

State of Arizona
COMMISSION ON JUDICIAL CONDUCT

Disposition of Complaint 11-285

Complainant: No. 1431110435A

Judge: No. 1431110435B

ORDER

The complainant alleged that a superior court judge was unfair and made improper statements at a hearing.

The responsibility of the Commission on Judicial Conduct is to impartially determine if the judge engaged in conduct that violated the provisions of Article 6.1 of the Arizona Constitution or the Code of Judicial Conduct and, if so, to take appropriate disciplinary action. The purpose and authority of the commission is limited to this mission.

After reviewing the allegations and listening to the recording of the hearing, the commission found no evidence of ethical misconduct and concluded that the judge did not violate the Code in this case. The commission has no authority to investigate the legal sufficiency of the judge's ruling. Accordingly, the complaint is dismissed in its entirety pursuant to Rules 16(a) and 23.

Dated: December 21, 2011.

FOR THE COMMISSION

/s/ George Riemer

George A. Riemer
Executive Director

Copies of this order were mailed to the complainant and the judge on December 21, 2011.

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

COMPLAINT AGAINST JUDGE

- NOVEMBER 4, 2011

Judge (and staff) did not follow proper procedure creating the appearance of impropriety and treated Respondent unfairly and unprofessionally. Judge made unprofessional comments during the court hearing on July 18, 2011. His demeanor and comments throughout the hearing made it clear that the judge had already made up his mind about how he was planning on ruling prior to the hearing and did not give Respondent an opportunity to present any evidence or his side of the case.

Procedural Background

On March 31, 2011 the parties filed a Stipulation in the case to modify custody, child support and parenting time regarding their son. The stipulation essentially changed custody from Mother Petitioner to Father Respondent. There was an attached child support worksheet which indicated that support should have been around \$535/month to be paid by mother to father. Father agreed in the stipulation to accept less than that amount at \$210/month. There was no other information supplied to the Court regarding why that amount of child support was agreed upon.

On June 7, 2011, Respondent Father petitioned the Court for a modification of child support and used the simplified modification form provided by the Self-Help Center. In order to motion the court for a modification of support, the moving party must demonstrate there has been a substantial change in circumstances. Parties are permitted to use the "simplified modification" form when there exists at least a 15% change between the current amount of support ordered (\$210) and the amount being requested in the modification (\$700). This form is very simple and only asks for proof that the amounts are within those parameters. The form does not require any facts/information be included to support the requested change. Therefore, Judge had no information at the time of the filing of the Modification to know what the Respondent based his request on.

On June 10, 2011 (three days after receipt of Respondent's Motion for Modification) and before the Respondent could serve the Petitioner Mother with that pleading and before Petitioner requested a hearing, Judge scheduled the matter for a hearing (on July 18th, 2011). This is not proper procedure. Respondent father called the Judge's Judicial Assistant two times between June 13th and June 30th, after he learned the matter had been set for a hearing. He was not able to speak directly to the Judge's assistant but left messages which contained the following information/questions: (1) that he had not served the Petitioner with the pleading yet; (2) there had been no request for a hearing; (3) he asked if the Court maybe erred in scheduling the matter for a hearing so soon without following the proper procedure and (4) he asked whether the court hearing could be continued so he could serve the other party. Respondent's voice mail messages included a return phone number yet he did not receive a return phone call. Since he had not heard back from the Court, he rushed to serve the Petitioner with the court documents. She responded/objected to the Motion to Modify Child Support. She did not attach a Child Support Worksheet (as required). She argued that the motion should be denied because there had been an agreement between the parties. Rather than serving Respondent as required, she tucked

her responsive pleading in the minor child's suitcase for his return to Respondent's home after a summer visit. Respondent received it a couple weeks *after* she filed it with the Court. Respondent quickly filed a Reply on July 12th and mailed to the Court for consideration at the July 18th hearing. Respondent was not sure whether the Judge would receive this pleading prior to the hearing or not. As of the date of this complaint, Respondent is uncertain if Judge _____ read this pleading. The reason this pleading was so important to Respondent and to the case was that it was the only time Respondent was offered the opportunity to address the reasons for the requested modification.

The Court Hearing

On July 18, 2011, a court hearing regarding Respondent's Motion to Modify was conducted with the Respondent and the Petitioner appearing telephonically. The Respondent lives in Coconino County (Flagstaff) and the Petitioner lives in Oregon. Respondent made arrangements to appear telephonically via a motion to appear telephonically. A few days before the scheduled hearing, Respondent called the Judge's Judicial Assistant and provided a telephone number to that he could be contacted for the hearing (it was his cell phone number). About an hour prior the scheduled hearing, the Respondent called the Judge's JA and gave her a "land line" to reach him at for the hearing. The Respondent had not heard from the Court at the time of the scheduled hearing so he called again and the JA told him the Court was in another hearing and would conduct *his* hearing at the end of calendar. According to the Judge's minute entry from the hearing held on July 18th, the Court started the hearing without the Respondent indicating the Court "tried to reach him [Respondent] without success." According the Court's minute entry, it relied on the Petitioner to find a telephone number for Respondent.

Respondent called the Judge's Judicial Assistant several times prior to the hearing (two times within the hour prior the hearing) to check in, make sure the Court had the correct telephone number and to make sure the hearing had not been conducted without him. Even after all of his efforts to ensure he could be reached, the Judge and/or the judge's staff was not professional or competent in the handling of this information as relayed by the Court minute entry dated July 18, 2011. This created the appearance that the Judge was not treating the parties fairly and may have had *ex parte* communication with Petitioner prior the hearing.

