(No. 01 CC 2. - Complaint dismissed.)

In re CIRCUIT JUDGE SUSAN J. McDUNN
of the Circuit Court of Cook County, Respondent.

Order entered November 27, 2002

SYLLABUS

On February 5, 2001, the Judicial Inquiry Board filed a complaint with the Courts Commission, charging respondent with conduct that is prejudicial to the administration of justice and conduct that brings the judicial office into disrepute in violation of the Code of Judicial Conduct, Illinois Supreme Court Rules 61, 62 and 63. In summary form, the complaint alleged that, in 1998 and early 1999, respondent presided over two cases in Adoption Court involving petitions for adoption. In each case, the birth mother of the child and her lesbian partner were petitioning for adoption by the mother's lesbian partner. In each case, both the guardian ad litem and the Cook County Department of Supportive Services recommended that the adoption petition be granted. Nonetheless, the complaint alleged that respondent, whose conduct suggests that she is prejudiced against homosexuals and believes they should not be permitted to adopt children, attempted to thwart both adoptions. Respondent was eventually removed from the two cases by the presiding judge, who then granted each petition. Notwithstanding the presiding judge's orders granting the adoptions and even though she had already been removed from the case, respondent took further judicial steps calculated to frustrate and void the adoptions. The complaint further alleged that respondent's bias against homosexuals resulted in her making rulings contrary to Illinois law and in her advancing her own personal beliefs over the legal rights of the parties who appeared before her.

Held: Complaint dismissed.

Sidley Austin Brown & Wood, of Chicago, for Judicial Inquiry Board.
Ross & Hardies, of Chicago, for respondent.

Before the COURTS COMMISSION: THOMAS, Chairperson, BUCKLEY, CARR JR., and, SLATER, commissioners, CONCURRING; WALTER and LAWRENCE, commissioners, DISSENTING IN PART; WOLFF, commissioner, JOINING DISSENT IN PART; and WOLFF, commissioner, DISSENTING.

ORDER

The Judicial Inquiry Board (the Board) filed an eight-count complaint with the Illinois Courts Commission (Commission) against Judge Susan J. McDunn of the Circuit Court of Cook County (respondent) charging her with violating the Code of Judicial Conduct (155 Ill. 2d R. 61 *et seq*.). Respondent's motion to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2000)) was denied. We subsequently granted respondent's motion for leave to file a supplemental motion to dismiss pursuant to sections 2-615 and 2-619 of the Code. 735 ILCS 5/2-615, 2-619 (West 2000). At the conclusion of a hearing held

on September 27, 2002, we granted respondent's motion to dismiss the complaint for the reasons stated below.

FACTS

Given the procedural posture of this case, the facts are taken from the allegations of the Board's complaint, which are deemed to be true. In ruling on a motion to dismiss under either section 2-615 or 2-619 of the Code, all well-pleaded facts are accepted as true, as are any reasonable inferences drawn from those facts. *Carver v. Nall*, 186 Ill. 2d 554 (1999) (section 2-619); *Van Horne v. Muller*, 185 Ill. 2d 299 (1998) (section 2-615). However, conclusions of law or conclusions of fact not supported by allegations of specific fact are not admitted. *Romanek v. Connelly*, 324 Ill. App. 3d 393 (2001).

As set forth in the complaint, in 1998 and early 1999 respondent presided over two cases involving petitions for adoption: *In re Petition of C.M.A.* (CMA), case no. 98 CoA1153; and *In re Petition of M.M.* (MM) case no. 98 CoA1118. In each case, the birth mother of a child and her lesbian partner were petitioning for adoption by the mother's partner.[1] In both cases, the guardian *ad litem* (the GAL) and the Cook County Department of Supportive Services (the DSS) recommended that the adoption petitions be granted. The DSS report characterized the petitioners as "stable," "loving" and "nurturing."

It is common practice in Cook County to grant uncontested adoption petitions "off call," *i.e.*, without an evidentiary hearing. In all other uncontested adoption matters over which respondent had presided, she had entered off call orders granting the petitions. On July 21, 1998, petitioners and the GAL requested the entry of off call orders granting the petitions. Respondent denied the requests and ordered a hearing to be held in each case to determine whether the adoptions were in the best interests of the children.

In re Petition of C.M.A.

