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Commonwealth of Kentucky
Court of Appeals

NO. 2024-CA-0593-MR

ALLEN RAY JORDAN

APPELLANT

v. APPEAL FROM TODD CIRCUIT COURT
HONORABLE JOE W. HENDRICKS, JR., JUDGE
ACTION NO. 20-CI-00077

SANDY LYNN BOSS

APPELLEE

AND

NO. 2024-CA-0632-MR

SANDY LYNN BOSS JORDAN (NOW
BOSS)

CROSS-APPELLANT

v. CROSS-APPEAL FROM TODD CIRCUIT COURT
HONORABLE JOE W. HENDRICKS, JR., JUDGE
ACTION NO. 20-CI-00077

ALLEN RAY JORDAN

CROSS-APPELLEE

OPINION AND ORDER
REVERSING AND REMANDING

** ** *

BEFORE: CALDWELL, CETRULO, AND ECKERLE, JUDGES.

ECKERLE, JUDGE: Appellant/Cross-Appellee, Allen Ray Jordan (“Jordan”), and Appellee/Cross-Appellant, Sandy Lynn Boss (“Boss”), challenge orders of the Todd Circuit Court in matters relating to the dissolution of their marriage. In his direct appeal, Jordan primarily argues that the Trial Judge was compelled to recuse himself due to unethical conduct. It is undisputed here that the Trial Judge engaged in impermissible, *ex parte* communications about the merits of the case and the parties, both of which were the subject of his rulings. He then declined to recuse himself. Significantly, in supplemental recusal proceedings, now-retired Chief Justice John Minton acknowledged the impropriety of the Trial Judge’s actions but declined to order recusal at the time. Instead, he chose to allow the trial to proceed and the issues to be relitigated before this Court.

We take the opportunity to correct this injustice, reverse the trial proceedings and rulings, and order the recusal of the Trial Judge, further finding that the two prior motions to recuse were timely. We remand the case for the appointment of a Special Judge to try the case anew. Thus, we need not address the specific claims regarding each claimed error in the rulings below as to the appeal and cross-appeal, as they will not withstand the necessary recusal. We

further deny Jordan's motion to strike Boss's brief due to relatively minor deficiencies under the circumstances.

I. Factual and Procedural History

Jordan and Boss married on April 2, 2011, and separated in September of 2020. No children were born of the marriage. On September 24, 2020, Boss filed a petition for dissolution of the marriage. Thereafter, Boss filed motions for a restraining order, a show cause order, and for temporary relief seeking, *inter alia*, the exclusive use and possession of the marital residence, including 26 acres of land associated with the residence (the "Residential Property"). Boss also filed a petition with the Todd District Court for an emergency protective order ("EPO"). The District Court granted the EPO.

The parties later agreed to modify the EPO to allow Jordan onto the Residential Property to obtain certain property, including a semi-truck, track hoe, truck and trailer, dump truck, and some tools. On October 16, 2020, Jordan visited the Residential Property, accompanied by his father and a Sheriff's Deputy. While Jordan retrieved the listed property, Boss alleged that Jordan violated the limited exceptions to the EPO. In particular, Boss alleged that Jordan entered the cattle barn. Boss later discovered that Jordan had put a large chain and lock on the gate used for access to the field, preventing her from getting into the field to take care

of the cattle. In addition, Boss alleged that Jordan had moved a bucket from the cattle field and had hung a rope in the shape of a noose in the cattle barn.

Based upon this conduct, Boss filed a motion to hold Jordan in contempt for violating the EPO. The Trial Court ordered the EPO matter to be consolidated with the dissolution proceeding. On October 21, 2020, the Trial Court held a combined hearing on these motions, as well as Jordan's motion for temporary relief in the dissolution action.

At that hearing, the Trial Judge, Hon. Joe W. Hendricks, Jr. ("Judge Hendricks"), advised the parties that he had received contact from the Todd County Sheriff outside of Court proceedings and concerning Jordan's actions at the Residential Property. Judge Hendricks related that the Sheriff had told him that Jordan was at the property for more than four hours: "I got a call from the Sheriffs saying they were out there for four hours dealing with this crap, and they're mad at me because I made them do it." Record on Appeal ("ROA") VR 10/21/2020, 12:22:35. Judge Hendricks then commenced raising his voice at Jordan and exclaiming: "And I'm really upset." *Id.*

Judge Hendricks also advised the parties that he and the Sheriff discussed years-long prior law enforcement encounters with Jordan and Boss. He said: "[T]his has been going on for years[, and] [t]hey have repeatedly dealt with this." ROA, VR 10/21/2020, 12:23:51. Thus, while considering holding Jordan in

contempt for allegedly current violations of an EPO, Judge Hendricks explicitly considered prior acts of alleged violence of which the Sheriff had advised him *ex parte*. In other words, Judge Hendricks used extrajudicial information of past violence to support his ruling as to alleged contemporaneous violations.

