

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 10-107

Complainants: No. 1391610203A

Judge: No. 1391610203B

ORDER

The complainant alleged that a superior court judge was biased, issued incorrect rulings and minute entries that were inconsistent with what occurred at the hearings. The commission reviewed the allegations, the judge's response, and the recording of the hearing and found no evidence of ethical misconduct on the part of the judge. The complaint is dismissed pursuant to Rules 16(a) and 23.

Dated: September 8, 2010.

FOR THE COMMISSION

\s\ Keith Stott

Executive Director

Copies of this order were mailed to the complainant and the judge on September 8, 2010.

This order may not be used as a basis for disqualification of a judge.

State of Arizona
Commission on Judicial Conduct
1501 W. Washington Street, Suite 229
Phoenix, Arizona 85007

FOR OFFICE USE ONLY

2010-107

COMPLAINT AGAINST A JUDGE

Your name: _____ Judge's name: Hon. _____ Date: 04/15/10

Instructions: Describe in your own words what the judge did that you believe constitutes misconduct. Please provide all of the important names, dates, times and places related to your complaint. You can use this form or plain paper of the same size to explain your complaint, and you may attach additional pages. Do not write on the back of any page. You may attach copies of any documents you believe will help us understand your complaint.

DESCRIPTION OF MISCONDUCT WITH REFERENCES TO SUPPORTING CASE DOCUMENTS, AND FOR THE RECORD RECORDED TIMESTAMPS

1. Judge _____ falsified the Minute Entry record for the August 4, 2008 Evidentiary Hearing where the Minute Entry states:

“4:18 p.m. This is the time set for hearing on Temporary Orders. Petitioner, Sue Hitselberger is present with counsel, Daniel Zanon. Respondent is neither present nor represented by counsel. Best Interest Attorney, Carol Carter, is also present.... Carol Carter provides an oral report to the Court.
4:22 p.m. Respondent, _____ is now present. “

For the Record (FTR) Aug 4 2008 4:20:30-4:20:52 shows that prior to my arrival in the Court Room Judge _____ stated to opposing Counsel, “Let me try to get the best interest lawyer on the phone. because she, I don’t know if you saw that she filed a Motion for Assessment of Fees.” Judge using the Courtroom’s speakerphone, then dials a phone number which rings six times before Judge _____ hangs up the phone, cutting the line before the call is answered by either voicemail or a person. Listening to the tones emitted from the speakerphone as Judge _____ dials the number for Carol Carter, there is an indication that Judge _____ did not dial the same phone number that Carol Carter lists on her Motion for Assessment of Fees, in which the last three digits are all zeros and should emit the same tone when dialed, yet the tones are different for the numbers dialed by Judge _____

Regardless of whether or not Judge _____ actually attempted to contact Carol Carter, what is most obvious is the fact that Carol Carter was not present in the Court Room and never provided a report to the Court.

For two reasons, this incident also ties into a separate issue of my complaint, about how I was prejudiced by Judge _____ failure to follow court procedures. First, because had Carol Carter provided a report to the Court, that would be contrary to the role of the Best Interest Attorney. Arizona Rules of Family Law Procedure, Rule 10 E. Paragraph 6 states:

- An attorney appointed as child’s attorney or best interests attorney may not:
- a. be compelled to produce the attorney’s work product developed during the appointment;
 - b. be required to disclose the source of information obtained as a result of the appointment;

- c. submit a report into evidence; or
- d. testify in court.

Second, Carol Carter's Motion for Assessment of Fees, where she asks the Court to address the issue of how her fees will be paid, would not have been necessary for her to file had Judge : followed procedures for assigning a Best Interest Attorney. Judge : had previously ordered the parties to contribute \$500 each towards the fees with the remainder to be paid by the Office of Contract Counsel, and because there is no provision in the rules for sharing costs between the Office of Contract Counsel and the parties of a case, Carol Carter was unable to be paid and represent the Minor Child.