A best interests hearing was held on September 1, 1998, in CMA. The DSS investigator testified that she would highly recommend the adoption, as it was in the child's best interest. The investigator did not believe that petitioners' sexual orientation was a concern for the child. Respondent questioned both petitioners, but not about the child. Instead, she inquired about petitioners' experiences in realizing that they were homosexual, their early sexual experiences, and the nature of their relationship. After the hearing, the GAL moved for entry of judgment of adoption, but the court did not enter a ruling at that time.

More than three months later, on December 11, 1998, petitioners and the GAL filed a joint motion for substitution of judge because respondent had not ruled on the adoption petition. Judge Francis Barth, presiding judge of the County Division, granted the motion. Judge Barth also subsequently granted the adoption petition.

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[1]The petition for adoption in MM involved two children. Each petitioner is the biological mother of one child. Petitioners sought to adopt each other's biological child as co-parents.

Approximately ten days after the best interests hearing in CMA, the petitioners and the GAL in MM filed a motion for substitution of judge pursuant to section 5/2-1001(a)(2) of the Code. 735 ILCS 5/2-1001(a)(2) (West 1998). That section provides that a party is entitled to one substitution of judge without cause as a matter of right if the substitution motion is presented before trial or hearing begins and before the judge has ruled on any substantial issue in the case, or if it is presented by consent of the parties. Respondent denied the motion on the basis that her decision to require a best interests hearing was a substantive ruling and because she did not believe that the GAL could consent to the motion on the children's behalf.

Petitioners then filed a motion for voluntary dismissal without prejudice pursuant to section 2-1009 of the Code. 735 ILCS 5/2-1009 (West 1998). Respondent denied that motion as well, explaining that it had not been brought before any hearing had begun, as required by section 2-1009. The "hearing" referred to by respondent was the entry of the off call order requiring a best interests hearing. Petitioners then sought a supervisory order from the supreme court, which was denied. Shortly thereafter, respondent issued an order adding an organization known as the Family Research Council (FRC) as a "secondary guardian" to represent the interests of the children. Respondent believed that the FRC was a necessary party because they publicly supported the position that adoption by unmarried persons and persons living a homosexual lifestyle were not in the best interests of children, a position that no party to the case had advocated. Respondent was concerned that there was no party in the case to present evidence and arguments contrary to the position taken by the GAL and petitioners. Without the FRC, if she granted the adoption petition, no one would appeal; if she denied it, no party would defend the ruling.

Subsequent to the order adding the FRC as a party, the petitioners and the GAL filed an emergency motion to stay that order. Judge Barth vacated the order, reassigned the case to himself, and granted the adoption petition.

On February 13, 1999, respondent entered orders in both adoption cases declaring void Judge Barth's orders removing her from the cases and granting the adoptions. Respondent also added the FRC as a party in CMA and reopened the case for purposes of receiving further evidence.

Petitioners then sought leave to appeal to the Illinois Appellate Court, which was granted. That court ruled that all orders entered by respondent after her removal from the adoption cases were null and void. In addition, the court held that the motion for substitution of judge filed in MM should have been granted, rendering all subsequent orders in that case void. See *In re Petition of C.M.A.*, 306 Ill. App. 3d 1061 (1999).

On February 5, 2001, the Board filed its complaint alleging that respondent violated Canons 1, 2 and 3 of the Code of Judicial Conduct. 155 Ill. 2d Rs. 61, 62, 63. Those canons provide that a judge should uphold the integrity and independence of the judiciary (155 Ill. 2d R. 61), promote public confidence in the integrity and impartiality of the judiciary (155 Ill. 2d R. 62), and perform judicial duties impartially, without bias or prejudice (155 Ill. 2d R. 63). The specific allegations of the various counts of the complaint are described below.

ANALYSIS
Section 2–615 Motion to Dismiss

Although this Commission denied respondent's initial section 2-615 motion to dismiss, we subsequently granted respondent's motion for leave to file a supplemental and additional section 2-615 and 2-619 motion to dismiss. In that supplemental motion respondent renewed her original 2-615 motion and asked us to reconsider its denial. We have done so and hereby grant the motion.

