

**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*

**FILED BY CLERK**

**APR 15 2011**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

JOSHUA D. TAIZ,	)	
	)	2 CA-CV 2010-0154
Petitioner/Appellee,	)	DEPARTMENT A
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
JENNIE L. GREENE,	)	Rule 28, Rules of Civil
	)	Appellate Procedure
Respondent/Appellant.	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D20080919

Honorable Michael J. Cruikshank, Judge

AFFIRMED

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Robert L. Barrasso, Esq.

Tucson  
Attorney for Petitioner/Appellee

West, Christoffel & Zickerman, PLLC  
By Anne Elsberry

Tucson  
Attorneys for Respondent/Appellant

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ESPINOSA, Judge.

¶1 In this domestic relations case, the trial court granted appellee Joshua Taiz sole legal custody and primary physical custody of the parties' minor child. Appellant

Jennie Greene appeals, arguing the court erred in twice declining to continue the date of the custody trial. Finding no error, we affirm.

### **Factual Background and Procedural History**

¶2 When reviewing the denial of a motion to continue, we view the facts in the light most favorable to upholding the trial court's decision. *See Neis v. Heinsohn/Phoenix, Inc.*, 129 Ariz. 96, 97, 628 P.2d 979, 980 (App. 1981). In March 2008, Taiz filed a petition for dissolution of marriage requesting, *inter alia*, that the trial court award him sole legal and physical custody of the parties' minor child, B. The court bifurcated the case, holding separate trials for the property and custody issues.

¶3 The custody trial initially was set for February 2010. A few days before trial, Greene fired her attorney and the trial court granted her a continuance until early May so she could retain new counsel. On April 14, three weeks before trial, John Bolt appeared on behalf of Greene and filed a motion to continue to allow him to prepare for trial. The court denied the motion, and Bolt withdrew.

¶4 On May 4, the day before trial, Greene filed a notice with an attached letter from a nurse explaining that Greene had been hospitalized. During an informal telephone conference with the court, Taiz's counsel and Greene agreed to a continuance, and the trial was reset for May 17. Three days before the new trial date, Greene filed another notice in which she stated she would not be able to attend the trial. This notice also was accompanied by a nurse's letter explaining that although Greene had been released from the hospital, she would be "unable to participate in any legal hearings for the next 8-10 weeks" due to a concussion, "difficulties with headache," reduced concentration, visual

disturbance, and ongoing outpatient treatment. The trial court proceeded with the trial notwithstanding Greene's absence, noting that the notice "[wa]s not a motion to continue" and did not provide the opinion of a physician, and concluding Greene's absence was an instance of "malingering and manipulation" consistent with a pattern of past behavior. At the conclusion of trial, the court took the matter under advisement and expressly permitted Greene to submit documents and exhibits in support of her case.

¶5 On June 8, Greene filed a number of documents in response to the court's invitation, and also filed a motion to continue the May 17 trial accompanied by a letter from her treating physician. Noting that the motion was "obviously untimely," the trial court summarily denied it and granted Taiz sole legal custody and primary physical custody of B. Greene now appeals. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(B).

### **Discussion**

¶6 Greene argues the trial court erred in failing to continue the custody trial in response to her April 14 motion to continue and her May 14 notice of nonattendance at trial. Rule 77(C)(1), Ariz. R. Fam. Law P., provides that "[n]o trial setting . . . shall be vacated or continued except by formal order of the court." "[A] motion for continuance is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless that discretion has been abused." *Aries v. Palmer Johnson, Inc.*, 153 Ariz. 250, 256, 735 P.2d 1373, 1379 (App. 1987); *see also* Ariz. R. Fam. Law P. 1 cmt. (case law interpreting similar statewide rules applies to family law rules as well); *Kline v. Kline*, 221 Ariz. 564, ¶ 13, 212 P.3d 902, 906-07 (App. 2009) (same).

## April 14 Motion to Continue

¶7 Greene first contends the trial court should have granted her April 14 motion because she had included in the motion all of the showings required by Rule 77(C)(2) for obtaining a continuance on the ground that a witness or party is unavailable. But among the requirements of the rule is “that the postponement is not sought only for delay, but is based on good cause.” Ariz. R. Fam. Law P. 77(C)(2)(d); *see also* Pima County Super. Ct. Loc. R. P. 8.3(E) (“No postponement of a trial shall be granted except for good cause.”). In denying the motion, the court was concerned with the age of the case and noted it was “complicated” and “messy.” The court also alluded to delay caused by the previous continuance to allow Greene to seek new counsel. Finally, the court concluded Greene had been “somewhat dilatory in retaining [Bolt] at such a late point” because she had had ample time to do so previously. We can infer from the court’s comments it did not believe Greene had established “good cause” for a continuance in light of the case’s attendant circumstances. We cannot say the court abused its discretion.

