State of Wisconsin: **Circuit Court:** **Milwaukee County**

In re the Paternity of AD

State of Wisconsin,

Petitioner,

and, Case No. 10PA000000

Jane Doe, and
John Q. Public,

Respondent.

Notice of motion and motion prohibiting the guardian ad litem from discussing this matter with her ward

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Please take notice that on the 25th day of January, 2012, at 8:30 a.m. or as soon thereafter as counsel may be heard, the above-captioned respondent, Jane Doe, by her attorney, Jefffrey W. Jensen, will appear before that branch of the Milwaukee County Circuit Court presided over by the Hon. *****, and will then and there move the court to prohibit the guardian ad litem from discussing this matter with her ward, Alphonso.

As grounds, the undersigned alleges and shows to the court as follows:

1. That the child, Alphonso, is nine years old. During his entire life he has lived with, and he has been cared for by, his mother, Jane Doe. The biological father, John Public, until recently, has been in prison for much of Alphonso's life. Public has no relationship whatsoever with Alphonso.

2. That, after Public was released from prison, the State child support agency

filed this paternity action for the purpose of establishing a child support order for Public.

3. That Public was determined to be Alphonso's biological father. Thereafter, Public demanded that he be granted placement rights with Alphonso. Consequently, the court appointed attorney Willhelmina Furnace as Alphonso's guardian ad litem.

4. That attorney Furnace began her investigation. Doe met with Furnace, and was cooperative during the interview; however, Furnace requested to speak to Alphonso about his wishes. Doe declined on the grounds that Alphonso was unaware that Public was his father, and Doe has not discussed the issue with Alphonso. Presently, Alphonso is thriving. He is doing well in school, and his behavior is good. Doe fears that if Furnace discusses this case with Alphonso it will create emotional trauma for Alphonso, and it may have negative consequences for him.

5. That, under the circumstances, the court should order that Furnace not discuss the case with Alphonso because: (A) Given Alphonso's age, very little weight ought to be given to his wishes regarding the issues in this case; (B) Under the law, it is unlikely the Public will be granted periods of placement; and, (C) therefore, the value of having Attorney Furnace speak to Alphonso is substantially outweighed by the danger of emotional harm to the child.

Wherefore, it is respectfully requested that the court order that Attorney Furnace not discuss this case with Alphonso.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

Law Offices of Jeffrey W. Jensen
Attorneys for Jane Doe
By:_____
Jeffrey W. Jensen
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State of Wisconsin: **Circuit Court:** **Milwaukee County**

In re the Paternity of Alphonso C. Doe

State of Wisconsin,

Petitioner,

and, Case No. 10PA004875

Jane Doe, and
John T. Public,

Respondent.

Memorandum of Law in Support of Notice of motion and motion prohibiting the guardian ad litem from discussing this matter with her ward

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Argument

I. It is in Alphonso's best interest to order the guardian ad litem not to discuss this matter with Alphonso.

Generally speaking, the court must appoint a guardian ad litem whenever custody or placement is disputed. *See,* 767.407(1)(a)2, Stats. However, there are certain circumstances where, even though custody and placement may be disputed, the court may decline to appoint a guardian. The court may decline to appoint a guardian ad litem whenever:

> 3. The court determines any of the following:
>
> a. That the appointment of a guardian ad litem will not assist the court in the determination regarding legal custody or physical placement because the facts or circumstances of the case make the likely determination clear.
>
> b. That a party seeks the appointment of a guardian ad litem solely for a tactical purpose,

> or for the sole purpose of delay, and not for a purpose that is in the best interest of the child.

Sec. 767.407, Wis. Stats.

Here, though there appear to be grounds to do so, Doe does not suggest that the court completely terminate the guardian ad litem. Rather, Doe merely moves the court to eliminate the requirement that the guardian ad litem consider the wishes of Alphonso, as is required by Sec. 767.407(4), Stats.

A. Determining Alphonso's wishes will not assist the court in determining placement.

Although Sec. 767.407(4), Stats. places the responsibility on the guardian ad litem to consider the wishes of the child, the statute also provides that the guardian "shall not be bound by" the child's wishes. Thus, in forming her recommendation to the court, the guardian is free to totally disregard Alphonso's wishes, and to make her recommendation based upon the remainder of her investigation. Plainly then, prohibiting the guardian from discussing the matter with the child will not deprive the child of any right that he might otherwise have.

Given Alphonso's age (nine years old), very little weight ought to be placed on his wishes by the court. Even if the guardian were to determine Alphonso's wishes, approve of them, and convey them to the court, the court possesses the discretion--grounded in common experience-- to utterly disregard Alphonso's opinion of what is in his best interest. A judge is not expected to lay aside matters of common knowledge or his own observation and experience of the affairs of life. *See* *De Keuster v. Green Bay & W. R.R. Co.*, 264 Wis. 476, 479, 59 N.W.2d 452, 454 (1953). Most responsible parents do not allow a nine year-old to determine what is in his best interest. If parents did so, we would quickly have a generation of nine year-olds who ate Fruit Loops three meals a day, and who played the "Angry Birds" video game all day instead of attending school.