A motion to dismiss filed pursuant to section 2-615 of the Code attacks the legal sufficiency of the complaint; we must determine whether the allegations, construed in the light most favorable to the Board, are sufficient to establish a cause of action upon which relief may be granted. *Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A.*, 186 Ill. 2d 472 (1999). In making this determination, all well-pleaded facts in the complaint and all reasonable inferences flowing therefrom are accepted as true. *Weatherman*, 186 Ill. 2d 472. However, in opposing a motion to dismiss, a party cannot simply rely on mere conclusions of law or fact unsupported by specific factual allegations. Illinois is a fact-pleading jurisdiction, and a party must allege facts sufficient to bring his or her claim within the cause of action asserted. *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39 (2001). In addition, although pleadings are to be liberally construed (735 ILCS 5/2-603(c) (West 2000)), a complaint must state a cause of action by alleging *facts*; failing to do so cannot be cured by liberal construction. See *Mt. Zion State Bank & Trust v. Consolidated Communications, Inc.*, 169 Ill. 2d 110 (1995); see also *Knox College v. Celotex Corp. et al.*, 88 Ill. 2d 407 (1981).

The cause of action asserted by the Board in this case is judicial misconduct. Specifically, the Board alleges that respondent was biased against the petitioners due to their sexual orientation. Such an allegation is, of course, a legal conclusion that must be supported by sufficient factual allegations to establish bias. "[A]n actionable wrong cannot be made out merely by characterizing acts as having been wrongfully done; the pleading of conclusions alone will not suffice for the factual allegations upon which a cause of action must be based." *Adkins v. Sarah Bush Lincoln Health Center*, 129 Ill. 2d 497, 520 (1989). We must therefore examine each count of the Board's complaint to determine whether the claim of bias has been factually supported.

Count I alleges that respondent improperly delayed ruling on the petition in CMA for over three months despite having heard "all the evidence necessary to make a ruling" during the best interests hearing on September 1, 1998. It is evident from the record in this case, however, that *respondent* did not believe she had heard "all the evidence" necessary to rule. In the February 1999 orders in which the respondent appointed the FRC, she noted that no expert opinion had been presented regarding the impact of adoption by homosexuals on the children's best interests, nor had there been any evidence regarding the effects of adoption by two persons of the same sex, regardless of any sexual relationship. Respondent explained that since taking the case under advisement she had been researching and considering various legal issues, including the due process rights of minors, the scope and nature of the GAL's duties and authority, and the court's own duties and authority. Respondent also pointed out that neither the Illinois Supreme Court nor any Illinois Appellate Court had ever reviewed a best interests finding in the context of an adoption petition brought by persons living a homosexual lifestyle, or by two persons of the same sex. Under such circumstances, this Commission does not believe that the delay was improper, particularly in view of the fact that the child at all times remained in the custody of petitioners. Count I does not support

a conclusion that respondent was biased.

Count II alleges that at the best interests hearing in CMA, respondent asked petitioners inappropriate questions about their sexual orientation, such as how long they had been homosexuals and when they had become sexually active. "A trial court is free to examine witnesses in its discretion, provided it does not become an advocate, abandoning its function as an impartial tribunal." *People v. Griffin*, 194 Ill. App. 3d 286, 296 (1990). The appropriate scope of questioning by the court depends on the facts and circumstances of each case and lies largely within the judge's discretion. *People v. Falaster*, 173 Ill. 2d 220 (1996). Respondent's questions appear to simply reflect her understanding that petitioners' sexual orientation could have an impact on the child's best interests. This view was consistent with existing law. In *In re Marriage of Martins*, 269 Ill. App. 3d 380, 389 (1995), the Illinois Appellate Court held that a mother's lesbian relationship was "a proper factor" to be considered in determining custody under section 602 of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/602 (West 1992). Indeed, *any* intimate cohabitation relationship, whether it is heterosexual, homosexual or lesbian in nature, may properly be considered by a trial court in making a custody determination. *In re Marriage of Diehl*, 221 Ill. App. 3d 410 (1991); see also *In re Marriage of Williams*, 205 Ill. App. 3d 613 (1990) (trial court properly considered effect of mother's homosexual relationship on child in determining custody in accordance with child's best interests). Application of the law concerning custody determinations under the Marriage Act to an adoption proceeding was not improper, as both are concerned with a child's best interests. Although some of the questions may have caused embarrassment, the Board has not alleged that respondent was hostile or demeaning. Count II does not state a cause of action for bias.[2]

Count III alleges that respondent ignored clear Illinois law in refusing to grant petitioners' motion for substitution of judge filed on September 11, 1998, in MM. As related above, under section 2-1001(a)(2) of the Code, a party is entitled to one substitution of judge as a matter of right if the judge has not ruled on any substantial issue in the case or if the parties have consented to the substitution. 735 ILCS 5/2-1001(a)(2) West (1998). Respondent denied the motion because she considered her decision to require a best interests hearing a substantive ruling. A ruling on a "substantial" issue is one directly related to the merits of the case. *Nasrallah v. Davilla*, 326 Ill. App. 3d 1036 (2001). In this case the denial of petitioners' request for entry of an off call adoption order, and instead requiring an evidentiary hearing, could be considered equivalent to denying a request for summary judgment, which would clearly be a ruling related to the merits of the case. We do not believe that denial of the substitution motion on those grounds evidenced bias.

