

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

HEATHER CHANDLER,) 1 CA-SA 10-0211
)
Petitioner,) DEPARTMENT E
)
v.)
) MARICOPA County
) Superior Court
THE HONORABLE CAREY SNYDER) No. FC 2008-053121
HYATT, Judge of the SUPERIOR)
COURT OF ARIZONA, in and for)
the County of MARICOPA,)
) DECISION ORDER
Respondent Judge,)
)
BRIAN BARTOLINI,)
)
Real Party In Interest.)
_____)



DIVISION ONE
FILED: 10/28/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

This special action came on regularly for conference this 27th day of October, 2010, before Presiding Judge Philip Hall, Judges Peter B. Swann and Sheldon H. Weisberg participating. For reasons that follow, we accept jurisdiction of this special action, but deny relief.

Heather Chandler ("Mother") filed this special action seeking relief from the orders entered by the Honorable Carey Snyder Hyatt (1) granting the motion for order that case continue to be assigned to Judge Hyatt filed by Brian Bartolini ("Father") and denying his notice of change of judge as moot; (2) denying

Mother's motion for reconsideration and notice of change of judge contained therein; and (3) granting Father's emergency motion to return children to Arizona. She also claims that Judge Hyatt's orders reassigning the case to her division demonstrates bias or prejudice.

On March 18, 2010, this court accepted jurisdiction and granted special action relief to Mother by vacating an order entered by Judge Hyatt setting aside a relocation provision in a default divorce decree and modifying the decree from sole custody to joint custody, with Father as primary residential parent. *Chandler v. Superior Court (Bartolini)*, 1-CA-SA 10-1028 (Ariz. App. Mar. 18, 2010)(mem. decision).

Father filed a petition for review to the Arizona Supreme Court on April 19, 2010. However, because the mandate had not issued and this court's March 18, 2010 decision was not yet final, on April 14, 2010, Father filed an "Emergency Motion to Return Children to Arizona and Petition for Contempt". On May 5, 2010, Judge Hyatt issued an order for the parties to appear before her on July 15, 2010 at the Northeast Regional Court Center. On or about June 14, 2010, Judge Hyatt was transferred to the Downtown Judicial District and a judge pro tem in the Northeast Judicial District was administratively assigned to the case. On July 7, 2010, the judge pro tem issued a ministerial order allowing Mother to appear telephonically at the July 15 hearing.

On July 9, 2010, Father filed a "Motion for Order that the Above-enumerated Case Will Continue to be Assigned to the Honorable Judge Hyatt" ("motion for continued assignment") and a separate notice of change of judge, requesting that the matter be transferred from the newly-assigned judge pro tem back to Judge Hyatt. Mother opposed the motion. On July 15, 2010, Judge Hyatt granted Father's motion for continued assignment. She also denied Father's notice of change of judge as moot. On July 23, 2010, Mother filed a motion for reconsideration of the July 15, 2010 order. In it, she requested a change of judge as of right in the event that Judge Hyatt continued as the assigned judge.

On July 27, 2010, Judge Hyatt denied Mother's motion for reconsideration and by implication her notice of change of judge. On August 9, 2010, Judge Hyatt heard oral argument from both parties and testimony on Father's motion to return children to Arizona and petition for contempt filed on April 14, 2010. Judge Hyatt dismissed the petition for contempt as moot, but ordered that the children remain in Arizona, and affirmed her January 20, 2010 order regarding joint custody and parenting time. On September 22, 2010, the Arizona Supreme Court denied Father's petition for review. On September 29, 2010, Mother filed this special action seeking review of the July 15, July 27 and August 9, 2010 orders. Because Mother has no equally plain, speedy, and adequate remedy by appeal, we accept jurisdiction. Ariz. R. Spec.

Act. 1(a); *Smith v. Mitchell*, 214 Ariz. 78, 79, ¶ 2, 148 P.3d 1151, 1152 (App. 2006) (denial of peremptory request for change of judge properly reviewed by special action).

Mother argues that Judge Hyatt erred in granting Father's motion for continued assignment and denying the notice of change of judge as moot (July 15, 2010 order), and in denying her motion for reconsideration of that order (July 27, 2010 order). Although not designated as such, Father's motion for continued assignment was effectively a motion to transfer the case from the Northeast Judicial District to Judge Hyatt's division in the Downtown Judicial District. Rule 10.3(a), Local Rules of Practice for the Maricopa County Superior Court (Local Rule), governs requests to transfer or remove a case from a particular regional judicial district. Under Local Rule 10.3(b), the court may consider various factors in transferring a case, including "any [] relevant factor indicating good cause for transferring the case to or removing the case from an assigned Regional Judicial District". Ariz. Local R. Prac. Super. Ct. (Maricopa) 10.3(b)(6).

