APPENDIX

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

LETA HOALCRAFT,	)	
Plaintiff	)	
	)	
vs.	)	No. 91068
	)	
WALTER TROY SMITHSON,	)	
Defendant	)	

ORDER

This cause came before the Court on January 4,2000, on the motion to set this case for a final hearing, said motion filed by Defendant, Walter Troy Smithson. The Court found the motion to be well-taken and that it should be granted. At the hearing on the motion the Court noted that although it had previously disregarded as evidence certain previous statements of counsel for Plaintiff, Leta Hoalcraft, concerning a discussion he allegedly had with the prior judge assigned to this case on the issue of a "review" of issues raised by the pleadings, the Tennessee Court of Appeals did not in its opinion of December 17, 1999. The Court finds that the appellate court opinion converted counsel for Plaintiff into a material witness on a crucial, contested issue in this case which has yet to proceed to a final hearing.'

It is therefore ORDERED as follows:

1. A final hearing on Mr. Smithson's petition for change of custody, as amended January 4, 2000, is set for February 28, 1999, at 9:00 a.m.

2. Before January 18, 2000, counsel for Plaintiff shall file a brief on the issue of whether he should be disqualified from representing Plaintiff any further in the trial court

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1. The issues of custody, visitation and removal were to be "reviewed" approximately one year after entry of judgment of July 17, 1997. The Tennessee Court of Appeals relied upon the testimony of Leta Hoalcraft's attorney, R.E. Lee Davies, concerning what "review" meant and thus there had yet to be a "review" of these issues before the petition for change of custody was filed on October 13, 1998. As a result, the Tennessee Court of Appeals apparently determined that the word "review" does not mean what it traditionally is defined to mean in finding that the judgment of July 17, 1997, was final and not subject to review or revision under T.R.C.P. 54.02, as guided by the Tennessee Supreme Court's decision in Fox v. Fox, 657 S.W. 2d 747 (Tenn. 1983). To do this, the Court of Appeals has apparently sidestepped the traditional and historical rule that the Court only speaks through its minutes found in its Orders and not through hearsay testimony given only by a single attorney of record concerning what a judge may have said oft the record. If a T.R.A.P. 11 application is taken and granted, the Tennessee Supreme Court should correct what appears to this Court as plain error in accepting Mr. Davies' testimony concerning what the word "review" means in the judgment of July 17, 1997.

in this case pursuant to DR 5-102 (A), it appearing that he has now been recognized as, accepted as or deemed a material witness in this cause which is not final. A hearing on whether disqualification is required is set for January 18, 2000, at 9:00 a.m.

3. Upon consideration of the amended petition, the Court on its own motion appoints Ms. Julia Stovall as guardian ad litem of the minor children. Ms. Stovall shall be permitted to interview the children and conduct an investigation into the circumstances of this case. The issue Ms. Stovall's fees shall be reserved pending the final hearing. Ms. Stovall shall file a written report before the trial and address what is in the best interests of the minor children in this case.

It is so ORDERED.

This the 6th day of January, 2000.

RUSS HELDMAN, CIRCUIT COURT JUDGE

Certificate of Service

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

LETA HOALCRAFT,	)	
Plaintiff	)	
	)	
vs.	)	No. 91068
	)	
WALTER TROY SMITHSON,	)	
Defendant	)	

MEMORANDUM

Issues pending before the Court and addressed at the hearing on January 18, 2000, turn on whether the last custody determination rendered by this Court and addressed on appeal was a temporary or pendente lite custody order or a final custody order with no expectation that a further hearing would be necessary. The last trial court judgment or order addressing custody was entered January 15, 1999, after proceedings occurring on January 5 and 6, 1999. The transcript of these proceedings reveal this Court found as follows:

> The whole purpose of this proceeding is temporary in nature, not a final proceeding. This is a proceeding, as far as this Court is concerned that has arisen, I'll say it again, as a result of the fact that the Court previously entered an order, and this matter was placed on the review docket in the summer of 1998. It wasn't placed on the review docket. The order anticipated that there would be a review of this matter in the summer of 1998, rightly or wrongly. There is a petition that this order be changed, so whether that interpretation is right or wrong, it's still a petition that needs to be dealt with.
>
> And so the Court is in the process of reviewing this matter based upon the circumstances that have occurred since the last hearing. That's the way I look at it.
>
> There's going to be a final hearing, but this is not a final hearing. This is to adjudicate the temporary placement of these children pending final hearing.
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> * * * * *
>
> But based upon the power that I have, I'm going to set aside that sentence that says the prior petition for change of custody is dismissed based upon what I've heard the last couple of days, and I'm going to allow Mr. Smithson to proceed on a petition for change of custody at the final hearing at a later date. I'm going to allow Mrs. Hoalcraft to amend her petition for permission to remove and ask for any other relief that she wants to prior to that final hearing. And so I view this case now in the posture in the case where there's a pendente lite issue before me.
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> * * * * *

> And so since this case is in a posture of still pending and not final, this case differs from the Harris case in that these children have now testified twice about their preference. They've testified, Callie especially, very passionately about what she wants, to the point yesterday, once the questioning was over, she continued to want to tell me, in tears, how badly she wanted to try living with her father, knowing that she is growing up and has lived with her mother for a period of her life. She wants to look back on her life and know that she's really lived with both of them. I think that's where she was coming from. I don't think she meant any harm necessary, in the order. And I will expressly find that this is not a final determination.

The words used in the Order of January 15, 1999, makes it clear the last custody determination was not a final one:

> "Temporary custody of Calli and Trevor Smithson is awarded to Father pending a final hearing regarding a final detemination of custody."

In the appellate court opinion entered December 17, 1999, at page 6, it states:

> "The judge did, however, indicate that this was only a temporary ruling until a full trial could be held. Pursuant to this finding, an order granting Mr. Smithson temporary custody was entered on January 15, 1999."

The fact that the order of January 15, 1999, was certified as "final" pursuant to T.R.C.P. 54.02 so it could be appealed as a matter of right, rather than pursuant to appellate court permission under T.R.A.P. 9, does not change the intrinsic posture or character or nature of the judgment as a temporary or pendente lite determination. To conclude otherwise would deprive Mr. Smithson of due process of law and require a feat of intellectual dishonesty.

Therefore, the Court concludes that the judgment or order of January 15, 1999, constitutes a temporary or pendente lite custody determination and that the parties and the Court expected and anticipated that after January 15, 1999, the case would proceed to a final hearing where a final custody determination based on the parties' pleadings would be made.

The "amended" petition or complaint, filed by Mr. Smithson on January 4, 2000, in light of this conclusion, is not properly denominated. Instead of being a mere "amended" complaint under T.R.C.P. 15.01, which does not expressly require the filing of a motion before leave to amend is freely granted if justice so requires, this pleading should be

properly deemed an amended and "supplemental" petition or complaint. T.R.C.P. 15.04 permits the filing of a supplemental complaint or pleading on motion of a party. Since a motion was not filed prior to the pleading being filed, paragraph 1 of the Order of January 6, 2000, setting the case for trial on February 28, 2000, on an "amended" complaint only, will be vacated. Since both parties are still entitled to a final hearing or a final custody determination based on their former pleadings, it most likely would be proper to permit Mr. Smithson to supplement his pleadings by filing what the Court now deems an amended and supplemental pleading to his former complaint or petition, if a proper motion is filed. This is especially true where the Order of January 15, 1999 states: "Mother may amend her pleadings if she desires." This was in anticipation of a final hearing to come.

Because Mrs. Hoalcraft should have at least 30 days after a supplemental pleading is filed to answer and prepare to defend against the same, the trial or final hearing in this case *shall be* continued from February 28, 2000, to a date to be determined after the Court rules on the disqualification issues and the issue of whether the prior order should be vacated any further for reasons advanced by Ms. Hoalcraft in her motion. All unresolved pending issues remain under advisement.

This the 26th day of January, 2000.

RUSS HELDMAN, CIRCUIT COURT JUDGE

Certificate of Service

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

LETA HOALCRAFT,	)	
Plaintiff	)	
	)	
vs.	)	No. 91068
	)	
WALTER TROY SMITHSON,	)	
Defendant	)	

SUPPLEMENTAL MEMORANDUM

Issues which have been under advisement in this case are as follows:

1. Whether the Order of January 6, 2000, said Order setting the case for a final hearing, should be vacated in its entirety because of certain findings in the opinion of the Tennessee Court of Appeals of December 17, 1999 and because Leta Hoalcraft claims she had no opportunity to be heard before the Order was entered.[1]

2. Whether counsel for Ms. Hoalcraft, R.E. Lee Davies, should be disqualified since, as a witness to and participant in an ex parte communication with a prior trial judge, his testimony about what was said was relied on and accepted by the Tennessee Court of Appeals as to whether a "review" of the issues of custody, relocation or visitation by this Court were necessary before the judgment of July 17, 1997 became final pursuant to T.R.C.P. 54.02. [2]

3. Whether the undersigned should recuse or disqualify himself from this case for setting the case for a final hearing without hearing oral opposition by Ms. Hoalcraft to Mr. Smithson's motion to set filed on December 28, 1999, served by mail on December 27, 1999, and set on the Court's domestic motion docket for heating on January 4, 2000, and for addressing the appellate court decision in the Court Order of January 6, 2000, all of which Ms. Hoalcraft claims "gives rise to whether this Court's impartiality might reasonably be questioned" and requires disqualification under Canon 3 E. (1) of Rule 10, Tennessee Supreme Court Rules.

