SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY
COURT OF APPEALS
10,005 E. OSBORN RD. SCOTTSDALE, AZ 85256 (480) 362.6315

In the Matter of:

BRIAN THOMAS,

An Alleged Incompetent Member,

Sarah De Oliveira,

Petitioner/Guardian Ad Litem/Appellant

Case No.: APC-18-0016
(Referencing: APC-17-0020, C-10-0112 and C-18-0062)

MAJORITY OPINION

by Justices Guss and Russell

DISSENTING OPINION

by Justice Bender

FILED
SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY COURT
2019 APR -4 PM 1:13

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BEFORE JUSTICES PAUL BENDER, MARY GUSS, AND SIERA RUSSELL

Justices Guss and Russell delivered the Majority Opinion.

On July 14, 2017, Sarah De Oliveira, the Guardian ad Litem (GAL) for Brian Thomas filed a Petition for Appointment of Guardian for him. The Petition came before the trial court during a hearing in Mr. Thomas' conservatorship case on August 30, 2017.

At the conclusion of that August hearing, the trial court dismissed the Petition for Guardianship on the basis that a GAL lacked authority to make such a filing. Also at the conclusion of the hearing, Ms. De Oliveira was excused on her own motion as Mr. Thomas' GAL, with the trial court noting, she "will have no further requirements to report on this matter to the Court."

The dismissal of the Petition was the subject of an appeal to this Court filed by Ms. De Oliveira, and the Court issued an opinion in that appeal on January 24, 2018. The appeal was not submitted to the court as a special action appeal but rather as a typical appeal from a final trial court decision and this Court proceeded in that manner. Neither the Notice of Appeal, filed September 6, 2017, nor the Appellant's October, 2017 Opening Brief mentioned the rule or requirements for special action appeals.

Therefore, this Court's appellate opinion dated January 24, 2018, presumed that the order dismissing the GAL's petition for a Mental Health Examination and guardianship for Mr. Thomas was a final judgment and that it disposed of the case completely by removing any option for the appellant GAL and closed the case proceedings in their entirety. However, that was not the situation.

Information that this Court did not have before it when it published the January 2018 opinion was that the trial court had held a full hearing in Mr. Thomas' conservatorship case on December 20, 2017. Several witnesses offered testimony at that hearing, and the trial court concluded that Mr. Thomas was of sound mind and capable of caring for his own property. The conservatorship case was in fact dismissed outright at that point (while the appeal was pending). That trial court ruling constitutes a final decision in the proceedings below.

Just as parties are required to advise the Court of Appeals of any "significant and pertinent authority" (Rule 10(d)) that has changed since the filing of the appeal, so they should bear the burden to advise the Court of continuing proceedings or decisions in the trial court which significantly change the posture of the pending appeal. That was not done here. Ultimately, two very significant pieces of information were missing when the Court heard oral argument and decided this case: (1) that the order appealed from was a non-final order, and (2) that the underlying case had proceeded through a hearing and dismissal.

Rule 2(b) of the Rules of Civil Appellate Procedure permits an appeal from a non-final order only in certain circumstances and based on certain criteria. The appealing party has the obligation to advise the Court that the appeal is from a non-final order and to show why such an appeal should be granted. That did not happen here. Thus, this Court was proceeding under incomplete and potentially misleading information.

Had Appellant filed a special action under Rule 2(b), outlined the facts and circumstances that justified the special action appeal on a non-final judgment (and possibly also sought a stay of the trial court proceedings under Rule 16(a)), the trial court proceedings would have halted pending the outcome of the appeal. By filing a special action and requesting a stay, Appellant would have alerted this Court to the ongoing underlying case. But no such notice was forthcoming because neither of those procedural rules was followed. Consequently, this Court was unaware of the trial court's December 20, 2017 determination, which effectively rendered the appeal moot.

Given that the trial court made its determination as to Mr. Thomas' capacity to conduct his own financial affairs and care for his person more than a year ago, this Court need not intervene further. The Court therefore **vacates** its January 24, 2018 opinion as improvidently entered and **dismisses** this appeal as moot.

SO ORDERED this 2nd day of April, 2019

SEAL

Electronically approved 4/2/2019

/s/
Mary Guss, **Justice**

Electronically approved 4/2/2019

/s/
Siera Russell, **Justice**

JUSTICE BENDER DELIVERED THE FOLLOWING DISSENTING OPINION

This is our second opinion in this case. Our previous opinion, filed on January 24, 2018, unanimously reversed a Trial Court decision that had dismissed a petition by Mr. Thomas's Guardian ad Litem. The dismissed petition asked for the appointment of a guardian for Mr. Thomas and requested that the Court order a mental health examination (MHE) for him. In addition to denying the GAL's petition, the Trial Court also excused the GAL from further service on behalf of Mr. Thomas in this matter. The Trial Court based these rulings on its belief that the GAL had no legal authority to request a guardianship or an MHE for Mr. Thomas.

In our January 24 opinion, we held that the Trial Court was wrong in believing that the GAL lacked authority to petition for the appointment of a guardian and to request an MHE. We therefore remanded the case to the Tribal Court with specific directions to treat the GAL as a party to the case and to consider the GAL's guardianship petition and MHE request. The Trial Court has not followed these directions and the GAL has appealed to us from that failure.

My colleagues now want to abandon our effort to require the Trial Court to recognize the GAL's legal authority to act to protect Mr. Thomas. They vote instead to withdraw our January 24 opinion as "improvident" and to dismiss the GAL's appeal as "moot." I respectfully dissent. Withdrawal of our prior unanimous opinion and dismissal of the GAL's appeal would, in my view, be procedurally and substantively incorrect. Even more importantly, it threatens to jeopardize the welfare of both Mr. Thomas and the community.

