, an impairment of the ability to protect it, and inadequate representation -- must be present before a right to intervene arises).

2. Nonparty Fyfe’s reliance on *Aaberg v. District Court*, 528, 319 P.2d 491 (1957) for the proposition that father has waived his objection to the court’s authority is misplaced. In *Aaberg*, the complainant “*simultaneously* question[ed] the authority of the court and ask[ed] the court for affirmative relief.” 319 P.2d at 493 (emphasis in the original). This constituted a waiver of his objection. Here, father has expressly reserved his objection and asked that any pending motions not yet decided and any subsequent motions not yet decided be ruled on by the judge substituted. *See* father’s March 27, 2009 recusal motion and his Objection to Wilson’s Bill of Costs. *And see See Marriage of Harrington*, (Colo. App., No. 07CA0379, May 29, 2008) (“[F]ather never waived his objection to the trial judge’s authority and consequently, the trial court was without authority to enter the order on remand before ruling on the motion for substitution”). *See also* 24 A.L.R.4th 870, §870, *WAIVER OR LOSS OF RIGHT TO DISQUALIFY JUDGE BY PARTICIPATION IN PROCEEDINGS*, (1983).

3. Nonparty Fyfe points out that “Where a ‘motion and supporting affidavits for disqualification contain only opinions and hearsay statements’ they are insufficient to require recusal.” (quoting *Marriage of Elmer*, 936 P.2d 617, 619 (Colo. App. 1997)). However, the substance of father’s Motion concerns the very words appearing in opposing counsel’s billing statements—not father’s “opinion and hearsay statements.” In Wilson’s Answer, she admits that Ms. Colony represents “clients” who are unnamed judges in the First Judicial District (*Id.* at 2) and refers to her on page 3 of her Answer as, “attorney general representing other parties” and “defendants who were not within the scope of the Court of Appeals’ remand” (*Id.*)

4. Nonparty Fyfe’s discussion of *S.S. v. Wakefield*, 764 P.2d 70 (Colo. 1988) is far from “instructive.” It’s irrelevant. *Wakefield* concerned “the bald assertion in an affidavit that the judge initiated an *ex parte* communication with a party, without any averment whatever as to how that communication manifested an actual or apparent bias or prejudice against the party or her attorney.” Here, in contrast, opposing counsel’s billing records and Answer indicates, judges of the First Judicial District are considered “parties” and “defendants” to this case, and that the attorney representing those judges contacted a party adverse to father to discuss “defense strategy.” For that reason, it is improper for that same court to preside over the cause.

5. Nonparty Fyfe next argues that “Father has not presented any evidence that demonstrates actual bias against Father.” Response at ¶ 8. Father does not need to show actual bias. See *Hammons v. Birket*, 759 P.2d 783 (Colo. App. 1988) (Trial court's denial of motion to recusal constitutes was an abuse of discretion and was reversible error when there was, at least, an appearance of bias or prejudice due to the existence of a professional relationship between the trial judge and an expert witness for defendants). A trial judge must accept affidavits filed with motion to disqualify as true, even though judge may believe that the statements contained in the affidavits are false or the meaning attributed to them by the party seeking recusal is erroneous. *Wright v. District Court*, 731 P.2d 661 (Colo. 1987). And, in *United States v. Jordan*, a case that is illustrative, the Fifth Circuit held that the famous *Litekey v. U.S.* opinion,¹ “neither stated nor implied that the impossibility of fair judgment test would supplant the reasonable person standard in cases involving alleged bias”). 49 F.3d 152, 155 n.3 (5th Cir. 1995).

6. Nonparty Fyfe also argues that “Father presents no evidence that Judge Tidball's alleged bias had any affect on this Court's determinations.” Citing to the Court’s determinations are fatal to a recusal motion, as opposing counsel well knows. See, e.g., *Schupper v. People*, 157 P.3d 516, (Colo. 2007) (*en banc*) (“Judicial rulings alone almost never constitute [a] valid basis for a bias or partiality motion. . . . Almost invariably, they are proper grounds for appeal, not for recusal.”) (quoting *Litekey*, *supra*).

¹ *Litekey v. United States*, 510 U.S. 540, 555 (1994)

WHEREFORE, for the foregoing reasons and based on the foregoing authorities, father requests the substitution of the trial judge under Rule 97 and reassignment to another judicial district under Rule 98.

Submitted this 3rd day of April, 2009.


Sean L. Harrington

CERTIFICATE OF MAILING

I hereby certify that on the 3rd day of April, 2009, a true and accurate copy of the foregoing *REPLY* has been mailed, first class postage prepaid, to the following:

First Judicial District Court
Attn: Chief Judge R. Brooke Jackson
100 Jefferson County Parkway
Golden, CO 80401

and by electronic mail to:

David H. Yun (DYun@jalegal.com);
Brett N. Huff (bhuff@huffandleslie.com); and
Christy C. Ryan (cryan72@msn.com).

