

July 5, 2012

**PUBLIC ADMONITION OF
MAGISTRATE BARBARA JOHNSTON
ST. JOSEPH PROBATE COURT**

The Indiana Commission on Judicial Qualifications has determined that formal disciplinary charges are warranted against Magistrate Barbara Johnston. However, in lieu of filing formal disciplinary proceedings, the Commission issues this Admonition pursuant to Supreme Court Admission and Discipline Rule 25 VIII E(7) and with the consent of Magistrate Johnston. Magistrate Johnston cooperated with the Commission in this matter and acknowledges she violated the Code of Judicial Conduct.

The Commission admonishes Magistrate Johnston for entertaining and granting an *ex parte* motion to intervene and for custody filed by the child's maternal grandparents, without prior notice to the noncustodial father or an opportunity for him to be heard. Magistrate Johnston violated the Code of Judicial Conduct and basic due process requirements for emergency orders as outlined in Indiana Trial Rule 65(B). (See also, *In Re Anonymous*, 729 N.E.2d 566 (Ind. 2000); Commission Advisory Opinion #1-01; Public Admonition of the Honorable Daniel C. Banina, Miami Circuit Court, January 20, 2009; Public Admonition of the Honorable J. Steven Cox, Franklin Circuit Court, March 21, 2003; Public Admonition of the Honorable Christopher B. Haile, Marion Superior Court, Civil Division 11, October 17, 2005.)

C.W.M. (Mother) filed a paternity action regarding E.M. (Child). In August 2007, paternity of E.M. was established, and S.G. (Father) was ordered to pay child support and maintenance for E.M. Mother petitioned the court in April 2009 to modify child support, and Father participated in the modification hearing in October 2009. The Child Support Order was modified, and Father was ordered to make payments through the Clerk of Court. Father attended all scheduled hearings.

On August 2, 2011, F.M.K. and S.W.M. (Maternal Grandparents), by counsel, filed a "Trial Rule 24 Motion to Intervene and for Custody" in which they asked for custody of E.M. because the child's mother had died.¹ Maternal Grandparents' counsel also submitted electronically an unsigned "Consent to Appointment of Guardian" form which inaccurately suggested that Father consented to Maternal Grandparents becoming E.M.'s guardians.² Other than the unsigned consent form, there was no indication in Maternal Grandparents' pleading that Father had been served with the motion.

¹ The Maternal Grandparents did not indicate in the motion when Mother had died, did not provide a death certificate, and did not indicate where E.M. currently was residing.

² St. Joseph County Local Rule 71-AR16-702.6 provides that, "Documents filed through the E-filing system by use of a valid user name and password [through the QUEST electronic system] are presumed to have been signed and authorized by the user...." For verified pleadings or documents which require a person's signature, "the QUEST

Magistrate Johnston scheduled a hearing on the motion for August 4, 2011. The Maternal Grandparents, their counsel, and E.M.'s uncle, G.I. (Uncle), appeared for the hearing on August 4, but Father was not present. Instead of ensuring that Father had notice of the motion and the scheduled hearing, Magistrate Johnston proceeded with the hearing. During the hearing, Maternal Grandfather testified that E.M. had been living with Uncle, who resides in Indiana, since Mother's death. Maternal Grandparents live in Kenya. There was no indication why E.M. could not continue living with Uncle until Father received notice and could participate in a custody hearing. Maternal Grandfather testified that he had been in telephone contact with Father about Mother's funeral arrangements, but he had not notified Father about the guardianship motion or the hearing. Maternal Grandfather also made representations about Father's wishes regarding custody, which later proved to be untrue.³ Magistrate Johnston questioned Maternal Grandparents' counsel about the consent form and learned from him that Father had never signed the consent form.

Rather than making any efforts to contact Father to determine whether he had received notice (i.e. by requiring the Maternal Grandparents to provide Father's telephone number or by checking with the Clerk's office to determine what address support checks were received from) or setting another immediate hearing in order for Father to be heard, Magistrate Johnston issued an "Order on Change of Custody" on August 4, 2011 granting custody of E.M. to Maternal Grandparents and allowing them to take the child to Kenya. Magistrate Johnston also issued an "Order on Motion to Change Payee," which directed the Clerk of Court to change the payee so that support payments would be directed to Maternal Grandparents.

Magistrate Johnston did not set a subsequent hearing within ten days, as required under Trial Rule 65(B). Once Father learned about the court order changing custody, he immediately hired counsel and filed a "Motion to Correct Error and Set Aside Order of August 4, 2011." A hearing on that motion was not scheduled until October 11, 2011, and an evidentiary hearing was not completed until January 11, 2012. At that time, custody of E.M. was granted to Father.

By entertaining Maternal Grandparents' August 2, 2011 motion for change of custody when Father had not received notice (without a sufficient explanation as to why notice should not be required), hearing evidence on the substantive matter, and then issuing the August 4, 2011 Order (without complying with the requirements of Trial Rule

imprint of the name will satisfy the requirement; however, the attorney is required to maintain an original, signed paper copy [of the document] in his office." It is undisputed in this matter that Maternal Grandparents' counsel never had a signed consent from Father.

³ In an October 11, 2011 hearing on a motion to correct errors filed by Father, Father's counsel informed the court that Father had been told that E.B. merely would be visiting Kenya, not that Maternal Grandparents planned to seek custody and move the child to Kenya.

65(B)), Magistrate Johnston violated S.G.'s due process rights as well as Rule 1.1, 1.2, 2.2, and 2.5 of the Code of Judicial Conduct, which require judges to ensure the fairness, impartiality, diligence, and integrity of the judiciary. She also violated Rule 2.9(A) of the Code of Judicial Conduct, which forbids *ex parte* contacts absent a true emergency in which irreparable danger would result if the court does not act without the benefit of notice to the other party and a hearing; even then, the affected party is entitled to a hearing within 10 days of the *ex parte* Order.

The Commission recognizes that when child custody is at issue, judicial officers may be confronted with parties, and their attorneys, desperately seeking urgent judicial intervention. Such occasions call upon all judges and lawyers to proceed with heightened awareness of and high regard for the importance for a parent's right to be heard. In the absence of a true emergency that presents a risk of irreparable injury to a child, such right must be scrupulously honored and protected. This fundamental notion has long been emphasized and enforced by both the Indiana Supreme Court Disciplinary Commission and the Indiana Judicial Qualifications Commission.

The Commission now admonishes Magistrate Johnston for violating the Code of Judicial Conduct and the laws of the State. This Admonition concludes the Commission's investigation, and Magistrate Johnston will not formally be charged with ethical misconduct.

Questions about this Admonition may be directed to Adrienne L. Meiring, Counsel for the Commission, at (317) 232-4706, or to Magistrate Johnston.