Further, when Jordan attempted to introduce evidence as to a disputed fact, Judge Hendricks explicitly assessed his credibility with the *ex parte* information. Jordan asserted that the cattle barn was not within 1000 feet of the residence. Judge Hendricks openly stated that this statement contradicted the facts provided by the Sheriff, which he viewed as conclusive of the issue:

Jordan: Sir, the cattle barn is over a thousand feet away, and it's a different address.

Judge Hendricks: No, it's not over a thousand feet away. That's what the Sheriff told me last night, or, the night before last on the phone. He's made, he's checked that.

ROA, VR 10/21/2020, 12:57:15. A Deputy Sheriff, who was present at the Residential Property on the night in question, testified that he did not observe any conduct by Jordan that violated the EPO or Agreed Order. Apparently, Judge Hendricks also did not believe him.

During the hearing, Judge Hendricks permitted Boss to introduce a great deal of evidence supporting her arguments. He declined to offer Jordan that same opportunity and courtesy, and he refused to allow Jordan's evidence and argument about a number of items. ROA, VR 10/21/2020, 12:25:26, 12:27:31,

12:53:18. He also cross-examined Jordan by using the information that he had received *ex parte* to challenge Jordan's credibility: "Sheriff White called me the other day, and that is not the impression I'm getting" ROA, VR 10/21/2020, 12:55:10.

At the conclusion of the hearing, Judge Hendricks stated that he was willing to hold Jordan in contempt for his actions at the Residential Property but declined to do so at that time: "I almost should hold you in contempt and put you in jail for six months, just for that. You hear me? [Loudly] You hear me?" ROA, VR 10/21/20, 12:22:35. Rather, Judge Hendricks ordered "an injunction" of the EPO until Boss moved from the home. Judge Hendricks further stated that, once Boss moved, there would be a permanent, no-contact, protective order. He held in abeyance any determination regarding violations of the EPO or issuance of a domestic violence order ("DVO") until the conclusion of the dissolution matter. He then scheduled a bench trial for July 30 and August 2, 2021, on the disputed matters concerning the dissolution, EPO, and DVO.

Therefore, in October of 2020, Jordan was aware of the improper, *ex parte* contact and that Judge Hendricks was considering holding him in contempt for alleged actions that he had learned about through the *ex parte* contact. And Jordan knew that Judge Hendricks would be making rulings upon the EPO and DVO filed against him. However, Jordan changed attorneys during this time, and

he did not inform his new counsel of the prior negative exchanges with Judge Hendricks, the acquisition and use of *ex parte* information, and the threats until the trial, which was almost one year afterwards, in August of 2021.

On the second day of that trial, Judge Hendricks took escalated adverse action against Jordan. He flatly accused Jordan of filing a false Consideration Certificate regarding his purchase of real property in Logan County, Kentucky (the “Logan County Property”). Judge Hendricks then threatened Jordan with felony charges, stating that he would refer the case to the Commonwealth Attorney for possible prosecution for perjury. Judge Hendricks repeated these charges at the close of the hearing. He then recessed the bench trial until August 24, 2021.

In light of Judge Hendricks’s adverse rulings, behavior, tone, and continuing threats, which were based upon the *ex parte* contact, and because new counsel had just been made aware of them, Jordan’s attorney filed a motion before Judge Hendricks pursuant to Kentucky Revised Statute (“KRS”) 26A.015, asking him to recuse himself. He filed this motion on August 23, 2021, before the continuation of the trial. Jordan also filed a separate motion and affidavit with the Chief Justice of the Kentucky Supreme Court seeking to disqualify Judge Hendricks, pursuant to KRS 26A.020. In light of the pending motions, Judge Hendricks cancelled the remainder of the trial and hearing.