As stated by Father in his motion for continued assignment, in the interests of "judicial economy and economic costs to the parties," the "matter should continue to be heard by Judge Hyatt." Father indicated that Judge Hyatt had reviewed the voluminous case file, was familiar with the "detailed fact scenario," had conducted an evidentiary hearing on the contested

custody issue and had issued a thirteen-page ruling; further, there was nothing to show the transfer would cause inconvenience to Mother. Father's specified grounds for transfer, including judicial economy and economic costs to the parties, constitute "good cause" under Local Rule 10.3(b)(6). Thus, Judge Hyatt did not err in granting Father's motion for continued assignment and in denying Mother's motion for reconsideration, including her notice of change of judge. See *Anderson v. Contes*, 212 Ariz. 122, 126, ¶ 15, 128 P.2d 239, 243 (App. 2006)(father not entitled to change of judge after remand regarding modification of decree because trial judge in best position to resolve such dispute); *Hofstra v. Mahoney*, 108 Ariz. 498, 500, 502 P.2d 1317, 1319 (1972) (husband had no right to new judge in action to modify alimony award in decree as trial judge was familiar with his assets and income and a change of judge would require great expense and encourage judge shopping).

Mother does not argue that Judge Hyatt abused her discretion in granting Father's motion for continued assignment for the reasons stated in his motion. Rather, Mother's argument in this special action and as she argued below, is that these rulings violated Local Rule 10.3(c).¹ That Rule provides that:

¹Mother argued below that Father's notice of change of judge was untimely under Rule 42(f)(1)(C), Arizona Rules of Civil Procedure, but does not argue that here.

A change of judge, whether as a matter of right or for cause, shall not cause the removal of a qualified case from the assigned Regional Judicial district. In the event a request for change of judge is filed, the Presiding Judge for the County, or the designated regional Presiding Judge, shall reassign the case to another judge either regularly or specially assigned to the designated Regional Judicial district if such reassignment is administratively practical.

That Rule is designed to ensure a convenient forum for a party seeking a change of judge as of right or for cause. Given her out-of-state residence, Mother does not claim that transferring the case from one regional judicial district to another is inconvenient for her. Rather, she simply relies on the language of the rule that a "change of judge . . . shall not cause the removal of a qualified case from the assigned Judicial District". Here, however, there was no change of judge for cause. And because Judge Hyatt granted Father's motion to continue assignment, Father's notice of change of judge was rendered moot. Notwithstanding that the case was temporarily assigned to a judge pro tem after Judge Hyatt was transferred, there was no change of judge as of right. Rule 10.3(c) does not apply to these facts.

Moreover, after entry of the July 27 order, Mother did not seek special action relief, but rather proceeded with the hearing on Father's emergency motion to return children to Arizona. Mother thereby waived her right to challenge Judge Hyatt's denial of her notice of change of judge by allowing Judge

Hyatt to preside over the contested August 9 proceeding. Ariz. R. Civ. P. 42(D)(ii)(aa); Ariz. R. Fam. L.P. 6, (party waives right to change of judge as a matter of right when "the judge rules on any contested issue"); *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223-24, 921 P.2d 21, 22-23 (1996)(husband could not challenge denial of notice of change of judge where he did not seek special action relief and case went to trial).

As to the August 9, 2010 order, Mother argues that Judge Hyatt usurped the jurisdiction of this court by entering an order affirming its earlier orders modifying the decree as to custody and visitation after this court vacated those orders. However, the memorandum decision was not final and effective until the mandate issued on October 18, 2010. *Borrow v. El Dorado Lodge, Inc.* 75 Ariz. 218, 220, 254 P.2d 1027, 1028-29 (1953). More importantly, in our decision, we stated that because the one-year period for modification of the decree had passed, "Father can file a petition to modify []custody" and that "[i]mmediately upon the issuance of this decision, either party may file a motion for a temporary order if a request to change custody is made." Father argues that his emergency motion to return children to Arizona was "essentially proceeding in this manner." Although an inelegant way to seek modification of custody, we agree with Father. Thus, even if the mandate had issued, this court contemplated the filing of such a motion. Judge Hyatt did not usurp this court's

jurisdiction by considering Father's motion and entering the August 9, 2010 order.²

As to Mother's claim of Judge Hyatt's bias and prejudice, the record reveals that Mother's motion for change of judge for cause under Rule 42(f)(2) is currently pending in the superior court before the Honorable Norman J. Davis. Therefore, we decline to address this issue.

Finally, both parties request an award of their reasonable attorneys' fees based upon the disparity in the parties' financial resources and the reasonableness of the positions taken. See A.R.S. § 25-324. Because we have no information about the parties' financial resources, we decline to award attorneys' fees incurred by either party in this matter.

IT IS ORDERED that the court of appeals, in the exercise of its discretion, accepts jurisdiction in this special action, but denies relief.

/s/ _____
SHELDON H. WEISBERG, Judge

²In this decision order, we address only those issues raised by Petitioner in her petition; to-wit: whether the orders related to the "denial of a change of judge" were procedurally defective because they violate the Local Rule or circumvent this court's memorandum decision.