

**DISTRICT OF COLUMBIA COMMISSION
ON JUDICIAL DISABILITIES AND TENURE**
515 FIFTH STREET, N.W., BUILDING A, ROOM 246
WASHINGTON, D.C. 20001
(202) 727-1363

DETERMINATION AND UNDERTAKING

Re: The Honorable Erik Christian
Associate Judge
Superior Court of the District of Columbia

The following Determination and Undertaking is intended to resolve a number of issues that were brought to the Commission’s attention in 2019, resulting in the Commission’s review of the cases In re: M.T. (Case No. 2017 DEL 0017) and Simon v. Alford (2019 DRB 000474). The Commission met with Judge Christian regarding its findings and concerns. The Commission discussed the facts of each of these cases and listened to his reasons and explanations for his conduct. As discussed in further detail below, based on the Commission’s inquiry, the totality of the circumstances and Judge Christian’s responses and his willingness to address certain issues related to judicial temperament, the Commission finds that this Determination and Undertaking is an appropriate resolution to resolve its inquiry.

I. In re: M.T. (Case No. 2017 DEL 0018)

The Commission found that Judge Christian violated canons of judicial conduct during a February 21, 2017 hearing by taking actions that were intended to send messages to attorneys and the public that were not germane to disposition of M.T.’s case and that were extraneous to the enforcement of law, specifically Judicial Code of Conduct (“the Code”), Canon 1, Rule 1.2 (Promoting Confidence in the Judiciary) and Canon 2, Rule 2.6(A) (Right to be Heard). The factual background and the specific violations of the Code are described below.

By way of background, at the outset of the February 21, 2017 hearing, Judge Christian was aware of the following facts: (i) the government had filed a praecipe to dismiss its case against M.T. the day before, which was a federal holiday; (ii) upon learning of the government’s praecipe, defense counsel had sought M.T.’s release from a youth shelter through the emergency judge on an emergency basis because there was no longer a legal basis to hold him; (iii) the emergency judge had consulted with Judge Christian but did not rule on defense counsel’s motion; (iv) on February 21, 2017, because of his custody status, M.T. did not control the timing of his arrival in court; and (v) when the case was called, Judge Christian’s clerk advised that M.T. was on his way to court.

Judge Christian’s comments at the February 21, 2017 hearing violated the canons in two ways.

First, despite the facts above and even though the case was being dismissed, when the case was initially called and M.T. was not present, Judge Christian stated that he would issue a custody order for M.T. (*i.e.* a bench warrant). Judge Christian explained to the Commission

that although he said he would issue a custody order during the hearing, he only intended to send a message to others in the courtroom not to be late in his courtroom and the custody order was not in fact entered into the system. Under the totality of the circumstances, the Commission finds that Judge Christian's comment about issuing a custody order for M.T. (whether it was entered into the court system or not) and his intent to thereby send a message to others in the courtroom was not germane to the disposition of M.T.'s case and was extraneous to the enforcement of law, which was a misuse of judicial power and created an appearance of unfairness in these and potentially other future proceedings.

Second, when M.T. and his counsel arrived in court later that morning, Judge Christian initially asked the government if it was going to trial. After the government referenced the praecipe filed dismissing the case, Judge Christian asked M.T.'s counsel why she thought her client's release was an emergency and then instructed her: "[I]n the future... this isn't an emergency matter. Just let your office know, these dismissals are not emergencies where you call the emergency judge. So don't do that in the future." The Commission finds, and Judge Christian in hindsight agrees, that counsel's advocacy regarding her client's custody status upon learning of the government dismissal was appropriate and consistent with her ethical duties. Further, the Commission finds that instructing counsel and her office not to raise these issues in the future as an emergency was not appropriate as it was not germane to M.T.'s case or legal status, it conveyed a message that the Court intended to chill similar advocacy in the future by counsel, her office and others in the courtroom, and it left an appearance of unfairness in the proceedings.

The specific Canons and Rules of the Code that are at issue include:

Canon 1, Rule 1.2 requires that "[a] judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety* and the appearance of impropriety." Commentary to Rule 1.2 is instructive in that it describes conduct that may undermine public confidence in the judiciary that the rule is intended to address. *See* Canon 1, Rule 1.2, Comments 1, 3 and 5 ("improper conduct or conduct that creates an appearance of impropriety" (Comment 1); "[c]onduct that compromises or appears to compromise the ... integrity [or] impartiality of the judge" (Comment 3); "conduct reflects adversely on the judge's ... impartiality [or] temperament...." (Comment 5)).

Canon 2, Rule 2.6(A) states "[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.*" Commentary to Rule 2.6(A) is instructive in that it states: "The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed."

The Commission has discussed with Judge Christian that sending messages to litigants or counsel that are not germane to the disposition of the case or that are extraneous to the enforcement of law are not consistent with the Code. The Commission also discussed with Judge Christian that matters related to an individual's liberty should be treated by the Court with a sense of urgency and without prejudice toward the litigant or counsel who are advocating appropriately and in accordance with their ethical duties. This should be done whether they represent the defendant or the government. In hindsight, Judge Christian agrees with the Commission's views and in the future will conform his conduct and comments accordingly.

