

Marriage of Harrington

COLORADO COURT OF APPEALS

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Court of Appeals No.: 07CA0379  
Jefferson County District Court No. 99DR3717  
Honorable Jane A. Tidball, Judge

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In re the Marriage of

Christy Ryan, f/k/a Christy Harrington,

Appellee,

and

Sean Harrington,

Appellant.

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ORDERS VACATED IN PART, REVERSED IN PART,  
AND CASE REMANDED WITH DIRECTIONS

Division VI

Opinion by: CHIEF JUDGE DAVIDSON

Ney\* and Nieto\*, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**

Announced: May 29, 2008

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Law Office of Madeline E. Wilson, Madeline E. Wilson, Denver, Colorado, for  
Appellee

Sean Harrington, Pro Se

\*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.  
VI, §5(3), and §24-51-1105, C.R.S. 2007.

In this post-dissolution of marriage proceeding, Sean Harrington (father) appeals from the trial court's order denying his motion for C.R.C.P. 60(b)(5) relief and awarding attorney fees to Christy Ryan (mother). We vacate the order, reverse the award of attorney fees, and remand for further proceedings.

The parties' marriage was terminated by decree in 2000. Post-decree litigation between the parties has been protracted and has generated three prior appeals by father. *See In re Marriage of Harrington*, (Colo. App. No. 03CA1825, Dec. 30, 2004) (not published pursuant to C.A.R. 35(f)) (*Harrington I*); *In re Marriage of Harrington*, (Colo. App. No. 04CA1161, Mar. 9, 2006) (not published pursuant to C.A.R. 35(f)) (*Harrington II*); *In re Marriage of Harrington*, (Colo. App. No. 04CA1986, Aug. 3, 2006) (not published pursuant to C.A.R. 35(f)) (*Harrington III*).

To the extent relevant, we rely on the history set forth in the prior appeals.

In this appeal, father asserts that the trial court failed to enter valid orders on remand that complied with our mandates in *Harrington II* and *III*. In *Harrington II*, we reversed the trial court's

order holding father solely responsible for \$845 in special advocate fees and directed that the fees be allocated equally between the parties pursuant to the order of appointment. In *Harrington III*, we determined that the trial court erred by summarily denying father's motion under C.R.C.P. 60(b)(5) that sought disqualification of the special advocate. We concluded that the trial court had to reconsider the motion and enter findings regarding whether there had been a violation of any of the standards applicable to special advocates.

While the second appeal was pending and on same day as the court's ruling on the C.R.C.P. 60(b)(5) motion, father filed a motion for substitution of the trial judge pursuant to C.R.C.P. 97. The trial court subsequently entered an order staying the motion for substitution until jurisdiction revested following the conclusion of both appeals.

In January 2007, after *Harrington II and III* were announced and the case was mandated, the trial court entered additional findings regarding father's request for disqualification of the special advocate. The trial court determined that father failed to

demonstrate clear, strong, and satisfactory proof requiring disqualification. The court also concluded that the newly discovered evidence claimed by father, even if admitted, would not change the result of its prior orders denying father's request for the special advocate's disqualification.

Father filed a special appearance for substitution of the trial judge and requested that the order on remand be vacated. As grounds, father claimed that the judge lacked authority to enter the order because the proceedings had been suspended pending a determination of his C.R.C.P. 97 motion for substitution of the judge. In March 2007, the trial court ruled that father's motion was then ripe. However, the trial court also found that father had not stated any basis warranting disqualification of the judge and denied his special appearance and the motion. The trial court also awarded attorney fees to mother under section 13-17-102(2), C.R.S. 2007.

In August 2007, the trial court judge disqualified herself sua sponte and the case was assigned to a different division.

## I. Dismissal

Although mother has not filed a motion to dismiss this appeal, she, nevertheless, argues that this appeal is moot because of the transfer of this case to Texas under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), §§ 14-13-101 to -403, C.R.S. 2007. However, the issues on appeal involve the services of the special advocate that were rendered prior to the transfer and are unrelated to the proceedings in Texas. Accordingly, contrary to mother's representations, the trial court's jurisdiction has not been completely divested by the transfer of the case to Texas and this state remains the proper forum for adjudication of the matters raised. *See In re Marriage of Doria*, 855 P.2d 28, 30 (Colo. App. 1993) (court retained jurisdiction to determine maintenance and child support even though it had deferred jurisdiction over custody to another state).