2. Judge falsified the sequence of events of swearing in the parties, and falsified recording testimony of an admission in her Minute Entry of September 29, 2008 when she stated:
Sue Hitzelberger and are sworn and testify.
The Court notes that Father tested positive for methamphetamines at TASC on September 24, 2008. Father admits that he "occasionally" uses methamphetamines. Petitioner's Exhibits 14 through 17 are marked for identification and received in evidence.

First, the parties were not sworn in until 10 minutes after Judge questioned me.
Rule 603, of the Arizona Rules of Evidence, states the following:

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Second, according to FTR Sep 29 2008, 4:26:14, Judge stated, "I was just relating on the record to Mr. Zanon and his client regarding your positive drug test from September 24th for amphetamines." In the minute entry is says I tested positive for methamphetamines.

Third, Judge Minute Entry statement, "Father admits that he "occasionally" uses methamphetamines" does not qualify as recorded testimony of an admission because my vague one word response "occasionally" was deliberately elicited by Judge during what felt like an inquisitorial proceeding, and also because it was not deliberate, detailed, and unequivocal. According to FTR Sep 29 2008, 4:26:14, Judge stated, "I was just relating on the record to Mr. Zanon and his client regarding your positive drug test from September 24th for amphetamines. Have you seen that sir?" I replied, "Yes." asked, "Do you have any explanation?" I said, "Uhhh, no." said, "No, other than you use methamphetamines?" I said, "Uhhh occasionally."

3. According to Minute Entry filed by Judge on November 10, 2008, she held a court hearing on October 31, 2008, which I was not provided notice of. During the hearing, Judge made untrue statements as excuses for why I was not provided notice. According to FTR Oct 31, 2008 9:59:50, Judge stated, "We have tried to get a hold of I even tried with the juvenile court staff. But nobody seems to know exactly where he is. All the addresses and phone numbers we have are no longer applicable to him. And so either juvenile court or here, nobody has a correct address for him. So, unfortunately he's probably by not having notified the court of a new address, given up his right to be present today, but I did note in the juvenile file that he consented to the emancipation. So that's not as much of a hurdle as I would expect." On October 31, 2008 my legal mailing address was the same address on file with the court. Given the fact that the Court consolidated the emancipation case with the custody case by way of an order signed by Juvenile Court Judge Holt on October 29, 2008, it is clear that Judge scheduled the October 31, 2008 hearing knowing that I would not be

able to be legally noticed of it. There was no hearing scheduled for either case prior to the consolidation on October 29th and the hearing on October 31.

The untruthfulness of Judge _____ statements are evidenced by her own contradictory statement five minutes later at FTR 10:04:34, when she states to Minor, "And so it wasn't a consideration for you to go to stay at Grandpa's House with Dad? Uh, that was my information that he doesn't live in his house any more that he staying with his father." Minor says, "Yeah. I mean they still have the house and the same address so if anything needs to be mailed, they are still getting all their mail at their original address." Judge _____ then says, "Oh, oh, ok, at the Copper Basin." Minor says, "Yeah."

There was no other discussion about my address until that point in the hearing, so therefore Judge _____ was not being truthful about her knowledge of my address by making statements that cannot both be true about how no one knows how to get a hold of me and saying I was living at my Dad's house and then she stated the name of the street Copper Basin, which I lived on.

Judge _____ made a second reference to her knowledge about a different address at FTR 10:19:55, when she states, "If the situation is such that Dad is residing for the most part with his father." One can only assume her knowledge about me having a second address was the result of ex parte communications with Petitioner or her attorney during a fact finding discussion outside of Court.