II. Simon v. Alford (2019 DRB 000474)

The Commission reviewed in detail several complaints regarding Judge Christian’s handling of Simon v. Alford, a contested custody involving a 5-year old minor child.¹ The Commission notes that this was an unusual and complex case, which required consideration of the record and custody proceedings in their totality, as well as careful attention to the distinction between (i) legal error over which the Commission does not have jurisdiction and (ii) judicial misconduct.

To be clear, the Commission does not express any view as to the ultimate custody determination of the child or the legal position of either litigant. Further, the Commission is not basing this Determination and Undertaking on any single decision, action or legal error by Judge Christian. Rather, the Commission based its determinations on the totality of the record and what it found to be a pattern of conduct and disregard for procedural requirements.

The Commission determined that Judge Christian violated the canons of judicial conduct by: (i) creating an appearance of a lack of impartiality and a perception of unfairness under Canon 1, Rule 1.2 (Promoting Confidence in the Judiciary); (ii) not affording Ms. Alford an opportunity to be heard as required by established law under Rule 2.6(A) (Right to be Heard); and (iii) engaging in *ex parte* communications or receiving *ex parte* information, without affording the parties an opportunity to be heard as required by law and that impacted the perception of the fairness of the proceedings under Rule 2.9 (*Ex Parte* Communications). The factual background and the specific Code violations are described below.

Based on the record, the Commission determined that Judge Christian violated the judicial canons in the following three ways.

First, throughout the proceedings, Judge Christian did not follow certain established procedures required by clear and unambiguous law. For example, between February 14, 2019 when Judge Christian awarded temporary sole legal and physical custody of the child to Mr. Simon through May 22, 2019, Judge Christian did not notify or confer with the court in the child’s home state² despite multiple requests from Ms. Alford and her counsel, who appeared on a limited basis in two hearings on the issue of jurisdiction.³ Further, Judge Christian did not rule on certain substantive issues raised by Ms. Alford in multiple motions over the pendency of the case, including a motion to recuse in March 2019.⁴

¹ The parties appeared pro se for most of the proceedings, but Ms. Alford was represented by counsel briefly and on a limited basis for purposes of contesting jurisdiction. It is undisputed that prior to February 2019, the child had resided for her entire life in Virginia with her mother.

² See D.C. Code § 16-4604(d) (requiring communication with the home state judge). The home state custody proceedings in Virginia were initiated almost simultaneously with the proceedings in the District of Columbia, including the assignment of a guardian ad litem.

³ In the interim, the parties were required to attend multiple hearings in courts in both states on the same issues with no resolution, no coordination among the courts, and no opportunity for the litigants to be heard on legal and factual arguments as to jurisdiction or other custody and related issues in the best interests of the child.

⁴ While Judge Christian denied motions captioned as “Emergency Motions” by Ms. Alford (approximately 12 in total) because the Court found they did not meet the standard for an “emergency”, the Court never ruled on the underlying substance of Ms. Alford’s motions, including concerns raised related to the child’s medical issues, allegations of intrafamily threats, violence, visitation challenges, among others.

Second, Judge Christian did not afford the parties to be heard as required by law (leading up to and after his *ex parte* communications with the home state judge). When Judge Christian did consult with the child's home state judge on May 22, 2019, he took the call in his chambers; the call was not on the record nor was there any contemporaneous record of the discussion. Judge Christian reported a summary of his call in an Order and a hearing the following day. However, he did not schedule a hearing to allow the parties to be heard and to present legal and factual arguments following the *ex parte* call as required by established and unambiguous law.⁵

Third, in a hearing on July 11, 2019, Judge Christian made comments about possible complaints on the internet by a litigant that (i) were not germane to disposition of the case; (ii) were extraneous to the enforcement of law, (iii) the litigant perceived to be threatening, and (iv) created an impression of unfairness in the proceedings. Given the prevalence of social media and websites that allow for ratings of and commentary about judges, the Commission notes the following regarding this third issue.

- At the hearing, while Ms. Alford was trying to read a prepared statement in which she said that she had consulted with an attorney, Judge Christian inquired whether the attorney gave Ms. Alford legal advice about going on the internet “and commenting on this judge’s decisions....” He further inquired: “They didn’t give you legal advice about not doing this?” Ms. Alford took Judge Christian’s comment as threatening and as demonstrating his bias against her; in the totality of the circumstances, it reinforced Ms. Alford’s perception that Judge Christian was treating her unfairly.
- The Commission notes that by the July hearing, Ms. Alford had in fact complained about Judge Christian on a website called the “Robing Room”. Judge Christian advised the Commission that while he has looked up information about himself on the Robing Room and the internet generally, he did not believe he did so during the time period of this case nor did he recall seeing any complaints by Ms. Alford.
- However, the Commission found that Judge Christian’s comments (intentional or not) were perceived by Ms. Alford as threatening and intimidating. Whether Judge Christian saw the “Robing Room” complaints or not, his statements in Court suggested that he may have been aware that Ms. Alford was making complaints about him on the internet, a fact that was irrelevant to the proceedings or the Court’s role in the fair and just administration of the case.⁶ The statements further added to Ms. Alford’s perception and belief that Judge Christian was biased against her, that the proceedings were not fair and impartial, and she feared that the Judge’s

⁵ See D.C. Code §16-4601.09 (*ex parte* communication between courts on jurisdiction must be recorded and the parties must be given an opportunity to be heard before a decision on jurisdiction is made). The Commission notes that jurisdiction was a highly contested issue, and Ms. Alford filed several motions on this issue, including a substantive motion prepared by counsel, that were not addressed by the Court on their substance.

