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IN THE TENNESSEE BOARD OF JUDICIAL CONDUCT

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APPELLATE COURT CLERK
NASHVILLE

IN RE:	)	
THE HONORABLE LU ANN BALLEW	)	
CHILD SUPPORT MAGISTRATE	)	Docket No. M2013-02345-BJC-DIS-FC
FOURTH JUDICIAL DISTRICT	)	
COCKE COUNTY, TENNESSEE	)	File No. B13-5426
	)	

RESPONSE TO THE PRETRIAL STATEMENT OF DISCIPLINARY COUNSEL, TENNESSEE BOARD OF JUDICIAL CONDUCT

COMES now the Respondent, Lu Ann Ballew, by and through counsel, and submits the following Response to the Pretrial Statement of Disciplinary Counsel for the Tennessee Board of Judicial Conduct:

I. FACTS

The parties have entered into and filed with the Clerk of the Supreme Court Stipulated Facts (the "Stipulation"). Two specific events recited in the Stipulation are most pertinent to this response. The first is the filing of a document titled "Statement of Facts and Reasons Supporting Name Change" (the "Statement") by the Respondent. The Statement contains the following language: (i) that the court found it was in the best interests of the child to change the child's first and last names (ii) that "'Messiah' means Savior, Deliverer, the One who will restore God's kingdom. 'Messiah' is a title that is held only by Jesus Christ;"' and (iii) that "[l]abeling this child, 'Messiah' places an undue burden on him that as a human being, he cannot fulfill. The second event is a broadcast

interview with the Respondent during which she stated the following: (i) "[t]he word "messiah" is a title and it's a title that has only been earned by one person and that one person is Jesus Christ"; and (ii) "[i]t could put [the child] at odds with a lot of people and, at this point, he has had no choice in what his name is."

II. ARGUMENT

A. Religious Bias

Disciplinary Counsel cites five cases from foreign jurisdictions as persuasive authority for his position that the facts stated *supra* constitute a violation of the judicial canon prohibiting judges from exhibiting religious bias while acting in their official capacities. Each case and its application to the facts will be addressed in turn.

In *In re Singbush*, the formal charges against Judge Singbush alleged that he:

> (1) was habitually late for court; (2) offered to resume hearings that could not be concluded in the time allotted at inconvenient dates and times, such as Friday at 5:00 p.m. or Saturday morning; (3) took multiple, lengthy smoke breaks, which compromised the parties' ability to have their cases heard promptly; (4) routinely failed to appear on time at first appearances for the Marion County Jail, generally arriving at 11:00 a.m. for first appearances scheduled to begin at 9:00 a.m.; (5) took long lunch breaks when scheduled for first appearance duties, which caused proceedings to finish as late as 8:00 p.m.; and (6) had previously responded to allegations of tardiness in responding to a 6(b) Notice of Investigation in JQC# 95–197, which was dismissed by the Investigative Panel.

In re Singbush, 93 So.3d 188, 190 (Fla. 2012).

It was further alleged that, in a case over which Judge Singbush presided he "on his own initiative, and without notice to the parties, undertook to obtain a National Crime Information Center (NCIC) report that pertained to one of the witnesses." *In re Singbush*, 93 So.3d at 190. In response,

counsel moved for a mistrial and, during the hearing on that motion, Judge Singbush made the following comments:

> I don't know of anybody that's made a mistake—and except for perhaps one, and for that we murdered him. You know, he was faultless and we murdered him for it. That's not politically correct but I happen to believe in God.... Christ is the intercessor.

In Re Singbush, 93 So.3d at 191.

Canon 1 of the Florida Code of Judicial Conduct provides in pertinent part:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

The comments to Canon 1 of the Florida Code of Judicial Conduct state that:

> Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Fla. Code of Jud. Conduct, Canon 1 cmt.

In holding that Judge Singbush's actions violated the first Canon of Florida's Code of Judicial Conduct, the court noted that "[t]he evidence established that public confidence in the integrity of the judiciary was impaired by Judge Sinbush's unexcused habitual tardiness and inappropriate statement regarding religion." *In re Singbush*, 39 So.3d at 193.

