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PERSPECTIVE

Private judge in Jolie/Pitt case: no more flawed than usual

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In *Jolie v. Superior Court*, 2021 DJDAR 7512 (2021), Angelina Jolie obtained a writ of mandate from the 2nd District Court of Appeal, Division 7 ordering the disqualification of Judge John W. Ouderkirk (Ret.), who had been retained to serve as a temporary judge to adjudicate her ongoing divorce with Brad Pitt. Justice Dennis M. Perluss, writing for the court was joined by Justices Gail Ruderman Feuer and John L. Segal (who added a concurring opinion).

There is a multitude of lessons in this opinion, and it merits review by sitting bench officers, private judges, and the family law bar. While the court's conclusion that Judge Ouderkirk committed a violation of the relevant judicial ethics is indisputable, in light of the somewhat-malleable standard articulated by the court for disqualifying a temporary judge, its ultimate determination to disqualify Judge Ouderkirk is not so clear.

Jolie and Pitt married in August 2014. It was Judge Ouderkirk who officiated their wedding in France, suggesting the couple had some significant degree of prior positive relationship with him. Just two years later, in September of 2016, Jolie filed for divorce and sought custody of their children based on harsh allegations about Pitt. In January 2017, based on the parties' stipulation, Judge Ouderkirk was appointed as a temporary judge for all purposes — importantly, not arbitrator, neutral or referee, but judge.

At the time, Pitt was represented by Lance Spiegel of Young, Spiegel & Lee (now known as Young, Spiegel, Hillman & Hosp, LLP) while Jolie was represented by Laura Wasser of Wasser, Cooperman & Carter (now known as Wasser, Cooperman & Mandles, P.C.). As required by judicial ethics, prior to his appointment both Judge Ouderkirk and Alternative



New York Times News Service

Brad Pitt and Angelina Jolie on the red carpet at the Golden Globe Awards in Beverly Hills, Calif., Jan. 11, 2009.

Resolution Centers made disclosures regarding matters where both sets of lawyers had hired him. Not surprisingly, they disclosed a variety of matters involving both Spiegel and Wasser. Both Judge Ouderkirk's and ARC's disclosure letters expressly stated that Judge Ouderkirk would continue to accept assignments from any of the parties or their lawyers, although ARC's letter also stated that Judge Ouderkirk would inform the parties if he did so.

The parties stipulated to extend Judge Ouderkirk's appointment in 2018. During that year, a new attorney from Greenberg Glusker Fields Claman & Machtinger LLP associated in on behalf of Jolie, so ARC wrote another updated disclosure letter which added additional matters that either Wasser or Spiegel was handling before him. Then in August 2018, Samantha Bley DeJean of San Francisco replaced Wasser as Jolie's lead counsel, so ARC sent another disclosure letter and Judge Ouderkirk supplemented his own disclosures indicating no prior matters with DeJean or her law offices, but did mention

another matter with one of Jolie's other lawyers. He again advised that he would continue to accept other cases from the parties or their lawyers.

In October 2018, while DeJean was lead counsel for Jolie, the parties again stipulated to extend Judge Ouderkirk's appointment through June 2019. Judgment for custody was entered during this period. The parties then again agreed to extend Judge Ouderkirk's appointment through December 2019. And thereafter, the parties again stipulated to extend Judge Ouderkirk as temporary judge through December 2020. DeJean clearly knew at the time of these stipulations that she was not based in Los Angeles and had not retained Judge Ouderkirk for other appointments, but that both her opposing counsel were doing so as well as some of her co-counsel. The history of the disclosures demonstrated that this practice would continue and both ARC and Judge Ouderkirk had made that clear.

In December 2019, Anne C. Kiley associated in with Spiegel as counsel for Pitt, but there were

no new disclosures provided or requested. However, six months later, in June 2020, Pitt filed a request for a change in the custody order, seeking more time with the couple's children, which Jolie opposed. In response, DeJean, who knew that, while she had not used Judge Ouderkirk's services for anything else, Kiley, who had come into the matter six months earlier, might have done so, requested new disclosures. ARC promptly responded disclosing two new matters, one involving Kiley and one involving Spiegel. DeJean then requested more details directly from Judge Ouderkirk, who provided information indicating that the new Spiegel matter was completed and had required little time, and that the Kiley-related matter had preceded her appearance in the case, so it had not needed to be disclosed previously.

Immediately after receiving Judge Ouderkirk's response, Jolie asked him to recuse himself, suggesting that this had been the strategy all along. Judge Ouderkirk declined, so Jolie went to court seeking disqualification. Orange County Superior Court Judge Erick Larsh was requested to sit by assignment to decide the matter and denied the disqualification request. He found that the request was untimely and that the newly disclosed information would not cause a person to reasonably entertain a doubt about Judge Ouderkirk's impartiality. The Court of Appeal disagreed. Justice Perluss pointed to California Rule of Court 2.831(d), which requires that matters subject to disclosure not known at the time of appointment but occurring later be disclosed "as soon as practicable thereafter." Judge Ouderkirk apparently was not aware of this rule and had even admitted that the disclosure could have been done much sooner — indeed, it obviously could and should have been done at the time Kiley became counsel of record in December 2019. So,

under any analysis, disclosure six to seven months later was not “as soon as practicable.” The other new Spiegel matter, although brief, had occurred in April 2019, and it should have sparked a disclosure as well and even earlier.

