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IN THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT OF FLORIDA

CASE NO. _____
Lower Tribunal Case No. 2021-002070-CP-02

MELISSA AZRACK, individually, and as parent, natural guardian, next friend, and court appointed Guardian of the property of the Minor Child, E.M.A.,

Petitioner,

v.

JOHN M. MCDONALD, as Personal Representative of the Estate of MALCOLM JOEL DORMAN, Deceased,

Respondent

PETITIONER'S EMERGENCY PETITION FOR WRIT OF PROHIBITION AND MOTION TO REVIEW THE DENIAL OF PETITIONER'S MOTION TO STAY

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At a hearing conducted on April 9, 2024 [App. 539-559], when the probate court Judge was asked why he would deny an unopposed petition to reinstate Dr. Dorman as E.M.A.'s father on her birth certificate (where it appeared after her birth but was removed by the court, and where the trust documents and Dr. Dorman's Will also identify Dr. Dorman as E.M.A.'s biological father, thereby illegitimizing the child), the Judge responded: **"That was your client's decision. That was your client's decision to have a child out of wedlock, all right?"** (App. 552). And then, before hearing the Petition and considering the evidence that would have been introduced at the hearing, the Judge stated that **he felt sorry for Dr. Dorman, Dr. Dorman had been taken advantage of, and Dr. Dorman was "a little bit of a sucker.**" (App. 552-553). Conversely, when asked if he felt sorry for the child (who is only 5½ years old), the Judge responded: **"Ms. Azrack had a - - had a child out of wedlock after signing the - - the sperm doner agreement...."** (App. 552).

Besides expressing clear prejudice against Ms. Azrack for having a child "out of wedlock" and sympathy for Dr. Dorman, the

court **prejudged the Petition** to Reinstate Dr. Dorman's name on E.M.A.'s birth certificate, and **declared that the affidavit submitted by Dr. Zev Rosenwaks was not evidence**. (App. 548).

Dr. Rosenwaks is the Director and Physician in Chief of the Ronald and Claudia Cohen Center for Reproductive Medicine at Weill Cornell ("the Center") and was involved in Dr. Dorman and Ms. Azrack's joint (as a couple) IVF efforts to have a child together. (App. 65-75). Through the efforts of Dr. Rosenwaks, the Center and others, Dr. Dorman's sperm was collected in a very invasive procedure where his sperm was surgically removed from his testicles and then used to fertilize the egg that was implanted in Ms. Azrack's womb so that they could have a child together, and Melissa gave birth to E.M.A. on November 10, 2017. *Id.* at App. 69-72. According to Dr. Rosenwaks, who has known Dr. Dorman for many years, Dr. Dorman was thrilled when E.M.A. was born and after her birth, he remained in contact with Dr. Rosenwaks and sent him photographs of his daughter and updated him on her progress. *Id.* at App. 72.

The Probate Court Judge stated the Affidavit of Dr. Rosenwaks was not evidence prior to conducting a hearing where

the evidence would have been introduced. Dr. Rosenwaks testified unequivocally that **"There is absolutely no doubt in my mind that E.M.A. was born as a result of Malcolm Dorman's retrieved sperm in his efforts to have a child with Melissa Azrack.** Furthermore, I know with certainty how utterly thrilled he was when he learned that Melissa was pregnant, especially after all the unsuccessful IVF efforts they had in Miami. On multiple occasions after E.M.A. was born, Malcolm expressed how proud he was to have a chance to be a father to E.M.A." *Id.* at App. 72.

The Judge also admitted that for Azrack to file a Petition to Reinstate and have it heard by him, would make no sense because he admitted that he has prejudged the motion without having any idea what evidence would be introduced to support it. "[A]s a result of the email that you sent yesterday and as a result of the comments today, it really makes no sense for us to file the motion **because you have prejudged it**." The Court: "**Correct**." *Id.* at 13. (emphasis added).

These statements and multiple additional actions taken by the Judge, which will be discussed herein, require his immediate

disqualification. Not only would a reasonable person have a well-founded fear that he would not have his matters decided by a fair and impartial Judge, these statements, are beyond troubling in and of themselves.