Section 2-1001(a)(2) also entitles a party to substitution if it is consented to by the parties. Count III alleges that by refusing to grant substitution on that basis respondent "ignored clear Illinois law allowing the GAL to consent to substitute judges on behalf of the children the GAL represents."

We do not agree with the Board regarding the clarity of Illinois law with respect to consent

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[2]We are aware of the appellate court's reference in *In re Petition of C.M.A.* to respondents "extreme and patent bias" against petitioners that was "manifest[ed] in numerous ways, including her insensitive probing and wrongful interrogation" of petitioners. 306 Ill. App. 3d at 1067. However, those statements were unnecessary to resolve the issues presented, and therefore constitute nonbinding *dicta*.

by a GAL under section 2-1001(a)(2) of the Code. The cases relied on by the Board, *In re Dominique F.*, 145 Ill. 2d 311 (1991), and *In re Darnell J.*, 196 Ill. App. 3d 510 (1990), interpreted section 2-1001(a)(2) prior to its amendment in 1993, when it was extensively rewritten. The pre-1993 version permitted substitution based on an assertion of prejudice as well as by consent of the parties. Compare 735 ILCS 5/2-1001(a)(2) (West 1998) with Ill. Rev. Stat. 1991, ch. 110, par. 2-1001(a)(2). Both *Dominque F.* and *Darnell J.* involved petitions for substitution based on claims of prejudice; consent was not asserted as grounds. In addition, while both *Dominique F.* and *Darnell J.* involved petitions filed by guardians *ad litem*, their authority to do so was not at issue in those cases. While it is true that respondent's decision to deny the motion for substitution was subsequently found to be erroneous (see *In re Petition of C.M.A.*, 306 Ill. App. 3d 1061), "mere errors of law or simple abuses of judicial discretion should not be the subject of discipline by the [Courts] Commission (*People ex rel. Harrod v. Illinois Courts Commission et al.*, 69 Ill. 2d 445, 471 (1977). See also *Liteky v. United States*, 510 U.S. 540, 555 (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"). Respondent's erroneous ruling denying the motion for substitution does not, in our opinion, support a charge of bias.

Similarly, respondent's failure to grant the MM petitioners' motion to voluntarily dismiss the case, as alleged in count IV, does not state a cause of action for bias. Section 2-1009 of the Code permits a plaintiff to dismiss "at any time before trial or hearing begins." 735 ILCS 5/2–1009(a)(West 1998). Respondent denied the motion on the basis that she had held a "written hearing" when she ordered that a best interests hearing be held. A "hearing" occurs when the parties begin to present their arguments and evidence to the court to achieve an ultimate determination of their rights. See *In re Marriage of Fine*, 116 Ill. App. 3d 875 (1983). Here the petitioners submitted their petition and the investigative report and sought entry of a final judgment order of adoption by means of the "off call" procedure. According to the Board's complaint, in most uncontested adoption proceedings, this procedure is the only "hearing" that is ever held. Accordingly, respondent's position that denying entry of an off call order and requiring an evidentiary hearing was itself the beginning of a "hearing" was not untenable. However, even if respondent's ruling was in error, that does not establish that she ruled out of bias. See *Liteky*, 510 U.S. 540; *Harrod*, 69 Ill. 2d 445; see also *People v. Damnitz*, 269 Ill. App. 3d 51 (1994) (incorrect evidentiary rulings are insufficient basis for motion to substitute judge).

Counts V, VI and VII allege that respondent improperly added the FRC as a party to the adoption cases, sought permission from petitioners in MM to allow FRC to have access to the case file, and gave the FRC access to that file. The Board argues that the FRC was not qualified to act as a guardian *ad litem* because it is not a licensed attorney (see 750 ILCS 50/13 (B)(a) (West 1998)). The Board also asserts that the FRC had no legally recognizable interest which would allow it to intervene (see *Cooper et al. v. Hinrichs et al*, 10 Ill. 2d 269 (1957)), and that allowing it access to the adoption files was improper (see 750 ILCS 50/18 (West 1998) (concerning confidentiality of adoption records)).