Judge _____ started the July 18, 2011 hearing by informing the parties that "he had no intention of modifying the child support amount unless the Respondent could show that the Stipulation entered into in March 2011 was entered fraudulently or under duress." He immediately demonstrated his bias. He did not address the issue that Petitioner did not file a child support worksheet with her Response. She did not properly serve the Respondent. Judge _____ did not address/greet either of the parties, did not indicate what information he had received or read prior to the hearing nor did he swear in either party. He flat out started the hearing with the statement that he was not going to consider the Respondent's motion to modify unless he could prove "fraud or duress." He did not care about the parties income, the fact that the Petitioner had lied to the Respondent and Court in the Stipulation, that she did not follow procedure. The judge demonstrated this bias by never asking either party for their income information. He had *no* intention of modifying support regardless of what the evidence was.

Respondents first question to Judge [redacted] was asking whether he had received or read his Reply (dated July 12, 2011). The Judge made a statement of some sort but did not answer the question. (At least Respondent does not recall an answer to his question). Instead the Judge asked Respondent *again* to explain how the agreement he entered into was done by fraud or duress. Respondent was not prepared for this question, as this is not the legal standard required to modify child support. Rather the standard is whether there has been a substantial change in circumstances. Respondent attempted to explain some of the reasons he requested the modification. The Judge then gave the Petitioner an opportunity to speak. The Judge then allowed Respondent to speak and Respondent explained how the Petitioner had fraudulently gotten him to agree to the support amount contained in the stipulation. Respondent told the Judge that she had misrepresented her income by signing the court paperwork that the information contained in the pleading was "true and accurate to the best of her ability." He told the judge that he learned afterwards from a letter he had gotten from her employer that the information was in fact not true or correct and that she misrepresented her income (agreeing that it was \$550 per month less than what it actually was). The Judge's response was, "...well she did not put that information on the form, you did ...so that is not fraud." Also, at some point, when Respondent was explaining to Judge [redacted] that he did not know much of this information about the needs of the child (medical condition or school situation) prior to the change of custody, Judge [redacted] stated, "that Respondent had not exercised "due diligence."

The Respondent then tried to explain to Judge [redacted] that, at the time of the change in custody, child support was the least of his concerns. He was concerned about the well being of his son. Because Respondent did not know if Judge [redacted] had read his Reply, Respondent wanted Judge [redacted] to know that the child had been in an emotional/abusive situation in Oregon and as such, Respondent agreed to whatever terms the Petitioner asked (including child support) to keep the child safe in AZ with him. Respondent then explained that since the child had been with him for the past few months, he learned about many things he did not know about the child; that he was "high needs" and that Respondent needed additional support. The judge then told Respondent (implying that if he could not "afford" him) "he could give the child back [to his Mother]."

The most **offensive part** of the hearing was when Judge [redacted] compared the change of custody – stipulation to a "contract to purchase a car." At some point during the hearing, Judge [redacted] told the Respondent that the stipulation he entered into was comparable to "going down to a car dealership to buy a car and then getting home and learning you'd ended up getting a bad deal." Judge [redacted] went on to explain that "just because a person who bought a car thought they got a bad deal ... does not mean that person can "get out of the contract." He said, "I am not going to let you get out of this contract (stipulation)." (the words are not verbatim but a paraphrased). Judge [redacted] expressed no concern for the child's well being. He was rude and careless about the manner in which he dealt with this situation and regardless of whether he agreed to modify support, Judge [redacted] should not be comparing a change in custody of a child to a bad car deal. At this point in the hearing, Respondent was convinced that Judge [redacted] never even considered the request and did so without any relevant information.

I gladly took custody of my son and would not change that decision for anything. At the time, I truly feared for his safety. I am offended by how I was treated by Judge during this hearing. He was insensitive and rude with his comments. He did not treat me fairly. I do not feel like he was impartial nor do I feel like he even gave me a chance to present any relevant information.

Additionally, the minute entry dated 7/18/11 indicates that he discussed "income amounts" and "income information." The judge did not discuss any substantive income information of the parties in order to adequately assess whether a child support modification was appropriate or warranted. He had already decided that he was not going to modify support (and probably decided that even before the hearing ... as evidenced by him scheduling the hearing within 3 days of the receipt of Respondent's request and before Petitioner was served or responded). This entire experience made me feel like Judge was acting suspicious and possibly unethically. In the hearing, the Judge told Respondent he was going to deny Respondent's motion because he could not prove fraud or duress. The minute entry stated that his motion was denied because Respondent did not exercise "due diligence."

The Attorney General Office subsequently petitioned to transfer this case to Coconino County where the Respondent and child reside. None of the parties have lived in Pinal County for at least 10 years and Petitioner lives out of State. Judge changed the pleading the AG filed from a Motion for Modification to a Motion for Reconsideration and then denied it. As that was the reason for the Requested Transfer, he also denied that request. It *seems* like he a personal stake in this case and is not following the law.

I understand that a judge's decision will not always go my way. However, I felt Judge was unprofessional in the manner in which he handled my case, he created an impression of impropriety and bias, and did not give me a fair hearing. I hope you will review the transcript, pleadings and minute entries to determine whether Judge should be reprimanded for his conduct. Thank you for your time.

Sincerely,