

833 So.2d 262  
District Court of Appeal of Florida,  
Fourth District.

Douglas **PETERSON**, Petitioner,  
v.  
Alexandra ASKLIPIOUS, Respondent.

No. 4D02-4170. | Dec. 26, 2002.

Mother brought contempt action after father failed to pay attorney's fees in connection with amended final judgment establishing paternity, residence and support. Father filed motion to disqualify judge. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, [Edward A. Garrison, J.](#), denied motion. Father filed petition for writ of prohibition. The District Court of Appeal held that father met burden of alleging facts required for legally sufficient motion to disqualify judge.

Writ of prohibition granted.

West Headnotes (3)

[1] **Judges**

 **Bias and Prejudice**

Whether motion to disqualify judge is legally sufficient requires determination as to whether alleged facts would create in reasonably prudent person a well-founded fear of not receiving fair and impartial trial. [West's F.S.A. § 38.10](#); [West's F.S.A. R.Jud.Admin.Rule 2.160\(d\)\(1\)](#).

[6 Cases that cite this headnote](#)

[2] **Judges**

 **Bias and Prejudice**

**Judges**

 **Sufficiency of Objection or Affidavit**

Term "legal sufficiency," when used in context of determining whether motion to disqualify judge is legally sufficient, encompasses more than mere technical compliance with rule and the statute; court must also determine if facts alleged, which must be taken as true, would

prompt reasonably prudent person to fear that he could not get fair and impartial trial. [West's F.S.A. § 38.10](#); [West's F.S.A. R.Jud.Admin.Rule 2.160\(d\)\(1\)](#).

[6 Cases that cite this headnote](#)

[3] **Judges**

 **Statements and Expressions of Opinion by Judge**

Father ordered to pay attorney's fees in connection with amended final judgment establishing paternity, residence, and support met burden of alleging facts required for legally sufficient motion to disqualify judge in contempt proceeding; trial judge's comments gave father well founded fear that judge would not afford father fair and impartial trial on contempt motion and trial judge was alleged to have been unwilling to afford father opportunity to be heard on his ability to pay attorney's fees previously ordered, which was due process right in contempt proceedings. [West's F.S.A. § 38.10](#); [West's F.S.A. R.Jud.Admin.Rule 2.160\(d\)\(1\)](#).

[6 Cases that cite this headnote](#)

**Attorneys and Law Firms**

\***263** [Robert L. Bogen](#) of the Law Offices of Braverman & Rossi, Boca Raton, for petitioner.

[Randy D. Ellison](#), West Palm Beach, for respondent.

**Opinion**

PER CURIAM.

Petitioner Douglas **Peterson** seeks prohibition following a trial court order denying his motion to disqualify the judge presiding in post-judgment domestic proceedings. We grant the petition.

Petitioner was ordered to pay attorney's fees in connection with an amended final judgment establishing paternity, residence and support. The trial court made a finding of petitioner's ability to pay the fees at that time. When payment

was not made, respondent's counsel moved for contempt against petitioner. At the hearing, the presiding judge said:

THE COURT: So he's going to tell me one more time he has no money when I haven't believed him anytime before that?

PETITIONER'S COUNSEL: Well, he's entitled. It's not a matter of what you believe, it's a matter of ...

THE COURT: Unfortunately, I already made those findings, and I don't need his testimony.

PETITIONER'S COUNSEL: It's a matter of the evidence, Your Honor.

THE COURT: Motion for contempt is granted....

The trial court thereupon entered orders granting contempt in favor of respondent's trial firm and appellate counsel. The court found that petitioner had the ability to pay the purge provision set by the court based on previous hearings on petitioner's finances, including a hearing held just 90 days earlier. Petitioner is separately appealing the contempt orders.

Petitioner filed a timely motion to disqualify based on these comments attributed to the trial judge. The trial judge denied the motion.

Allegations in a motion to disqualify are reviewed under a *de novo* standard as to whether the motion is legally sufficient as a matter of law. See § 38.10, Fla. Stat.; *Armstrong v. Harris*, 773 So.2d 7 (Fla.2000), *cert. denied*, 532 U.S. 958, 121 S.Ct. 1487, 149 L.Ed.2d 374 (2001). A motion to disqualify is governed in substance by section 38.10, Florida Statutes, and procedurally by rule 2.160, Florida Rules of Judicial Administration. The rule states that “[a] motion to disqualify shall show ... that the party fears that he or she will not receive a fair trial or hearing because of specifically described

prejudice or bias of the judge.” Fla. R. Jud. Admin. 2.160(d)(1).

[1] Whether the motion is legally sufficient requires a determination as to whether the alleged facts would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial. See *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla.1990).

[2] The term “legal sufficiency” encompasses more than mere technical compliance with the rule and the statute; the court must also determine if the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial \*264 trial. *Hayslip v. Douglas*, 400 So.2d 553, 556 (Fla. 4th DCA 1981).

[3] We find that petitioner met his burden in this case. The motion was legally sufficient. The trial judge's comments gave petitioner a well founded fear that the judge would not afford petitioner a fair and impartial trial on the contempt motion pending before him. As well, the trial judge is alleged to have been unwilling to afford petitioner the opportunity to be heard on his ability to pay the attorney's fees previously ordered, a due process right in the contempt proceedings. See *Zuchel v. State*, 824 So.2d 1044 (Fla. 4th DCA 2002); *Wargo v. Wargo*, 669 So.2d 1123 (Fla. 4th DCA 1996).

Accordingly, the petition for writ of prohibition is granted. Any orders entered after the filing of the motion for disqualification shall be vacated.

POLEN, C.J., FARMER and MAY, JJ., concur.

#### Parallel Citations

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