In *In re Petition of C.M.A.*, the appellate court ruled that respondent erred in adding the FRC as a party to the adoption proceedings and in allowing it access to the adoption files. *In re Petition of C.M.A.*, 306 Ill. App. 3d 1061. This Commission has no jurisdiction to review that decision; our function is "to apply the facts to the *determined* law, not to determine, construe, or interpret what the law should be." (Emphasis in original.) *Harrod*, 69 Ill. 2d at 473. The issue we must decide is

whether those errors, and the reasonable inferences drawn from them, are sufficient to state a cause of action for bias. As noted earlier, *Harrod* cautions that "mere errors of law or simple abuses of judicial discretion should not be the subject of discipline." *Harrod*, 69 Ill. 2d at 471. *Harrod* also suggests, however, that discipline may be warranted when a judge grossly disregards law that is "clear on its face." *Harrod*, 69 Ill. 2d at 472. Did this respondent ignore settled law because of her bias against homosexuals, or did she have a basis for believing her rulings were justified? At this juncture we believe it is appropriate to examine the rationale set forth in the orders issued by respondent. We therefore quote at some length from the orders appointing the FRC in MM and CMA.

> "This case presents issues of first impression in Illinois. In *In re the Petition of K.M.*, 274 Ill. App. 3d 189, 653 N.E.2d 888 (1st Dist. 1995), the Illinois Appellate Court decided that the statutory provision regarding standing in adoption cases does not limit standing, in cases involving more than one petitioner, to a husband and wife. In *K.M.*, however, the court made clear that the questions of whether petitioners have standing to file an adoption petition and whether the proposed adoption is in the best interest of the child were separate questions. After finding that a same-sex couple had standing to file a petition for adoption, the *K.M.* court remanded the case back to the trial court directing it to make a best interest determination. Neither the Illinois Supreme Court, nor any Illinois Appellate Court, has ever reviewed a finding by a trial court regarding the best interest of a child in connection with an adoption petition brought by persons living a homosexual lifestyle, or brought by two persons of the same sex (whether or not the two were involved in a sexual relationship).
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> Expert opinion exists on both sides of the issues raised by this case. A full evidentiary hearing on all of the issues in this case is in the best interests of the children. The court has a duty to do what is necessary to ensure that relevant expert opinions both pro and con that exist on this matter, along with the bases for such opinions, be presented and considered before rendering a decision on the minors' best interests.
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> Courts owe a special duty to minors in any litigation, but particularly in the adoption context. It has long been the public policy of this State that the rights of minors be carefully guarded. See *Muscarello v. Peterson*, 20 Ill. 2d 548, 555, 170 N.E.2d 564, 569 (1960); *Skaggs v. Industrial Comm'n*, 371 Ill. 535, 541, 21 N.E. 2d 731 (1939). When minors become parties to litigation, courts not only have the inherent power to protect the interests of minors, but also have the duty to do so. *City of Chicago v. Chicago Bd. of Education*, 277 Ill. App. 3d 250, 260, 660 N.E.2d 74, 80 (1st Dist. 1995), *appeal denied*, 166 Ill. 2d 536, 664 N.E. 2d 639 (1996) (citing *Tymony v. Tymony*,

> 331 Ill. 420, 163 N.E. 393 (1928), and *Gibbs v. Andrews*, 299 Ill. 510, 132 N.E. 544 (1921). That duty includes the duty to raise issues and defenses not raised by the minor's representative on the minor's behalf. See *Clarke v. Chicago Title & Trust Co.*, 393 Ill. 419, 430, 66 N.E. 2d 378, 384 (1946).
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> The Adoption Act specifically provides that "[t]he welfare of the child shall be the prime consideration in all adoption proceedings." 750 ILCS 50/15 (1996). Thus, the paramount goal of proceedings under the Act is the best interest and welfare of the child. *Lingwall v. Hoener*, 108 Ill. 2d 206, 213, 483 N.E.2d 512, 516 (1985); *Thorpe v. Thorpe*, 48 Ill. App. 2d 455, 462, 198 N.E.2d 743, 747 (4th Dist. 1964).
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> Finally, "[a]n adoption decree is not in the nature of a consent decree." *Nees v. Doan*, 185 Ill. App. 3d 122, 126, 540 N.E.2d 1046, 1048 (4th Dist.), appeal denied, 545 N.E. 2d 114 (1989). Instead, the entry of a judgment for adoption is "dependent upon the court's findings from the evidence, if any, that the adoption is for the welfare of the child." *Id.*
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> This court is committed to conducting a full hearing at which there is opportunity for an adequate presentation of all relevant evidence existing on the issues; keeping an open mind until all evidence is presented; following the law; determining what is in the best interest of the children in this case; and basing that ruling only on the evidence presented in this case."