INTRODUCTION

MELISSA AZRACK, individually, and as parent, natural guardian, next friend, and court appointed Guardian of the property of the Minor Child, E.M.A.("Petitioner"), through undersigned counsel and pursuant to Article V, Section 4(b)(3) of the Florida Constitution, Florida Rule of Appellate Procedure 9.030(b)(3), and Rule of Appellate Procedure 9.310(f), hereby respectfully petitions this Court to: review Judge Jose Fernandez's Orders denying Petitioner's good faith, well-founded Emergency Motion to Disqualify Judge Jose Fernandez and Emergency Motion to Stay, (App. 6-8); grant a Stay pending review of this Emergency Petition; and grant a writ of prohibition prohibiting Judge Jose Fernandez in the Probate Court from presiding over this case and all related matters.

Pending before the Probate Court is a Motion to Approve a Mediated Settlement Agreement ("Motion to Approve"), which was scheduled for April 9, 2024, at 9:30 a.m., and is expected to be reheard tomorrow at the same time along with Judge Fernandez insisting that the fee hearing commence tomorrow morning at 9:30 a.m. over Azrack's objection as the hearing had been officially cancelled.

A material term in the Settlement Agreement (see paragraph 9) is Movant's **Unopposed** Petition to Reinstate Malcolm Joel Dorman's Name as E.M.A.'s Father on Her Birth Certificate. (App. 9-20). Importantly, pursuant to the Settlement Agreement, that Petition was not to be heard prior to the Court's approval of the Settlement Agreement. However, prior to the hearing on the Motion to Approve, and without the Unopposed Petition to Reinstate being Noticed for Hearing, or a hearing on the Petition, the trial court *sua sponte* emailed the parties that he was not going to grant Petitioner's **Unopposed Petition to Reinstate** because h**e doesn't believe that is what Dr. Dorman would have wanted.**

Specifically, the trial court stated: "I don't believe I have to grant this even without objection or if by stipulation. This is not what Dr. Dorman wanted. I will not rewrite his life." (App. 21). After issuing this missive clearly prejudging the Petition, Respondents filed a Motion to Strike the Petition as prematurely filed. (App. 22-61). One hour later, before Petitioner had an opportunity to respond to the Motion to Strike, the court *sua sponte* entered an order denying the Petition to Reinstate. (App. 62-64).

Because the Petition to Reinstate was not yet before the court, the Petition had not yet been set for a hearing, and the court had not entertained argument on the Petition, the court's email prejudging the merits of the Petition is clearly grounds standing alone to disqualify Judge Jose Fernandez. Petitioner, therefore, filed a timely Motion to Disqualify Judge Jose Fernandez, and requested that he grant a stay pending review of a Petition for Writ of Prohibition. Having denied both, this Motion for Review is appropriate pursuant to Florida Rule of Appellate Procedure 9.310(f) and the Petition for Writ of Prohibition is appropriate

pursuant to Article V, Section 4(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(b)(3).

BASIS FOR JURISDICTION

This Court has jurisdiction to issue a writ of prohibition under Article V, Section 4(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(b)(3), and it is well settled that "'[a] petition for writ of prohibition is the appropriate vehicle to test the validity of the denial of a motion for disqualification.'" *Kline v. JRD Management Corp.*, 165 So. 3d 812, 813 (Fla. 1st DCA 2015) (quoting *Caleffe v. Vitale*, 488 So. 2d 627, 627 (Fla. 4th DCA 1986)). *See also Sutton v. State*, 975 So. 2d 1073, 1076 (Fla. 2008); *Wal-Mart Stores, Inc. v. Carter*, 768 So. 2d 21, 21-22 (Fla. 1st DCA 2000) ("The traditional remedy for interlocutory review of an order denying judicial disqualification is prohibition.").

This Court has jurisdiction to review the trial court's denial of Petitioner's Motion to Stay pending review of her Petition for Writ of Prohibition pursuant to Rule 9.310(f), Florida Rule of Appellate Procedure. *Amerisure Mut. Ins. Co. v. Taylor*, 44 So. 3d 593 (Fla. 3d DCA 2010) (Table).

