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

In the Matter of J.D.W.,
DOB: 10/16/2015, a minor,

OFFICE OF THE PROSECUTOR
SRP-MIC,
Appellant,

and

In the Matter of
A.B., DOB: 07/24/13,
and
A.B., DOB: 07/24/13, minors,

OFFICE OF THE PROSECUTOR
SRP-MIC,
Appellant.

Case No.: APJ-17-0001
Case below J-16-0077

and

Case No.: APJ-17-0002
Cases below J-15-0131
and 0132

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY COURT
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Consolidated on Appeal.

OPINION and ORDER

By order of this Court dated April 19, 2017 these cases were consolidated on appeal since they have identical legal issues. In each case the Office of the Prosecutor filed a special-proceedings appeal after the trial court did not accept DNA test results into evidence without foundational testimony. The appeals were timely and Appellant filed briefs in each case. No responsive briefs were filed. Upon review of the cases and the pertinent Salt River ordinances, this Court affirms the decision of the trial court.

FACTS and PROCEEDINGS

Case number 17-001 commenced with a dependency action filed on behalf of J.W., a minor child born October 16, 2015. J.W. was declared a dependent and ward of the court on February 17, 2016. Eric Williams, J.W.'s putative father, and J.W. underwent DNA testing with Genetic Technologies, Inc., who then submitted a written report to the court. That report declared a 99.9708% probability that Eric William is the father of J.W.

At the initial paternity hearing held in the case on December 12, 2016, the Community requested a finding of paternity based on the written test results alone. Those written results were a part of the court file and were signed by the director of the testing lab and the lab's forensic scientist, whose signature appeared under the following language, "I hereby certify that the above testing was conducted according to currently accepted standards, and that the results and conclusions, including the probability of paternity, were verified and are correct as reported."

The court did not admit the report and did not make a paternity finding based on the written report alone. The express concern of the court was with the chain of custody of the sample that was tested. More specifically, the court questioned whether the individual who took the DNA sample was an employee of the lab or the Salt River Pima-Maricopa Indian Community; whether the results were signed under penalty of perjury and whether the lab was fully accredited.

The court did not believe that the requirements detailed in Section 10-7 of the Community's Code of Ordinances were sufficiently established via the written report. The court then set another hearing on the paternity issue for the following month.

At the continued paternity hearing in January, 2017, the Community presented testimony from the individual who took the DNA swab from Eric Williams. As a result of this hearing, evidentiary chain-of-custody gaps remaining from the initial paternity hearing and the report were filled in by the witness. Then the court entered an Order of Paternity on the 17th of January, finding that Eric Williams was the father of J.W.

The facts of **case number 17-002** differ slightly. Two minor children, twins, were involved in this dependency proceeding. The putative father of the children was deceased. In order to establish his paternity, the Community obtained testing of the children and the children's paternal grandfather. Again, Genetic Technologies, Inc. conducted the testing and their written report found a 99.9922% probability that the individuals tested were all related. Different language appeared above the signature lines in this report. It stated:

> I, the undersigned, upon being duly sworn, depose and state that I have analyzed the data on the biological specimens from the above-named individuals, that the report containing the results of said analysis has been prepared under my direct supervision, and that the facts and results therein are true and correct.

The paternity hearing in case number 17-002 was held on the 10th of January, 2017. The Community again sought to have paternity established based strictly on the written testing report, without foundational testimony. The court denied this request, again making reference to the chain of custody of the test swab. As the individual who took the swab was present in the court the Community called her to testify and the requisite testimonial foundation for admission of the testing results was established.

In each of these two cases, the Salt River Pima-Maricopa Indian Community filed special actions. The Community asserts that the trial court erred in each case when it denied "the admission of uncontested DNA testing results without testimony".

DISCUSSION

The appeal briefs in the two cases summarize the argument in language that differs only in the percentage figure used to express the probability of paternity. That language, setting out the grounds for appeal, reads as follows:

> Whether the juvenile court erred in its ruling that testimony to lay foundation or other proof of authenticity is required prior to the admission of the Report of DNA testing for the establishment of paternity where DNA test analysis indicated 99.9708% [99.97006%] probability of paternity, where statute provided that if tests show that there is ninety-five percent or greater chance that alleged parent is parent then results must be admitted as evidence, and where any party failed to object to the results of the DNA test?

Section 10-7 of the Community Code of Ordinances details the requirements of reports of DNA testing when testing is performed and the admission of those test results into evidence is sought. Subsection (a)(2) of that section list five pieces of information that together suffice to make a written DNA testing report admissible into evidence without supporting testimony:

1. The names and photographs of the individuals whose specimens have been taken;
2 The names of the individuals who collected the specimens;
3. The places and dates the specimens were collected;
4. The names of the individuals who received the specimens In the testing laboratory; and
5. The dates the specimens were received.