Respondent then appointed the FRC to present any arguments and evidence that existed on the best interests issue from a "different vantage point" than the GAL so that "both sides" of the issue would be heard. This Commission believes that a fair reading of respondent's orders creates the clear impression of a judge conscientiously applying existing law to an unresolved question: what impact does the sexual orientation of the petitioners have on a child's best interests? Respondent's belief that neither *In re Petition of K.M.* nor any other reported case had addressed that precise issue was not, in our opinion, an unreasonable interpretation of the law. More to the point, the only bias suggested by respondent's orders is one towards fulfilling her mandated duty of placing the best interests of the children above all others. We find that counts V, VI and VII fail to state a cause of action for bias.

Count VIII of the Board's complaint alleges that respondent improperly attempted to retain control of the two adoption cases after she had been removed from those cases by Judge Barth. Respondent entered orders purporting to render the removal orders void.

A review of respondent's orders indicates that she believed that the removal orders were entered improperly because the motion for substitution had not been initially presented to her. A

motion for substitution for cause is ordinarily presented to the judge at whom it is directed for a threshold determination of the merits of the motion. See *Alcantar v. Peoples Gas Light & Coke Co.*, 288 Ill. App. 3d 644 (1997). Indeed, the appellate court in *In re Petition of C.M.A.*, stated that "[i]t would be the better practice to file the petition in the trial court, first" (*In re Petition of C.M.A.*, 306 Ill. App. 3d at 1069). Nevertheless, the *C.M.A.* court ruled that the "exigencies" of the case precluded following the procedure in this case.

More fundamentally, it appears that respondent believed that the substitution motions were merely intended to circumvent her orders regarding a best interest hearing:

> "[I]f Petitioners were allowed to substitute judges, or dismiss and then refile, they would be able to resubmit the same case to another judge off call seeking the same order which this court has already denied; and it is likely the order would be entered off call. As Petitioners' Counsel and the GAL have stated to this court, the other judges in the County Division routinely approve off call adoption petitioners such as this one involving same-sex couples when the GAL and investigator recommend it. It is unlikely a full evidentiary hearing would ever be heard on how these circumstances impact upon the best interests of the children."

Under the circumstances, respondent's reaction to her removal from the cases was understandable. "A party is not free to 'judge shop' until he finds a jurist who is favorably disposed to his cause of action." *In re Marriage of Petersen*, 319 Ill. App. 3d 325, 338 (2001). That respondent's belief that the removal orders were entered improperly was ultimately held to be incorrect (see *In re Petition of C.M.A.*, 306 Ill. App. 3d 1061) is not proof of bias. We find that count VIII fails to state a cause of action.

Finally, the Board has urged this Commission not to consider the various counts of the complaint in isolation, but to consider respondent's entire pattern of conduct. The Board acknowledges that "any one of [respondent's] actions taken alone might have appeared innocuous" but insists that, viewed as a whole, the complaint contains sufficient facts to support a charge of bias. We disagree. In our opinion, the totality of respondent's conduct is simply and plausibly explained as arising from her belief that petitioners' sexual orientation *might* be a relevant factor in determining the children's best interests. This view was not outlandish. The court in *In re Petition of K.M.*, after finding that same sex couples had standing to adopt, remanded for best interests hearings despite the fact that "the findings of DSS, the opinion of the guardian, the recommendation submitted, and the opinion of the circuit court all support a finding that the proposed adoptions would be in the best interests of the children." *In re Petition of K.M.*, 274 Ill. App. 3d at 205. Respondent's rulings were consistent with *In re Petition of K.M.*, and reflected her belief that the issue of sexual orientation was a relevant consideration at a best interests hearing. The Board's disagreement with respondent's *legal* position is not grounds for judicial discipline. Indeed, the very canons that respondent is charged with violating require her to uphold the independence of the judiciary (155 Ill. 2d R. 61) and to remain "unswayed by partisan interests, public clamor, or fear of criticism" (155 Ill. 2d R. 63).