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1. No legal authority is set forth in Ms. Hoalcraft's Motion to Vacate Order.

2. Canon 3 D.(2) of Rule 10 of the Rules of the Tennessee Supreme Court, the Code of Judicial Conduct, states in pertinent part: "A judge who receives Information indicating a substantial likelihood that a lawyer has committed a violation of the Code of Professional Responsibility should take appropriate action."

4. Whether Mr. Smithson's "Amended Petition," filed January 4' 2000, should be dismissed or Mr. Smithson allowed to file and proceed on a "Supplemental Petition for Modification of Custody," received on February 2, 2000.

As explained in detail in the Memorandum of January 26, 2000, this case has yet to proceed to a final hearing because the prior order or judgment (which was reversed on appeal) made only a temporary or pendente lite custody determination. The appeal was made possible as a matter of right *only* because the pendente lite order or judgment of January 15, 1999, was made final pursuant to T.R.C.P. 54.02 by the express largesse of this Court. As is found in the Court of Appeals' Opinion of December 17, 1999, at page 8, "[a]n interim order is one that adjudicates an issue preliminarily." Certifying a pendente lite, temporary or interim order as "final" so an appeal as of right may ensue does not preempt a litigant's right to a full trial on the merits or a final hearing after proper time has elapsed for discovery and trial preparation. Limiting a litigant to a pendente lite hearing only, especially in a domestic relations case involving children, would constitute a violation of due process. Public confidence in the judicial process would erode, if not collapse. Such an absurd result would occur in that the Court could at any time after a pendente lite hearing surprise any litigant who had expected ultimately a final trial on the merits by foreclosing that expectation with a T.R.C.P. 54.02 designation to the temporary order. The Court of Appeals fixed the correct posture of this case as "interim" only on page 7 of its opinion, stating: "The trial judge did, however, indicate that this [judgment of January 15, 1999] was only a *temporary* ruling *until a full trial* could be held *pursuant to this finding*, an order granting *temporary* custody was entered." (Emphasis added). The only sound, logical conclusion is that a temporary ruling or judgment has now been reversed. A permanent judgment, entered after a final trial or hearing, was not reversed because one never existed in the first place. The law of the case is merely that custody should not change pending a final hearing or trial.

Ms. Hoalcraft's reliance on findings by the Court of Appeals to claim that this case is over is an attempt to deprive Mr. Smithson of his constitutional rights of due process inherent in and at a final hearing or trial on the full merits. Further, to charge this Court with bias, prejudice and the appearance of partiality in setting the case for final trial and

appointing a guardian ad litem is clearly unsustainable. By finding that all allegations were addressed and that no exigencies occurred between July 1997 and January 1999, the Court of Appeals only made findings concerning evidence adduced at a temporary hearing during a preliminary or pendente lite stage of the case, certainly long before adequate time for discovery and full and complete trial preparation could be had. This does not mean that evidence dated or occurring between July 1997 and January 1999 that is introduced and properly qualifies as an exigent circumstance at a final hearing or trial cannot be considered by this Court at said final hearing or trial. This does not mean Mr. Smithson is precluded from having that opportunity at said final hearing or trial. This does not mean that all Mr. Smithson is entitled to is a pendente lite or temporary hearing on his claim that custody should be changed. This does not mean that the Court as parens patriae of the children must be without power to call upon the assistance of a guardian ad litem to assist it in making a final determination affecting the best interest of the Smithson children, if the appropriate burden of proof is met.[3] If the Court of Appeals meant otherwise, it would have expressly said so or made it clear that Mr. Smithson was not entitled to receive what similarly situated pendente lite litigants receive: a full and fair final hearing or full trial on the merits after full pre-trial discovery and preparation has been had. The Court of Appeals did not expressly hold that a final hearing or trial should not be had. It could not and would not do so without committing a clear violation of Mr. Smithson's rights under Article 1, Sections 8 (law of the land clause) and 17 (open courts clause) of the Tennessee Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Section 17 mandates that "all courts shall be open," and this Court cannot shut the door of the courthouse to Mr. Smithson or any litigant by improperly construing words in a Court of Appeals Opinion out of their proper pendente life context. See, e.g., Whitaker v. Whitaker, 957 S.W. 2d 834, 839 (Tenn. App. 1997)(provisions imposed by judicial decree which prevented a father "from seeking relief" concerning visitation violated "open court provision of the Tennessee Constitution set out in Article 1, Section 17"). This case must proceed to a final hearing.

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3. Rubin v. Kirschner, 948 S.W. 2d 742, 747 (Tenn.App. 1997).

Since there has been no stay of proceedings issued pending any appeal,[4] it was a proper matter for the Court's discretion to set the case for a final hearing after the motion to set was called on the Court's docket on January 4, 2000, regardless of whether Ms. Hoalcraft was given an opportunity to be heard in opposition to the setting of the same.[5] T.R.C.P. 40 provides in part: "The courts shall provide by rule for the setting of cases for trial (a) without request of the parties but upon notice to the parties, or (b) upon request of a party and notice to other parties." Local Rule 7(c) of the 21st Judicial District provides as one of 3 options that cases "shall" be set for trial "[b]y the court with notice to counsel." These rules do not require hearings but permit this Court on its own motion, if it desires, to set a case for trial. All that is required that counsel for both parties receive notice of the date set by the Court. Merely setting the case for final hearing at a later date cannot therefore demonstrate a disqualifying bias or prejudice under these circumstances.[6]

Neither can the appointment of a guardian ad litem in this case. Such power of appointment always rests within the sound discretion of the trial court in child custody cases. See, e.g., Herrera v. Herrera, 944 S.W. 2d 379, 384-385 (Tens. App.1996). That discretionary decision shall not be reversed by an appellate court "unless it affirmatively appears that the trial court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining." Marcus v. Marcus, 993 S.W. 2d 596, 601 (Tenn. 1999). It certainly is not desirable that the Smithson children testify again in this case, if the same can be avoided, especially where they have already made their desire so clear that they want to live with their father and the Court of Appeals preliminarily is of the opinion that none of Mr. Smithson's preliminary evidence constitutes a requisite

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4. T.R.C.P. 62.03 requires an order staying these proceedings pending appeal to prevent action from being taken in this Court to proceed to a final hearing. See, e.g. Young v. Young, 971 S.W. 2d 386, 393 (Tenn.App.1997).

5. The Court's Order of January 6, 2000, gives notice of a final hearing date for February 28. For reasons set forth in the Memorandum of January 6, 2000, that date became impracticable and 'will be vacated."

6. Mr. Davies received initial consent from the attorney for Mr. Smithson for a continuance of his motion to set on the representation that Mr. Davies could not appear to oppose the same because he would be in trial before another Circuit Judge. However, on January 4, 2000, that judge had made himself available to assist with hearing cases called on the civil docket because the trial (in which Mr. Davies was to participate) had settled. By the time the motion to set was called, the basis for consent for a continuance did not exist. It ultimately appeared to the Court that Mr. Smithson and his counsel, both present at the call of the docket, still desired a future trial date to be set that day. It was proper for this Court to grant the motion under all circumstances.

exigency to justify a change of custody at the pendente lite stage of this case. A guardian ad litem appointment is therefore appropriate before there is any further contested hearing in this case. See, also, T.C.A. 36-4-132 (a), which gives a trial court the discretion to appoint a guardian ad litem "on its own motion."[7] There is no disqualifying bias or prejudice or partiality in the appointment of a guardian ad litem for the Smithson children.

The custody and relocation Order or Judgment of July 17, 1997, states in part: "This case *shall* be placed on the review docket in the summer of 1998 when Plaintiff returns from Thailand with the children." (Emphasis added). At the pendente lit hearing of January 4, 1999, the Court was called upon to determine the impact of the failure of the case being placed on the "review" docket on the finality of the prior custody detemination. The following exchange occurred:

> THE COURT: Mr. Davies, what do you understand the statement in that prior order that was entered, "This case shall be placed on the review docket in the summer of 1998, when plaintiff returns from Thailand with the children"?
>
> You made presentation to the Court about the last time we were in court on this case. I just wanted to give you an opportunity to state exactly what you understand as to why there was not a review at that time.
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> MR. DAVIES: Well, I guess there - that's two questions. And the first thing I guess I ought to address is what the review was for.
>
> We don't have a transcript of the hearing. But I can tell you that the children's testimony today wasn't really any different than their testimony back in 1997. They both said that they didn't want to go to Thailand; they wanted to live with their father.
>
> And Judge Bell decided that - my client has always had custody of these children. She had custody from the divorce, from the very-beginning. And so Judge Bell, of course, heard the proof under the Abby vs. Strange ruling.
>
> And there were several things going on at that time. What
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> he said was, first of all, if my client met the requirements of Abby - Abby vs. Strange-, then she would be allowed to move to Thailand unless Mr. Smithson was able to prevail in his counterclaim to change custody. And if it got to that point, then there would be" a comparative fitness test as to who was the most fit parent.
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> And Judge Bell, as you can tell from the order, found that Ms. Hoalcraft met the requirements of Abby vs. Strange. And then he went ahead and found that Mr. Hall - Mr. Smithson did not prevail on his counter-claim to change custody.