There are three reasons why the *Singbush* case is inapplicable to the current case and of no value in judging Magistrate Ballew's actions. First, the holding of the *Singbush* case makes it impossible to determine whether Judge Singbush's statements from the bench regarding religion,

standing alone, would have constituted a violation of Canon 1 because the deciding court combines those comments with all of the other and more egregious allegations to support their decision. In other words, the court does not state that Judge Singbush's comments regarding religion constituted a violation of Canon 1, rather that his "unexcused habitual tardiness **and** inappropriate statement regarding religion" constituted a violation. *In re Singbush*, 93 So.3d at 193 (emphasis added). Second, Judge Singbush had already stipulated that "he did make a statement introducing religion or his religious beliefs into the decision-making process" as part of his agreement with Florida's Judicial Qualifications Commission. *In re Singbush*, 93 So.3d at 191. Judge Singbush admitted that he used his religious beliefs as part of his decision-making. Magistrate Ballew has made no such admission. Third, Judge Singbush's stated specifically from the bench that "I happen to believe in God." *In re Singbush*, 93 So.3d at 191. Magistrate Ballew's Statement of Facts and Reasons Supporting Name Change does not state that her decision was based on her own religious beliefs. In fact, the Stipulated Facts evidence that Magistrate Ballew was concerned for the child and the reception that a child named "Messiah" might receive in the community. Magistrate Ballew was aware that the child's father had expressed concerns about the name "Messiah" and that the father's family had also expressed those same concerns. She made a thoughtful decision that attempted to be fair to both parents while also protecting the child from a yoke he had no choice in bearing. The fact that Magistrate Ballew decided to include language in the Statement from which someone could infer her religious beliefs does not rise to the level of clear and convincing evidence that she was biased in her decision. This language was included in an attempt to explain why naming a child "Messiah" might be detrimental to the child's development and welfare.

In *Huitt v. Hsia*, a domestic relations commissioner in Florida ruled in favor of a mother wishing to modify custody so that she might relocate the parties' child to Virginia. *Huitt v. Hsia*, 848 So.2d 459, 460 (Fla. Dist. Ct. App. 2003). In granting the mother's petition, the commissioner cited the mother's religious beliefs and the father's lack thereof as a reason for his decision. *Huitt*, 848 So.2d at 460. Based on the foregoing, the father moved to have the commissioner disqualified from hearing the parties case. *Huitt*, 848 So.2d at 460. The appellate court granted the father's motion. *Huitt*, 848 So.2d at 460. This case is completely inapplicable to the current case because it does not deal with a judge accused of misconduct nor does it involve a finding of judicial misconduct; rather the case concerns a motion to disqualify a judge.

In *Nebraska v. Empson*, disciplinary charges were brought against Judge Empson for numerous allegations, including allegations of sexual harassment by multiple, specifically seven, different women who interacted with the judge as court personnel or attorneys. *Empson*, 562 N.W.2d 817 (Neb. 1997). One of the many charges brought against Judge Empson was that:

> At the conclusion of a criminal case in 1995 (State v. Hunt) after a verdict had been reached, Judge Empson, during a post-trial discussion with the jurors, distributed religious materials to the jurors in the courthouse. Judge Empson has also, in the courthouse, given a copy of the Bible to a litigant who had appeared before him in a domestic relations case seeking a protective order.

Empson, 562 N.W.2d at 829.

The *Empson* court held that it was a violation of Nebraska's Code of Judicial Conduct for Judge Empson to distribute religious materials to jurors in an effort to promote his own religion, but that the gift of a Bible to a litigant was not a violation. *Empson*, 562 N.W.2d at 830-31. In so holding, the court noted that "[w]hile respondent is free to practice his religion as he chooses, his

attempts to express his personal views on persons within the confines of the courthouse are violative of Canons 1 and 2 . . .." *Empson*, 562 N.W.2d at 830. Magistrate Ballew was not attempting to "express her personal views" on any of the parties before her; she was attempting to explain why her decision was in the best interests of the child.

Again, in *State v. Pattno*, the issue was not whether a judge had committed judicial misconduct, but rather, whether the reading of biblical scriptures immediately prior to sentencing in a criminal case warranted remand and re-sentencing by a different judge. *State v. Pattno*, 579 N.W.2d 503, 508-09 (Neb. 1998). The *Pattno* court held that the test was "whether a reasonable person under these circumstances would question the trial judge's impartiality." *Pattno*, 579 N.W.2d at 508. In holding that remand was necessary, the court stated that "relying upon one's personal religious beliefs as a basis for a sentencing decision injects an impermissible consideration in the sentencing process." *Pattno*, 579 N.W.2d at 509; *citing U.S. v. Bakker*, 925 F.2d 728 (4th Cir. 1991).