Judge Hendricks then denied the motion to disqualify himself even as he admitted that he had discussed substantive matters outside of Court with the Sheriff. Judge Hendricks reasoned that the contact was not improper because he did not initiate it, and he disclosed his version of the discussion to the parties at the hearing. Judge Hendricks also stated that he did not rely on the *ex parte* information to make any disposition of the disputed issues or any assessment of the parties' credibility. Rather, Judge Hendricks indicated that he accused both parties of falsifying consideration certificates, and he merely advised Jordan that he could be prosecuted for perjury for any falsehoods.

On November 5, 2021, then-Chief Justice John Minton (who has since retired) denied Jordan's motion for disqualification. Nonetheless, he condemned Judge Hendricks behavior, concluding that Judge Hendricks "permitted ex parte communications with the Todd County Sheriff concerning matters that were then pending before the court[,]” Order Denying Motion for Disqualification (the “Non-Disqualification Order”), November 5, 2021, page 3, ROA at 408, and “then considered those communications during the October 21, 2020 hearing.” *Id.* He blamed Jordan for waiting more than ten months after the conduct to bring the motion. *Id.* at pp. 3-4, ROA at 408-09. Because Jordan instead proceeded to trial knowing the facts upon which the basis for disqualification rested, the then-Chief Justice concluded that Jordan “has not demonstrated that Judge Hendricks's ex

parte communications with the Todd County Sheriff have any bearing on evidentiary facts that are presently in dispute.” *Id.* at 4, ROA at 409.

The Non-Disqualification Order added that “Kentucky law currently leaves open the question of whether a defendant has waived an argument for recusal when the judge considers extrajudicial information – in this case, gleaned from impermissible ex parte communication – which give the judge personal knowledge of a disputed evidentiary fact then pending before the court – but the defendant has waited for a substantial period of time to assert that basis for recusal.” *Id.* at p. 5, ROA at 410. He declined to exercise his authority to designate a Special Judge pursuant to KRS 26A.020. He preferred to let the matter be addressed later by this Court, specifically noting that “the parties remain free to seek appellate review [of this issue] after the entry of a final judgment.” *Id.* at 5-6, ROA at 410-11.

Subsequently, Judge Hendricks rescheduled the remaining portion of the bench trial for August 15, 2022, almost one full year later. Thereafter, on October 23, 2023, Judge Hendricks issued Findings of Fact, Conclusions of Law, and Final Decree for Dissolution of Marriage (the “Dissolution Order”). As relevant to this appeal, Judge Hendricks addressed Jordan’s claims regarding the existence of a prenuptial agreement, the property and debt division concerning

both the Residential Property and the Logan County Property, and Boss's claims for maintenance and attorney's fees.

Judge Hendricks prefaced his findings by concluding that both Jordan and Boss "substantially lack personal credibility." Dissolution Order, p. 3, ROA at 885. He stated emphatically that Jordan made false statements on the Consideration Certificate for the Logan County Property. *Id.* at pp. 3-4, ROA at 885-86. Judge Hendricks also found that Boss had falsified financial records as to her income and expenses. "Further the evidence indicates that she illegally 'rented' migrant workers from farmers who were using immigrant workers on Agricultural worker visas." *Id.* at p. 4, ROA at 886.

Judge Hendricks then addressed Jordan's claims that the parties entered into a prenuptial agreement. Jordan alleged that he kept the original executed agreement, which was not copied, locked in his safe. However, he asserted that this document disappeared after he was required to vacate the Residential Property upon entry of the EPO. *Id.* at 5, ROA at 887. Jordan claimed that Boss drilled into the safe, removed the prenuptial agreement, and left a disparaging note in its place.

Jordan attempted to prove the existence of this agreement through his own testimony and by introduction of a preliminary, unsigned copy of the alleged agreement. *Id.* at pp. 7-11, ROA at 889-93. Boss admitted that the parties had

discussed having a prenuptial agreement but testified that Jordan never presented one to her. She also denied removing any documents from Jordan's safe in 2020. *Id.* at p. 11, ROA at 893. Thus, evidence conflicted. As the fact-finder, Judge Hendricks chose to rule against Jordan, finding that he failed to prove the existence of a valid, prenuptial agreement by clear and convincing evidence. *Id.* at pp. 11-12, ROA at 893-94.