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7. The word "for" which precedes "dissolution of marriage involving children" in T.C.A. 36-4-132 means "[b]y reason of; with respect to; "because of," "on account of," or "in consequence of." Black's Law Dictionary (6th ed.1990). Accordingly, "an action for dissolution of marriage involving minor children" includes any post-divorce custody action because the same always occurs In consequence of the "dissolution of marriage involving minor children."

And then what he said was, we'll have this review. We'll just have - set it for review to see how things are going when they come back from Thailand. And so my understanding was that he wasn't going to change his mind because of whether they came back in and said they wanted to live with their father again. They've already said that. He was just wanting to make sure that Thailand was, you know, an okay place, that they were - nothing terrible was going on in Thailand once they got down there.

And, of course, we've heard from the children. Both of them have said that Thailand was fine. They don't have any problems with Thailand. They - you've got their grades.

They've done well in Thailand.

So nothing has changed that would cause this Court to find there's been a change of circumstances since the Court's last ruling on this. We went through - I don't know if it was a day or two days of trial where we talked about comparative fitness and things like that between both parents, which this court hasn't heard anything about from my client's perspective.

So that was the only reason why Judge Bell decided he should have a review, was kind of just to check up and see if Thailand was okay. And if Thailand, something bad was going on in Thailand, then he was going to look at it again.

And so when the time - you know, as you notice, this order doesn't say when or how we get to this review or anything like that. It just says to be reviewed

So I'll tell the Court, as an officer of the court, when Ms. Hoalcraft came back last summer for the visitation that was scheduled, she asked me what to do. She said, you know, there's this order down.

And I said, "Well, there's no date to appear. I'll call the Judge and ask him what he wants to do; does he want us to come in on some date for this review or whatever, and I - and I'll report back to you."

And so I did call the Judge and said, "We've got this order down here that says that you wanted us to come back for a review. What do you want us to do?"

And Judge Bell said, "You don't need to do anything unless there's a problem." He said, "If there's a problem from your end, set it for a review."

So I said, "Okay."

So I called my client back, and I said, "The Judge says unless you have a problem, that there's no need to have a review."

THE COURT: What if there was a problem from the father's end of it? Would he have had a right to

'MR. DAVIES: Well, I suppose he would have, but I'm not his lawyer. I don't know what he had on his mind.

You know, it seems to me each side is responsible for their own behavior. And my client, seems to me, is the only person who did anything about his order, and yet they're trying to hang it on her. And she's the only one who made any contact with the Court at all about whether there should be a review.

So, that's what I think Judge Bell meant by - when he said there should be a review. And then the second is what I'm telling you what Judge Bell told me when I called him about whether he wanted to have a review.

At the time, this Court "had no reason to doubt" what Mr. Davies said "concerning his *understanding* of the posture of this case" up for review in 1998. What was stated by the Court was an observation, not a "finding" of fact.[8] However, this Court did not accept or rely on anything Mr. Davies testified to whatsoever in deciding as it did in its January 15, 1999 order or judgment that the Order of July 17, 1997 "contemplated a 'review' of this case after a period of time had passed" with the children being under Ms. Hoalcraft's custody in Thailand and therefore was "not a final order."

There are a very good reasons why this Court did not accept or rely upon Mr. Davies' testimony.[9] *First*, what the prior trial judge said orally to Mr. Davies was not the judgment of the Court and could not be used to alter the plain meaning of the judgment which required ("shall,") placing the case back on the docket for "review."[10] This is because no court "speaks" by means of oral ex parte communications between a trial judge and an attorney for one litigant to a case. As has been held recently by the Middle Section Court of Appeals in the extremely well-reasoned case of Environmental Abatement. Inc. v. Astrum R.E. Corporation, App.No. M-1998-00871-CO-AR3-CV (Tenn.App. Feb.29, 2000),

> The phrases "until entered by the court," "enter judgment," and "make the agreement the judgment of the court" as used in Harbour[v. Brown. 732 S.W. 2d 598, 599 (Tenn.1987)], must be interpreted by reference to the well-settled rule that "[a] court speaks only through its written judgments, duly entered upon its minutes. Therefore, no oral pronouncement is of any effect unless and until made a part of a written judgment duly entered." *Sparkle Laundry & Cleaners, Inc., v. Kelton*, 595 S.W. 2d 88, 93 (Tenn. Ct. App. 1979); see *Massachusetts Mut. Life Ins. Co. v. Taylor Implement & Vehicle Co.*, 138 Tenn. 28, 36, 195 S.W. 762, 765 (1917).

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8. "I do believe that Mr. Davies as an officer of the Court has faithfully represented to the Court what happened last summer concerning his understanding of the posture of this case in the sense that this case which states it will be placed on the review docket in the summer of 1998, when Plaintiff returns from Thailand with the children. And have no reason to doubt what he has said about that."

9. What Mr. Davies said to the Court about what the prior trial judge told him was found to be or referred to as "testimony" by the Court of Appeals on page 8 of its Opinion: "According to testimony, the purpose of the review docket was to ensure the parties could go back to court if there was a problem between July 1997 and the summer of 1998." The substance of Mr. Davies' testimony is evidenced on pages 4 and 8 of the opinion.

10. This case was never placed on any summer 1998 "review docket." There is no evidence whatsoever to the contrary, despite what the Court of Appeals states on page 4 of its Opinion. Nevertheless, since the judgment used the word "shall,." it really did not matter what the parties did or did not do. It was incumbent upon this Court to place the case back on the docket for review and to give notice to the parties. The Court of Appeals held that "a final order" is one "leaving nothing else for the trial court to do.' Without Mr. Davies' "testimony," it is clear that the Court of Appeals could have found that there was something required of the Court to do before the order or judgment became "final."

What Mr. Davies testified to concerning what the prior trial judge told him (regardless of its hearsay and ex parte offensiveness) was at best a mere "oral pronouncement" which well settled Tennessee law teaches cannot be considered as having "any effect" as a judgment. That is why this Court had this to say on January 4, 1999:

> First of all, I want to address how I perceive the status of this case. And all I can do is rely upon the previous orders of the Court because the Court speaks through its minutes, and that's reflected in the orders of the Court, not necessarily an oral ruling.

By saying "all I can do is rely on the previous orders of the Court," the Court was implicitly "saying" that it could not consider the testimony of Mr. Davies and that it would not and could not rely on, consider, or accept any of the same in deciding the meaning of the prior judgment and construing the same as to the word "review" or "review docket." What Mr. Davies testified the prior trial judge said to him was of no effect to this Court. This Court was simply following the plain words of the law of judgments and the plain words of an unambiguous order or judgment. Nothing this Court said or did can or should be construed otherwise.

Second, the act of Mr. Davies testifying while remaining counsel for Ms. Hoalcraft clearly contravenes DR 5-102 (A) of the Tennessee Code of Professional Responsibility, Rule 8 of the Tennessee Supreme Court Rules, because Mr. Davies did not first withdraw as counsel for Ms. Hoalcraft. DR 5-102 (A) states:

> Withdrawal as Counsel When the Lawyer Becomes a Witness. (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in the lawyer's firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial and the firm, if any, shall not continue representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in the lawyer's firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

None of the exceptions found in DR 5-101 (B)(1) through (4) apply. The testimony of Mr. Davies does not relate *solely* to an uncontested matter, it does not relate *soley* to a matter of formality, and it does not relate to the nature and value of legal services rendered. Although Mr. Davies is a competent and successful attorney, there has been no evidence Mr. Davies brings a "distinctive value" as counsel in this particular case. This Court could not and cannot accept or rely on the testimony of Mr. Davies without disqualifying him,

something this Court first declined even to consider over a year ago, for it was clear then that this Court could not accept what Mr. Davies said the prior trial judge told him anyway without violating the rule that courts speak only through their written judgments, duly entered upon their minutes.

Third, this Court could not accept Mr. Davies testimony because it contained the assertion of what appeared to be an ex parte communication between Mr. Davies and the prior trial judge. Mr. Davies appears to have admitted such at a hearing on February 15, 2000. Canon 3 B. (7) of Rule 10 of the Rules of the Tennessee Supreme Court, the Code of Judicial Conduct, forbids this Court ("shall not . . . consider") from considering ex parte communications except under certain circumstances. Those exceptional circumstances are enumerated under Canon 3 B. (7) (a) (i) or (a) (ii). The Court is of the opinion that subsection (a) is inapplicable because the issue of "review" is an issue which deals "with substantive matters or issues on the merits," that is, review of the prior custody, visitation and relocation determination.[11] There is no evidence that those exceptional circumstances exist or have existed.

