REL: July 16, 2021



# ALABAMA COURT OF CIVIL APPEALS

## SPECIAL TERM, 2021

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## 2200703, 2200704, and 2200705

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## Ex parte Herrick J. Siegel

## PETITIONS FOR WRIT OF MANDAMUS

## (In re: Herrick J. Siegel

## v.

## Joanna Leigh Siegel)

## (Jefferson Circuit Court, DR-15-901228.01 and DR-15-901228.03)

## (In re: Joanna Leigh Siegel

2200703, 2200704, and 2200705

**v.**

**Herrick J. Siegel)**

**(Jefferson Circuit Court, DR-15-901228.02)**

FRIDY, Judge.

Herrick J. Siegel ("the father") petitions this court for writs of mandamus directing the Jefferson Circuit Court ("the trial court") to set aside Judge Patricia Stephens's order of recusal and to further direct Judge Stephens to resume presiding over postdivorce actions involving the parties that were pending before her. For the reasons set forth below, we grant the father's petitions.

The materials submitted to this court indicate the following. On January 30, 2018, Judge Stephens entered a judgment divorcing the father from Joanna Leigh Siegel ("the mother") that incorporated an agreement between the parties. Pursuant to the judgment, the parties were awarded joint legal custody of their four minor children ("the children"); the mother was awarded sole physical custody of the children, subject to the father's visitation. In the judgment, Judge Stephens found

that it was not in the children's best interest to relocate to New York and denied the mother's request to make such a move.

On June 27, 2018, the father filed a petition for a rule nisi claiming that the mother had not abided by a number of the provisions in the divorce judgment involving the children. The action initiated by the father's petition was designated in the trial court as case no. DR-15-901228.01 ("the .01 action"). On October 3, 2018, the mother filed a counterclaim for a rule nisi alleging that the father had failed to pay certain expenses as required by the divorce judgment. The action initiated by the mother's counterclaim was designated in the trial court as case no. DR-15-901228.02 ("the .02 action"). On September 19, 2019, the father filed an objection to the mother's proposed relocation to Sands Point, New York, after the oldest child's graduation from high school in the spring of 2020. The action initiated by the father's objection to the move was designated in the trial court as case no. DR-15-901228.03 ("the .03 action"). Each of the postdivorce actions was assigned to Judge Stephens.

On April 27 and 28, 2021, an evidentiary hearing was held before Judge Stephens in the pending actions. The transcript of the hearing

indicates that, during the first day of the hearing, much of the testimony centered on the lack of a relationship between the father and the children and the father's refusal to exercise visitation with the children since the divorce judgment had been entered 39 months earlier. The evidence was undisputed that the father had had little to no contact with the children since the parties divorced. At the start of the second day of the hearing -- April 28 -- the mother's attorney announced that she needed to "put something on the record," and the following discussion was held:

> "MS. SENESAC [the mother's attorney]: Yesterday afternoon after court broke for the day there was a meeting in chambers with the Court at which the Court expressed an opinion about why the children were not visiting based on what the Court thought the children's feelings were and thought was going on in the children's home despite there being no evidence presented yesterday at trial to support that. And despite the fact that during the trial of the divorce case in this matter which Your Honor presided over and the children didn't testify and no therapist testified as to what the children were feeling. So there were comments made by the [father's] counsel about the character of the [mother] calling her awful and horrible that there was absolutely no evidence introduced yesterday to support that nor will there be any evidence to support that. And after [the mother's] counsel had exited the Court's chambers [the father's] counsel remained and said something under her breath out of my earshot to the Court.

> "Now I am requesting that if the Court has prejudged this case and has made up its mind that the Court would recuse itself. I trust that if the Court does not recuse itself that it is because the Court will not prejudge this case and that it will make its decision based on the evidence introduced by the witnesses in this case."

After the father's attorney responded, pointing out that Judge Stephens had impressions from her history of the litigation between the parties and that Judge Stephens had not "conjured for [herself]" "fresh evidence," the mother's attorney noted that petitions to modify custody are to be based solely on events that had occurred after the entry of the last judgment regarding custody. Judge Stephens then responded:

> "THE COURT: Okay. Thank you both. I think it's very unfortunate that I felt that I could talk to the two of you as professionals in my office about my impressions of what was going on and then it be construed as I can't be fair in this case. I think that's very unfortunate. As I mentioned to you, I tried this case. I can't unring the bell of what happened in the trial of this matter.
>
> "I need to correct the record. I never said that these children -- this is a situation with them. I said to you and I will repeat and don't mind repeating that it could be a situation in which the children feel that they can't be free and laugh and communicate with dad because it will make their mom feel some kind of way. I said that to you. I didn't say it was definitive. I said it could be the situation in which they wouldn't feel free to run up to dad and hug him and I thought

we could have that discussion freely. And I told you Attorney Senesac when you walked out of my office and Attorney Bear [the father's attorney] was standing there, I told you yesterday she said 'I'm sorry.' That's what she said and I told you she said she was sorry but yet you want to put on the record like she was talking to me ex parte about the case and that's just simply not what happened. When you walked back into my office was when she made the comment that I have to say should not have been made. But when you were out of my office she said 'I'm sorry.' Now if that's ex parte communication then I guess it is what it is. She said 'I'm sorry.'