With respect to the Residential Property, Judge Hendricks found that Jordan purchased the house and farm during a prior marriage. The former spouse executed a quitclaim deed conveying her interest in the property to Jordan. "The Consideration Certificate states that the parties certified that the value of said interest in the property is \$40,000.00." *Id.* at p. 12, ROA at 894. Shortly before his marriage to Boss, Jordan refinanced the outstanding mortgage debt on the Residential Property. That debt had an outstanding balance of \$42,838.62. *Id.* at p. 13, ROA at 895. The refinanced second mortgage contained a principal loan amount of \$22,297.24. The loans were paid in full during Jordan's and Boss's marriage. *Id.*

However, Judge Hendricks declined to award the Residential Property to Jordan outright, despite Jordan's sole ownership prior to his marriage to Boss. Rather, based upon the loan payments, and the value of the improvements during the marriage to Boss, Judge Hendricks found that Jordan had a non-marital interest

of \$126,406.80, and he assessed the marital equity during the nine-year union as \$311,593.20. *Id.* at p. 14, ROA at 896. He awarded the Residential Property to Jordan, subject to Boss's interest in the marital equity. *Id.*

Next, Judge Hendricks found that Jordan purchased the Logan County Property immediately prior to his marriage to Boss. *Id.* The Consideration Certificate filed with the deed states that the full purchase price for the property was \$50,000.00. *Id.* Jordan borrowed this amount from Farm Credit Services, and that loan had a remaining balance of \$27,344.78 at the time of the trial. *Id.* at 14-15, ROA at 896-97. In addition, Jordan executed a promissory note for \$79,000.00, upon which Jordan made payments during the marriage. That loan had a remaining balance of \$39,900.00 at trial. *Id.* at p. 15, ROA at 897. Judge Hendricks found emphatically that the amount stated on the Consideration Certificate was false and likely resulted in fraudulent tax filings. He went further to deem this false statement as diminishing to Jordan's credibility as a whole. *Id.* at p. 14, footnote 1, ROA at 896.

Boss introduced the appraisal report by Ben Bolinger, who testified that the fair market value of the Logan County Property is \$206,000.00. *Id.* at 15, ROA at 897. Jordan introduced the testimony of C.B. Oliver, who testified that the fair market value is actually \$128,500.00. *Id.* Boss further testified that she and

Jordan worked to improve the Logan County Property during the marriage, including building a cabin together. Jordan disputed this evidence. *Id.*

Again, the evidence submitted by Jordan and Boss contrasted. Judge Hendricks chose to give credence to Boss's appraiser and not to Jordan's. He then concluded that, after deduction of the loan, the marital equity in the property is \$178,655.22. *Id.* Judge Hendricks limited Jordan's contribution to the \$50,000.00 stated on the Consideration Certificate. *Id.* Judge Hendricks then awarded the entire Logan County Property to Boss, even though Jordan had purchased it prior to marrying her and even though she had made no financial contributions. Judge Hendricks directed her to refinance and assume the remaining approximate half-balance of the loan. Judge Hendricks also assigned to Jordan the entire debt of the note, which had also been taken before the marriage and paid down approximately 50%. *Id.*

After considering other property claims that are not at issue here, Judge Hendricks next addressed Boss's claims for maintenance. He noted that Jordan had paid temporary maintenance to Boss in the amount of \$2,500.00 per month, beginning November 1, 2020. *Id.* at p. 19, ROA at 901. Boss also received proceeds from the sale of the marital cattle. *Id.* He ultimately found that Boss had sufficient income and property to meet her reasonable needs without further maintenance. *Id.* at p. 19-20, ROA at 901-02.

Finally, Judge Hendricks addressed Boss's claim for attorney's fees.

Boss claimed that she incurred total fees and expenses of \$64,296.58, and she owed a remaining balance of \$53,290.29. *Id.* at 23. In assessing fees, Judge Hendricks made factual findings on the very disputed issues that had been the subject of his *ex parte* communications. He specifically mentioned disapprovingly that Jordan had attempted unsuccessfully to have him recused twice. He blamed Jordan for the delay in the trial. Judge Hendricks then concluded Boss's attorney's fees to be reasonable in light of the tactics employed by Jordan,

which included multiple violations of the Emergency Protection Order, staging damage and destruction at the Residence, claiming that [Boss] had removed all of his documentation from the Residence, attempting to prove the existence of a signed antenuptial agreement which never existed, adding "expert" witnesses to his witness list at the last minute prior to hearings, calling Tammy Campbell to testify as an expert witness without producing any report prior to the hearing and when she clearly was not qualified to provide an opinion as to the value of [Boss's] business, and filing a specious Motion to Disqualify Judge Hendricks as the presiding Judge after two (2) days of final hearings, when the Motion had no legal validity and was rejected out of hand by the Kentucky Supreme Court. [Boss] had prepared for the hearing on August 23, 2022, which had to be postponed and was not able to be rescheduled for a year. All of these actions constituted obstructive tactics by [Jordan] which caused [Boss's] legal fees and expenses to explode as she had to respond to each of these unfounded claims.