Now the Court of Appeals, by its opinion, has accepted Mr. Davies' testimony and bound this Court to accept the same on the "review" issue before proceeding to a final hearing according to the law of the case. Ladd v. Honda Motor Co., Ltd., 939 S.W. 2d 83, 90 (Tenn.App. 1996).[12] The Court of Appeals did not address certain issues addressed by this Court in this Supplemental Memorandum, including whether Mr. Davies' disqualification must result if his testimony concerning the ex parte communication is accepted. The Court cannot presume the Court of Appeals addressed this issue since it did not expressly say so and to conclude otherwise would cause this Court to assume that

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11. Canon 3 B. (7)(a) provides in part: "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 concerning a pending or impending proceeding except that: (a) Where circumstances require, ex parte communications for scheduling , administrative purposes or emergencies that do not deal with substantive matters or issue on the merits are authorized; provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication; and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parts communication and allow an opportunity to respond."

12. The law of the case only applies to issues "actually before the court" or issues "necessarily decided by implication." Id. However, there are 3 limited exceptions to this rule. Sere Memphis Publishing Co. v. Tennessee Petroleum, 975 S.W. 2d 303. 306 (Tenn.1998). These exceptions are not before this Court at this time. It would most likely be incumbent on a party to raise the issue and claim an exception applies.

the Court of Appeals disregarded a canon of ethics. That is something this Court cannot and shall not do absent express evidence to the contrary by express language in the opinion, language which does not appear therein. Therefore, it was proper for this Court on its own motion to issue the show cause portion of its Order of January 6, 2000, for this Court must respond to, correct or at least address any apparent violation of any Disciplinary Rule which occurs in any case before it. Canon 3D. (2) of the Code of Judicial Conduct states in part: *"A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Code of Professional Responsibility should take appropriate action."* (Emphasis added). "Appropriate action" and an explanation for the same was initiated in this Court's Order of January 8, 2000, to wit:

> 2. Before January 18, 2000, counsel for Plaintiff shall file a brief on the issue of whether he should be disqualified from representing Plaintiff any further in the trial court in this case pursuant to DR 5-102 (A), it appearing that he has now been recognized as, accepted as or deemed a material witness in this cause which is not final. A hearing on whether disqualification is required is set for January 18, 2000, at 9:00 a.m.

This Court has now considered Mr. Davies' Brief in response to the show cause order. In it he claims: "DR 5-101 (2)(A) has absolutely nothing to do with the present posture of this case. It is beyond the comprehension of the undersigned how any future hearings before this Court have any relationship to statements made on January 5, 1999." The Court concludes that there exists a violation of DR 5-102 (A), that is, Mr. Davies giving testimony in behalf of his client, testimony which according to the Court of Appeals should be accepted and considered. Therefore, Mr. Davies shall be disqualified from representing Ms. Hoalcraft any further in these proceedings before this trial Court. He must withdraw as her attorney.

Mr. Davies and Ms. Hoalcraft have countered with a motion that the undersigned be disqualified. The undersigned is not biased or prejudiced against either and has done nothing to create the appearance of partiality or impropriety in the handling of this case. They charge that the undersigned has violated Canon 3 B. (9) of the Code of Judicial Conduct in issuing the January 6, 2000, Order, which forbids or prohibits a judge, "while a proceeding is pending or impending in any court," from making "any public comment that

might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing."[13] Canon 3 B. (9) goes on to state, however: “This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.”

Statements in the Court's Order of January 6, 2000, concerning the Opinion of the Court of Appeals do not constitute "any public comment that might reasonably be expected to affect" the outcome of a proceeding "pending or impending in any court" or otherwise “impair its fairness.”[14] The statements in the Order were made "in the course of" the undersigned's "official duties" as the judge of the Court in which this case is pending for final hearing. The statements do not constitute statements requiring recusal or disqualification for bias or prejudice against Mr. Davies or Ms. Hoalcraft or the appearance of the same. The statements are consistent with what this Court previously held about the meaning of the word "review" in the prior judgment prior to the action of the Court of Appeals. Just because the Court of Appeals reverses a trial court does not mean that the trial court is required suddenly to "agree" with the reasoning of the appellate court. Reasonable minds of reasonable judges often differ on complex, thorny legal issues. The appellate court requires and most certainly shall receive this Court's obedience to appellate court orders and the carrying out of its appellate court mandates. However, it does not require this Court's analytical or intellectual agreement on all issues.

In Foley v. Foley, No. 01A01-9903-CH-00187 (Tenn.App. 1999)(perm. app. den. April 17, 2000), the Tennessee Court of Appeals refused to order a recusal where there

13. At issue appears to be footnote 1 to the Order of January 6, 2000. In the Order, this Court 'finds that the appellate court opinion converted counsel for Plaintiff into a material witness on a crucial, contested issue in this case which has yet to proceed to a final hearing." The Court further states in said footnote as follows: "The issues of custody, visitation and removal were to be "reviewed" approximately one year after entry of judgment of July 17, 1997. The Tennessee Court of Appeals relied upon the testimony of Leta Hoalcraft's attorney, R.E. Lee Davies, concerning what "review" meant and thus [sic] there had yet to be a review of these issues before the petition for change of custody was filed on October 13, 1998. As a result, the Tennessee Court of Appeals apparently determined that the word 'review" does not mean what it traditionally is defined to mean in finding that the judgment of July 17, 1997, was final and not subject to review or revision under T.R.C.P.54.02, as guided by the Tennessee Supreme Courts decision in Fox v. Fox, 657 S.W. 2d 747 (Tenn. 1983). To do this, the Court of Appeals has apparently sidestepped the traditional and historical rule that the Court only speaks through its minutes found in its Orders and not through hearsay testimony given only by a single attorney of record concerning what a judge may have said off the record. If a T.R.A.P. 11 application is taken and granted, the Tennessee Supreme Court should correct what appears to this Court as plain error in accepting Mr. Davies' testimony concerning what the word "review" means in the judgment of July 17, 1997."

_____

14. An example of a public comment would be a statement or comment by the undersigned to the media about this case.

was an appearance that the trial judge, as a practicing attorney, had previously been aligned with or had advocated a certain view or position taken by one of the parties to the case. The Court held as follows:

> Bias and prejudice are only improper when they are personal. A feeling of ill will or, conversely, favoritism toward one of the parties to a suit are what constitute disqualifying bias or prejudice. For example, where a judge stated that he "could not stand" a certain law enforcement officer and would not accept cases initiated by him, it was found that his personal feelings and intense dislike of the officer were improper. *However, neither bias nor prejudice refer to the attitude that a judge may hold about the subject matter of a lawsuit. That a judge has a genera! opinion about a legal or social matter that relates to the case before him or her does not disqualify the judge from presiding over the case.* Despite earlier fictions to the contrary, it is now understood that judges are not without opinions when they hear and decide cases. Judges do have values, which cannot be magically shed when they take the bench. The fact that a judge may have publicly expressed views about a particular matter prior to its arising in court should not automatically amount to the sort of bias or prejudice that requires recusal.

(Emphasis added). See also, Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 4.04, at 10-02 (2d ed. 1995)(footnotes omitted).

In Liteky v. United States, 510 U.S. 540, 555-556,114 S.Ct.1147,1157,127 L.E.d. 2d 474 (1994), the United States Supreme Court held as follows:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. See *United States v. Grinnell Corp.*, 384 U.S., at 583, 86 S.Ct., at 1710. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment possible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921), a World War I espionage case against GermanAmerican defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German

> Americans" because their "hearts are reeking with disloyalty." *Id.* at 28 (internal quotation marks omitted.) *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration - even a stern and short-tempered judge's ordinary efforts at courtroom administration - remain immune.

In In re Brown, 879 S.W. 2d 801, 806 (Tenn. 1994), the Tennessee Supreme Court held that a Shelby County Circuit Court Judge's expressions of dissatisfaction as to "matters relevant to the case before the court" did not constitute a violation of the Code of Judicial Conduct and wrote as follows:

> The judicial system recognizes that errors will be made and it provides means whereby decisions and procedures can be reviewed and errors corrected. Review, analysis and criticism are an essential part of the judicial process, and, even comments which reflect unfavorably upon one aspect of the judicial system may reasonably promote confidence in the system as a whole.
>
> The statements found to erode confidence in the judiciary were made in open court during the course of formal proceedings, they were directed to counsel representing parties in the case, and they related primarily to matters relevant to the case before the court. A judge is not subject to discipline for an appropriate exercise of judicial discretion. *In re Elliston*, 789 S.W. 2d 469, 475 (Mo.1990). Necessary judicial independence requires that a judge not be subject to discipline for good faith comments directed primarily and principally at issues properly before the court.

The statements in the Order of January 6, 2000, about which Ms. Hoalcraft complains are "good faith comments" directed primarily and principally at issues which have been properly before the court. They do not require recusal.