⁶ By this time, Ms. Alford’s motion to recuse also remained pending for approximately 4 months. The Court made further reference to Ms. Alford complaining about the Court in a subsequent July 17, 2019 order denying an Emergency Motion that she filed.

ability to fairly adjudicate the matters of custody or visitation for her daughter were compromised.⁷

The Commission also noted certain errors related to Judge Christian's November 6, 2019 Order, titled "Permanent Custody Order". According to Judge Christian, the Order was intended to be a default judgement that was subject to a motion to vacate by Ms. Alford. In other words, if Ms. Alford had requested modification of the Order to have visitation with her child, Judge Christian would have granted it. However, the Commission found that there is nothing in the Permanent Custody Order or the transcript that would convey to especially a pro se litigant that was the Court's intent. The Commission need not address these issues in light of Judge Christian's March 20, 2020 letter to the Chief Judge of Superior Court of the District of Columbia, seeking a remand of the case from the District of Columbia Court of Appeals to the Family Court Division of Superior Court for further proceedings.⁸

The specific Canons and Rules of Code are described below.

Canon 1, Rule 1.2. See citation and commentary in M.T. above.

Canon 2, Rule 2.6(A). See citation above. Commentary to the rule is instructive, particularly as it relates to pro se litigants. See Canon 2.6(A), Comments 1 (acknowledging the right to be heard is essential to a fair and impartial system of justice and that substantive rights can be protect only if procedures protecting the right to be heard is observed) and 1A (identifying a judge's affirmative role in facilitating the ability of every person who has a legal interest in a proceeding to be fairly heard, in particular with respect to self-represented litigants).

Canon 2, Rule 2.9(A) requires that "[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 or their lawyers, concerning a pending* or impending matter*...." While Rule 2.9(A) provides further guidance regarding where *ex parte* communications may and may not be acceptable, the rule and associated commentary make clear that no party should gain a procedural, substantive or tactical advantage as a result of the *ex parte* communication and that the judge must notify the parties and "give[] the parties an opportunity to respond." Further, Rule 2.9(B) requires that "[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."

Taken together and viewed in the totality of the circumstances in this case, the Commission determined that these issues – even if unintentional - created an appearance of unfairness in the administration of the proceedings. While the Commission is mindful that contested cases like Simon v. Alford may present special and challenging circumstances for judges, many of which are and will continue to be beyond the Commission's jurisdiction, the Commission also recognizes

⁷ See Belton v. United States, 581 A.2d 1205 (D.C. 1990) (concluding that the sentencing hearing was unfair because the trial judge had engaged in *ex parte* communication based upon which his impartiality might be reasonably questioned; reversing conviction); In re M.C., 8 A.3d 1215 (D.C. 2010) (finding that the judge was required to recuse herself after receiving emails from another judicial officer about a party, which constituted extrajudicial knowledge acquired outside of the judge's judicial functions and that was important to key issues in the case, including her ability to assess credibility of a critical witness).

⁸ The case has been remanded by the Court of Appeals on March 25, 2020. See 19-FM-1182. Judge Christian is no longer assigned to the Family Court and thus, will not be assigned to handle this matter on remand.

the importance for judges in such cases to assure that (i) required procedures are followed, (ii) *ex parte* facts are appropriately disclosed, (iii) the parties are afforded the right to be heard and the opportunity to respond, and (iv) the fairness of the proceedings receive their utmost attention.

In its discussions, the Commission was encouraged that Judge Christian recognized his mistakes that were made in both cases and credits his actions to request that the case of Simon v. Alford be remanded by the District of Columbia Court of Appeals back to the Family Division of the Superior Court of the District of Columbia for further proceedings.

The Commission commends Judge Christian's willingness to seek advice and mentoring from other experienced judges on the Superior Court, and his commitment to the Commission that he will continue to consult with them as needed.

Given Judge Christian's approach to these matters, his willingness to reflect on and improve the issues raised in this Determination and Undertaking, to conform his conduct to the standards of the Code of Judicial Conduct, and his overall service to the citizens of the District of Columbia, the Commission concludes that no further action or sanction is warranted.

The Commission makes this document public with the agreement of Judge Christian.

Erik P. Christian

Erik P. Christian
Associate Judge
Superior Court of the
District of Columbia

Date: 4/17/20



Jeannine C. Sanford, Esq.
Chairperson
District of Columbia Commission
on Judicial Disabilities and Tenure

Date: April 20, 2020