Id. at p. 24, ROA at 906.

Nonetheless, Judge Hendricks concluded that Jordan was not entirely responsible for all of the expenses that Boss incurred. Consequently, the Trial Court directed that Jordan pay \$10,000.00 (approximately the amount that Boss had already paid) toward Boss's attorney's fees. *Id.*

After entry of the judgment, Jordan filed a motion to alter, amend, or vacate pursuant to Kentucky Rule of Civil Procedure ("CR") 59.05. He argued that the Logan County Property was non-marital and should have been awarded to him, subject to Boss's marital interest. He further argued that the Trial Court erred in calculating the marital equity in the Residential Property and the Logan County Property. Jordan also objected to the award of attorney's fees, arguing that the Trial Court mischaracterized the Non-Disqualification Order. In response, Boss requested an increase in the award of attorney's fees.

On April 24, 2024, Judge Hendricks issued an order denying Jordan's motion. In this Order, entered approximately six months after trial, Judge Hendricks observed that the Non-Disqualification Order was based upon Jordan's timing of the motion. "Order Pertaining to Parties' Post Judgment Motions," April 24, 2024, ("Post-Judgment Order") p. 5, ROA at 985. He then concluded that the timing of the motion and the resulting delay justified the award of attorney's fees. *Id.* Thus, he based a large part of his ruling assessing fees, which also included some of the appraisal fees, on Jordan's attempts to have him recused.

This appeal and cross-appeal followed. Additional facts will be set forth below as necessary.

II. Motion to Strike

As an initial matter, Jordan moved to strike Boss's brief because she failed to designate references in her cross-appeal showing that the issues were preserved for review. Kentucky Rule of Appellate Procedure ("RAP") 32(A)(4). Boss acknowledges this deficiency and claims that she corrected it by including those references in her reply to Jordan's motion to strike. However, she did not request leave to file a corrected brief, and thus her brief remains noncompliant.

"Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, [RAP 31(H)(1)]; or (3) to review the issues raised in the brief for manifest injustice only[.]" *Barnette v. Evans*, 697 S.W.3d 749, 755 (Ky. App. 2024) (quoting *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010)).

Here, the majority of Boss's brief consists of her responses to Jordan's claims of error. RAP 32(B) does not require preservation statements for those portions of her brief. Furthermore, in her cross-appeal, Boss only seeks relief from the Trial Court's orders concerning attorney's fees and maintenance. The factual grounds for those decisions are fully set out in the Trial Court's orders. More fundamentally, we are not reaching the merits of the orders on fees and

maintenance because we are reversing the proceedings for failure to grant a recusal where warranted. While we caution counsel to be more diligent in complying with the RAPs, we decline to exercise our discretion to strike Boss's brief or impose other sanctions at this time.

III. Recusal

Jordan primarily argues that Judge Hendricks was required to recuse himself based upon his improper *ex parte* communication with the Todd County Sheriff. We agree with this premise, given the multiple, clear appearances of impropriety, as also noted by the then-Chief Justice. Nonetheless, we must note at the outset that this Court lacks the authority to disturb rulings by the Kentucky Supreme Court, including non-disqualification orders issued by the Chief Justice pursuant to KRS 26A.020. *See Augenstein v. Deutsche Bank Nat'l Tr. Co. as Tr. for Certificateholders of Soundview Home Loan Tr. 2005-OPT4, Asset-Backed Certificates, Series 2005-OPT4*, 647 S.W.3d 857, 865 (Ky. App. 2021). Jordan's appeal implicates directly the validity of the Non-Disqualification Order. And we have no power to alter it even if we disagree with it.

Nonetheless, Judge Hendricks denied a separate motion to recuse himself. By appealing the Trial Court's final judgment, including its denial of self-recusal, Jordan has placed the issue squarely before us. KRS 26A.015.

The Kentucky Code of Judicial Conduct, as set out in Kentucky Rules of the Supreme Court (“SCR”) 4.300, Canon 2, Rule 2.9 provides clear instruction. “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 or their lawyers, concerning a pending or impending matter,” except in limited situations defined by the rule. *See also Penticuff v. Miller*, 503 S.W.3d 198, 209 (Ky. App. 2016). Thus, while a Judge shall certainly not “consider” *ex parte* information when ruling, he shall not even “permit” it in the first place. Further, the prohibition against *ex parte* communication with law enforcement officers regarding a pending case applies even if the Judge did not initiate the contact. *Alred v. Com., Jud. Conduct Comm’n*, 395 S.W.3d 417, 442 (Ky. 2012).