Leave to amend or supplement pleadings shall be freely given when justice so requires. See T.R.C.P. 15. Mr. Smithson has now filed and there has been heard a motion for leave to file a supplemental pleading. Mr. Smithson's "Supplemental Petition for Modification of Custody" states supplemental facts which may be considered at the final hearing in this cause. It apparently supercedes and replaces the prior "Amended Petition," thus rendering the issue of the dismissal of the same moot. Since this case has yet to proceed to final hearing, it is appropriate to grant Mr. Smithson's motion for leave to file his supplemental petition. Ms. Hoalcraft shall have 45 days to obtain new counsel and to answer the supplemental petition and file any counterclaim. The case will be reset for final

hearing or trial once the answer is filed. The guardian ad litem shall interview the children, investigate their current circumstances and file a preliminary answer in response to Mr. Smithson's claims for a change of custody as soon as possible *after* Ms. Hoalcraft obtains new counsel and files her answer. At a final hearing, Mr. Smithson has the burden of proving a "material change in circumstances" to justify this Court even considering whether custody should in any way be changed.

An Order shall enter addressing the matters contained within this and the prior memorandum of this court.

This the 5th day of May, 2000.

RUSS HELDMAN, CIRCUIT COURT JUDGE

Certificate of Service

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

LETA HOALCRAFT,	)	
Plaintiff	)	
	)	
vs.	)	No. 91068
	)	
WALTER TROY SMITHSON,	)	
Defendant	)	

ORDER

In accordance with the Memorandum of January 26, 2000, and the Supplemental Memorandum of May 5, 2000, it is hereby ORDERED as follows:

1. The Motion to Vacate Order is GRANTED in part and DENIED in part. Paragraph 1 of the Order of January 6, 2000 is VACATED.

2. The Motion for leave to File Supplemental Pleading is GRANTED. The Supplemental Petition for Modification of Custody is deemed FILED May 5, 2000. The Motion to Dismiss Amended Petition is DENIED as MOOT.

3. The Motion for Disqualification of trial judge is DENIED.

4. R.E. Lee Davies is hereby disqualified as counsel for Leta Hoalcraft in the trial court in this case. He shall withdraw as her counsel of record in the trial court.

5. Ms. Hoalcraft shall have 45 days to obtain new counsel and to answer the supplemental petition and file any counterclaim. The case will be reset for final hearing or trial once the answer is filed. The guardian ad litem shall interview the children, investigate their current circumstances and file a preliminary answer in response to Mr. Smithson's claims for a change of custody as soon as possible *after* Ms. Hoalcraft obtains new counsel and files her answer. At a final hearing, Mr. Smithson has the burden of proving a "material change in circumstances" to justify this Court even considering whether custody should in any way be changed.

It is so ORDERED.

This the 5th day of May, 2000.

RUSS HELDMAN, CIRCUIT COURT JUDGE

Certificate of Service

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

LETA HOALCRAFT,	)	
Plaintiff	)	
	)	
vs.	)	No. 91068
	)	
WALTER TROY SMITHSON,	)	
Defendant	)	

SUPPLEMENTAL ORDER AMENDING
SUPPLEMENTAL MEMORANDUM

The Supplemental Memorandum, filed May 5, 2000, is hereby amended to add the following paragraph to the top of page 8 of the same:
"In the case of Sharon Anne Smith v. Alan Wayne Smith, No. 01A-01-9705-CH 00216, 1997 WL 672646 (Tenn.App. 1997), Mr. Davies represented the appellant, Ms. Smith, and in the appellate court's opinion, the following is found:

> Mrs. Smith's attorney argues that the minutes of the court contained no indication that the court's original order on alimony was based in any way on the expenses of private school. He asserts that as a court speaks only through its minutes, the order appealed from is accordingly erroneous. Mr. Smith's attorney points out that the transcript of the 1994 proceedings contained extensive testimony about Bradley Smith's need for private schooling, and asserts that the court has the right to recall the reasoning behind its ruling."

It is so ORDERED.
This the 8th day of May, 2000.

RUSS HELDMAN, CIRCUIT COURT JUDGE

Certificate of Service

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

LETA HOALCRAFT,	)	
Plaintiff	)	
	)	
vs.	)	No. 91068
	)	
WALTER TROY SMITHSON,	)	
Defendant	)	

AMENDED ORDER

In accordance with the Memorandum of January 26, 2000, and the Amended Supplemental Memorandum of May 9, 2000, it is hereby ORDERED as follows:

1. The Motion to Vacate Order is GRANTED in part and DENIED in part. Paragraph 1 of the Order of January 6, 2000 is VACATED.

2. The Motion for leave to File Supplemental Pleading is GRANTED. The Supplemental Petition for Modification of Custody is deemed FILED May 5, 2000. The Motion to Dismiss Amended Petition is DENIED as MOOT.

3. The Motion for Disqualification of trial judge is DENIED.

4. R.E. Lee Davies is hereby disqualified as counsel for Leta Hoalcraft in the trial court in this case. He shall withdraw as her counsel of record in the trial court.

5. Ms. Hoalcraft shall have 45 days to obtain new counsel and to answer the supplemental petition and file any counterclaim. The case will be reset for final hearing or trial once the answer is filed. The guardian ad litem shall interview the children, investigate their current circumstances and file a preliminary answer in response to Mr. Smithson's claims for a change of custody as soon as possible after Ms. Hoalcraft obtains new counsel and files her answer. At a final hearing, Mr. Smithson has the burden of proving a "material change in circumstances" to justify this Court even considering whether custody should in any way be changed.

6. The Order of May 5, 2000, is vacated and replaced by the instant Order.

It is so ORDERED.
This the 9 day of May, 2000.

RUSS HELDMAN, CIRCUIT COURT JUDGE

Certificate of Service

IN THE CIRCUIT COURT FOR WILLIAMSON COUNTY, TENNESSEE
AT FRANKLIN

LETA HOALCRAFT,	)	
Plaintiff	)	
	)	
vs.	)	No. 91068
	)	
WALTER TROY SMITHSON,	)	
Defendant	)	

AMENDED SUPPLEMENTAL MEMORANDUM

Issues which have been under advisement in this case are as follows:

1. Whether the Order of January 6, 2000, said Order setting the case for a final hearing, should be vacated in its entirety because of certain findings in the opinion of the Tennessee Court of Appeals of December 17, 1999 and because Leta Hoalcraft claims she had no opportunity to be heard before the Order was entered.[1]

2. Whether counsel for Ms. Hoalcraft, R.E. Lee Davies, should be disqualified since, as a witness to and participant in an ex parte communication with a prior trial judge, his testimony about what was said was relied on and accepted by the Tennessee Court of Appeals as to whether a "review" of the issues of custody, relocation or visitation by this Court were necessary before the judgment of July 17, 1997 became final pursuant to T.R.C.P. 54.02. [2]

3. Whether the undersigned should recuse or disqualify himself from this case for setting the case for a final hearing without hearing oral opposition by Ms. Hoalcraft to Mr. Smithson's motion to set filed on December 28, 1999, served by mail on December 27, 1999, and set on the Court's domestic motion docket for hearing on January 4, 2000, and for addressing the appellate court decision in the Court Order of January 6, 2000, all of which Ms. Hoalcraft claims "gives rise to whether this Court's impartiality might reasonably be questioned" and requires disqualification under Canon 3 E. (1) of Rule 10, Tennessee Supreme Court Rules.

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1. No legal authority is set forth in Ms. Hoalcraft's Motion to Vacate Order.

2. Canon 3 D.(2) of Rule 10 of the Rules of the Tennessee Supreme Court, the Code of Judicial Conduct, states in pertinent part: "A Judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Code of Professional Responsibility should take appropriate action."

4. Whether Mr. Smithson's "Amended Petition," filed January 4, 2000, should be dismissed or Mr. Smithson allowed to file and proceed on a "Supplemental Petition for Modification of Custody," received on February 2, 2000.

As explained in detail in the Memorandum of January 26, 2000, this case has yet to proceed to a final hearing because the prior order or judgment (which was reversed on appeal) made only a temporary or pendente lite custody determination. The appeal was made possible as *a matter of right, only*, because the pendente lite order or judgment of January 15, 1999, was made final pursuant to T.R.C.P. 54.02 by the express largesse of this Court. As is found in the Court of Appeals' Opinion of December 17, 1999, at page 8, "[a]n interim order is one that adjudicates an issue preliminarily." Certifying a pendente lite, temporary or interim order as "final" so an appeal as of right may ensue does not preempt a litigant's right to a full trial on the merits or a final hearing after proper time has elapsed for discovery and trial preparation. Limiting a litigant to a pendente lite hearing only, especially in a domestic relations case involving children, would constitute a violation of due process. Public confidence in the judicial process would erode, if not collapse. Such an absurd result would occur in that the Court could at any time after a pendente lite hearing surprise any litigant who had expected ultimately a final trial on the merits by foreclosing that expectation with a T.R.C.P. 54.02 designation to the temporary order. The Court of Appeals fixed the correct posture of this case as "interim" only on page 7 of its opinion, stating: “The trial judge did, however, indicate that this [judgment of January 15, 1999] was only a *temporary* ruling *until a full trial* could be held *pursuant to this finding*, an order granting temporary custody was entered.” (Emphasis added). The only sound, logical conclusion is that a temporary ruling or judgment has now been reversed. A permanent judgment, entered after a final trial or hearing, was not reversed because one never existed in the first place. The law of the case is merely that custody should not change pending a final hearing or trial.