4. Judge _____ failed to promptly notify me of the substance of ex parte communications she had engaged in with Petitioner and counsel. On July 31, 2008, Petitioner sent an email to Judge _____ trying to sway her decision at the upcoming August 4 hearing. Instead of contacting me about the ex parte email she received, Judge _____ emailed Petitioner's counsel, Mr. Zanon and advised him of the inappropriate email she received. Judge _____ deferred the duty of notifying me to Mr. Zanon, who then took 21 days to advise me by sending a mailed letter, which did not include a complete copy of the ex parte email. I was never provided an opportunity to respond, nor did Judge _____ ever mention the ex parte email during the hearings. According to the Judicial Rules of Conduct Rule 2.9 (B):

If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision to promptly notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

5. Judge _____ made a change in physical custody of a contested custody case in her Minute Entry of the evidentiary hearing on September 29, 2008 filed October 2, 2008 that did not refer to the absence or presence of any of the ten enumerated statutory factors listed in A.R.S. § 25-403(A). Judge _____ should have made make specific findings on the record about all relevant factors and reasons for which the decision is in the best interest of the child, as required by ARS § Section 25-403 (B). In her Minute Entry, Judge _____ only listed one reason for changing custody:

IT IS FURTHER ORDERED affirming the designation of joint legal custody of Christine to both parties, however, based upon Father's admitted use of methamphetamines Mother will now be the primary residential parent so long as she relocates to Anthem.

6. Judge _____ refused to hear my Motion for Order to Appear re Contempt, filed July 18, 2008. Judge Hyatt listed my motion along with Petitioner's in her Minute Entry of July 18, 2008, filed July 28, 2008, as stated:

IT IS ORDERED continuing this matter to August 4, 2008 at 4:00 p.m. The Court will hear Petitioner's Petition for Contempt and Respondent's Petition for Contempt at that hearing.

Then in the Minute Entry of August 4, 2008, filed August 7, 2008 there is no mention of my Motion being heard, nor in any of the other Minute Entries.

During the evidentiary hearing on September 29, 2009, I pressed Judge [redacted] to hear my Motion, and she denied that I ever filed it and then dismissed the issue with a quick explanation which does not agree with the statutes. FTR Sept 29, 2008 4:53:20 recorded the following dialogue:

How about her mother's contempt for failing to follow the visitation and custody order? Doesn't that count for anything?

That is not before me. You've never filed a petition.

I have filed a contempt I believe.

How does that address the..

Before you, I'm before you! I've brought this up since the very first hearing.

It's not contempt to not see your child. It's contempt to violate the court order by seeing your child outside the court ordered time. So there's no contempt against mother.

So according to Judge [redacted] [redacted] could be held in contempt for caring for an abandoned child, and the parent who abandons the child is not guilty of any wrongdoing. According to Judge [redacted], to avoid being held in contempt, I should have left my daughter in the street to fend for herself during the periods when her Mom was supposed to have visitation and chose to not participate in her visitation. This line of reasoning is so absurd, that it should not be necessary for me to point out all the statutes that don't agree with it in order to make my point.

7. Judge [redacted] abused her authority when she denied my Application for Deferral of Fees and Cost of Transcripts and sent email about me to Court staff that was unprofessional. It is my belief that she did this solely to thwart my efforts to appeal the case, and in effect to suppress the facts regarding her judicial misconduct and abuses of discretion from being heard before the Court. Judge [redacted] issued a Minute Entry on May 13, 2009 filed May 18, 2009 which reads:

The Court has received Respondent's Application for Deferral or Waiver of Costs of Preparing Transcripts on Appeal.

No good cause appearing,

IT IS ORDERED denying Respondent's Application for Deferral or Waiver of Costs of Preparing Transcripts on Appeal.

Judge [redacted] did not file a copy of my application with her order. I had tried to file my application with the Clerk at the counter at Superior Court, but the Clerk would not accept it, and instructed me to hand deliver it to Judge [redacted] chambers. The reason I filled out the application was because I was following the instructions in the *Guide for Self-Represented ("Pro Se" or "Pro Per") Appellants and Appellees*, provided by the Court of Appeals. If Judge [redacted] would have filed my application or listed the facts stated within the application, then there would have been good cause appearing, because for the past several months I had been unemployed with no other income and had exhausted my bank accounts, and on February 16, 2009 my wife and I declared Chapter 7 bankruptcy.