KRS 26A.015(2) requires recusal when a Judge has “personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings, or has expressed an opinion concerning the merits of the proceeding[.]” KRS 26A.015(2)(a). The statute also requires recusal “where he has knowledge of any other circumstances in which his impartiality might reasonably be questioned.” KRS 26A.015(2)(e); *see also* SCR 4.300, Canon 3B.

The burden of proof required for recusal of a Judge is an onerous one. *Stopher v. Commonwealth*, 57 S.W.3d 787, 794 (Ky. 2001). The bar is set high purposely and by necessity, to prevent parties and attorneys from crassly using the

motion as a tactic to dispense with Judges whose rulings they do not like. There must be a showing of facts “of a character calculated seriously to impair the judge’s impartiality and sway his judgment.” *Id.* (citing *Foster v. Commonwealth*, 348 S.W.2d 759, 760 (Ky. 1961)). Motions for recusal are to be considered in the timeframe in which they present themselves. *See United States v. Liggins*, 76 F.4th 500, 508 (6th Cir. 2023). *See also Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467, 471 (Ky. 2010) (“Both the statute and the judicial canons, however, look prospectively at recusal to guide judges and litigants with regard to ongoing or future proceedings.”).

“The mere belief that the judge will not afford a fair and impartial trial is not sufficient grounds for recusal.” *Stopher*, 57 S.W.3d at 794-95 (citing *Webb v. Commonwealth*, 904 S.W.2d 226 (Ky. 1995)). Likewise, a “trial court’s adverse ruling[s], even if erroneous, [do] not provide a basis for finding bias.” *Bissell v. Baumgardner*, 236 S.W.3d 24, 29 (Ky. App. 2007). Furthermore, 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. *Alred*, 395 S.W.3d at 433-34 (citing *Liteky v. United States*, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157, 127 L. Ed. 2d 474 (1994)). The whole idea of our system of justice, especially in appellate

proceedings, is to assess a Judge's rulings based upon their soundness in the law and reason, and not to judge arbiters upon their personhood. And where a Judge does not insert his person into the proceedings, recusal is not warranted.

However, where a Judge personally receives *ex parte* information, which is by definition off the record, outside of Court, and generally supportive of only one side and against the other, recusal should generally ensue. What that Judge might ultimately do with said information may never be truly known and is not dispositive of the question. The mere receipt of this type of improper information is impermissible. Hearing it alone, even without taking any action at all, can be grounds for recusal.

Here, then-Chief Justice Minton has already found, as an undisputed, admitted fact that Judge Hendricks allowed the Sheriff to discuss the disputed factual merits of the case with him off the record and outside the presence of the parties and counsel. The allegations before us now are that Judge Hendricks used and considered that improperly received information when ruling on matters of fact and witness credibility. That is the precise danger of permitting *ex parte* information to be received. What has been heard cannot be unheard. And there is no guarantee that future rulings will not be so tainted by the knowledge of conversations that one should not have entertained in the first place.

It is not an acceptable excuse that a Judge did not start the impermissible conversation with non-parties, off-the-record, and about the merits. No Judge is allowed to remain in any attempted conversation of this sort. Instead, and at the outset, he must end the conversation immediately and remove himself entirely from it. Even if he takes these initial, required steps, he may have to recuse, depending upon what and how much information he heard.

There is no shame in self-recusal where an appearance of impropriety exists. Granting such relief does not mean that there has been actual impropriety. It simply means that there is an objective basis for at least one party to believe that the Judge cannot remain impartial. Every Judge should endeavor to have a Courtroom that is not only fair, but also reasonably believed and perceived to be fair.