When the Board's complaint is stripped of the conclusory allegations that respondent acted

out of bias, the remaining *facts* amount to nothing more than errors of law or abuses of judicial discretion.

> "Applying simple logic to the question, if a motion to dismiss admits only facts well pleaded and not conclusions, then, in considering the motion, if after deleting the conclusions that are pleaded there are not sufficient allegations of fact which state a cause of action against the defendant, the motion must be granted regardless of how many conclusions the count may contain and regardless of whether or not they inform the defendant in a general way of the nature of the claim against him." *Knox College*, 88 Ill. 2d at 426.

We find that the Board's complaint states insufficient facts to state a cause of action for judicial misconduct. Accordingly, respondent's motion to dismiss is granted with prejudice.

Complaint dismissed.

WALTER, concurring in part and dissenting in part:

I agree with the majority that no individual count of the Board's complaint contains sufficient facts to state a cause of action for judicial misconduct. I disagree that the Respondent's motion to dismiss under section 2-615 should be granted with prejudice. It is not clearly apparent that no set of facts can be alleged which, if proven, would entitle recovery. The Board's counsel indicated his intent to seek leave to file an amended complaint; and that request, if made, should be allowed. *Brown-Seydel v. Mehta*, 281 Ill. App. 3d 365, 368 (1996); *Illinois Graphics Co., et al. v. Nickum*, 159 Ill. 2d 469, 488 (1994); *Bowe v. Abbott Laboratories, Inc. et al.*, 240 Ill. App. 3d 382, 388-389 (1992).

LAWRENCE joins in this partial concurrence and dissent; WOLFF joins in part in this partial concurrence and dissent.

WOLFF dissenting:

These deliberations concern two motions.

In response to the new 2-619 motion, all commissioners affirmed our jurisdiction.

The majority order dismisses the 2-615 motion with prejudice. I am heartened by the dissent written by Commissioner Walter and joined by Commissioner Lawrence stating that the complaint should not be dismissed with prejudice, which I join in part, but I am concerned that the dissent's grounds may be too narrow.

The Commission has two new members. Neither took part in the earlier motions on the case. The majority order, however, reflects a substantial change from the position of the Commission last year in response to the 2-615 motion. In fact, the Commission majority substantively reversed its most recent decision, which had been not to dismiss the case and from which there had been only one dissenter, and now dismisses with prejudice.

This order concerns two issues. The first is an issue of fundamental Commission process. The 2-615 motion had been disposed of last spring. It should not have been a part of the order calling for the hearing. If the Commission is willing to rehear motions as its members change, those appearing before the Commission will constantly view their access to fair treatment and justice

subject to straddling the substance of the case and the timing of appointments to the Commission. The vicissitudes of term expirations should not be the determinants of justice. It was inappropriate, or perhaps illegal, to have revisited the 2-615 motion. That had been settled.

The second issue has two parts. One is procedural and one links that process with the substance of the case. The majority ruling to grant the 2-615 motion hinges on the commissioners' view of the strength of the pleading concerning the fairness of Judge McDunn's treatment of those appearing before her. That order argues that the facts do not warrant going forward in this case. The Code of Civil Procedure indicates that for the purpose of a 2-615 motion, the pleadings are to be considered valid. According to the Civil Procedure materials provided to the non-judicial commissioners, "A motion to strike or dismiss [a 2-615 motion] concedes that all well-pleaded facts in the pleading under attack are true" (Miner v. Gillette Co., 87 Ill. 2d 7 (1981)), but only for the purpose of the motion. The Judicial Branch Education material notes, "A complaint should not be stricken and the action dismissed unless the court [in this case, the Commission] is prepared to conclude that there is no possible set of facts in support of the allegations in the complaint that would entitle the plaintiff to relief (Illinois Graphics Co. v. Nickum 159 Ill. 2d 469 (1994))." If the Commission by a six to one vote accepted last spring that the pleadings were sufficient to deny the motion to dismiss, and only two new commissioners have joined the panel (the argument of vicissitudes of tenure, outlined above to the contrary not withstanding), it is difficult to understand what message the other three commissioners are sending to the public by reversing that action. After all, the complaint had not changed. Either we think the pleadings are well-argued and the issue of bias is significantly important to hear the full evidence to substantiate it or we do not. Last spring six of us thought it was. That motion was decided. It should certainly not have been reheard nor reversed. Melding process and substance, the majority order includes a series of arguments examining the contention that " … conclusion of law or conclusion of fact not supported by allegations of specific fact are not admitted." Using the judge's orders in the case, and attempting to interpret them, the majority takes the counts one at a time and seeks to explain why each may not evidence bias. This presents some problem, since the JIB has argued that a full hearing of the case will demonstrate that the separate counts, considered in toto, will show bias. The majority examines each count separately as to the facts, yet concludes that "the totality of respondent's conduct is simply and plausibly explained as arising from her belief that petitioners' sexual orientation might be a relevant factor in determining the children's best interests." See Order page nine. This conclusion, based on the examination of the individual counts, is hardly responsive to the JIB contention that the evidence will show a pattern of bias understood as part of the whole set of actions by the judge.