However, the *Pattno* court also noted that "**[s]tatements of religious expression by a judge** or remarks which suggest that the judge dislikes the crimes committed by a defendant **do not necessarily evidence improper bias or prejudice**." *Pattno*, 579 N.W.2d at 509 (emphasis added); *citing Six v. Delo*, 885 F.Supp. 1265 (E.D. Mo. 1995), affirmed 94 F.3d 469 (8th Cir. 1996); *United States v. Baer*, 575 F.2d 1295 (10th Cir. 1978); *Poe v. State*, 341 Md. 523, 671 A.2d 501 (1996).

Of the three cases cited by the *Pattno* court for the immediately preceding proposition, only two specifically regard religious expression. In *Six v. Delo*, the petitioner argued that the trial judge impermissibly relied on the Bible in his sentencing deliberations. *Six*, 885 F.Supp. at 1272. The trial judge, in response to both the prosecutor and the defense counsel's biblical references during closing arguments, stated on the record before he announced his sentence the following:

attempts to express his personal views on persons within the confines of the courthouse are violative of Canons 1 and 2 . . .." *Empson*, 562 N.W.2d at 830. Magistrate Ballew was not attempting to "express her personal views" on any of the parties before her; she was attempting to explain why her decision was in the best interests of the child.

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> I listened carefully to the recitation of respective counsel as they each correctly referred to the passage in Matthew Five, Verse Seven. "Blessed are the merciful, for they will be shown mercy." Quite by chance I came upon a verse while waiting for the jury to return its verdict this afternoon. It is James Two, Verse Twelve. "Speak and act as those who are going to be judged by the law and that gives freedom, because judgment without mercy will be shown to anyone who has not been merciful. Mercy triumphs over judgment." However, my perception of my job is not to reward [or] to to [sic] punish, except as the evidence dictates.

Six, 885 F.Supp. at 1272.

In holding that the petitioner's argument was without merit, the *Six* court noted that the trial judge specifically stated that he relied only on the evidence in making his decision and that there was no evidence in the trial transcript that the judge relied on the Bible in making his decision. *Six*, 885 F.Supp.at 1272. Magistrate Ballew's Statement of Facts and Reasons Supporting Name Change does not state that she relied on her religious beliefs in making her decision. The Statement evidences that Magistrate Ballew was familiar with the views of the community and made her decision out of concern for the reception the child might receive in that community.

In *Poe v. State*, the defendant argued that the trial judge sentenced him based on that judge's "own personal religious or moral standard, and in spite of any evidence to mitigate punishment." *Poe*, 671 A.2d at 505. Before announcing the sentence to be imposed on the defendant, the trial judge stated:

> That's what irritates me today with this liberal philosophy. I guess I'm a dinosaur. I'm still old-fashioned. Maybe my time is gone, maybe. **I still believe in good old-fashioned law and order, the Bible,** and a lot of things that people say I shouldn't believe anymore. Perhaps I am a dinosaur sitting here, but I'm not going to change. Maybe one day they will say you should not sit here any more because you are too much of a dinosaur. You are too conservative in criminal law. **You believe too much in the Bible** and law and order.

Poe, 671 A.2d at 505-06 (emphasis added).

In holding that the judge's comments did not warrant reversal, the *Poe* court stated "nor do we believe that Judge Cole's comments reflected that his personal religious beliefs had been betrayed." *Poe*, 671 A.2d at 506; *citing Gordon v. State*, 639 A.2d 56 (R.I. 1994)(holding that biblical reference by sentencing judge did not suggest bias). The trial judge at issue in *Poe* stated directly what his own religious beliefs were and, notwithstanding this declaration, the appellate court found that his sentencing decision was not based on "prejudice". *Poe*, 671 A.2d at 506. Again, never in the Statement does Magistrate Ballew state that her religious beliefs formed any part of the basis for her decision. What the Statement does say is that she thought her decision was in the best interests of the child. Magistrate Ballew took into account her own understanding of the denotation and connotation associated with the term "Messiah", how the community might react to someone named "Messiah", and used this knowledge to make a difficult decision about how to best protect the child.

Finally, in *Judicial Inquiry and Review Board of the Supreme Court of Pennsylvania v. Fink*, Judge Fink was accused and found guilty of the following violations: (i) improper communication with parties to litigation pending before the respondent, (ii) abuse of criminal contempt powers, (iii) improper use of judicial office, (iv) failure to disqualify, and (v) interjection of religion and religious bias in judicial proceedings. *Fink*, 532 A.2d 358, 360-369 (Pa. 1987). Regarding the fifth charge, the *Fink* court described six different instances of religious expression or religious bias. *Fink*, 532 A.2d at 368-69.

