

1 Case Number CV 002

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6 IN THE JUSTICE COURT OF AUSTIN TOWNSHIP
7 COUNTY OF LANDER, STATE OF NEVADA
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9
10 RUBEN GALLEGOS
11 and
12 VIRGINIA (SISSIE) GALLEGOS,
13 Plaintiffs

MOTION TO CHANGE TRIAL

14 v.

15
16 MICHAEL MARKING
17 and
18 ELIZABETH FLEMING,
19 Defendants
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22
23 COME NOW Michael Marking and Elizabeth Fleming, in proper person, as Defendants, and
24 hereby make their MOTION TO CHANGE TRIAL.
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26

27 **WHEREAS**

28 (1) The justice of the peace for this Court, the Hon. Joe Dory, is disqualified from acting
29 in this matter (see MEMORANDUM OF POINTS & AUTHORITIES, page 3); and

30 (2) In instances of disqualification, the place of trial must be changed or a different justice
31 of the peace must be appointed *pro tempore* to conduct the proceedings (see
32 MEMORANDUM OF POINTS & AUTHORITIES, page4);

33
34 **THEREFORE**

35 Defendants hereby request that a different justice of the peace be appointed, or the trial
36 moved, according to statute and rule.

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38 **IN SUPPORT** of this request, petitioners attach a **DECLARATION OF MICHAEL MARKING**, and their
39 **MEMORANDUM OF POINTS AND AUTHORITIES**.

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41 **DEFENDANTS NOTE** that they are serving and filing, concurrently with this **MOTION TO CHANGE**
42 **TRIAL**, two other motions: a **MOTION FOR A MORE DEFINITE STATEMENT**, and a **MOTION TO DISMISS**.

43
44 **DATED** this Tuesday, 1 June 2010.

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47 _____
48 Michael Marking, Defendant

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51 _____
52 Elizabeth Fleming, Defendant

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54 both at General Delivery, Austin, Nevada 89310
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57 MEMORANDUM OF POINTS AND AUTHORITIES
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59 **1. The Hon. Joe Dory is disqualified from acting in this matter.** Because of at least
60 one child in common with one of the Plaintiffs, the Hon. Joe Dory is disqualified from
61 acting in this matter.

62 RULE 2.11 Disqualification

63 (A) A judge shall disqualify himself or herself in any proceeding in which the judge's
64 impartiality might reasonable be questioned, including but not limited to the following
65 circumstances:

66 (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or
67 personal knowledge of facts that are in dispute in the proceeding.

68 (2) The judge knows that the judge, the judge's spouse or domestic partner, or a person
69 within the third degree of relationship to either of them, or the spouse or domestic partner
70 of such a person is:

71 (a) a party to the proceeding [...]

72 -- Nevada Code of Judicial Conduct (NCJC)

73 **2.** The statutes also make reference to consanguinity and affinity as grounds for
74 disqualification. See, for example, NRS 4.435 disqualifies a justice of the peace by reason
75 of “being related to the defendant, plaintiff or complaining witness in the proceeding by
76 consanguinity or affinity within the third degree”.

77 **3.** The Hon. Joe Dory is also disqualified by repeated violations of the rules
78 concerning ex parte communications which give rise to an appearance of bias. NCJC 2.9
restricts ex parte communications to emergency and necessary administrative matters,
which stricture is violated routinely. Furthermore, when such ex parte communications

79 occur, the judge must make “provision promptly to notify all other parties of the substance
80 of the ex parte communication and gives the parties an opportunity to respond.” (NCJC
81 2.9(A)(1)(b)) Such provisions are not routinely made. Furthermore, access to ex parte
82 sessions is unequal, being more available to friends of the judge than to others.

83 **4.** The Comment (1) to Rule 2.11 of the NCJC says, “Under this Rule [2.11], a judge is
84 disqualified whenever the judge’s impartiality might reasonably be questioned, regardless
85 of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.”

86 **5.** Accordingly, the Hon. Joe Dory is also disqualified under NCJC 2.11.

87 **6.** Further grounds for disqualification include failure to recuse himself in in matters
88 before him when conflicts arise, or alternatively, to disclose relationships to parties so that
89 those parties might elect whether or not to proceed with him sitting in said matters, as
90 required by NCJC 2.11(C). Such failures to recuse or disclose undermine confidence in the
91 judicial system, and give a further appearance of partiality. An appearance of partiality
92 disqualifies the Hon. Joe Dory by NCJC 2.11, Comment 1.

93
94 **7. A substitute justice must be appointed, or the trial moved.** Under the statutes, in
95 instances of disqualification, the trial must be moved or a substitute justice brought in to
96 oversee the proceedings.