Substantively, the majority argument only holds true if the commissioners are confident the judge did not exercise bias but rather ruled solely on the basis of exercising appropriate judgment in determinations about the well-being of the children in these cases. The Commission has not yet heard evidence supporting these facts. If there remains any doubt about her fairness, granting the motion eliminates the possibility of examining the evidence as to whether what we have here is a matter of judgment or bias.

Reasonable people can disagree as to whether facts are well pleaded and whether facts are sufficient to support the next step in our process. I still wish (and had hoped the full Commission would wish) to understand the actions of Judge McDunn better, based on complete evidence to be presented at a hearing of the case. The JIB in answer to a question from the bench made the point (albeit in artfully and only after retracting its initial response about taking the counts one at a time or all together) that the specific evidence in the case will demonstrate a pattern of bias. The counts

indicate a series of unusual actions by the judge: she questioned the adoptive parents not about their behavior toward the children (which would have been appropriate) but about the parents' sexual histories (inappropriate and unnecessary to the analysis of the well-being of the child); she consolidated cases based only on the sexual orientation of the adopting parents (again, not an appropriate consideration); she added a third party to the case simply because of the sexual orientation of the adopting parents, although the third party had no standing to participate in the case; she released confidential information to the third party; and the judge continued to issue orders in the case in spite of the fact that the presiding judge had taken the case away from her.

These are at best unusual actions. The majority concludes in each instance that the judge's actions do not evidence bias. Whether the judge was acting with bias in violation of the canons remains to be seen in the evidence. The counts against her, accepted as true for purposes of this motion, raise serious enough questions to justify further examination as to whether there was bias. Those appearing before her deserve an opportunity to be treated fairly. Out of respect for the Constitution and to discharge our responsibilities as public servants and commissioners, we must assume that complaints are not brought to the JIB frivolously. We also must assume that the role of the JIB is to determine which charges have merit and to bring forward to the Commission those that the JIB members believe are justified. The JIB has heard the evidence; they have done the research. According to its annual report, the JIB deemed 4 of the 357 matters brought to it last year of sufficient import and validity to have brought them to the Commission. When one is brought forward to us which is not on its face frivolous and when there are charges that in total suggest the probability of bias, we have an obligation to hear the evidence.

The majority has analyzed the orders and the counts presented to us and concluded "the totality of respondent's conduct is simply and plausibly explained as arising from her belief that petitioners' sexual orientation might be a relevant factor in determining the children's best interests." See Order page nine. The set of facts we have been presented were neither simply nor plausibly understood that way by those filing the initial complaint, by the JIB, by an Appellate Court or by six commissioners last spring.

While there is reason for concern about the timeliness of the Commission's actions, we all agree that a balance must be struck between providing all parties ample time to present their side of the case and expeditious action of the process. If the Constitutional construction under which we are created is to function properly, we must accept the consequences of the process which permits citizens of Illinois to question the behavior of their judges. We must consider the judgment of the members of the JIB, after hearing evidence and researching a case, in bringing us the cases they believe are well-founded; and we must hear the evidence in those cases unless they are patently frivolous or there is substantial reason to dismiss them, which we acknowledged last spring was not the case here. If a judge has the fair and open forum of the Commission to be vindicated should the JIB have erred in its judgment, then we have correctly administrated the Constitutional scheme created for review of judicial conduct. It would be tragic if a judge were to suffer unfairly and be publicly discredited without a fair hearing. The role of the Commission is to provide the forum for that hearing, both for the judge and for those who genuinely believed they have been wronged by that judge, and also to stand by our decisions and conform to the rules of procedure. With this ruling, we are doing neither.