

Order

Supreme Court
Lansing, Michigan

July 25, 2006

Clifford W. Taylor,
Chief Justice

ADM File No. 2006-01

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

Appointment of Chief Judge
of the Kent County Probate Court

Pursuant to MCR 8.110, it is ordered that the Honorable Paul J. Sullivan is appointed Chief Judge of the Kent County Probate Court effective August 1, 2006, for the unexpired portion of a two-year term, which commenced January 1, 2006, while continuing as Chief Judge of the Circuit Court for the 17th Judicial Circuit.

TAYLOR, C.J. (*concurring*). This Court, by a vote of four to three, has appointed Judge Paul J. Sullivan as Chief Judge of the Kent County Probate Court. Justice WEAVER, having unsuccessfully urged that we appoint Judge Patricia Gardner, has filed a dissenting statement.

I have, as I do roughly 260 times biennially as we pick chief judges, made my choice as to which of several candidates could, in my judgment, most satisfactorily serve. No aspersion as to any person is intended or should be imputed from my performance of my duty. Justice WEAVER has done a disservice to Judge Gardner, by suggesting an antagonism toward Judge Gardner that does not exist. Sadly this was all so unnecessary. Justice WEAVER should not resent her colleagues for simply seeing things differently than she does. Accordingly, I decline Justice WEAVER's peculiar invitation to accept responsibility for the publication of the various matters in *her* statement. I hope that in the future judges who are willing to serve will not be reluctant to submit their names for fear of similar treatment as Justice WEAVER scurries about to "help" them.

YOUNG, J. (*concurring*). I concur in the appointment of Judge Paul J. Sullivan as Chief Judge of the Kent Probate Court, and I join the views expressed in Chief Justice TAYLOR's concurring statement.

Until today, during my tenure on this Court, no member has exposed the presumed shortcomings of a failed candidate who has been considered for an appointment by this Court. For all of the reasons recited by the Chief Justice in his statement, I believe that Justice WEAVER has injured our institutional interest in preserving the dignity of people who unsuccessfully seek appointments by this Court. Equally significant, Justice WEAVER may well have unwittingly injured Judge Gardner by recounting two very troubling cases in which Judge Gardner's rulings were overturned on appeal.

In making her statement, Justice WEAVER purports to speak with authority on behalf of Judge Gardner. Other than on the basis of Justice WEAVER's assertion, no other member of this Court knows whether this claimed authority is genuine.

Since Justice WEAVER has chosen to make an issue of Judge Gardner's handling of *In re JK*, 468 Mich 202 (2003), and *Ryan v Ryan*, 260 Mich App 315 (2004), 1v den 471 Mich 937 (2004), the public can satisfy itself whether these cases support or undermine the case for Judge Gardner that Justice WEAVER advances. Judge Gardner's conduct in each of these two cases was particularly controversial, repudiated on appeal and led, in the *Ryan* case, to federal litigation against the court clerk for Kent County, where Judge Gardner presides.¹

These concerns point to the propriety of our traditional practice of *not* commenting on the failed candidacies of aspirants for Supreme Court appointment. It is my hope that Justice WEAVER's deviation today will be the sole exception to that practice.

CAVANAGH, J. (*dissenting*). In light of the preference expressed by the Kent County probate judges and the reluctance to assume the responsibility expressed by Judge Sullivan, I would appoint Judge Gardner as Chief Judge of Kent County Probate Court.

WEAVER J., (*dissenting*). I dissent from Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN's decision to appoint 17th Circuit Court Judge Paul J. Sullivan to the position of Chief Judge of the Kent County Probate Court.¹ The majority's decision to appoint a circuit judge, Judge Sullivan, over the most logical candidate, Kent County Probate Judge Patricia D. Gardner, is unjustified and publicly unexplained. It deprives the people of Kent County of the best choice, Judge Gardner, for their next Chief Judge of Probate.

When Kent County Probate Court Chief Judge Janet A. Haynes announced her resignation, the four probate judges of Kent County unanimously recommended to this Court that Judge Patricia Gardner be appointed Chief Judge of the Kent County Probate Court. Judge Gardner has indicated her willingness to assume the responsibilities of chief probate judge.

