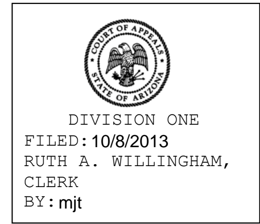
NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 10/8/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

MARISOL A. CANALES, Petitioner,	No. 1 CA-SA 13-0180
v.	DEPARTMENT A (AUGUST)
THE HONORABLE JOHN PAUL PLANTE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of YUMA, Respondent Judge,	Yuma County Superior Court No. S1400DO200801189
DAVID R. CANALES, Real Party in Interest.	**DECISION ORDER**

This special action was considered by Presiding Judge Peter B. Swann and Judges Kent E. Cattani and Diane M. Johnsen during a regularly scheduled conference held on August 6, 2013. After consideration, and for the reasons that follow,

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, accepts jurisdiction in this special action and grants relief.

We are required to decide whether the superior court abused its discretion by denying the petitioner's notice of change of judge under Ariz. R. Civ. P. 42(f)(1). We hold that under the literal terms of Rule 42(f)(1), the petitioner did not waive her

right to notice the currently assigned judge because the judge's previous involvement in the case was limited to ruling on an *ex parte* application at a time before the judge was permanently assigned to the case.

The relevant procedural history is as follows. In December 2009, in Yuma County Superior Court Case No. S1400DO-2008-01189, Commissioner Stocking-Tate entered a decree dissolving the marriage of the petitioner ("Mother") and the real party in interest ("Father"). In August 2010, Mother applied for and obtained an order of protection against Father under the existing case number. The judge who granted the *ex parte* application was Judge Plante.

In the following years, a series of administrative orders regarding the superior court's case management system resulted in several reassignments of Case No. S1400DO-2008-01189. The case was reassigned from Commissioner Stocking-Tate to Judge Kenworthy, then from Judge Kenworthy to Judge Reeves, and finally from Judge Reeves to Judge Plante starting January 1, 2013. After Judge Plante was assigned, Father filed an *ex parte* application for temporary restraining orders that would grant him temporary custody of the parties' children. Judge Pro Tem Aguirre granted Father's motion and set the matter for a hearing before Judge Plante. The next day, Mother filed an *ex parte* motion requesting that the temporary restraining orders be

quashed. Judge Pro Tem Aguirre granted relief to Mother, ordered the children returned to Mother's custody, and reset the scheduled hearing.

Before the hearing date, Mother sought reassignment of the case from Judge Plante by filing a notice of change of judge as a matter of right. Judge Plante denied Mother's notice, holding that she had waived her right to notice him because of his previous involvement in the case. Mother then moved for reconsideration and the motion was denied. She then brought this special action and requested a stay, which we granted. We accept jurisdiction because special action provides the only avenue for relief from the denial of a notice of change of judge, and because the superior court's ruling was plainly erroneous. *See* Ariz. R.P. Spec. Act. 1(a); *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223-24, 921 P.2d 21, 23-24 (1996); *Amos v. Bowen*, 143 Ariz. 324, 327, 693 P.2d 979, 982 (App. 1984).

Rule 42(f) governs notices and requests for change of judge in family court cases and in protective order proceedings. ARFLP 6; ARPOP 1(A)(2). Under Rule 42(f)(1)(A), "[i]n any action pending in superior court, except an action pending in the Arizona Tax Court, each side is entitled as a matter of right to a change of one judge and of one court commissioner." But the right can be waived. Rule 42(f)(1)(D) provides:

> After a judge is assigned to preside at trial or is otherwise permanently assigned to the action, a party waives the right to change of that judge as a matter of right when:
> (i) the party agrees to the assignment; or
> (ii) after notice to the parties
> (aa) the judge rules on any contested issue; or
> (bb) the judge grants or denies a motion to dispose of one or more claims or defenses in the action; or
> (cc) the judge holds a scheduled conference or contested hearing; or
> (dd) trial commences.
> Such waiver is to apply only to such assigned judge.

"[W]hat the [waiver] rule means is that the right to a peremptory challenge against the trial judge is lost as soon as the parties have reason to know how he feels about any aspect of the merits of the case." *King v. Superior Court (Taber)*, 108 Ariz. 492, 494, 502 P.2d 529, 531 (1972). The merits of the case "refer[] to significant legal rights as distinguished from technicalities relating to only procedure or form." *Dudley v. Superior Court (Tenka)*, 123 Ariz. 80, 81-82, 597 P.2d 983, 984-85 (1979) (citation omitted).

Here, Judge Plante's resolution of Mother's August 2010 application for an order of protection arguably gave Mother some insight into his views on the merits of the parties' ongoing custody disputes. But under the plain terms of Rule 42(f)(1)(D), waiver can occur only "[a]fter a judge is assigned to preside at trial or is otherwise permanently assigned to the action." Nothing in the record provided to us suggests that

Judge Plante presided at a trial or was permanently assigned to the parties' case at any point before January 1, 2013.

Neither Mother's application for order of protection nor Judge Plante's resolution of the application changed the case's permanent assignment. To promote efficiency and discourage "judge shopping," post-decree disputes are considered to be a part of the original action and do not entitle a litigant to refresh his or her rights under Rule 42(f)(1). *Hofstra v. Mahoney*, 108 Ariz. 498, 500, 502 P.2d 1317, 1319 (1972). Logically, this rule includes parents' post-decree applications for orders of protection against each other. The order of protection proceedings were properly conducted under the original case number, which case remained at that time assigned to Commissioner Stocking-Tate. To be sure, a "new" judge heard the application -- most likely because of a general administrative policy designed to ensure speedy relief for protective-order applicants. But because the "new" judge neither presided over a trial nor was permanently assigned to the case, there was no waiver under Rule 42(f)(1)(D). *Cf. Medders v. Conlogue*, 208 Ariz. 75, 77-79, ¶¶ 6-12, 90 P.3d 1241, 1243-45 (App. 2004) (holding that criminal defendant did not waive right to notice judge who previously presided over contested release-conditions hearing because at the time of the

hearing that judge was not "assigned" within the meaning of Ariz. R. Crim. P. 10.2(c)(3)).

Mother timely exercised her right to a change of judge after Judge Plante was permanently assigned and before he entered any rulings or held any conferences or hearings as the permanently assigned judge. Her notice of change of judge should not have been denied. We therefore grant special action relief and direct that the case be reassigned from Judge Plante.

/s/

PETER B. SWANN, Presiding Judge