THIS COURT'S STANDARD OF REVIEW

This Court reviews the legal sufficiency of a motion to disqualify *de novo*. *Errin v. Marin*, 357 So. 3d 716 (Fla. 4th DCA 2023). "In determining the legal sufficiency of a motion for disqualification, the test is whether the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial." *Casner v. Fury Mngmt. Inc.*, 324 So. 3d 1029, 1029-30 (Fla 3d DCA 2021) (internal quotations and citations omitted) and "the standard is the reasonable effect on the party seeking disqualification, not the subjective intent of the judge." *Id.* at 1030.

STATEMENT OF FACTS

This case has suffered multiple actions taken by Judge Fernandez, when viewed together, would lead a reasonably prudent person, and has created in the Petitioner, a well-founded fear that she has not and cannot receive impartial treatment and rulings by the presiding judge, Judge Jose Fernandez. This probate action was

initiated after Dr. Malcolm Joel Dorman died in 2021. Dr. Dorman, had considerable assets when he died, including a home in Golden Beach that was sold after his death for $24 million. Dr. Dorman was not married and had no children other than his infant daughter, E.M.A. conceived through in vitro fertilization ("IVF") (joining a women's egg and a man's sperm in a laboratory dish).

The uncontroverted evidence is that E.M.A. is the biological child of Dr. Dorman. It is undisputed that he acknowledged in writing in his estate planning documents admitted to probate and elsewhere that E.M.A. is his biological child, he celebrated his daughter's life and was actively involved in it with respect to her healthcare, education, extracurricular and other activities and he generously provided for his daughter and Azrack in his will.

It is also undisputed that Dr. Dorman and his partner, the Petitioner, Melissa Azrack, together as a couple, sought assistance of Dr. Zev Rosenwaks at the Ronald and Claudia Cohen Center for Reproductive Medicine at Weill Cornell ("the Center") in New York in 2015 after their efforts to have a child together through a clinic in Miami had failed. (App. 65-75). Through the efforts of the Center and

others, Dr. Dorman's sperm was collected, E.M.A. was conceived through IVF fertilization, and Melissa gave birth to E.M.A. on November 10, 2017. *Id*. at App. 72. According to Dr. Rosenwaks, who has known Dr. Dorman for many years and has served as the Director and Physician in Chief for the Center since 1988, Dr. Dorman was thrilled when E.M.A. was born and after her birth he remained in contact with Dr. Rosenwaks and sent him photographs of his daughter and updated him on her progress. *Id*. at App. 72.

As part of a timely filed Rule 1.540 Motion to Vacate [App. 482-534] the Final Order Removing Dr. Dorman's Name from his Daughter's Birth Certificate (without a required evidentiary hearing), an Affidavit by Dr. Rosenwaks was obtained attesting to these facts and verifying that Malcolm Dorman was, in fact, the biological father of E.M.A. Specifically, Dr. Rosenwaks averred that **"There is absolutely no doubt in my mind that E.M.A. was born as a result of Malcolm Dorman's retrieved sperm in his efforts to have a child with Melissa Azrack. Furthermore, I know with certainty how utterly thrilled he was when he learned that Melissa was pregnant, especially after all the unsuccessful IVF efforts they**

had in Miami. On multiple occasions after E.M.A. was born, Malcolm expressed how proud he was to have a chance to be a father to E.M.A." *Id.* at App. 72.

After protracted litigation, the parties reached a Mediated Settlement Agreement. (App. 80-100). A material provision to the settlement is contained in paragraph 9, which states the following:

> **E.M.A.'s Birth Certificate.** Following the entry of an order by the Court approving of this Agreement, Petitioner may file an unopposed petition seeking to reinstate Dr. Dorman's name back onto E.M.A.'s birth certificate (the "Birth Certificate Reinstatement Petition") in the Probate Proceeding. The Parties agree that Petitioner has standing to file the Birth Certificate Reinstatement Petition. Respondents will not file or otherwise make any objection to the entry of an order granting the relief sought by Petitioner in any such Birth Certificate Reinstatement Petition.

Id. at App. 90.