"MS. SENESAC: Yes, Your Honor.

"THE COURT: But in no way do I feel that I am not qualified to hear this case. If that's the case then every judge who has heard the original divorce or heard the .01 or heard the .02 or I have some cases that are .09. Should I recuse myself because I know about the case? That's what's implied from what you're saying.

"MS. SENESAC: No, Your Honor. And I apologize. I'm not saying Your Honor is not qualified. I only needed -- I felt -- I worried about this all last night. I felt like I needed to put it on the record because I trust Your Honor that if you have prejudged this case that you would recuse. That's all. Based on what was said in chambers my concern is that I felt like Your Honor may have prejudged this case and if Your Honor hasn't prejudged this case before we have put on all the evidence then I trust Your Honor. But I felt like I had no choice but to put it on the record and I apologize if that offended the Court but I have to represent my client.

"THE COURT: Do you feel that I prejudged because of the comment that I made about the possibility of what could be

going on? Do you feel that I prejudged the case because I said to y'all in chambers also it was my hope at the end of this case that there could be reconciliation between dad and the children? That was a huge hope for me. Do you think I prejudged this case because I said to Attorney Bear why didn't someone file something to get Dr. Bell off this case so that we could get someone into the case that would have been working on this reconciliation? Did I prejudge when I said all that?

"MS. SENESAC: No.

"THE COURT: These were some of the things that I said to you in chambers, I am so disappointed that there has been no reconciliation between dad and these children.

"....

"MS. SENESAC: And Your Honor had that been the extent of it I would have understood because that was an entire day of testimony yesterday was the lack of relationship between father and child [sic]. What concerned me was the next step was the blame that was placed on -- the hypothetical blame that was placed on my client when there was nothing to suggest that, nothing to suggest that yesterday. That was my concern. Had the comments simply been of course Your Honor is disappointed that nothing has happened in 39 months. Of course.

"THE COURT: So because I said I wonder if that could be a possibility -- if that could be a possibility -- and that's actually based on life experiences. Can you discard life experiences when you are on the bench? When you are representing your clients? And I wondered if that could be a possibility. And you correct me if I was wrong, but I don't think I definitively said that these children didn't

communicate with dad, don't want to be around dad because of how their mother would react to it. I said that could be a possibility.

"MS. SENESAC: Yes, Your Honor.

"MS. BEAR [the father's attorney]: That's what you said.

"MS. SENESAC: Yes, Your Honor, that is what you said. I concur. That is what you said.

"THE COURT: And that gave you the impression that I had prejudged the case?

"MS. SENESAC: No, Your Honor. Again, it gave me the impression that you -- that there was a possibility that you for whatever reason were preprogrammed and had already prejudged the case and no matter what the evidence was would believe that it was my client's fault. It only -- again if I thought it had definitively showed bias I would have asked you to recuse right then and there, Your Honor.

"....

"MS. SENESAC: Again I don't believe that you have prejudged this, but I need to know that you haven't based on that comment. It did make me wonder if you have."

A recess was taken, after which Judge Stephens said:

"We are in a situation, I think, that does require me to go ahead and recuse. It is not a situation which I have prejudged this case, but I do believe because of the impression and the statements made by the [mother's] counsel it will create an appearance that if I rule in favor of the [father] then the

> [mother's] counsel is going to allege that I prejudged this case. If I rule for the [mother] then it will appear that I ruled in the [mother's] favor because of the statements of the [mother's] counsel. So I just feel that at this point because of the impression that has been created by the statements that I have to go ahead and recuse. So I will go ahead and enter that recusal order so that the case can be reset in front of someone else."

On April 28, 2021, Judge Stephens entered an order recusing herself from the postdivorce actions, as well as any future litigation between the parties. She also referred the cases to the circuit clerk for reassignment. On June 8, 2021, the father filed his petitions for a writ of mandamus. In his petitions, the father contends that there was no statutory basis for Judge Stephens to recuse herself and that her recusal was not required under the Alabama Canons of Judicial Ethics.

We first note that a petition for the writ of mandamus is the proper method by which an appellate court will review a trial judge's recusal. Ex parte Hill, 508 So. 2d 269, 271 (Ala. Civ. App. 1987); McGough v. McGough, 47 Ala. App. 223, 225, 252 So. 2d 646, 648 (Civ. 1970). A writ of mandamus "is an extraordinary and drastic writ" that we will issue "only when (1) the petitioner has a clear legal right to the relief sought; (2)

the respondent has an imperative duty to perform and has refused to do so; (3) the petitioner has no other adequate remedy; and (4) this Court's jurisdiction is properly invoked." Ex parte Flint Constr. Co., 775 So. 2d 805, 808 (Ala. 2000).