Further, because the appeal concerns father's request for sanctions against the special advocate for his alleged unethical practice, including reimbursement of the special advocates' fees, expert fees, and attorney fees, the appeal is not moot. *See*

*Reifschneider v. City & County of Denver*, 917 P.2d 315, 319-20 (Colo. App. 1995) (although verdict was reinstated, the issue of whether sanctions were properly imposed based on plaintiff's amendment of his complaint prior to second trial was not moot since need to deter inappropriate conduct did not disappear and defendant necessarily incurred fees as result of challenged conduct).

## II. Order Entered on Remand

Father next contends that the trial court lacked authority to enter the order on remand because it had not yet ruled on his motion to substitute the judge. We agree.

The filing of a motion to disqualify under C.R.C.P. 97 suspends all other proceedings in a case until the motion is ruled upon.

*Dominic Leone Constr. Co. v. Dist. Court*, 150 Colo. 47, 49, 370 P.2d 759, 760 (1962). Thus, the respondent judge must review the motion and decide whether it is sufficient to require his or her recusal before taking any further action. *Johnson v. Dist Court*, 674 P.2d 953, 957 (Colo. 1984); *see also Kovacheff v. Langhart*, 147 Colo. 339, 363 P.2d 702 (1961) (trial could not proceed until the

motion for change of trial judge was disposed of); *Brown v. State*, 863 So.2d 1274, 1274 (Fla. Dist. Ct. App. 2004) (once motion for disqualification of the judge has been filed, no further action can be taken, even if the trial court is not aware of the pending motion); *People v. Harvey*, \_\_\_ N.E.3d \_\_\_, \_\_\_ (Ill. App. Ct. No. 1-06-1930, Feb. 13, 2008) (although rule does not specifically divest the judge of authority to act, the language of related provision stating that “the court shall proceed no further” until the substitution motion is ruled on means that the judge loses all authority and power to act while the motion is pending); *People v. Bell*, 658 N.E.2d 1372, 1378 (Ill. App. Ct. 1995) (judge sought to be replaced loses all power and authority to enter further orders in the case while the substitution motion is pending); *In re Adoption of I.K.E.W.*, 724 N.E.2d 245, 251 n.9 (Ind. Ct. App. 2000) (it is well settled that upon the filing of a motion for change of judge, the trial court is divested of jurisdiction except to grant the change of venue or to act on emergency matters).

Here, the trial judge was authorized to remove herself from the case on her own accord. *See Spring Creek Ranchers Ass’n v.*

*McNichols*, 165 P.3d 244, 245 (Colo. 2007) (a judge may recuse himself or herself sua sponte without written explanation or specific findings). Further, the judge's subsequent recusal renders moot any question regarding the propriety of the earlier denial of father's motion for substitution. *People v. Rodriguez*, 914 P.2d 230, 283 (Colo. 1996). However, father never waived his objection to the trial judge's authority, see *Aaberg v. District Court*, 136 Colo. 525, 319 P.2d 491 (1957), and consequently, the trial court was without authority to enter the order on remand before ruling on the motion for substitution. Therefore, the order on remand must be vacated.

In view of this result, we need not reach the substantive issues father asserts regarding whether the trial court complied with the mandate issued in *Harrington III*. Instead, the court to which this case is now assigned must reconsider father's motion to disqualify under C.R.C.P. 60(b)(5) and enter orders consistent with that mandate.

Father also maintains that the trial court never complied with our mandate in *Harrington II* directing the special advocate fees to be allocated equally between the parties. We are unable to confirm

whether a complying order was entered. We have also discovered some suggestion in the record that the special advocate may have waived the fees in question. On remand, the court should determine whether our remand in *Harrington II* has been carried out or whether it is no longer necessary, and enter any orders it deems necessary.

### III. Award of Attorney Fees

Father next contends that the trial court erred in awarding mother her attorney fees under section 13-17-102(2). We agree.

Mother requested her attorney fees in her response to father's special appearance and motion for substitution, which she alleged was frivolous and vexatious. In granting mother an award of \$300 in fees, the trial court made no findings under section 13-17-102(6), C.R.S. 2007, that father, who was appearing pro se, "clearly knew or reasonably should have known that" his motion was substantially frivolous or vexatious. In view of our holding that the trial court acted in excess of its authority, we conclude that father's special appearance was not frivolous or made for vexatious purposes. We also conclude that findings were necessary under

section 13-17-102(6) to address father's pro se status. The award of fees was, therefore, erroneous and is reversed.

#### IV. Attorney Fees and Costs on Appeal

Mother requests her attorney fees and costs on appeal pursuant to C.A.R. 38(d) and 39(a) and (c). However, in view of the outcome reached in this appeal, we deny her request.

The order entered on remand is vacated, the award of attorney fees is reversed, and the matter is remanded for further proceedings.

JUDGE NEY and JUDGE NIETO concur.