Ms. Hoalcraft's reliance on findings by the Court of Appeals to claim that this case is over is an attempt to deprive Mr. Smithson of his constitutional rights of due process inherent in and at a final hearing or trial on the full merits. Further, to charge this Court with bias, prejudice and the appearance of partiality in setting the case for final trial and

appointing a guardian ad litem is clearly unsustainable. By finding that all allegations were addressed and that no exigencies occurred between July 1997 and January 1999, the Court of Appeals only made findings concerning evidence adduced at a temporary hearing during a preliminary or pendente lite stage of the case, certainly long before adequate time for discovery and full and complete trial preparation could be had. This does not mean that evidence dated or occurring between July 1997 and January 1999 that is introduced and properly qualifies as an exigent circumstance at a final hearing or trial cannot be considered by this Court at said final hearing or trial. This does not mean Mr. Smithson is precluded from having that opportunity at said final hearing or trial. This does not mean that all Mr. Smithson is entitled to is a pendente lite or temporary hearing on his claim that custody should be changed. This does not mean that the Court as parens patria of the children must be without power to call upon the assistance of a guardian ad item to-assist it in making a final determination affecting the best interest of the Smithson children, if the appropriate burden of proof is met.[3] If the Court of Appeals meant otherwise, it would have expressly said so or made it clear that Mr. Smithson was not entitled to receive what similarly situated pendente lite litigants receive: a full and fair final hearing or full trial on the merits after full pre-trial discovery and preparation has been had. The Court of Appeals did not expressly hold that a final hearing or trial should not be had. It could not and would not do so without committing a clear violation of Mr. Smithson's rights under Article 1, Sections 8 (law of the land clause) and 17 (open courts clause) of the Tennessee Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Section 17 mandates that "all courts shall be open," and this Court cannot shut the door of the courthouse to Mr. Smithson or any litigant by improperly construing words in a Court of Appeals Opinion out of their proper pendente lite context. See, e.g., Whitaker v. Whitaker, 957 S.W. 2d 834, 839 (Tenn. App. 1997)(provisions imposed by judicial decree which prevented a father "from seeking relief' concerning visitation violated "open court provision of the Tennessee Constitution set out in Article 1, Section 17"). This case must proceed to a final hearing.

_____

3. Rubin v. Kirschner, 948 S.W. 2d 742, 747 (Tenn.App. 1997).

Since there has been no stay of proceedings issued pending any appeal[4] it was a proper matter for the Court's discretion to set the case for a final hearing after the motion to set was called on the Court's docket on January 4, 2000, regardless of whether Ms. Hoalcraft was given an opportunity to be heard in opposition to the setting of the same.[5] T.R.C.P. 40 provides in part: "The courts shall provide by rule for the setting of cases for trial (a) without request of the parties but upon notice to the parties, or (b) upon request of a party and notice to other parties." Local Rule 7(c) of the 218th Judicial District provides as one of 3 options that cases "shall" be set for trial "[b]y the court with notice to counsel." These rules do not require hearings but permit this Court on its own motion, if it desires, to set a case for trial. All that is required that counsel for both parties receive notice of the date set by the Court. Merely setting the case for final hearing at a later date cannot therefore demonstrate a disqualifying bias or prejudice under these circumstances.[6]

Neither can the appointment of a guardian ad litem in this case. Such power of appointment always rests within the sound discretion of the trial court in child custody cases. See, e.g., Herrera v. Herrera, 944 S.W. 2d 379, 384-385 (Tenn. App. 1996). That discretionary decision shall not be reversed by an appellate court "unless it affirmatively appears that the trial court's decision was against logic or reasoning, and caused an injustice or injury to the party complaining." Marcus v. Marcus, 993 S.W. 2d 596, 601 (Tenn. 1999). It certainly is not desirable that the Smithson children testify again in this case, if the same can be avoided, especially where they have already made their desire so clear that they want to live with their father and the Court of Appeals preliminarily is of the opinion that none of Mr. Smithson's preliminary evidence constitutes a requisite

_____

4. T.R.C.P. 62.03 requires an order staying these proceedings pending appeal to prevent action from being taken in this Court to proceed to a final hearing. See, e.g., Young v. Young, 971 SW 2d 386, 393 (Tenn.App. 1997).

5. The Court's Order of January 6, 2000, gives notice of a final hearing date for February 28. For reasons set forth in the Memorandum of January 6, 2000, that date became impracticable and "will be vacated."

6. Mr. Davies received initial consent from the attorney for Mr. Smithson for a continuance of his motion to set on the representation that Mr. Davies could not appear to oppose the same because he would be in trial before another Circuit Judge. However, on January 4, 2000, that Judge had made himself available to assist with hearing cases called on the civil docket because the trial (in which Mr. Davies was to participate) had settled. By the time the motion to set was called, the basis for consent for a continuance did not exist. It ultimately appeared to the Court that Mr. Smithson and his counsel, both present at the call of the docket, still desired a future trial date to be set that day. It was proper for this Court to grant the motion under all circumstances.

exigency to justify a change of custody at the pendente lite stage of this case. A guardian ad litem appointment is therefore appropriate before there is any further contested hearing in this case. See, also, T.C.A. 36-4-132 (a), which gives a trial court the discretion to appoint a guardian ad litem "on its own motion."[7] There is no disqualifying bias or prejudice or partiality in the appointment of a guardian ad litem for the Smithson children.

The custody and relocation Order or Judgment of July 17, 1997, states in part: "This case *shall* be placed on the review docket in the summer of 1998 when Plaintiff returns from Thailand with the children." (Emphasis added). At the pendente lite hearing of January 4, 1999, the Court was called upon to determine the impact of the failure of the case being placed on the "review" docket on the finality of the prior custody determination. The following exchange occurred:

> THE COURT: Mr. Davies, what do you understand the statement in that prior order that was entered, "This case shall be placed on the review docket in the summer of 1998, when plaintiff returns from Thailand with the children"?
>
> You made presentation to the Court about the last time we were in court on this case. I just wanted to give you an opportunity to state exactly what you understand as to why there was not a review at that time.
>
> MR. DAVIES: Well, I guess there - that's two questions. And the first thing I guess I ought to address is what the review was for.
>
> We don't have a transcript of the hearing. But I can tell you that the children's testimony today wasn't really any different than their testimony back in 1997. They both said that they didn't want to go to Thailand; they wanted to live with their father.
>
> And Judge Bell decided that - my client has always had custody of these children. She had custody from the divorce, from the very beginning. And so Judge Bell, of course, heard the proof under the Abby vs. Strange ruling.
>
> And there were several things going on at that time. What he said was, first of all, if my client met the requirements of Abby vs. Strange, then she would be allowed to move to Thailand unless Mr. Smithson was able to prevail in his counterclaim to change custody. And if it got to that point, then there would be a comparative fitness test as to who was the most fit parent.
>
> And Judge Bell, as you can tell from the order, found that Ms. Hoalcraft met the requirements of Abby vs. Strange. And then he went ahead and found that Mr. Hall - Mr. Smithson did not prevail on his counter-claim to change custody.

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7. The word "for" which precedes "dissolution of marriage involving children" in T.C.A. 36-4-132 means "[b]y reason of; with respect to; "because of; "on account of," or "in consequence of." Black's Law Dictionary (6th ed. 1990). Accordingly. "an action for dissolution of marriage involving minor children" includes any post-divorce custody action because the same always occurs in consequence of the "dissolution of marriage involving minor children."

And then what he said was, we'll have this review. We'll just have - set it for review to see how things are going when they come back from Thailand. And so my understanding was that he wasn't going to change his mind because of whether they came back in and said they wanted to live with their father again. They've already said that. He was just wanting to make sure that Thailand was, you know, an okay place, that they were - nothing terrible was going on in Thailand once they got down there.

And, of course, we've heard from the children. Both of them have said that Thailand was fine. They don't have any problems with Thailand. They - you've got their grades.

They've done well in Thailand.

So nothing has changed that would cause this Court to find there's been a change of circumstances since the Court's last ruling on this. We went through - I don't know if it was a day or two days of trial where we talked about comparative fitness and things like that between both parents, which this court hasn't heard anything about from my client's perspective.

So that was the only reason why Judge Bell decided he should have a review, was kind of just to check up and see if Thailand was okay. And if Thailand, something bad was going on in Thailand, then he was going to look at it again.

And so when the time - you know, as you notice, this order doesn't say when or how we get to this review or anything like that. It just says to be reviewed

So I'll tell the Court, as an officer of the court, when Ms. Hoalcraft came back last summer for the visitation that was scheduled, she asked me what to do. She said, you know, there's this order down.