Judge Hendricks could have recused himself without waiting on a motion; but once it was made, Judge Hendricks should have granted it. Well prior to trial, Judge Hendricks disclosed that the Sheriff had told him that Jordan remained at the Residential Property for four hours. This information was received while the issue of Jordan's violation of the EPO (allowing only very limited contact) was being litigated. Further, Jordan's defense at the hearing was that he was outside the 1000-foot bar of contact. Judge Hendricks noted that the Sheriff had told him that Jordan was inside that perimeter – thus clearly allowing outside

evidence in contravention of the facts before him. Indeed, a Deputy Sheriff that was present during the alleged events testified in Court that he did not see Jordan violate the EPO. Judge Hendricks noted specifically that Jordan's and the Deputy's testimony contradicted the *ex parte* information that he had received and was obviously considering. Further, the Sheriff told Judge Hendricks about the parties' prior contentious relationship – that involved repeated contacts with law enforcement over the years – during the time that Judge Hendricks was considering granting contempt for violating the EPO. Judge Hendricks even indicated that he was inclined to grant the motion and find Jordan in contempt, but he would hold his decision in abeyance until the trial on the dissolution of the marriage.

When the motion was filed with the Supreme Court, the then-Chief Justice had all of the information that he needed to order the recusal of Judge Hendricks. He declined to act. However, we are clearly authorized to do so, as Chief Minton himself acknowledged: “the parties remain free to seek appellate review [of this issue] after the entry of a final judgment.” *Id.* at 5-6, ROA at 410-11. Kentucky law allows that a motion to recuse “is to be reviewed on appeal on a *de novo* basis.” *Abbott, Inc. v. Guirguis*, 626 S.W.3d 475, 484 (Ky. 2021).

Accordingly, we have conducted a review *de novo*, as required. We find, as did the former Chief Justice, that Judge Hendricks improperly allowed himself to participate in an *ex parte* conversation with the Sheriff about the

disputed matters at trial, as discussed in detail above. This fact is beyond dispute. We further find that those impermissible conversations formed the basis of many of Judge Hendricks's rulings including finding that Jordan filed allegedly false certifications, violated the EPO, and engaged in contemptuous behavior. They also call into serious question the legitimacy of all of the rulings that Judge Hendricks made about Jordan's credibility, including rejecting his claim that a valid pre-nuptial agreement existed. Judge Hendricks's other rulings are also compromised, such as his discrediting Jordan's expert and awarding to Boss property that Jordan owned prior to marriage. Finally, Judge Hendricks's assessment of attorney's fees against Jordan for filing a motion to recuse is wholly improper. And by basing part of that award upon alleged violations of the EPO that were based upon *ex parte* information of violations, any foundation for it further crumbles. Any objective observer could reasonably view Judge Hendricks's tone and demeanor towards Jordan during the proceedings as antagonistic. It was incumbent upon Judge Hendricks to recuse himself here. His failure to do so tainted the entire proceedings, and his decisions must be reversed.

Jordan also contends that Judge Hendricks's consideration of *ex parte* information amounted to a structural error. We find merit in this contention as well.

“Structural errors are defects affecting the entire framework of the trial and necessarily render the trial fundamentally unfair. Such errors preclude application of the harmless error rule and warrant automatic reversal under that standard.” *McCleery v. Commonwealth*, 410 S.W.3d 597, 604 (Ky. 2013) (citing *Neder v. United States*, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 1999)).

Under this standard, this Court may grant appropriate relief “upon a determination that manifest injustice has resulted from the error.” CR 61.02. To qualify as “palpable error,” an error “must be easily perceptible, plain, obvious and readily noticeable.” *Nami Res. Co., L.L.C. v. Asher Land & Min., Ltd.*, 554 S.W.3d 323, 338 (Ky. 2018) (quoting *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006)). “Implicit in the concept of palpable error correction is that the error is so obvious that the trial court was remiss in failing to act upon it *sua sponte*.” *Id.* (quoting *Lamb v. Commonwealth*, 510 S.W.3d 316, 325 (Ky. 2017)). Here, unfortunately, the failure to recuse is an error that is as obvious as it is concerning. It goes to the fundamental structure of the proceedings, and it requires automatic reversal.

The Non-Disqualification Order cited to *Marchese v. Aebersold*, 530 S.W.3d 441 (Ky. 2017), as holding that a Judge’s reliance on an *ex parte* communication may amount to such structural error compelling reversal. In

Marchese, the Trial Judge independently researched the criminal record of the respondent to a petition for a DVO. *Id.* at 444-45. The Trial Court later granted the DVO based, in part, upon that *ex parte* information. The Kentucky Supreme Court concluded that the Trial Judge's actions amounted to structural error, requiring recusal even when the litigant failed to assert the ground in a timely manner. *Id.* The Supreme Court also held that the Trial Court's consideration of the extrajudicial information was an improper use of judicial notice, and that it violated the respondent's due process rights. *Id.* at 446-48. The holding and analysis in *Marchese* are compelling and controlling. In that case as here, the Trial Judge received information from an outside source and used it as the basis for making substantive rulings.