On Friday, April 5, 2024, the Estate filed a motion to approve the Settlement Agreement, (App. 76-103, and Azrack filed an Unopposed Petition to Reinstate Malcolm Joel Dorman's Name as E.M.A.'s Father on Her Birth Certificate. (App. 9-20). On the following Monday, April 8, 2024, at 12:01 p.m., prior to a hearing being set on

the Petition to Reinstate, which, pursuant to the Settlement Agreement could not be heard until the Court approved the Settlement Agreement, Judge Fernandez, *sua sponte*, without a request from any party, sent an unsolicited email (App. 21), clearly prejudging the Petition and stating as follows:

> "Folks, if this is a deal breaker, the hearing will proceed as scheduled.
>
> I don't believe I have to grant this even without objection or if by stipulation.
>
> This is not what Dr. Dorman wanted. I will not rewrite his life."

This email not only prejudges the unscheduled, unheard Petition to Reinstate Dr. Dorman's name as E.M.A.'s father on her birth certificate, it also demonstrates that the Judge has formed a personal opinion as to what he believes Dr. Dorman may have wanted although no hearing was conducted, and the Petition was not yet before the court. The motion to approve the Settlement Agreement specifically provides that the Petition may not be entertained prior to the approval of the Settlement Agreement and the hearing that was set for that purpose was set for the following day on April 9, 2024.

This is now the second time that Judge Fernandez has taken a position in this litigation, especially with regard to the Minor Child, without giving fair consideration, including conducting an evidentiary hearing, as to the justification for Dr. Dorman's name to be on his daughter's birth certificate. Here, however, Judge Fernandez went even further and expressed his personal feelings and opinions regarding a material component of the parties' Settlement Agreement and before Ms. Azrack was given an opportunity to be heard.

As if the foregoing was not bad enough, having had the benefit of the court's April 8, 2024, 12:01 p.m. email (App. 21), the lawyers for the Estate quickly filed a Motion to Strike Petitioner's Amended Petition (App. 22-61) and a Motion to Enforce Settlement Agreement (App. 22-61) at 2:56 p.m. the same afternoon. Less than an hour later, and before Azrack was able to file a response to the Motion to Strike, the court issued a *sua sponte* Order Denying Azrack's Amended Unopposed Petition to Reinstate. (App. 62-64).

The above Order was entered without any hearing at all, let alone an evidentiary hearing. Judge Fernandez did not even provide

Azrack's lawyers with any opportunity to be heard before ruling on, and in effect, granting the Estate's Motion to Strike the Amended Unopposed Petition to Reinstate Dr. Dorman's Name as E.M.A.'s Father on her Birth Certificate. Regardless, the earlier email on April 8, 2024, at 12:01 p.m. makes it perfectly clear that the Court will not fairly and impartially entertain the Unopposed Petition, much less grant it.

The substance of the Judge Fernandez's April 8, 2024, email wherein he expressed his personal opinions before permitting Azrack to present her case and **unopposed** arguments, and the entry of a *sua sponte* Order denying Azrack's Amended Unopposed Petition to reinstate Dr. Dorman's name as E.M.A.'s father on her birth certificate without any hearing whatsoever and prior to it being set for a hearing and decided before the Settlement Agreement was approved, as required by the Settlement Agreement itself, is well beyond the appearance of impropriety and mandates disqualification of Judge Fernandez.

It must also be noted that the prior Motions to Disqualify filed in this case were based on Judge Fernandez's refusal to conduct an

evidentiary hearing and factual findings he made without hearing the evidence (App.104-238); participating in *ex parte* communications with the Law Firm representing the Estate culminating in an *ex parte* $1.2 million Distribution Order (App. 239-308); denying Azrack's request for attorney's fees and costs without any oral pronouncements (App.309-334); refusing to acknowledge that Azrack had filed a timely *ore tenus* motion to stay as evidenced by a transcript of the proceedings (App. 335-470), and refusing to enter an order reflecting the denial of Azrack's motion pending appellate review, (a timely Petition for Writ of Certiorari was filed with the Third District and an Order to Show Cause was immediately issued requiring the Estate to respond) (App. 471-472); conducting a hearing on April 1, 2024 (App. 473-475) on the Estate's motion for sanctions while the same subject matter was pending before the Third District and a pending Motion to Disqualify Judge Fernandez, which he refused to rule on until **after** he made his rulings at the April 1, 2024 hearing (App. 476-478); and conducting a sanctions hearing at the unilateral request of the Estate with only one business day notice over the objection of Azrack and her attorneys and again

refusing to conduct an evidentiary hearing as required by law but entering the Sanctions Order against Azrack and all of her attorneys without making any of the requisite findings of fact to justify imposing sanctions against Azrack or her lawyers. (App. 479-481).