And I said, 'Well, there's no date to appear. I'll call the Judge and ask him what he wants to do; does he want us to come in on some date for this review or whatever, and I - and I'll report back to you."

And so I did call the Judge and said, "We've got this order down here that says that you wanted us to come back for a review. What do you want us to do?"

And Judge Bell said, "You don't need to do anything unless there's a problem." He said, "if there's a problem from your end, set it for a review."

So I said, "Okay."

So I called my client back, and I said, "The Judge says unless you have a problem, that there's no need to have a review."

THE COURT: What if there was a problem from the father's end of it? Would he have had a right to

' MR. DAVIES: Well, I suppose he would have, but I'm not his lawyer. I don't know what he had on his mind.

You know, it seems to me each side is responsible for their own behavior. And my client, seems to me, is the only person who did anything about his order, and yet they're trying to hang it on her. And she's the only one who made any contact with the Court at all about whether there should be a review.

So, that's what I think Judge Bell meant by - when he said there should be a review. And then the second is what I'm telling you what Judge Bell told me when I called him about whether he wanted to have a review.

At the time, this Court "had no reason to doubt" what Mr. Davies said "concerning his understanding of the posture of this case" up for review in 1998. What was stated by the Court was an observation, not a "finding" of fact.[8] However, this Court did not accept or rely on anything Mr. Davies testified to whatsoever in deciding as it did in its January 15, 1999 order or judgment that the Order of July 17, 1997 "contemplated a 'review' of this case after a period of time had passed" with the children being under Ms. Hoalcraft's custody in Thailand and therefore was "not a final order."

There are a very good reasons why this Court did not accept or rely upon Mr. Davies' testimony.[9] First, what the prior trial judge said orally to Mr. Davies was not the judgment of the Court and could not be used to alter the plain meaning of the judgment which required ("shall) placing the case back on the docket for "review".[10] This is because no court "speaks" by means of oral ex parte communications between a trial judge and an attorney for one litigant to a case. As has been held recently by the Middle Section Court of Appeals in the extremely wellreasoned case of *Environmental Abatement. Inc. v. Astrum R.E. Corporation*, App.No. M1998-00871-COA-R3-CV (Tenn.App. Feb.29, 2000),

> The phrases "until entered by the court," "enter judgment," and "make the agreement the judgment of the court" as used in *Harbour v. Brown*, 732 S.W. 2d 598, 599 (Tenn. 1987)], must be interpreted by reference to the well-settled rule that "[a] court speaks only through its written judgments, duly entered upon its minutes. Therefore, no oral pronouncement is of any effect unless and until made a part of a written judgment duly entered." *Sparkle Laundry & Cleaners, Inc., v. Kelton*, 595 S.W. 2d 88, 93 (Tenn. Ct. App. 1979); see *Massachusetts Mut. Life Ins. Co. v. Taylor Implement & Vehicle Co.*, 138 Tenn. 28, 36, 195 S.W. 762, 765 (1917).

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8. I do believe that Mr. Davies as an officer of the Court has faithfully represented to the Court what happened last summer concerning his understanding of the posture of this case in the sense that this case which states it will be placed on (he review docket in the summer of 1998, when Plaintiff returns from Thailand with the children. And I have no reason to doubt what he has said about that."

9. What Mr. Davies said to the Court about what the prior trial judge told him was found to be or referred to as 'testimony" by the Court of Appeals on page 8 of its Opinion: "According to testimony, the purpose of the review docket was to ensure the parties could go back to court If there was a problem between July 1997 and the summer of 1998." The substance of Mr. Davies' testimony is evidenced on pages 4 and 8 of the opinion.

10.This case was *never* placed on any summer 1998 "review docket." There is no evidence whatsoever to the contrary, despite what the Court of Appeals states on page 4 of its Opinion. Nevertheless, since the judgment used the word "shall," it really did not matter what the parties did or did not do. It was incumbent upon this Court to place the case back on the docket for review and to give notice to the parties. The Court of Appeals held that "a final order" is one "leaving nothing else for the trial court to do." Without Mr. Davies' "testimony"; it is clear that the Court of Appeals could have found that there was something required of the Court to do before the order or judgment became 'final.'

In the case of Sharon Anne Smith v, Alan Wayne Smith, No. 01A-01-9705-CH-00216, 1997 WL 672646 (Tenn.App.1997), Mr. Davies represented the appellant, Ms. Smith, and in the appellate court's opinion, the following is found:

> Mrs. Smith's attorney argues that the minutes of the court contained no indication that the court's original order on alimony was based in any way on the expenses of private school. He asserts that as a court speaks only through its minutes, the order appealed from is accordingly erroneous. Mr. Smith's attorney points out that the transcript of the 1994 proceedings contained extensive testimony about Bradley Smith's need for private schooling, and asserts that the court has the right to recall the reasoning behind its ruling.

What Mr. Davies testified to concerning what the prior trial judge told him (regardless of its hearsay and ex carte offensiveness) was at best a mere "oral pronouncement" which well settled Tennessee law teaches cannot be considered as having "any effect" as a judgment. That is why this Court had this to say on January 4, 1999:

> First of all, I want to address how I perceive the status of this case. And all I can do is rely upon the previous orders of the Court because the Court speaks through its minutes, and that's reflected in the orders of the Court, not necessarily an oral ruling.

By saying"'all I can do is rely on the previous orders of the Court," the Court was implicitly "saying" that it could not consider the testimony of Mr. Davies and that it would not and could not rely on, consider, or accept any of the same in deciding the meaning of the prior judgment and construing the same as to the word "review" or "review docket." What Mr. Davies testified the prior trial judge said to him was of no effect to this Court. This Court was simply following the plain words of the law of judgments and the plain words of an unambiguous order or judgment. Nothing this Court said or did can or should be construed otherwise.

Second, the act of Mr. Davies testifying while remaining counsel for Ms. Hoalcraft clearly contravenes DR 5-102 (A) of the Tennessee Code of Professional Responsibility, Rule 8 of the Tennessee Supreme Court Rules, because Mr. Davies did not first withdraw as counsel for Ms. Hoalcraft. DR 5-102 (A) states:

> Withdrawal as Counsel When the Lawyer Becomes a Witness. (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in the lawyer's firm ought to be called as a witness on behalf of the client, the lawyer shall withdraw from the conduct of the trial and

> the firm, if any, shall not continue representation in the trial, except that the lawyer may continue the representation and the lawyer or a lawyer in the lawyer's firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

None of the exceptions found in DR 5-101 (B)(1) through (4) apply. The testimony of Mr. Davies does not relate *solely* to an uncontested matter, it does not relate *solely* to a matter of formality, and it does not relate to the nature and value of legal services rendered. Although Mr. Davies is a competent and successful attorney, there has been no evidence Mr. Davies brings a "distinctive value" as counsel in this particular case. This Court could not and cannot accept or rely on the testimony of Mr. Davies without disqualifying him, something this Court first declined even to consider over a year ago, for it was clear then that this Court could not accept what Mr. Davies said the prior trial judge told him anyway without violating the rule that courts speak only through their written judgments, duly entered upon their minutes.

Third, this Court could not accept Mr. Davies testimony because it contained the assertion of what appeared to be an ex parte communication between Mr. Davies and the prior trial judge. Mr. Davies appears to have admitted such at a hearing on February 15, 2000. Canon 3 B. (7) of Rule 10 of the Rules of the Tennessee Supreme Court, the Code of Judicial Conduct, forbids this Court ("shall not . . . consider") from considering ex parte communications except under certain circumstances. Those exceptional circumstances are enumerated under Canon 3 B. (7) (a) (i) or (a) (ii). The Court is of the opinion that subsection (a) is inapplicable because the issue of "review" is an issue which deals "with substantive matters or issues on the merits," that is, review of the prior custody, visitation and relocation determination.[11] There is no evidence that those exceptional circumstances exist or have existed.

Now the Court of Appeals, by its opinion, has accepted Mr. Davies' testimony and bound this Court to accept the same on the "review" issue before proceeding to a final

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11. Canon 3 B. (7)(a) provides in part: "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 concerning a pending or impending proceeding except that: (a) Where circumstances require, ex parte communications for scheduling , administrative purposes or emergencies that do not deal with substantive matters or issue on the merits are authorized; provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication; and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allow an opportunity to respond."

hearing according to the law of the case. Ladd v. Honda Motor Co., Ltd., 939 S.W. 2d 83, 90 (Tenn.App. 1996).[12] The Court of Appeals did not address certain issues addressed by this Court in this Supplemental Memorandum, including whether Mr. Davies' disqualification must result if his testimony concerning the ex parte communication is accepted. The Court cannot presume the Court of Appeals addressed this issue since it did not expressly say so and to conclude otherwise would cause this Court to assume that the Court of Appeals disregarded a canon of ethics. That is something this Court cannot and shall not do absent express evidence to the contrary by express language in the opinion, language which does not appear therein. Therefore, it was proper for this Court on its own motion to issue the show cause portion of its Order of January 6, 2000, for this Court must respond to, correct or at least address any apparent violation of any Disciplinary Rule which occurs in any case before it. Canon 3D. (2j of the Code of Judicial Conduct states in part: *"A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Code of Professional Responsibility should take appropriate action."* (Emphasis added). "Appropriate action" and an explanation for the same was initiated in this Court's Order of January 6, 2000, to-wit:

> 2. Before January 18, 2000, counsel for Plaintiff shall file a brief on the issue of whether he should be disqualified from representing Plaintiff any further in the trial court in this case pursuant to DR 5-102 (A), it appearing that he has now been recognized as, accepted as or deemed a material witness in this cause which is not final. A hearing on whether disqualification is required is set for January 18, 2000, at 9:00 a.m.