¶8 Greene also argues that by denying the April 14 motion, the trial court deprived her of her due process right to be represented by counsel. In a civil matter such as this, due process is satisfied where a party has the opportunity to retain counsel. *See Encinas v. Mangum*, 203 Ariz. 357, ¶ 10, 54 P.3d 826, 828 (App. 2002). As Taiz correctly points out, Greene does not have an absolute right to an attorney. *See id.* Greene had contemplated retaining Bolt as early as September 2009, but failed to do so. When she fired her first attorney days before the February 2010 trial date, the court

continued the trial for over two months to allow her to hire another. That she may not have been able to afford to hire Bolt until April, as she alleges, rendering her motion untimely, does not result in a violation of her due process rights. *See id.* Greene had ample time to secure representation before the May 5 trial; accordingly, we cannot say the court clearly abused its discretion in denying her April 14 motion.<sup>1</sup>

### **May 14 Notice**

¶9 Greene additionally contends the trial court erred in failing to continue the May 17 trial date in response to the notice she filed May 14. In family law cases, a proper request for continuance must be set forth in a written motion that contains both a request for relief and good cause for granting the relief. Ariz. R. Fam. Law P. 3(B)(3), 35(A)(1), 77(C)(1); Pima County Super. Ct. Loc. R. P. 8.3(E). “The purpose of the motion is to obtain a ruling or an order directing that some act be done in favor of the applicant, and it should call to the attention of the court the particular purpose sought to be achieved, so that the court be given an opportunity to rule on the matter.” *State v. Wise*, 101 Ariz. 315, 317, 419 P.2d 342, 344 (1966).

¶10 Here, the face of Greene’s May 14 notice supports the trial court’s conclusion that it was not a motion to continue. The notice is titled “Notify Court of Medical Reason Not to Attend,” and the body of the cover page reads, “This and document attached is to notify courts[] that Jennie Greene will not be able to attend court

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<sup>1</sup>To the extent Greene contends the trial court erred in permitting Bolt to withdraw, she did not make this argument in the trial court; the argument is thus forfeited and we do not consider it here. *See Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994) (“errors not raised in the trial court cannot be raised on appeal”).

date on 5-17-10.” Attached to the notice is a letter signed by a nurse, outlining Greene’s post-hospitalization difficulties and concluding Greene was “unable to participate in any legal hearings for the next 8-10 weeks.” Neither the notice nor the attached letter indicates it is a motion, and neither document requests any form of relief, including continuance of the trial. Although at this point in the litigation Greene was not represented by counsel and was proceeding in propria persona, she is nevertheless held to the same standard as an attorney. *See Old Pueblo Plastic Surgery, P.C. v. Fields*, 146 Ariz. 178, 179, 704 P.2d 819, 820 (App. 1985). Consequently, the trial court did not err in declining to consider the notice as a motion to continue.

¶11 But even assuming, *arguendo*, the notice was sufficient to constitute a proper motion to continue, we agree with Taiz that Greene nevertheless is not entitled to relief. With respect to the May 14 notice, like the April 14 motion to continue, the trial court considered the protracted history of the case and previous continuances of the trial date in deciding whether to again continue the trial. The court additionally considered B.’s need for “permanency” and Taiz’s entitlement to resolution. Finally, the court observed that the letter attached to the notice was “not a physician’s opinion” and that “[n]urses cannot diagnose ailments.” Under these circumstances, the court reasonably could have found, as we infer it did, that Greene had not established good cause for a continuance. Thus, even if we construed the May 14 notice as a motion to continue, the court did not abuse its discretion in denying it.<sup>2</sup> For the same reasons, it did not err in

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<sup>2</sup>Although the trial court granted a continuance of the May 5 trial date but denied a continuance of the May 17 date in response to similar notices, the respective

denying Greene's "more formal" June 8 motion to retroactively continue the May 17 trial.

### Disposition

¶12 For the foregoing reasons, the trial court's judgment awarding custody to Taiz is affirmed.

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge

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circumstances were different. Whereas Greene was in the hospital on May 5, she had been released and was receiving outpatient treatment on May 17. Furthermore, the trial court continued the May 5 trial date only after Greene and Taiz had stipulated "to a brief continuance." In contrast, the parties never agreed to a continuance of the May 17 trial date; indeed, the record reflects Taiz's desire to proceed with the trial on that date. Thus, the continuance of the May 5 trial date does not provide grounds for concluding the court abused its discretion in declining to continue the May 17 trial based on a similar filing.