Although the cumulative effect of these actions warrants disqualification of Judge Jose Fernandez, his comments on the record and addressed at the opening of this Petition for Writ of Prohibition, now mandate disqualification. *See Kielbania v. Jasberg*, 744 So. 2d 1027, 1028 (Fla. 4th DCA 1997) (finding that the cumulative effect of the trial judge's participation at the hearing on the motion to disqualify, interjecting comments during petitioner's argument to clarify counsel's statements and comments verged on arguing with counsel about evidence and other issues required recusal).

ARGUMENT

I. The Law

"[E]very litigant is entitled to nothing less than the cold neutrality of an impartial judge." *Great American Ins. Co. v. 2000 Island Blvd. Condo. Assoc'n*, 153 So. 3d 384 (Fla. 3d DCA 2014),

recently reaffirmed in *Shabtai v. Shabtai*, 48 Fla. L. Weekly D1747, 1748 (Fla. 3d DCA August 30, 2023). *See also, Real State Golden Investment, Inc. v. Larrain*, 278 So. 3d 812 (Fla. 3d DCA 2019).

Motions to disqualify trial judges are governed by Fla. R. Gen. P., and Jud. Admin. 20330(h) governs the parameters of a trial court's ruling on motions to disqualify:

> **(h) Determination – Initial Motion.** The judge against whom an initial motion to disqualify under subdivision (e) is directed **may determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged.** If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion. **If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action.** Such an order does not constitute acknowledgement that the allegations are true.

(emphasis added). Fla. R. Gen. Prac. & Jud. Admin. 2.330(h) (2023). Canon 3 of the Florida Code of Judicial Conduct additionally mandates that a judge shall perform the duties of judicial office impartially and diligently. In pertinent part, Canon 3B directs:

> (5) **A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice...**
>
> (7) **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...**

(emphasis added), and Cannon 3C provides:

> (1) **A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration...**

(emphasis added).

The filing of a "legally sufficient" motion triggers the "stringent" rule of disqualification under Canon 3E of the Florida Code of Judicial Conduct. *Atkinson Dredging Co. v. Henning*, 631 So. 2d 1129, 1130 (Fla. 4th DCA 1994), and if a disqualification motion "is legally sufficient, the judge *shall* immediately enter an order granting disqualification and proceed no further in the action." Fla. R. Jud. Admin. 2.330(h). Additionally, the comments to Cannon 3E provides that "[a] judge is disqualified whenever the judge's impartiality might

reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply." *Corie v. City of Riviera Beach*, 954 So. 2d 68, 71 (Fla. 4th DCA 2007) (emphasis original).

In *Atkinson Dredging Co.,* 631 So. 2d at 1129, the Fourth District Court noted that "while cases may be factually distinguishable, the basic premise, with which we agree, is that: '**justice must satisfy the appearance of justice**' (emphasis added) (citation omitted). *See also McQueen v. Roye*, 785 So. 2d 512 (Fla. 3d DCA 2000)*; Marcotte v. Gloeckner*, 679 So. 2d 1225 (Fla. 5th DCA 1996) citing to and quoting *Atkinson Dredging Co.*: **"the appearance of justice proscribes the trial judge from continuing, even though the record may be void of any actual bias or prejudice on [the judge's] part."** (emphasis added).

The test for "legal sufficiency" is deliberately lenient "to ensure confidence in the judicial system," *Tableau Fine Art Grp., Inc. v. Jacobini*, 853 So. 2d 299, 301 (Fla. 2003), to avoid even the "appearance" of bias, *Marcotte v. Gloeckner*, 679 So. 2d 1225, 1226 (Fla. 5th DCA 1996), and "prevent an adversarial atmosphere from developing between the judge and the litigant" moving to disqualify

the judge. *Tableau Fine Art Grp.*, 853 So. 2d at 301. Under this deliberately lenient test, a trial court "shall not pass on the truth of the facts alleged," Fla. R. Jud. Admin. 2.330(h), but instead "must accept the facts alleged as true, *Brown v. St. George Island, Ltd.*, 561 So. 2d 253, 255 (Fla. 1990).

