



**SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY
COURT OF APPEALS**

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Salt River Pima-Maricopa Indian Community
Appellant,

Case No.: **APJ-16-0008**

-V-

**S.S. DOB: 10/7/2000 and
S.S. DOB:11/7/1998**

Appellee,

Opinion of the Court

This is an appeal from an Order of the Juvenile Court that temporarily released two dependent juveniles from off-reservation residential facilities in which they had been placed. The juveniles were temporarily released in order to permit them to attend the funeral of their great uncle. The appellant is the juveniles' Guardian Ad Litem (GAL), who was appointed to protect the juveniles' welfare pursuant to Chapter 11 of the Salt River Pima-Maricopa Indian Community Code (S.R.O.)

The juveniles' uncle died on August 30, 2016. On September 8, the Defense Advocate Office, acting on behalf of the juveniles' grandmother, filed a Motion in Juvenile Court requesting that the Court allow the juveniles to attend funeral services scheduled to take place in the evening of the next day and the morning of September 10. The Motion for Temporary Release was filed at 2:30 p.m. on September 8 and was summarily granted by the Juvenile Court, *ex parte*, at 3:37 p.m. the same day.

The Motion for Temporary Release recited that appellant GAL had been "notified of this request and object[ed] to [it]." The Juvenile Court, however, appears to have made no effort to determine the basis of the GAL's objection before granting the Motion about one hour after it was

filed, nor was the Order granting the Motion served on the GAL, who learned about the Order from the out-of-state facility at which one of the juveniles was being treated. On the morning of September 9, the day after the day on which the Motion for Temporary Release was filed and granted, the GAL filed a written Objection to the Motion, setting forth in detail the basis for her opposition to the temporary release. By that time, however, the Motion had been granted.

The GAL's Objection set forth a number of reasons for the GAL's opposition to the Motion for Temporary Release. Those reasons included the following: Both juveniles had a history of unsafe behaviors, including substance abuse, gang activity and running away. The juveniles' grandmother, at whose behest the Motion for Temporary Release had been filed, had previously been unable to exercise effective care and control of the juveniles. One of the juveniles had twice run away from the grandmother while on an approved home visit. That juvenile had once gone AWOL for more than two months from a therapeutic group home in which he had been placed, during which time he admitted to substance abuse and other unsafe activities. The out-of-state treatment facility at which the other juvenile was residing at the time the Motion for Temporary Release was filed considered him a high risk for AWOL and for relapse of substance abuse and gang-related behaviors. Because of continuing dangerous behaviors, neither of the facilities at which the juveniles were residing at the time of the Motion for Temporary Release recommended that the juveniles be released. The GAL's Objection stated her strong opposition to the temporary release because of her concern that "the boys will AWOL and engage in unsafe activities."

On September 9, shortly after receiving the GAL's written Objection, the Juvenile Court filed an Order affirming its decision to grant the temporary release on the previous day. The September 9 Order stated the Juvenile Court's understanding that "the GAL and Social Services objected to the Motion and that the Prosecutor will defer to the Court." In explaining the decision

to grant the temporary release, despite these objections, the Order found that:

....

4. It is essential that we respect the cultural, customs and traditions of this Community. The minors need to grieve the loss of their uncle with their family. Being with the family during this time promotes healing and closure.

5. The Court is concerned that the current placements view the attendance of the minors as a mere off campus pass. There seems to be a disconnection and absence of cultural competency because allowing minors to grieve with their family is not a novel concept. Further, those making the recommendations may not have the insight into the significance of the potential for healing, learning and family bonding that arises from participating in family burial services.

6. It is in the Minors' best interest to participate in the funeral ceremonies and services of their uncle.

The Juvenile Court's Order provided that the juveniles' grandmother would bear the transportation expenses connected with the temporary release. The Order also contained provisions regarding security and safeguards during the release: . . .

2. Social Services . . . shall monitor the minors at services without being intrusive.

3. The GAL has discretion to assist with monitoring the minors. . . .

6. [The juveniles' grandmother] shall meet [one of the juveniles] at the airport and ensure appropriate supervision. . . . *Minors shall not be allowed to reside in an unsafe environment, have no contact with gang members or known sex offenders.*

7. Minors shall remain in the presence of [their grandmother] and other responsible adults while in the community. They shall follow all house rules and refrain from using drugs or alcohol.

8. Social Services may have the minors submit to a urine random analysis if deemed necessary.

9. Minors shall return to the placements on September 11, 2016.

The juveniles were permitted to attend their uncle's funeral in accordance with the Juvenile Court's September 8 Order. The record does not reveal whether or to what extent they actually attended the funeral services. They did not, however, return to their placements on

September 11, as the Juvenile Court had ordered. According to the GAL's Opening Brief, the two juveniles "fled the care of [their grandmother] on September 10th 2016."