First, during a delinquency hearing involving the anti-social behavior of a teenage boy, Judge Fink:

> [C]alled for an in-chambers conference with the probation officer, the community mental health director, and a guidance counselor. At this meeting, Respondent suggested that the boy might be possessed by demons and that a local priest should examine him to determine whether an exorcism was required. Respondent then called a separate meeting with the boy's parents and told them the same thing. The parents felt compelled to accede to Respondent's request for an examination to determine whether the boy was possessed, because, according to the boy's mother, Respondent spoke with the voice of authority and she was concerned that treatment for her son would not proceed until the judge's wishes were complied with. The boy was examined by a priest and found not to be "possessed by demons," and so no exorcism was performed.

Fink, 532 A.2d at 368.

Second, at the close of a probation revocation hearing, Judge Fink:

> [W]hile in judicial robes and seated on the bench, called the defendant to the bench and handed her a religious card entitled "The Cross in My Pocket." Printed on the card was a religious poem. Respondent testified that he had handed out this card in similar circumstances on approximately six occasions to those whom he believed needed and would accept the message on the card. Respondent feels that he can determine whether a person needs and will accept the card because he has been given "the gift of discernment."

Fink, 532 A.2d at 368.

Third, during a hearing on a motion for reconsideration of sentence:

> [T]he defendant testified that he had been "born again," that he had "found" Jesus Christ, and as further evidence of his religious temperament, he began "speaking in tongues." Although Respondent denied the defendant's motion for reconsideration, Respondent, while wearing judicial robes, descended from the bench and physically embraced the defendant as a "brother in Christ."
> Similarly, in February 1986 Respondent presided over a protection

> from abuse hearing in Commonwealth v. James Watson, No. 14 of 1986 (C.P. Potter County), during which the defendant testified that he had been "born again" and that he had accepted Jesus Christ as his savior. While wearing judicial robes, Respondent descended from the bench and physically embraced the defendant as a "brother in Christ."

Fink, 532 A.2d at 368.

Fourth, Judge Fink candidly admitted that it was common knowledge in the community that he held strong religious beliefs and that "it was proper for him to give a lesser sentence to a criminal defendant who was actively engaged in the practice of religion than to one who was not. Because of Respondent's known religious bias, parties who appeared before Respondent frequently professed their religious practices." *Fink*, 532 A.2d at 368.

Fifth, during a custody hearing involving a mother who admitted to being an alcoholic and unstable, the mother stated "I have become a Christian. I have become reborn. I am stable enough." In response, Judge Fink stated that he believed the mother had been reborn and urged her to petition the court to change the custody order, but the mother subsequently admitted that she remained unstable and an alcoholic. *Fink*, 532 A.2d at 368-69.

Sixth, Judge Fink testified "that his religious activities and profession of religion in the courtroom were intended to 'foist' and encourage the belief in and practice of Christianity among Christians." *Fink*, 532 A.2d at 369.

In holding that Judge Fink's actions violated the Code of Judicial Conduct, the Supreme Court of Pennsylvania quoted itself as stating that:

> [O]ur Commonwealth is neutral regarding religion. It neither encourages nor discourages religious belief. It neither favors nor disfavors religious activity. A citizen of this Commonwealth is free, of longstanding right, to practice a religion or not, as he sees fit, and

> whether he practices a religion is strictly and exclusively a private matter, not a matter for inquiry by the state.

Fink, 532 532 A.2d 358, 370 (Penn. 1987); *citing Commonwealth v. Eubanks*, 512 A.2d 619 (Penn. 1986).

As Disciplinary Counsel notes, the *Fink* case is arguably the seminal case on the injection of religion into the duties of a judge, however; the facts of the *Fink* case portray such repeated, egregious religious bias that using them, by way of analogy, to support a finding that Magistrate Ballew's actions constitute a violation of the cited canons is inappropriate. Magistrate Ballew did not impinge a citizen's right to practice the religion of their choosing and she did not suggest that any of the parties should be a certain religion. What she did was make a practical decision, based on her own knowledge of the community, that she felt would be in the child's best interests, protect the child, and be fair to both of the child's parents. The evidence is simply not enough to rise to the level of the clear and convincing standard necessary to find that Magistrate Ballew's actions violated the cited ethical canons.

B. Comment on Pending Cases

Magistrate Ballew is also alleged to have violated Rule 2.10, which states in full that:

> A) A judge **shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court**, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
> (B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.
> (C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by

paragraphs (A) and (B).
(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.
(E) Subject to the requirements of paragraph (A), **a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter**.

Sup. Ct. Rules, Rule 10, RJC 2.10 (emphasis added).