A party seeking to disqualify a judge need only show "a well-grounded fear that he or she will not receive a fair trial at the hands of that judicial officer. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." *Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983); *see, also, Valdes-Fauli v. Valdes-Fauli*, 903 So. 2d 214, 217 (Fla. 3d DCA 2005) ("It is not our function to determine how the trial judge actually feels, but rather what feeling resides in the petitioner's mind and the basis for such feeling"); *Hayslip v. Douglas*, 400 So. 2d 553, 555 (Fla. 4th DCA 1981).

The standard for determining the legal sufficiency of a motion for judicial disqualification is whether a reasonable person would fear that he or she cannot get a fair trial with the present judge under the circumstances outlined in the motion. *See Krawczuk v. State*, 92

So. 3d 195, 200 (Fla. 2012); *Deakter v. Menendez*, 830 So. 2d 124, 130 (Fla. 3d DCA 2002). Additionally, "when a trial court fails to act in accordance with the statute and procedural rule on a motion to disqualify, an appellate court will vacate a trial court judgment that flows from that error." *Shah v. Harding*, 839 So. 2d 765, 766 (Fla. 3d DCA 2003).

II. The Law Applied to the Facts of This Case

In this case, the Judge has demonstrated that he has deep-seated prejudices, beliefs, and opinions that have caused him to prejudge not only Azrack's **Unopposed Petition** to reinstate Dr. Dorman's name as E.M.A.'s father on her birth certificate, but Ms. Azrack herself, and calls into question every ruling he has made in this case. First, the Judge remarked at the April 9, 2024, hearing, that he had conducted a trial and "[t]here was absolutely no evidence introduced at that trial that he [Dr. Dorman] was the father, all right?" (App. 546). That statement was, however, false. As Mr. Franklin noted at the hearing, the Will and Amended Trust admitted into evidence during the trial were not in dispute. In fact, Dr. Dorman's Amended Trust is being implemented as part of the

settlement. Both the Will and the Amended Trust admitted into probate were prepared by Attorney Shawn Snyder, and both instruments indicate that Dr. Dorman is the biological father or that 'EMA' was his biological daughter. The trial court's response to Mr. Franklin's correction of its mistaken recollection of the record, was that although that evidence remains undisputed to this day, Judge Fernandez determined how much weight to afford that evidence and he "gave that evidence very little, if any, weight." *Id.* at 550.

When the court was asked why it would deny an unopposed petition to reinstate Dr. Dorman's name on E.M.A.'s birth certificate (where it appeared after her birth but was removed by the court, thereby illegitimizing the child), the court responded: "That was your client's decision. That was your client's decision to have a child out of wedlock, all right?" *Id.* at 552.

These comments, made on the record when the Judge knew there were two court reporters present at the hearing, demonstrate the depth of Judge Fernandez's related prejudices and help explain his actions, comments, and rulings in this matter.

The hearing on April 9, 2024, although brief, was shocking. Twice the Judge demeaned Ms. Azrack for having a child "out of wedlock." After expressing disdain for Ms. Azrack, the Judge expressed sympathy for Dr. Dorman and made findings, with absolutely no evidence, that Dr. Dorman had been taken advantage of and was "a little bit of a sucker." And, in his email, the Judge *sua sponte* expressed his opinions regarding Dr. Dorman's intent prior to conducting a hearing on Azrack's Unopposed Petition, at which Azrack would have presented unrefuted evidence of Dr. Dorman's intent. He then ruled on the Unopposed Petition even though it had not even been noticed for the hearing scheduled the following day, and with a pending Motion to Strike the Petition and before Azrack could even respond. These unsolicited actions highlight the reasonableness of Azrack's fear.