Brian Thomas became a ward of the Community in 2001, when he was eight years old. At that time he suffered from bi-polar and post traumatic stress disorders. Since then, he has continuously had serious mental difficulties and problems, has committed crimes, and has spent considerable periods of time incarcerated in juvenile and adult mental health and correctional facilities. A Guardian ad Litem was appointed for him in 2008, when he was seventeen and consideration was being given to placing him in a mental health facility. Since that time, Community Court Judges have repeatedly determined Mr. Thomas to be an incapacitated adult and have noted, among other things, that Mr. Thomas's thinking was "erratic," that he was

"unable to live independently," that "someone has to be there to see him take his medication," that "[a]ll parties recommend a Guardian should be appointed to handle all of Mr. Thomas's personal, financial and medical affairs," and that "clear and convincing evidence exists to show that Mr. Thomas is unable to manage his financial matters and should have a conservator."

In June, 2017, a conservator who had been appointed for Mr. Thomas moved for an emergency Community Court hearing because of "concerns regarding the financial and physical wellbeing of Brian Thomas." The conservator asserted that Mr. Thomas "is currently homeless and has disclosed that he is noncompliant with psychiatric medication and is experiencing a mental health crisis."

The case before us began when, at the end of June, 2017, Mr. Thomas's GAL filed a similar Emergency Motion in which she stated that "Mr. Thomas has been decompensating and is in need of intervention. The GAL has concerns regarding his financial and physical wellbeing." The GAL believed that Mr. Thomas's "mental health issues combined with his substance abuse is affecting his well-being," and that "unless his mental health issues and substance abuse issues are addressed, he will return to prison and continue to be institutionalized for the rest of his life." The GAL petitioned for the appointment of a guardian and for an order requiring a mental health examination (MHE). The trial court, without making any findings regarding Mr. Thomas's mental health or need for a guardian, rejected the GAL's requests based on its incorrect belief that the GAL lacked authority to make those requests. The Trial Court

excused the GAL from further service as Mr. Thomas's GAL and dismissed the GAL's petition for relief. The GAL appealed.

Our January 24, 2018, opinion was intended to serve as a disposition of the GAL's appeal. In it, we held that the GAL had authority to act to protect Mr. Thomas's interests by requesting a guardianship and a MHE, and that the Trial Court should therefore have considered — not dismissed — the GAL's requests for an MHE and the appointment of a guardian. We remanded the case in order to give the Trial Court an opportunity to consider those requests. Unknown to us, however, on December 10, 2018, while we were considering the GAL's appeal from the Trial Court's refusal to order a MHE for Mr. Thomas, the Trial Court made a determination, without the benefit of the MHE that the GAL had requested, that Mr. Thomas was of sound mind and capable of caring for his own property. It did this despite the long record of Mr. Thomas's mental instability and anti-social conduct, his repeated failures to be concerned with his own safety and wellbeing, and the testimony of Mr. Thomas's GAL and conservator that Mr. Thomas was engaging in substance abuse and undergoing a mental health crisis that, if untreated, was likely to result in permanent damage to Mr. Thomas and the likelihood of future incarceration, perhaps for the reminder of his life.

In light of this disturbing — even frightening — record, the Trial Court clearly should not have determined on December 20 that Mr. Thomas was of sound mind and capable of caring for his property and himself while it knew that we were considering, and were about to decide, an appeal from its refusal to order an MHE designed to give it accurate and unbiased information

about the state of Mr. Thomas's mental health. The GAL's pending appeal from the Trial Court's refusal to order an MHE was a matter of record. If some emergency existed that required the Trial Court to make a determination about Mr. Thomas's mental health immediately — without awaiting the result of the GAL's appeal — the Trial Court should have informed us of the situation and asked us either to accelerate our disposition of the appeal or for advice about how to proceed in the circumstances.

It is now important for the safety and welfare of both Mr. Thomas and the community that the Trial Court make a fully informed determination regarding Mr. Thomas's mental health and need for a guardian or other protection. The GAL, whose duty it is to safeguard Mr. Thomas's welfare, should participate in that determination.

For the foregoing reasons, I believe that the Community Court's Order of December 20, 2017, should be vacated and the case remanded with instructions to reopen case number C-10-0112, to reassign Appellant Sarah De Oliveira as GAL for the purposes of the case, to proceed with the guardianship petition filed by Appellant, and to grant Appellant's request for an MHE.

My colleagues have voted not to do that because they consider this proceeding to be a special action, not an ordinary civil appeal from a final Trial Court order. The contention that our proceeding in this case has been a special action, rather than an appeal from a final judgment, has, so far as I know, not previously been made or suggested at any stage of this appeal by any of the parties or amici or by a member of this Court or the Trial Court. The contention is, in all

events, incorrect. This is not a special action. It is an ordinary appeal from the Trial Court's dismissal of a petition for guardianship and from its rejection of a request for an MHE. Those Trial Court orders are final orders because, unless they are reversed, they finally determine that the Trial Court will no longer consider the petition for guardianship and will not order that an MHE be conducted. Having issued the orders, there was nothing left for the Trial Court to do with respect to either of those subjects unless there should be a successful appeal. It was therefore entirely proper for the GAL to file her appeal as an appeal from a final judgment, rather than seeking permission to pursue a special action.

SO ORDERED this 4th day of April, 2019

Electronically approved 4/4/2019

/s/

Paul Bender, **Justice**