Three other orders contradict Judge [redacted] denial of my application because I was granted a deferral of fees in this case in Order Regarding Deferral or Waiver of Court Fees and Costs, filed April 23, 2009 and also in Order Regarding Deferral or Waiver of Court Fees and Costs, filed July 9, 2008. In addition, the Court of Appeals issued an Order on June 9, 2009 finding I was eligible for a deferral of fees, and the Court of Appeals also issued a Memorandum on June 9, 2009 addressed to Petitioner's Counsel explaining the deferral of fees remains in effect from July 9, 2008.

When I attempted to have transcripts prepared, Avtrans, the company that prepares transcripts, would not do them because they used Judge [redacted] order as the one that counts because it was issued from Superior Court where the hearings were held, and it had the latest date. Not having any money or

income is the main reason a deferral should be granted, and the statute specifies that a deferral of fees includes fees for preparing transcripts.

When I followed up with Avtrans company trying to ascertain why my transcripts would not be prepared, I was forwarded an email from Judge [redacted] which I feel is an inappropriate email from a judge because it expresses her apparent vindictiveness towards me. The email states:

John,

Please see below for the email from the court.

I have also attached the minute entry of May 13, 2009, wherein Judge [redacted] has denied your request for Respondent's Application for Deferral or Waiver of Costs of Preparing Transcripts on Appeal.

Andrea Granados-Larson
Customer Service Specialist
andrea.larson@avtranz.com
365 East Coronado Rd, Suite 100
Phoenix, AZ 85004
www.avtranz.com

From: Ken Crenshaw - SUPCRTX

Sent: Thursday, June 04, 2009 5:04 PM

To: andrea larson

Subject: FW: FC2008-050149 Hitselberger v. Sweet - Waiver or Deferral of Transcription Costs

Andrea,

I heard back from Judge [redacted] on the question of Mr. [redacted] claim to a waiver or deferral of transcription costs. Her reply appears below.

Ken Crenshaw
Administrator

Electronic Records Services

From: [redacted] - SUPCRTX

Sent: Thursday, June 04, 2009 1:47 PM

To: Ken Crenshaw - SUPCRTX

Subject: RE: FC2008-050149 Hitselberger v. [redacted] - Waiver or Deferral of Transcription Costs

Sorry, Ken. I read this and then passed on it w/o answering. I agree with your assessment. My order (signed or not) trumps and he has to pay for his transcripts on appeal. If the Appellate Court says otherwise upon his application, then they trump me. Until then, he pays. Thanks,

Judge [redacted] did not want my appeal to move forward because I had filed Motion for Relief which described in great detail the misconduct issues of this complaint, plus other issues that focus on her abuse of discretion, and therefore to stop this case from exposing her actions, she prevented me from obtaining transcripts. However, I was able to purchase the recordings of the hearings, and there is nothing she can do to change history and what is on the recordings.

8. Judge [redacted] prejudiced me by failing to consider the financial resources of both parties prior to issuing an order for me to pay \$20,000.00 in attorney's fees to Petitioner. Petitioner never submitted an Affidavit of Financial Information. I testified that my wife and I were indigent without income, yet Petitioner's husband earns six figure income and Petitioner also earns income, which is why I was Pro Per and Petitioner was represented by Counsel.

9. Judge [redacted] prejudiced me by requiring my wife and 17 ½ yr. old daughter to leave the court room during the evidentiary hearing on July 18, 2008 upon Petitioner's Counsel, Mr. Zanon, stating he was invoking the rule of exclusion. Mr. Zanon stated he would call them as witnesses, so Judge [redacted] asked them to leave the room. The fact is Mr. Zanon did not list them as witnesses on Mother's Pretrial Statement, and witnesses must be listed. Mr. Zanon did not attempt to call them as witnesses. Also, my wife and daughter had a legal interest in the outcome of the case, and a strong desire to be present, and should have been afforded the opportunity to be present throughout the hearing, per ARS § 25-407(C).