The GAL has filed a timely appeal from the Juvenile Court's September 8 Temporary Release Order

Discussion

Our Appellate Jurisdiction

The Temporary Release Order from which the GAL appeals has been fully carried out and, so far as we can tell, no longer has any legal effect. Vacating or reversing the Order in response to the GAL's appeal would therefore no longer have any bearing on the events of this specific case. This case thus appears to be moot with respect to the specific Order that is the subject of this appeal. The Appellate Brief that the GAL has filed recognizes this situation, but nevertheless requests that, for future purposes, we "instruct the Juvenile Court to provide the Guardian Ad Litem a reasonable opportunity to respond to any motion that indisputably affects the circumstances of the children that she is appointed to represent."

Because of the potential importance of the issue raised by the GAL's Appellate Brief, we issued a Procedural Order on December 14, 2016, requesting each party to the case to file a Supplemental Brief setting forth the party's position regarding whether, in view of the technical mootness of this appeal, there is a justiciable issue before the Court that the Court should resolve. The GAL's response to this request urged us to exercise jurisdiction because the Juvenile Court "routinely receives motions regarding children who have a Guardian Ad Litem assigned to them, but signs the orders without first hearing from the parties. . . . Motions are filed daily with the Juvenile Court requesting orders for children to travel out of state, for medical procedures, for change of placements, etc. This was not the first motion requesting temporary release to attend a funeral, nor will it be the last. In nearly all scenarios, the event and/or

occurrence has come and gone more quickly than the appellate process."

The Defense Advocate Office, on behalf of the juveniles' grandmother, responded to our request by filing a Supplemental Brief stating that its client "does not believe there is a controversy but rather views this as an isolated matter."

It thus appears to us to be likely that the Juvenile Court has been, and will continue to be, faced with a variety of situations, resembling that in this case, where a GAL has been appointed for the protection of juveniles, where expedited relief concerning those juveniles is requested, but where there is no time for the Court to follow an ordinary briefing and hearing schedule before determining whether or not to grant the requested relief. Whether in those circumstances a GAL is entitled, whenever possible, to an opportunity to present the GAL's views regarding the legality or the appropriateness of the requested relief, before the request is acted upon by the Juvenile Court, thus appears to be an important legal issue that may repeatedly arise, but that may not ordinarily remain a live issue long enough for the appellate process to be completed.

Where a significant legal issue is thus "capable of repetition but evading review," courts traditionally exercise appellate jurisdiction despite technical mootness. See, e.g. *Roe v. Wade*, 410 U.S. 113 (1973); *Rasmussen v. Fleming*, 154 Ariz. 207 (1987). We think it appropriate to do that here in order to provide the Juvenile Court with guidance regarding the way in which that Court should proceed, in difficult circumstances similar to those that have occurred in this case, in order to enable a Community GAL to fulfill his or her assigned responsibilities.

To help us consider what that guidance should be, our Order setting oral argument in this case invited the Solicitor of the Community Court to submit an amicus brief and to participate in oral argument on behalf of the Juvenile Court. The Order also invited the parties and the

amicus to address at argument whether the Salt River Community Constitution and Code contain provisions relevant to the situation confronting the Juvenile Court in this case, to provide us with information about how frequently situations like the one in this case arise, and to provide us with views about the role that tribal custom and tradition should play in such situations. Both the Court Solicitor and the Office of the Community Prosecutor have filed amicus briefs and also participated in the oral argument.

Juvenile Court Procedure

The juvenile placements in this case were imposed pursuant to child dependency proceedings governed by Article VII of Chapter 11 of the Salt River Pima-Maricopa Indian Community Code (S.R.O.). Article VII does not specify the procedures to be used by the Juvenile Court when a request is made to the Court for an Order temporarily releasing a juvenile from a placement so that the juvenile may attend a relative's funeral. Article VII does, however, require the appointment of a Guardian Ad Litem in all dependency proceedings "to represent a minor child's best interests." S.R.O. Sec. 11-160 (e) (1). The GAL is specifically required by the Code to advocate for the child's best interests "throughout the judicial proceeding" by "participating in appropriate aspects of the case," including "depositions, negotiations, discovery, pretrial conferences and hearings," S.R.O. Sec. 11-160 (f) (8), (6) and (2). The GAL is affirmatively authorized to "file petitions, motions, responses or objections as necessary" to represent the child's best interests, and to seek judicial relief including "[a]n increase, decrease or termination of contact or visitation" and "[a]n order restraining or enjoining a change of placement." S.R.O. Sec. 11-160 (g) (3). With particular importance to this case, the Code requires that the GAL "be notified of any court proceeding concurrently when all other parties have been notified." S.R.O. Sec. 11-160 (e) (6).