In McGough v. McGough, supra, this court issued a writ of mandamus directing Judge William Thetford of the Montgomery Circuit Court to resume hearing a domestic-relations case in which the husband had made a "rude remark" to the judge after Judge Thetford had attempted to advise the parties to reconcile. The husband filed a motion seeking Judge Thetford's recusal. Judge Thetford granted the motion, explaining that he was not biased against the husband and that he did not have any "predispositions" with respect to the underlying case; however, he believed recusal was necessary because, Judge Thetford explained, the husband was of the opinion that he could not receive a fair trial before Judge Thetford. In issuing the writ, this court sympathized with Judge Thetford's situation, but said:

> "If a judge is not disqualified or incompetent under statute, constitution or common law, it is his duty to sit, a duty which he cannot delegate or repudiate. It is not within the

> discretion of a judge, whether he will sit in a given cause. The fact that a judge has recused himself because he would rather not sit, or because he has been accused of bias or prejudice and unable to render a fair hearing and judgment is not acceptable. His disqualification depends upon the facts in regard thereto."

47 Ala. App. at 226, 252 So. 2d at 648-49 (internal citations omitted) (emphasis added). This court added that "[i]t is clear that a judge, otherwise fully qualified and competent cannot avoid his duty to sit in a cause by recusing himself to escape accusation, and unpleasantness, and because he had sat in another case involving the same parties." 47 Ala. App. at 226, 252 So. 2d at 649.

Seventeen years after McGough was decided, this court held that a trial judge must consider requests for recusal in light of the Alabama Canons of Judicial Ethics. Ex parte Hill, 508 So. 2d at 271. Hill involved a trial judge who had recused himself from a case on the ground that " 'there has been a long association between the parties and this judge and his wife, from living together at an early age in an apartment complex to communication and schooling of the children, church affiliation and many

other associations over the years.' " Id. at 270. After setting forth the general rule, stated in McGough, regarding a duty to sit, this court wrote:

> "Although that rule continues to have a deserved vitality, it must be considered in light of the Canons of Judicial Ethics that were enacted and became effective in Alabama subsequent to that case. That is to say that in addition to his being subject to disqualification under § 12-1-12, Code 1975, a judge must now himself consider whether his continued presence in a case violates Canon 3(C), Alabama Canons of Judicial Ethics, which provides in pertinent part:
>
> " 'C. Disqualification:
>
> > " '(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:
> >
> > " '(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.' (Emphasis ours.)
>
> "A federal court has construed the analogous federal statute that tracks the underscored language above to mean that the 'duty to sit' has been eliminated. See Potashnick v. Port City Construction Co., 609 F.2d 1101 (5th Cir.1980). Although we are not prepared to go that far, neither do we think the judge in this case abused his discretion by recusing himself in what he determined to be a questionable case. If

> there is bias or prejudice for or against a party, it is in the mind and conscience of the judge, not merely because of an accusation charging bias or prejudice. See Shell v. Shell, 48 Ala. App. 668, 267 So. 2d 461 (1972). Federal law has heretofore required that a judge determine in his own opinion whether he should disqualify himself; Alabama judges must now respond to a similar imperative in the Canons of Judicial Ethics as quoted above."

508 So. 2d at 271. Nonetheless, we added:

> "[W]e do not feel it prudent to require a judge to sit when he has determined and stated in the record grounds upon which his impartiality might reasonably be questioned. The facts of this case are distinguished from McGough in that in that case the judge stated that he did not believe his impartiality would be compromised; mandamus was therefore issued, ordering his reassignment to the case."

508 So. 2d at 271-72.

The circumstances in this case are more similar to those of McGough than of Hill. There is no relationship or association between Judge Stephens and either party that could serve as a reasonable basis for questioning Judge Stephens's impartiality. The attorneys for the parties do not dispute Judge Stephens's characterization of the conversation among Judge Stephens and the attorneys in chambers after the first day of testimony, during which Judge Stephens expressed her hope that the

father and the children could reconcile and merely posed a possible reason for their estrangement. On the record, Judge Stephens assured the parties that she had not prejudged the case and that she had no bias against either party. Viewing the challenged statement in context, we do not believe it was reasonable to question Judge Stephens's impartiality simply because she offered a possible explanation as to why the relationship between the children and the father is nonexistent. It appears that Judge Stephens was attempting to work with both attorneys to find a solution that would be beneficial to the children in helping to repair their relationship with their father, not that she had prejudged whether one of the parties should be held in contempt or whether the mother could relocate with the children.

Because there is no basis to find that Judge Stephens was unqualified, biased, or partial in presiding over these cases, we conclude that there was no basis for her recusal. We are not prepared to permit a trial judge to withdraw from a case because one party perceives bias that is not objectively reasonable. Accordingly, the father's petitions are due to

be granted. We direct Judge Stephens to set aside her order of recusal and to again preside over the actions that were previously before her.

2200703 -- PETITION GRANTED; WRIT ISSUED.

2200704 -- PETITION GRANTED; WRIT ISSUED.

2200705 -- PETITION GRANTED; WRIT ISSUED.

Thompson, P.J., and Moore, Edwards, and Hanson, JJ., concur.