Asking my wife and daughter to leave the court room was further unfounded by the fact that Petitioner had not arrived to the court room yet. I was under the impression that the party needs to be present before their Counsel can present their case. But Judge [redacted] allowed Mr. Zanon to discuss the case for several minutes before his client arrived, and during that discussion Judge [redacted] asked my wife and daughter to leave.

10. Judge [redacted] failed to recognize that the Emergency Order without notice filed June 18, 2008 which required my wife, daughter, and I to submit to urine and hair follicle drug testing, deserved to be heard regarding whether or not there was evidence to justify such an order being issued. I don't believe there is a provision within the statutes for issuing an emergency order without notice for drug testing. When I appeared in court, there was no time allotted for hearing why the order was granted, and instead Judge [redacted] only focused on my refusal to comply with the Emergency Order. At one point Judge [redacted] even stated that the Judge who signed the Emergency Order had already heard the evidence at another hearing. FTR Jul 18, 2008, 2:34:25 recorded Judge [redacted] explain her reasoning for ordering additional drug testing at the June 27 hearing she presided over:

The only thing that I was doing was enforcing another judge's order which you refused to follow. So that's all I was doing. And she had the evidence at that time to make that order. I didn't. I wasn't at that hearing. So all I was doing was enforcing that judge's order.

The record shows no hearings took place before another judge, so therefore Judge [redacted] should have reviewed the evidence and decided whether or not the emergency order was justified, rather than assume the order was valid, and focus only on my refusal to obey it.

11. Multiple times Judge [redacted] was unprepared for the hearing, and could not find the relevant paperwork, then she relied upon Petitioner's counsel to provide her with copies to use during the hearing without allowing me to see what he was providing her.

The first occurrence was at the beginning of the first hearing on June 27, 2008, when she asks her assistant, Tom, if they ever found the contempt petition (Reference FTR Jun 27 2008 4:36:13). Judge [redacted] said, "I know we did have a copy at one time that came in recently, and we've set this for a return just on that. But I couldn't find it in the docket and I couldn't find it in our stack of paperwork."

The second occurrence was in the same first hearing, when Judge [redacted] could not find the amendment to the foreign custody order which detailed the court ordered visitation schedule we had up until this hearing. Judge [redacted] accepted Mr. Zanon's offering to provide her with a copy of it (Reference FTR Jun 27 2008 5:04:35). Later I realized an important page was missing from the foreign judgment which contained the details of school holiday visitation schedule.

The third incident was at the beginning of the August 4, 2008 hearing, when Judge [redacted] did not have a copy of my Motion to Continue asking for a continuance due my Mother passing away the night before. Before the hearing started, I had prepared the Motion, spoke to Judge [redacted] staff on the

phone, and faxed a copy of the Motion to her. Then I drove to Court and filed the original with the clerk, and delivered a conformed stamped copy of my Motion to Judge [redacted] s office, at which time I was asked to go into the Court room to discuss this with the judge, as the hearing was proceeding without me.

The fourth incident occurred near the end of the August 4, 2008 hearing. When Judge [redacted] asked me why our daughter had not drug tested, I explained to her that the Court Order on record stated that Petitioner was the one ordered to ensure our daughter drug tested, and so it was Petitioner's fault it had not happened yet. Judge [redacted] raised her voice and angrily told me that yes she had ordered me to do this at the previous hearing. (Reference FTR Aug 4 2008 4:43:35) Later I reviewed all the Minute Entries of this case and could not find where I was ordered to take minor for drug testing. The only order which specified who would arrange for Minor to be drug tested was the Emergency Order, filed June 18, 2008, and in that order Petitioner, Mother, was required to make the arrangements. Judge [redacted] misplaced anger was particularly upsetting because I was still in a state of shock over losing my Mother, and had not fully prepared for this hearing, and then I could not understand what was going on as I heard Judge [redacted] be irrational as she threatened to take away custody of my daughter if I did not take Minor to drug test.