The case law is voluminous and clear; the trial judge's comments have to be viewed in the context of the case. *Valdes-Fauli*, 903 So. 2d at 217. In that case, this Court found that "where permanent alimony was a substantial issue to be decided, the trial court's 'alimony drone' comment alone was sufficient to place the

petitioner in fear that she will not receive a fair and impartial trial." *Id. See also Royal Caribbean Cruises, Ltd. v. Doe*, 767 So. 2d 626 (Fla. 3d DCA 2000) (finding that disqualification should have been granted where the judge's remarks suggested she had a pre-existing unfavorable opinion about the management and litigation tactics of the cruise line industry); *Roy v. Roy*, 687 So. 2d 956, 956 (Fla. 5th DCA 1997) (concluding that disqualification should have been granted where the trial judge referred to the former husband as "Mr. Dead Beat Man of the Year"); *Daren v. Williams*, 521 So. 2d 150 (Fla. 5th DCA 1988) (finding in a malpractice action that the trial judge was required to recuse himself where he openly expressed sympathy toward cerebral palsy victims).

It is also well-settled that a judge is not permitted to prejudge the case. *See State v. Gresham,* 214 So. 3d 780, 780 (Fla. 5th DCA 2017) (granting writ of prohibition and holding that comments made by a senior judge assigned to the case, indicating he had prejudged a motion to suppress were sufficient to put a reasonably prudent person in well-founded fear of not receiving a fair and impartial trial); *Pilkington v. Pilkington*, 182 So. 3d 776, 779 (Fla. 5th DCA 2015)

(requiring disqualification based on comments by the judge indicating he has prejudged the case or was biased); *Minaya v. State*, 118 So. 3d 926, 929 (Fla. 5th DCA 2013) ("Although a judge may form mental impressions and opinions during the course of hearing evidence, he may not prejudge the case.").

Here, the trial judge has made demeaning comments towards Ms. Azrack while expressing sympathy for others and comments reflecting that he has prejudged the Petition to Reinstate, which, for Ms. Azrack and as E.M.A.'s parent, is a material aspect of the Settlement Agreement – one she has agreed to pay the Estate $1.6 million for. She certainly has the right to expect the neutrality of the judge who will be deciding this very important issue.

REVIEW OF THE TRIAL COURT'S ORDER DENYING A STAY

Pending before Judge Fernandez is a Motion to Approve the Settlement Agreement, which contains paragraph 9, and providing as follows:

> **E.M.A.'s Birth Certificate.** Following the entry of an order by the Court approving of this Agreement, Petitioner may file an unopposed petition seeking to reinstate Dr. Dorman's name back onto E.M.A.'s birth certificate (the "Birth

> Certificate Reinstatement Petition") in the Probate Proceeding. The Parties agree that Petitioner has standing to file the Birth Certificate Reinstatement Petition. Respondents will not file or otherwise make any objection to the entry of an order granting the relief sought by Petitioner in any such Birth Certificate Reinstatement Petition.

*(*App. 76-103), and Azrack's Amended Petition to Reinstate Dr. Dorman's name as E.M.A.'s father on her birth certificate. Paragraph 9 is a material term in the Settlement Agreement which Ms. Azrack was willing to provide considerable consideration to obtain. However, the Petition to Reinstate is the matter the trial court has admitted he has prejudged. It is, therefore, clear that Ms. Azrack has a justifiable fear that she cannot have a fair and impartial hearing on the matter before this judge. Under these circumstances, the trial court should have granted Azrack a stay pending resolution of the Petition for Writ of Prohibition.

Azrack also submits that based on the grounds articulated in the Petition for Writ of Prohibition, she has the likelihood of success on the merits and thus this Court should, respectfully, grant a stay pending its review.

Lastly, **the stay is an emergency as the trial court has ordered the parties to appear for the fee hearing tomorrow, April 10, 2024 at 9:30 a.m**. even though the fee hearing had been cancelled. [App. 535-538].

CONCLUSION

No lawyer wishes to disqualify a judge, but there are those rare circumstances that warrant, and in this case, compel disqualification of this judge on this matter. Azrack, therefore respectfully requests that this Court issue a stay pending review and grant the instant petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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By: */s/ Leslie B. Rothenberg*

/s/ Barry S. Franklin