97 NRS 4.032 Justices of the peace pro tempore. [...]

98 2. Whenever a justice of the peace is disqualified from acting in a case pending in the
99 justice court or is unable to perform his official duties because of his temporary sickness
100 or absence, or other cause, he shall, if necessary, appoint a person from the panel of
101 substitute justices of the peace or, pursuant to NRS 4.340, invite another justice of the
102 peace to act in his place. [...]

103 4. If an appointment of a justice of the peace pro tempore becomes necessary and the
104 justice of the peace fails or is unable to appoint a person from the panel of substitute
105 justices pursuant to this section and fails or is unable to obtain another justice of the
106 peace pursuant to NRS 4.340, the chairman of the board of county commissioners shall:
107 [...]

105 (b) In counties whose population is 100,000 or less, appoint another justice of the peace
106 pursuant to NRS 4.340, a person from the panel of substitute justices of the peace
107 pursuant to this section or a municipal judge pursuant to NRS 4.345, to act in his place.

108 **8.** The statutes further say:

109 NRS 4.340 Temporary assistance for justice of the peace: Requirements; compensation
110 and travel expenses.

111 1. Whenever any justice of the peace, in consequence of ill health, absence from his
112 township, or other cause, is prevented from attending to his official duties, he shall, if
113 necessary, invite any other qualified justice of the peace of the same or another county or
114 appoint a person from the panel of substitute justices of the peace pursuant to NRS 4.032
115 to attend to his official duties, including those of registry agent. If he does not obtain
116 another justice of the peace pursuant to this section and he fails or is unable to appoint a
117 person from the panel of substitute justices of the peace pursuant to NRS 4.032, the board
118 of county commissioners shall: [...]

119 (b) In counties whose population is 100,000 or less, appoint any other justice of the peace
120 of the same or another county or a person from the panel of substitute justices of the
121 peace pursuant to NRS 4.032 or obtain a judge of a municipal court pursuant to NRS
122 4.345, to attend to his official duties. [...]

123 NRS 4.345 Disqualification of justice of the peace in certain counties: Substitution of
124 municipal judge. In counties whose population is 100,000 or less, if the justice of the
125 peace is disqualified by reason of being a party to or interested in a proceeding pending in
126 the justice court or of being related to the defendant, plaintiff or complaining witness in
127 the proceeding by consanguinity or affinity within the third degree, or in any case of his
128 sickness, absence or inability to act, and if a substitute justice of the peace has not been
129 obtained pursuant to NRS 4.340 and a person has not been appointed from the panel of
130 substitute justices of the peace pursuant to NRS 4.032, a judge of a municipal court of
any city in the county may, on the written request of the chairman of the board of county
commissioners, serve in place of the justice of the peace.

125 **9.** To further make this plain:

126 NRS 66.020 Place of trial may be changed in certain cases.

127 1. The court may, at any time before the trial, on motion, change the place of trial in the
128 following cases: [...]

129 (d) When from any cause the justice is disqualified from acting. [...]

130 2. In lieu of changing the place of trial, the justice before whom the action is pending may
for any of the cases mentioned in subsection 1 call another justice of the county to
conduct the trial.

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10. Summary. The Hon. Joe Dory is disqualified from acting in this case due to consanguinity with a party and also due to appearance of impropriety. It is mandatory by the statutes to change venue, or, alternatively, to bring in an alternate justice of the peace *pro tempore* to act in this matter.

DECLARATION OF MICHAEL MARKING

I, Michael Marking, under penalty of perjury, declare as follows:

This declaration is given in support of the accompanying Motion.

I am one of the Defendants in this action.

Upon information and belief, the factual assertions contained in said Motion are true and correct to the best of my knowledge.

This declaration is made Tuesday, 1 June 2010, at Austin, Nevada.

Michael Marking, Declarant

CERTIFICATE OF SERVICE

I hereby certify under penalties of perjury that on this date I served true and correct copies of the foregoing document by depositing them for mailing, in sealed envelopes, U.S. postage

157 prepaid, at Austin, Nevada, addressed as follows:

158 Ruben Gallegos and Virginia (Sissie) Gallegos; Post Office Box 221; Austin,
159 Nevada 89310

160 Dated Tuesday, 1 June 2010.

161

162

163 Michael Marking

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AFFIRMATION

167

(Pursuant to NRS 239B.030)

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169 I hereby affirm that the preceding document filed in the above-described manner does
170 not contain the social security number of any person.

171 Dated Tuesday, 1 June 2010.

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174 Michael Marking

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181 (Defendants' electronic document name: *ggvmf_motion_change_trial_20100601bI*

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