Judge Gardner currently serves in the family division of the 17th Circuit Court. Before becoming a judge, Judge Gardner practiced law for ten years with a private firm

¹ Justice WEAVER's characterization of these two cases is contradicted by the two published decisions and her recitation of the facts in *Ryan* is especially skewed. Again, members of the public are encouraged to read these opinions and decide for themselves whether Justice WEAVER's characterization of these cases is a fair one.

¹ Justices CAVANAGH, WEAVER, and KELLY voted against appointing Circuit Judge Sullivan and indicated support for Probate Judge Patricia D. Gardner for chief probate judge.

that primarily practices probate and family law. Moreover, Judge Gardner has proven her ability to serve as chief probate judge; she has worked closely with the current chief probate judge and filled in for her on probate matters when necessary. Judge Gardner has the confidence and support of her Kent County Probate Court colleagues. Indeed, Judge Gardner has the confidence and support of Chief Circuit Court Judge Paul J. Sullivan.

With all due respect to Chief Circuit Court Judge Sullivan, and with gratitude for his continuing service as the chief judge of the circuit court, he is not the correct choice for the job of chief judge of the Kent County Probate Court. The chief judge of the probate court should be a judge with significant probate court experience. Judge Sullivan admittedly does not have such experience.

Probate Judge Gardner is the obvious choice for the chief probate court judge position. It is our responsibility to make “[a]ll appointments . . . based upon merit.” Canon 3B(4) of the Code of Judicial Conduct. Because Judge Sullivan admittedly has no probate experience, the people of Kent County deserve to know why four justices, Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN, have denied Kent County the leadership it deserves on its probate court. These justices need to provide to the people of Kent County and this state their written reasons for their decision.

In May 2003, the majority strongly criticized Judge Gardner for allowing an adoption to proceed in the *In re JK* case,² because there was an appeal pending in this Court. However, the law at that time did not definitively preclude Judge Gardner from finalizing the adoption when there was an appeal pending in this Court.³ Because the Court of Appeals had already entered an order affirming Judge Gardner’s order terminating the mother’s parental rights, the law on its face permitted the finalization of the adoption.

The decision in *In re JK* changed the law by extending the period during which

² *In re JK*, 468 Mich 202 (2003)(WEAVER, J., not participating). To avoid delaying the *In re JK* case, I did not participate because of a communication that I had during deliberations on the case. Questioning by several justices at oral argument had revealed several justices thought the bonding and attachment expert upon whose opinion Judge Gardner relied was biased in favor of the foster mother. For example, to discredit the expert, Chief Justice TAYLOR suggested that there might be 10,000 bonding and attachment experts with similar credentials in Michigan and, therefore, it was somehow suspect that the expert came from across the state. However, at the end of a telephone conversation with a staff person for the Governor's Task Force on Juvenile Justice, which I chair, I asked how many such experts there were in Michigan. I learned that there were only two bonding and attachment experts in Michigan, of whom the expert in *In re JK* was one.

³ The applicable statute, MCL 710.56(2)(c), allows an adoption to proceed after “[t]he court of appeals affirms the order terminating parental rights.” MCL 710.41(2)(c) similarly provides that the persons with whom a child is placed pending adoption shall be informed that “an adoption will not be ordered until . . . [t]here is a decision of the court of appeals affirming the order terminating parental rights.”

adoptions must remain pending to include any appeals to this Court relating to the termination of parental rights.⁴ It was unreasonable for the *In re JK* majority to criticize Judge Gardner for failing to anticipate that this Court was going to change the law.

The Supreme Court's creation and imposition of new law in *In re JK* resulted in yet another year of turmoil and instability for the child, his mother, and his foster parents. If the law needed clarifying, the Court could have made that clarification⁵ without engaging in an attack on Judge Gardner's well-reasoned decision to terminate the mother's rights. It could have acknowledged that the law, as it read, did not so "obviously" dictate the result the Court wanted.