The fifth incident occurred at the beginning of the September 11, 2008 hearing, when Judge [redacted] says, "Mr. Zanon I know you filed something. And for the life of me I've misplaced it. With respect to continuing this hearing." (Reference FTR Sep 11 2008 3:40:39)

The sixth incident was at the September 29, 2008 evidentiary hearing, when Judge [redacted] said she had just received the results of my most recent urine test, but she could not find it, and sent her assistant, Tom, to go look for it. (Reference FTR Sep 29 2008 4:25:18) Judge [redacted] then said that she could not remember the date of the hair follicle test, so Mr. Zanon told her the date.

The seventh incident was during the September 29, 2008 hearing, as previously mentioned, Judge [redacted] did not recollect I had filed a Motion re Contempt, nor did she attempt to find it when I asked about it.

12. Judge [redacted] ignored Minor's pleas to not be sent to live with her mother, due her feelings of vulnerability and fear of her mother based upon past experiences being subjected to and injured by her mother's manipulation, temper and violent outbursts. See the Conciliation Services report of July 14, 2008, Minor's Affidavit filed as attachment #1 to my Declaration in Response to Motion, filed July 9, 2008, as well as Minor's Petition for Emancipation, and in verbal discussion in Court between Minor and Judge [redacted] on July 18, 2008. Judge [redacted] also ignored the evidence presented by Minor and myself about mother's drug abuse.
13. Judge [redacted] expressed inappropriate level of anger and threatened Minor, while Minor was crying and visibly upset over Judge [redacted] ruling. Judge [redacted] : asked Minor to provide the name and location where she worked so Mother could pick her up and begin having custody. Minor hesitated, and Judge [redacted] raised her voice and demanded, "Where do you work? Where do you work? Where's she going to pick you up today? Otherwise she can just take you from here."

There were other incidents that I felt Judge [redacted] acted inappropriately and incompetently, and in fact it felt like this case was all about non-stop catering to the whims of Petitioner's counsel, while denying me of my rights, and traumatizing our daughter. When I first wrote the draft of my Motion for Relief, filed January 16, 2009 it was over 200 pages retelling my interpretation of the events, but I narrowed it down to less than 100 pages of the most egregious offenses, and now I submit this complaint which focuses on

only some of the incidents which I feel clearly meet the standard of inappropriate conduct according to the Rules of Judicial Conduct.

Judge [redacted] actions were harmful to minor, as she was devastated by the shocking outcome of this case. Following the change in physical custody, while living with her mom, her school performance took a steep decline, and she constantly lived in fear of her mother's abuse. Shortly after the change in custody, Minor felt threatened to the point she had to lock the door to her room and hide in a closet while she waited expecting her mother to physically attack her, like she had in the past. Also after less than two weeks after gaining custody, Mother abandoned minor with the parent's of a classmate acquaintance for two weeks while Mother visited her husband in Texas. Because Judge [redacted] denied Minor the right to be heard and receive a custody order that was in her best interest, she felt there was nothing she could do to stop the abuse of her mother until she turned 18 years old.

As I read the growing list of complaints, appeals cases, and blog postings about Judge [redacted] I wonder how many other people and cases are out there who, because of Judge [redacted] have lost hope in a system that was supposed to protect one's rights and uphold the law, and have not come forward to complain to the Judicial Review Board. It's hard to open the book on the past and examine the details of what went wrong in order to document it. I too, don't have much hope this complaint will actually result in any action to prevent Judge [redacted] from harming others, but I finally wrote this mostly with hopes that it will help me let go of the memories that torment me, knowing I did what I could to stop the injustice.

RESPECTFULLY SUBMITTED, April 26, 2010.