Thus, the court should not leave its common sense at the door. Alphonso's opinion of what is in his best interest is of very little value to the court in determining the

placement issue here.

B. The likely determination of the contested placement issue is clear

The court need look no further than the statutes to reach the conclusion that Public's demand for periods of placement has almost no chance of success. Sec. 767.41(4)(b), Stats., provides, "A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent *would endanger the child's physical, mental or emotional health*." (emphasis provided) Additionally, in deciding a placement issue, the court must consider, "*The amount and quality of time* that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future." Sec. 767.41 5(am)4, Stats.

Here, for nine years, Public has spent *no time* with Alphonso. Additionally, Public has made no effort to maintain contact with Alphonso through letters or phone calls. If Doe were married, and if her husband were willing to adopt Alphonso, there would have been statutory grounds to involuntarily terminate Public's parental rights years ago because he has wholly failed to assume parental responsibility, and he has abandoned the child. *See,* 48.415(1)(a)3, Stats.[1]; and 48.415(6)(a), Stats[2].

Again, the court should view this situation through the lens of common sense. Let us disregard for a moment the fact that Public was a genetic contributor to

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[1] "The child has been left by the parent with any person, the parent knows or could discover the whereabouts of the child and the parent has failed to visit or communicate with the child for a period of 6 months or longer"

[2] (a) Failure to assume parental responsibility, which shall be established by proving that the parent or the person or persons who may be the parent of the child have not had a substantial parental relationship with the child.

(b) In this subsection, "substantial parental relationship" means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of the child. In evaluating whether the person has had a substantial parental relationship with the child, the court may consider such factors, including, but not limited to, whether the person has expressed concern for or interest in the support, care or well-being of the child, whether the person has neglected or refused to provide care or support for the child and whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy.

Alphonso. If Doe were to leave Alphonso-- if even for a short time-- in the care of a strange man who had recently been released from prison, and who was on extended supervision, Doe would be rightly subject to ridicule.

There is very little chance that Public will be awarded periods of placement with Alphonso.

C. Public's demand for placement is plainly raised solely for the purpose of a tactical advantage and to delay the matter.

Finally, Public's demand for periods of placement with Alphonso must be viewed with a healthy dose of skepticism. Public has had nine years within which to file a paternity action to have himself determined to be Alphonso's father, and to demand periods of placement. During this time, though, Public was apparently occupied with more pressing matters.[3] It is very telling that this case comes before the court, not on Public's petition, *but on the petition of the State* seeking to establish a child support order for Public. Such a situation occurs only when the father has been such an abject failure that the mother and the child have had to seek public benefits in order to survive. Nonetheless, the prospect of being ordered to provide financial support to Alphonso has, apparently, at last aroused Public's paternal instincts.

Even being so aroused, though, to date Public has been simply unable to find the time to meet his responsibilities to the court. Willhelmina Furnace was appointed the guardian ad litem in June, 2011. As of the last hearing before the commissioner on October 17, 2011, Ms. Furnace reported to the court that Public had simply been unable to work into his schedule a meeting with Ms. Furnace. Moreover, the court waived the mediation requirement on June 16, 2011. Nonetheless, Public has not filed a parenting plan within sixty days, as is required by Sec. 767.41(1m), Stats. Thus, we are left to wonder what Public's plans are if he were to be awarded the periods of placement with

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[3] On January 1, 2005, in Milwaukee County case number 2005CF000000, Public was convicted of armed robbery, and he was later sentenced to twenty-one years in prison (eleven years initial confinement and ten years extended supervision). After protracted postconviction litigation, Public's conviction was set aside on the grounds of ineffective assistance of trial counsel. He later reached a plea agreement, entered a guilty plea pursuant to *Alford*, and he was sentenced to a time-served disposition. This is the reason that Public is no longer in prison.

Alphonso that he claims to so desperately desire.

Conclusion

No one knows Alphonso better than Jane Doe. When must take her at her word, then, that Alphonso is presently thriving; and we must accept her opinion that if Alphonso were to be thrust into the middle of this paternity litigation by discussing it with the guardian ad litem, it would have a deliterious effect on Alphonso.

The court should consider the minimal probative value of having Ms. Furnace talk to Alphonso about the issues in this case, and weigh that against the harm that would be caused.

Ms. Furnace can certainly conduct an investigation, and give the court a valuable opinion concerning Alphonso's best interests, all without having to discuss the issues with him. The court should order that the guardian not discuss this matter with Alphonso.

Dated at Milwaukee, Wisconsin, this _____ day of _____, 2011

Law Offices of Jeffrey W. Jensen
Attorneys for Jane Doe

By:_____
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