The Code thus clearly contemplates that a GAL, an officer that the Code requires to be appointed in all dependency proceedings, have the status of a party in those proceedings and

fully participate, as a party would have the right to participate, in all aspects of the proceedings. Whenever the Juvenile Court is aware that a GAL has been appointed to represent the interests of juveniles who are the subject of a matter before the Court, the Court should therefore consider the GAL to have all the rights that a party would have in the proceeding at hand. In this regard, as explained above, the Code specifically requires that the GAL be notified of any court proceeding "concurrently when all other parties have been notified." In addition to being provided with notice, the GAL must be afforded the same rights to be heard that a party's lawyer would have in any civil or criminal judicial proceeding.

In many cases, where time permits ordinary schedules to be followed, that will not be difficult to do. Here, however, the Juvenile Court was put in a difficult position when presented with an application for significant relief at almost the last possible moment. In that situation, we think that the detailed Guardian Ad Litem provisions of Article VII, Chapter 11, of the Community Code required the Court to take whatever affirmative steps it reasonably could to give the GAL an opportunity to explain the GAL's position regarding the requested temporary release, and to do so before the Court acted on the application. That is especially appropriate where, as here, the Court had been made aware that the GAL opposed the Motion. But where a matter as important as the release of juveniles from protective custody is involved, the Court should make all reasonable efforts to treat the GAL as a full party to the proceeding whenever the Court is aware that a GAL has been appointed for the juvenile or juveniles involved in the proceeding.

There was no need in this case to set a formal in-court hearing, or to require written briefs, if time did not permit that to be done before a decision had to be made regarding the application for temporary release. In such circumstances, informal procedures are better than none. Communication involving the parties and the Court could, for example, have been attempted here by way of telephone, email, personal contact or whatever else might possibly

have been arranged to enable the GAL to present the reasons for her opposition to the Motion before the Court acted on the Motion. Without assistance from the Court, the GAL could not have been expected to communicate the reasons for her opposition to the Motion to the Court in the hour that elapsed between the time the Motion was filed and the Court's decision granting the relief requested in it. That was especially true here, where the Motion had not been served on the GAL. In circumstances like those in this case, the Juvenile Court may need to take affirmative steps in order to provide the GAL with the opportunity to exercise the responsibility that the Code places upon GALs to advocate for a juvenile's interests throughout the judicial proceeding by participating in all aspects of the proceeding. The Code requires that, whenever possible, a GAL is given every opportunity that a party to any litigation would have to participate as fully as possible in every decision with an effect or potential effect upon the rights and welfare of juveniles whom the GAL is appointed to protect.

The Juvenile Court here did not violate any specific existing rule regarding how it should proceed in circumstances like those in this case. Our decision regarding the procedure to be followed in such circumstances is based upon general due process considerations and the juvenile code provisions governing the role of the GAL that we have outlined in this opinion. It would be appropriate, and we recommend, that the Juvenile Court consider using its rule-making authority to clarify more specifically the procedure to be followed by the Court in cases like this.

Conclusion

In Juvenile Court proceedings involving a juvenile or juveniles for whom a Guardian ad Litem has been appointed pursuant to the provisions of Chapter 11 of the Community Code, the GAL is entitled to be considered and treated as a full party to the proceeding, with all the rights and responsibilities that a party ordinarily has in judicial proceedings, including the right to receive notice and the right to be heard. Where time constraints are present that may render

ordinary formal procedures inadequate to serve that purpose, the Court should take all reasonable steps necessary to give GALs the opportunity to participate in the consideration and decision of all matters that potentially affect the welfare of minors whom GALs are appointed to protect.

The September 8, 2016, Temporary Release Order that is the subject of this appeal is vacated as moot. This opinion is intended to clarify the sorts of procedures that will satisfy due process requirements for GAL participation in cases like this in the absence of processes established by rules or ordinance to handle motions needing expedited consideration.

ISSUED this 2nd day of May, 2017

S E A L

Electronically approved 5/2/2017

/s/

Paul Bender, Justice

Electronically approved 5/2/2017

/s/

Mary Guss, Justice

Electronically approved 5/2/2017

/s/

Siera Russell, Justice

FILED
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SALT LAKE COUNTY CLERK
COURT