If the listed information is all contained in the report, it is considered "sufficient to establish a reliable chain of custody that can allow the results of genetic testing to be admissible without testimony."

Section (a)(2) further specifies that, "a report of DNA testing must be in a record and signed under penalty of perjury by a designee of the testing laboratory." Subsection (b)(1) of 10-7 declares that "a man is rebuttably identified as the father of a child if the DNA testing complies with this section and the results disclose that: ... The alleged father has at least a 95 percent probably of paternity..."

No responsive briefs were filed in these appeals, and the facts are not in dispute. The question before the Court is strictly a legal question, i.e., when may

written DNA testing results be admitted into evidence without supporting testimony. The standard of review to be applied when the Court is considering a strictly legal question on appeal is *de novo*. (See Rules Committee note to Rule 12(c)(6) of the Rules of Civil Appellate Procedure.) This Court thus takes a fresh look at the facts, the ordinance(s) and the court's decision below.

The ordinance in question here is detailed and technical. The separate parts of Section 10-7 should be read and construed in a manner to give each its full measure of meaning. The Court believes that the Community is mixing unrelated sections of the statute in ways they are not meant to be mixed. For example, the Community argues that where there is a finding of 95% probability of paternity the test results "must be admitted as evidence" (impliedly, without supporting testimony). However, the language of subsection (b)(1) fails to support that conclusion. The section in question holds that such a high probability of paternity identifies the testee as the father of the child, subject to rebuttal. It does not hold that written evidence of the probability of paternity is thereby admissible into evidence without supporting testimony. That topic is covered separately in subsection (a)(2).

This Court concludes that Section 10-7 (a)(2) must be complied with in its entirety and in conjunction with Sections 10-7 (a)(3) and (a)(4) in order for a written DNA testing report to be admitted into evidence on the question of paternity without any supporting testimony. Otherwise, the report is incomplete.

This means that items a. through e. must be contained in the written report and that the report must "be signed under penalty of perjury by a designee of the testing laboratory." We find that the language in the testing report for J.W. in case number 17-001 does not come close to the "signed under penalty of perjury" requirement. While the document in case number 17-002 is closer it still falls short. The clearest way for labs and the Community to meet the "signed under penalty of perjury" requirement is for the reports (which can clearly be tailored to particular cases, given that the language above the signature lines is different in these two) to contain language identical to that contained in the ordinance. Importantly, the certification language should always be consistent within each and every report and it should also be a legal certification.

Further, it is worth noting two additional items in this ordinance. Subsection (4) of 10-7 contains yet another requirement for the genetic testing reports: that they "be accompanied by an affidavit from the [testing] expert" describing both the expert's qualifications and documentation of the chain of custody. And subsection (2) requires a "report of DNA testing" to be in a record. The Court interprets record as it is used here to refer to the written testing report prepared by the testing lab. Though these items are not issues in these appeals, they factor into the overall scenario with respect to admissibility of testing reports.

While these requirements may all seem highly technical, the Court believes that the statute lends itself to just such a technical interpretation. Not

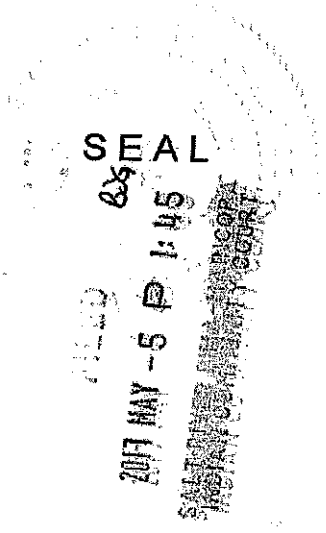
only are the various sections of the statute clear, detailed and precise, but the results of admitting the test results and making a finding of paternity are far-reaching, significant and permanent. In such circumstances it is better to lean toward the technical end of the continuum in interpreting the statute rather than the casual.

While it is not strictly part of this appeal, the Court believes it is worth discussing another section of 10-7, to remove any confusion that it may create. Subsection (3) states that, "Unless a party objects to the results of DNA tests in writing at least five days before the hearing, the tests shall be admitted as evidence of paternity without the need for foundation testimony or other proof of authenticity." If this section were given a strict reading, it would essentially negate the other requirements of the ordinance. While it is not entirely clear what the Legislature intended by this section of the ordinance, it is not likely that they meant to cancel out all other provisions through this one sentence. And the Court may question the reliability and authenticity of all evidence before it.

CONCLUSION

For the reasons stated above, the decision of the trial court is AFFIRMED in both of the cases consolidated in this appeal.

ISSUED this 5th day of May, 2017.



Electronically approved

/s/
Mary Guss, **Justice**

Electronically approved

/s/
Denise Hosay, **Justice**

Electronically approved

/s/
Jan Morris, **Justice**