Disqualification of a temporary judge for lack of impartiality is a “continuing right” and as the Court of Appeal states: “Ongoing disclosure on a timely basis is essential for that right to be meaningful.” The justices soundly rejected Judge Ouderkirk’s “excuse [for] his ethical lapse” by claiming an “administrative process” error, pointing out that, just as lawyers are not allowed to point to their assistants, Judge Ouderkirk must also accept the responsibility for the “ethical violation that occurred here.” The appellate court pointed out that he certainly knew his own assignments so he should have known his need to disclose, and further that the disclosures only occurred here because of a request by counsel, whereas a judge is obligated to make them “as soon as practicable.”

The appellate court could have at that point disqualified Judge Ouderkirk by simply ruling that a clear “ethical violation” once established automatically requires disqualification of a temporary judge, a position that would have been hard to debate or criticize. But the court actually rejected that bright-line rule approach, which was urged by Jolie’s lawyers. Rather, Justice Perluss emphasized that different standards apply to judges than to arbitrators, and that the rules and case law regarding disqualification of neutrals, some of which is “strict and unforgiving,” did not apply. Justice Perluss decided that the test for disqualification of a temporary judge is not whether an ethical lapse occurred, but rather, per Code of Civil Procedure Section 170.1 (a)(6)(A) (iii), whether in light of all the facts a person “might reasonably entertain a doubt that the judge would be able to be impartial,” a standard that (oddly) the court calls “objective” but seems rather subjective. A violation of the judicial canons by itself is not enough (though that would seem to be more objective); instead, “disqualification must be evaluated in light of the circumstances then existing.”

Of course, Judge Lasch had used this same standard and found that disqualification was

not warranted because he did not believe that Judge Ouderkirk could reasonably be seen as lacking impartiality. But the appellate court rejected Pitt’s argument that Jolie always knew that Judge Ouderkirk was handling other matters for Pitt’s lawyers; that both the judge and ARC had always stated he would accept other matters from the parties or their lawyers, so there was no surprise about this continuing; and that there were after all only two additional matters that had not been disclosed as timely as required by Rule 2.831(d), although they were ultimately disclosed.

Justice Perluss calls Pitt’s argument “doubly flawed,” but does not adequately explain why. It is true, as the opinion notes, that the “cumulative effect” of multiple cases “sometimes will matter,” although it is not clear how it matters here. Justice Perluss correctly points out that: “[t]his is not simply the difference between 10 or 12 ... but between a history of past relationships and an inventory of current ones.” But using the standard articulated by the court, it is also true that Judge Ouderkirk was very familiar with the case and to the parties, was also well-known to be handling other matters for both parties’ lawyers for which he was paid, and was a likely choice by these same well-known Los Angeles divorce lawyers for other high-stakes cases. These were the facts when the parties repeatedly stipulated to his appointment over several years and they did not materially change. While he had committed a clear violation, in light of these circumstances, a reasonable person would not necessarily think that his appointment to an additional matter on either side would suddenly create bias where there was none before. What happened was he made a mistake — and while blaming ARC is not an excuse that avoids responsibility, it certainly appears to have been an administrative snafu and entirely unintentional.

The appellate court does point out that one of the circumstances here was that Jolie’s current lead counsel was not local: “we do not believe it is irrelevant that Jolie is now represented by someone who is not a repeat-player in Judge Ouderkirk’s court.” That is true, but it is also not irrelevant that the obvious inference here is that Jolie’s counsel engaged in clever gamesmanship either in an

effort to change judges, (possibly anticipating a negative result due to the history of the matter in front of Judge Ouderkirk) or perhaps just seeking to delay Pitt’s custody request which is always a time sensitive matter. But the court does not seem to recognize that rather pertinent circumstance here — after all, forum shopping is a legal strategy. The court certainly did not mean to condone a new tactic — that is, hire an out-of-town lawyer to create the appearance of a bias if a party decides to try to disqualify the current temporary judge who has been retained by local opposing counsel in other matters — yet that may be the unintended consequence. Here, Jolie opted to hire a San Francisco attorney while knowing that Judge Ouderkirk was performing other services for opposing counsel and likely to be retained in the future and then continued to stipulate to extend the judge’s appointment.

Private judges are highly compensated, and there is a limited number of them who have the experience and reputation to handle high-end complicated

divorce cases. It is typical, as it was here, for those few neutrals to be in high demand and regularly retained by the same group of prominent Los Angeles divorce firms. Justice Segal in his concurring opinion suggests that no temporary judge should ever be compensated by the parties, that the status of judge is different from neutral, and that the rule should be changed so as to prohibit payment to temporary judges from the parties (but payment if appropriate should only come from the court). Of course, such a change would end the common practice of seeking appointment of a temporary judge for protracted and expensive litigation. But Justice Segal articulates a legitimate concern that both current compensation and the prospect of future and continuing compensation from repeat users does create the appearance of bias — perhaps unconscious bias — which is a fundamental problem with all private judging, be it arbitrators, referees, mediators, or temporary judges. It is a flawed system. But here, it was no more flawed than usual. ■

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