The day after she issued her decision in the case that gave rise to the current action, WBIR-TV requested, and was granted, an interview with Magistrate Ballew regarding her decision. During the portion of the interview broadcast to the public, Magistrate Ballew made two statements: (i) that "the word 'Messiah' is a title and it's a title that has only been earned by one person and that one person is Jesus Christ, and (ii) that "[the child's name] could put [the child] at odds with a lot of people and, at this point, he has had no choice in what his name is."

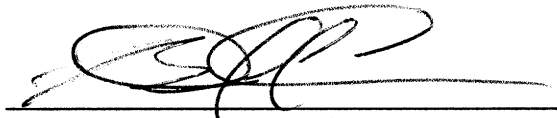
Magistrate Ballew's comments during the interview do not violate Rule 2.10 because her comments could not reasonably be expected to affect the outcome or impair the fairness of a pending matter. At the time of the interview, the matter of the child's name was pending before Chancellor Forgety. As evidenced by Chancellor Forgety's subsequent holding, Magistrate Ballew's comments did not in fact affect the outcome of the proceeding or impair its fairness, nor could her comments be reasonably expected to do so. Further, Magistrate Ballew's comments during the WBIR interview, although not verbatim what was written in her Statement of Facts and Reasons Supporting Name Change, were essentially the same reasons contained in the Statement. The Statement was part of the court record and could be accessed by the public, and would certainly be available to any appellate authority. Because no new reasons or considerations were given in the interview for her

decision, Magistrate Ballew's statements during the interview could not "reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court." Therefore, the charge alleging a violation of Canon 2, Rule 2.10 of the Code of Judicial Conduct should be dismissed.

III. CONCLUSION

As Disciplinary Counsel has correctly pointed out, there are no Tennessee cases directly addressing the issue presented to this Panel. However, Disciplinary Counsel incorrectly asserts that "judicial discipline authorities have uniformly recognized that such behavior [ostensibly that of Magistrate Ballew] falls well short of acceptable conduct." In *State v. Pattno*, a case cited by Disciplinary Counsel in his Pretrial Statement, the court noted that "[s]tatements of religious expression by a judge . . . do not necessarily evidence improper bias or prejudice." *Pattno*, 579 N.W.2d at 509. Of all the forms of human expression, there are none with such permanent, life-altering consequences for another human being who lacks any ability to counter it, then the choice of a name. Children have no control over their names, and a child's only protection from potentially detrimental names lies with the state. Magistrate Ballew made a very difficult decision and she based that decision on her knowledge of the community and the future difficulties she thought that a child named "Messiah" might face. The evidence simply does not rise to the level of the clear and convincing standard necessary to find that any of the cited Canons have been violated, and these charges should be dismissed.

Respectfully submitted this 27th day of February, 2014.



D. VANCE MARTIN, ESQ. (BPR#004145)
BRENT R. LAMAN, ESQ. (BPR#032214)
COUNSEL FOR LU ANN BALLEW

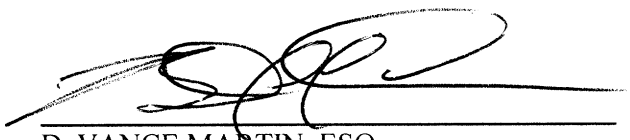
FINKELSTEIN, KERN, STEINBERG
& CUNNINGHAM
1810 AILOR AVENUE
KNOXVILLE, TENNESSEE 37921

CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to TRCP 5.02 a true and exact copy of the foregoing instrument has been delivered to all parties of interest or their attorneys as listed below ☒ by placing the same in the U.S. Mail, postage pre-paid, ☐ by hand-delivery, ☒ by email in PDF format, or ☐ by sending the document via facsimile. This the 27th day of February, 2014.

TIMOTHY R. DISCENZA, ESQ.
DISCIPLINARY COUNSEL
TENNESSEE BOARD OF JUDICIAL CONDUCT
POST OFFICE BOX 50356
NASHVILLE, TENNESSEE 37205

PATRICK J. McHALE, ESQ.
ASSISTANT DISCIPLINARY COUNSEL
TENNESSEE BOARD OF JUDICIAL CONDUCT
POST OFFICE BOX 50356
NASHVILLE, TENNESSEE 37205



D. VANCE MARTIN, ESQ.
BRENT R. LAMAN, ESQ.
Counsel for Lu Ann Ballew

FINKELSTEIN, KERN, STEINBERG
& CUNNINGHAM
1810 AILOR AVENUE
KNOXVILLE, TENNESSEE 37921
PHONE: (865) 525-0238
FAX: (865) 523-5138