This Court has now considered Mr. Davies' Brief in response to the show cause order. In it he claims: "DR 5-101 (2)(A) has absolutely nothing to do with the present posture of this case. It is beyond the comprehension of the undersigned how any future hearings before this court have any relationship to statements made on January 5,1999." The Court concludes that there exists a violation of DR 5-102 (A), that is, Mr. Davies giving testimony in behalf of his client, testimony which according to the Court of Appeals should

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12.The law of the case only applies to issues "actually before the court" or issues "necessarily decided by implication." Id. However, there are 3 limited exceptions to this rule. See Memphis Publishing Co. v. Tennessee Petroleum, 975 S.W. 2d 303, 308 (Tenn. 1998). These exceptions are not before this Court at this time. It would most likely be incumbent on a party to raise the issue and claim an exception applies.

be accepted and considered. Therefore, Mr. Davies shall be disqualified from representing Ms. Hoalcraft any further in these proceedings before this trial Court. He must withdraw as her attorney.

Mr. Davies and Ms. Hoalcraft have countered with a motion that the undersigned be disqualified. The undersigned is not biased or prejudiced against either and has done nothing to create the appearance of partiality or impropriety in the handling of this case. They charge that the undersigned has violated Canon 3 B. (9) of the Code of Judicial Conduct in issuing the January 6, 2000, Order, which forbids or prohibits a judge, "while a proceeding is pending or impending in any court," from making "any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing."[13] Canon 3 B. (9) goes on to state, however: "This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."

Statements in the Court's Order of January 6, 2000, concerning the Opinion of the Court of Appeals do not constitute "any public comment that might reasonably be expected to affect" the outcome of a proceeding "pending or impending in any court" or otherwise "impair its fairness."[14] The statements in the Order were made "in the course of" the undersigned's "official duties" as the judge of the Court in which this case is pending for final hearing. The statements do not constitute statements requiring recusal or disqualification for bias or prejudice against Mr. Davies or Ms. Hoalcraft or the appearance of the same. The statements are consistent with what this Court previously held about the

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13. At issue appears to be footnote 1 to the Order of January 6, 2000. In the Order, this Court "finds that the appellate court opinion converted counsel for Plaintiff into a material witness on a crucial, contested issue in this case which has yet to proceed to a final hearing." The Court further states in said footnote as follows: The issues of custody, visitation and removal were to be "reviewed" approximately one year after entry of judgment of July 17,1997. The Tennessee Court of Appeals relied upon the testimony of Leta Hoalcraft's attorney, R.E. Lee Davies, concerning what "review" meant and thus [sic] there had yet to be a "review" of these issues before the petition for change of custody was filed on October 13, 1998. As a result, the Tennessee Court of Appeals apparently determined that the word "review" does not mean what it traditionally is defined to mean in finding that the judgment of July 17, 1997, was final and not subject to review or revision under T.R.C.P. 54.02, as guided by the Tennessee Supreme Court's decision in Fox v. Fox, 657 S.W. 2d 747 (Tenn. 1983). To do this, the Court of Appeals has apparently sidestepped the traditional and historical rule that the Court only speaks through its minutes found in its Orders and not through hearsay testimony given only by a single attorney of record concerning what a judge may have said off the record. If a T.R.A.P. 11 application is taken and granted, the Tennessee Supreme Court should correct what appears to this Court as plain error in accepting Mr. Davies' testimony concerning what the word "review" means in the judgment of July 17, 1997."

14. An example of a public comment would be a statement or comment by the undersigned to the media about this case.

meaning of the word "review" in the prior judgment prior to the action of the Court of Appeals. Just because the Court of Appeals reverses a trial court does not mean that the trial court is required suddenly to "agree" with the reasoning of the appellate court. Reasonable minds of reasonable judges often differ on complex, thorny legal issues. The appellate court requires and most certainly shall receive this Court's obedience to appellate court orders and the carrying out of its appellate court mandates. However, it does not require this Court's analytical or intellectual agreement on all issues.

In Foley v. Foley, No. 01A01-9903-CH-00187 (Tenn.App. 1999)(perm. app. den. April 17, 2000), the Tennessee Court of Appeals refused to order a recusal where there was an appearance that the trial judge, as a practicing attorney, had previously been aligned with or had advocated a certain view or position taken by one of the parties to the case. The Court held as follows:

> Bias and prejudice are only improper when they are personal. A feeling of ill will or, conversely, favoritism toward one of the parties to a suit are what constitute disqualifying bias or prejudice. For example, where a judge stated that he "could not stand" a certain law enforcement officer and would not accept cases initiated by him, it was found that his personal feelings and intense dislike of the officer were improper. *However, neither bias nor prejudice refer to the attitude that a judge may hold about the subject matter of a lawsuit. That a judge has a general opinion about a legal or social matter that relates to the case before him or her does not disqualify the judge from presiding over the case.* Despite earlier fictions to the contrary, it is now understood that judges are not without opinions when they hear and decide cases. Judges do have values, which cannot be magically shed when they take the bench. The fact that a judge may have publicly expressed views about a particular matter prior to its arising in court should not automatically amount to the sort of bias or prejudice that requires recusal.

(Emphasis added). See also, Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 4.04, at 101-02 (2d ed. 1995)(footnotes omitted).

In Liteky v. United States, 510 U.S. 540, 555-556, 114 S.Ct. 1147, 1157,127 L.E.d. 2d 474 (1994), the United States Supreme Court held as follows:

> First, judicial rulings atone almost never constitute a valid basis for a bias or partiality motion. See *United States v. Grinnell Corp.*, 384 U.S., at 583, 86 S.Ct., at 1710. In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no

> extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. The may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment possible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921), a World War I espionage case against German-American defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans" because their "hearts are reeking with disloyalty." *Id.*, at 28 (internal quotation marks omitted.) *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration-even a stern and short-tempered judge's ordinary efforts at courtroom administration-remain immune.

In In re Brown, 879 S.W. 2d 801, 806 (Tenn. 1994), the Tennessee Supreme Court held that a Shelby County Circuit Court Judge's expressions of dissatisfaction as to "matters relevant to the case before the court" did not constitute a violation of the Code of Judicial Conduct and wrote as follows:

> The judicial system recognizes that errors will be made and it provides means whereby decisions and procedures can be reviewed and errors corrected. Review, analysis and criticism are an essential part of the judicial process, and, even comments which reflect unfavorably upon one aspect of the judicial system may reasonably promote confidence in the system as a whole.
>
> The statements found to erode confidence in the judiciary were made in open court during the course of formal proceedings, they were directed to counsel representing parties in the case, and they related primarily to matters relevant to the case before the court. A"judge is not subject to discipline for an appropriate exercise of judicial discretion. In re Elliston, 789 S.W. 2d 469, 475 (Mo.1990). Necessary judicial independence requires that a judge not be subject to discipline for good faith comments directed primarily and principally at issues properly before the court.

The statements in the Order of January 6, 2000, about which Ms. Hoalcraft complains are "good faith comments" directed primarily and principally at issues which have been properly before the court. They do not require recusal.

Leave to amend or supplement pleadings shall be freely given when justice so requires. See T.R.C.P. 15. Mr. Smithson has now filed and there has been heard a motion for leave to file a supplemental pleading. Mr. Smithson's "Supplemental Petition for Modification of Custody" states supplemental facts which may be considered at the final hearing in this cause. It apparently supercedes and replaces the prior "Amended Petition," thus rendering the issue of the dismissal of the same moot. Since this case has yet to proceed to final hearing, it is appropriate to grant Mr. Smithson's motion for leave to file his supplemental petition. Ms. Hoalcraft shall have 45 days to obtain new counsel and to answer the supplemental petition and file any counterclaim. The case will be reset for final hearing or trial once the answer is filed. The guardian ad litem shall interview the children, investigate their current circumstances and file a preliminary answer in response to Mr. Smithson's claims for a change of custody as soon as possible *after* Ms. Hoalcraft obtains new counsel and files her answer. At a final hearing, Mr. Smithson has the burden of proving a "material change in circumstances" to justify this Court even considering whether custody should in any way be changed.

An Order shall enter addressing the matters contained within this and the prior memorandum of this court.

This the 9th day of May, 2000.

RUSS HELDMAN, CIRCUIT COURT JUDGE

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