The majority's decision in *In re JK* received strong criticism in the press, especially in Kent County. Persons who watched this story unfold will remember the heart-wrenching efforts to reintroduce the child to his birth mother in the months that followed the *In re JK* decision, and the cooperation of the foster parents who stood by, willing and able to adopt the child. The press reported regularly on the efforts, which were overseen by Judge Gardner, to reintroduce the birth mother and the child, who had only lived with her for 16 months of his five years.

The efforts to reintroduce the mother and the child were hampered by the fact that the mother failed to disclose that she lost a job in September 2003 and by the fact that she repeatedly tested positive for marijuana in 2004. As a result of the failed drug tests, a termination hearing was scheduled for July 26, 2004. On the date of the scheduled hearing, the long, sad saga ended when the mother relinquished her parental rights. Thus, the *In re JK* case had a happy ending in spite of the Supreme Court's decision, and the adoption by the child's longest-term foster parents was allowed to proceed.

The history of the *In re JK* case provides no justification for this majority (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) to refuse to appoint

⁴ The majority in *In re JK* concluded that a court rule that addresses the execution and enforcement of judgments of the Court of Appeals, MCR 7.215(F), required that the plain terms of the statutes be ignored. Though the majority said that its rationale was "obvious," it in fact conflicted with this Court's holding that court rules cannot modify statutes in matters of substantive law. See *McDougall v Schanz*, 461 Mich 15, 26-27 (1999).

Regarding adoptions, the Legislature does not provide that an adoption cannot proceed until all appeals from the order of termination of parental rights have run. Rather, it permits the trial court to enter the adoption once the Court of Appeals affirms an order terminating parental rights. This is a substantive policy choice. The Legislature balanced the merits and hazards of allowing an adoption to take place before this Court had an opportunity to rule on the matter and decided that the better course was to allow an adoption to take place sooner, albeit with the risk that an adoption might be overturned if this Court granted leave to appeal and then reversed the order of termination of parental rights.

⁵ That is of course if it could get around the fact that it was rewriting substantive law in contravention to *MacDougall v Shanz*, *supra*.

Judge Gardner as chief probate judge. Similarly, the history of another highly publicized case, *Ryan v Ryan*,⁶ does not justify this majority's refusal to appoint Judge Gardner.

Ryan involved a teenager whose relationship with her parents had deteriorated to the point that she hired an attorney to represent her interests. The minor was a good student whose parents had forced her from their home over a dispute about the girl's boyfriend. Apparently, after some negotiations between the parents and the minor's attorney, the parents threatened to send her to a school for delinquent girls in the state of Utah. Upon learning of the minor's parents' imminent intent to remove her client from the state against her client's will, the attorney contacted Judge Gardner.

Upon learning these facts, Judge Gardner granted an ex parte order requiring that the status quo be maintained. The order directed that the minor not be removed from the state, but the order was never served because the minor had already been relocated by her parents to Utah.

It is well known that during the week when the ex parte order was issued, the Kent Circuit Court's family division was closed because the court was in the process of being moved to a new location. This fact complicated the handling of emergency matters.

The people of Kent County deserve the best qualified judge to administer their probate court. It is unjust for Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN to attempt to undermine the career and reputation of a good, hardworking judge by not appointing Judge Gardner as chief judge of probate. It is wrong for them to deprive the people of Kent County of Judge Gardner's services as chief probate judge without explanation.

KELLY, J. (*dissenting*). I have cast my vote in favor of Judge Gardner because I am not convinced of the need for the Court to select a chief judge for the Kent County Probate Court from outside that court. It is not my intent that this vote be interpreted to reflect adversely on Judge Sullivan.



I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 25, 2006

Corbin R. Davis

⁶ *Ryan v Ryan*, 260 Mich App 315 (2004). In March 2004, an appeal from a January 15, 2004, Court of Appeals decision rejecting the minor's action was pending in this Court. This Court ultimately denied leave to appeal in *Ryan* in December 2004. 471 Mich 937 (2004).