Finally, with regard to timing, as noted in the Non-Disqualification Order, a party alleging that a Trial Judge should recuse from his case must move for recusal in a timely manner after discovering the facts upon which the disqualification rests. *Bailey v. Bailey*, 474 S.W.2d 389, 391 (Ky. 1971). Otherwise, the issue can be considered waived and will not be considered. *Bussell v. Commonwealth*, 882 S.W.2d 111, 113 (Ky. 1994). Nevertheless, even when a timely motion for recusal is not made, a Trial Judge must recuse himself when presiding over a matter that would violate the statutory mandates for impartiality. *Carter v. Commonwealth*, 641 S.W.2d 758, 759-60 (Ky. App. 1982). A Court's

failure, *sua sponte*, to recuse when he cannot consider the case fairly constitutes reversible error. *Id.* at 759-60.

In this case, the *ex parte* communication between the Todd County Sheriff and Judge Hendricks concerned Jordan's conduct at the Residential Property on October 16, 2020. The disputed issues were whether his actions violated the existing EPO and agreed order, whether they amounted to contempt of court, and whether the Trial Court should issue a DVO based upon his conduct. When Jordan filed his recusal motions in August 2021, these matters were still pending. Judge Hendricks's rulings suggest that he relied on this information to assess Jordan's credibility in subsequent proceedings. He also based his award of attorney's fees, at least in part, on Jordan's decision to file the "specious" motion to disqualify. Thus, and as stated earlier, Judge Hendricks was required to recuse himself upon hearing the *ex parte* information from the Sheriff – regardless of the timing of Jordan's motion. Moreover, once Jordan's trial counsel¹ saw what he observed to be bias during the trial, he immediately filed the motion to recuse before the trial could resume. As a matter of due process, we cannot find that Jordan forfeited or waived his right to an impartial jurist.

¹ Jordan did not retain his prior counsel for trial, and we do not expect or require laypeople to be aware of the subjective standards of timeliness for recusal motions – or of impermissible *ex parte* conduct for that matter. Within a very short time of learning of the issue for the first time from Jordan, trial counsel filed the motion. We cannot deem it untimely under these circumstances.

Boss maintains that there was substantial other evidence to support the Trial Court's conclusions regarding Jordan's credibility and on disputed issues. We are aware that Judge Hendricks did not rule against Jordan on every issue. He denied the DVO and declined to hold Jordan in contempt. But the law does not mandate that Judges must make every single available call against one party in order to show bias. Indeed, it would be naïve to require such unanimity of rulings against one side to show apparent bias. We cannot and do not definitively rule that Judge Hendricks based any substantive rulings on the *ex parte* information. But we emphasize again that one will never truly know whether Judge Hendricks based his conclusions, including those regarding the parties' credibility, upon the evidence presented at trial, or rather, upon the improper, *ex parte* information that he personally received. As the Supreme Court held in *Phillips v. Rosquist*, 628 S.W.3d 41, 55 (Ky. 2021), the totality of circumstances was enough for a reasonable person to perceive bias, and we need not find an actual bias.

The appearance of impropriety taints each of the rulings such as to require reversal, even though it will cause both parties considerable money and further delay that could have been avoided. As a result of this reversal and remand, the other substantive issues concerning the Trial Court's rulings are now moot.

A new Judge and new trial are needed for the determination of the parties' marital and non-marital interests in the Logan County Property and the Residential Property, including the values of both properties. The consideration given and the loans, in terms of timing, source of funds, and amounts of payments made, all play a part in these decisions. The amount of equity acquired during the marriage will need to be determined anew. Maintenance will have to be reconsidered. And, of course, any award of attorney's fees will need to be revisited entirely. An independent and completely unbiased review of all matters is necessitated.

IV. Conclusions

Based upon the foregoing, we reverse and remand the Findings of Fact, Conclusions of Law, and Judgment of the Todd Circuit Court in the above-styled action. Judge Hendricks shall recuse from further action in this case other than to issue an Order seeking the appointment of a Special Judge to preside.

IT IS FURTHER ORDERED that the motion by the Appellant/Cross-Appellee, Allen Ray Jordan, to strike the brief of the Appellee/Cross-Appellant, Sandy Lynn Boss, is denied.

ALL CONCUR.

ENTERED: November 14, 2025



JUDGE, COURT OF APPEALS

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