SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY
COURT OF APPEALS
10,005 E. OSBORN RD. SCOTTSDALE, AZ 85256 (480) 850-8115

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, Appellant, -v- CANDACE VALENCIA, ROSARIO PACHECO , BENNETT BENITEZ and INTMO: X.V. (DOB: 01/25/2014) INTMO: J.P. (DOB: 11/26/2003) INTMO: K.P. (DOB: 11/26/2003) INTMO: K.B. (DOB: 11/30/2009) Appellee.	Case No.: **APJ-17-0003** **ORDER**

I. SUMMARY

This matter is before the Court pursuant to a written order of the Salt River Pima Maricopa Indian Community Court directing a change of placement of two of the minor's referenced above. The Appellant seeks review of the matter and has asked us to find error in the court's actions as a violation of due process of law.

For the reasons that follow, we reverse the lower court's order.

II. BACKGROUND

On January 4, 2017, Appellant filed a juvenile dependency petition and a motion to set a protective custody hearing requesting removal of the children mentioned herein. On January 5, 2017, the court issued an order scheduling a protective custody hearing for January 6, 2017. The stated purpose for the hearing was to review removal of the children.

On January 6, 2017, the parties convened for a protective custody hearing. However, the hearing was continued to provide the parent an opportunity to retain legal counsel. In addition, the court found that the dependency petition supported the grounds for emergency removal as set forth pursuant to Section 11-157(d)(2) of the Salt River Ordinance ("S.R.O."). The court also found that the continued removal of the children was

necessary for their protection. Accordingly, the court ordered the children shall not be returned to the home and shall remain in protective custody under the legal custody, care and control of social services. The court also ordered social services to immediately seek relative placement pursuant to Sections 11-158 and 11-166 of the S.R.O. The court then affirmed the placement of two of the children at Canyon State Academy and granted supervised visitation with said minors. A second hearing was set to take place on January 23, 2017.

On January 9, 2017, Appellant filed a notice of change of judge citing to Section 4-36 of the S.R.O. According to the Appellant's brief, the request shall be immediately honored if no substantive ruling preceded the request for the change of judge. The Appellant then noted that since the court did not rule on any substantive matters at the January 6, 2017 hearing, because the hearing was continued, the request should have been immediately granted as a matter of right to the moving party.

On January 12, 2017, the court issued an order entitled "protective custody hearing – change of placement." The order reiterated several findings listed in the January 6, 2017 order. It also addressed information related to the placement of the children that was discussed during the hearing. Particularly, the order noted that while social services mentioned that it initially placed the minors with a relative, consistent with Section 11-166 S.R.O., the social worker then told the court that the twin minors were subsequently placed at Canyon Sate Academy.

The court expressed, "this [was] puzzling considering the placement requirements of Section 11-158 and 11-166." According to the court, CPS is not authorized to place the minors in long term placement without first adjudicating custody or dependency.

In addition to a number of factual findings, the order contained several conclusions of law. First, it concluded that the subsequent placement of the minors was inappropriate because there were no findings of dependency and because relatives were available to take the children. Next, the court found that the removal of the children to Canyon State Academy violated the due process rights of the minors by placing them in an environment where restrictions are placed on their liberty without due process of law. The court felt that such placement also violated the mother's right to have unrestricted access to her children without further order of the court.

The court then admonished the Appellant and social services informing both parties that placement preferences must be consistent with Section 11-166 of the S.R.O. requiring placement of minors with their family, extended family, other Salt River members, members of other tribes and then other agencies or foster placements approved by the court. The

court concluded by ordering social services to place the minors back with their relatives on or before January 13, consistent with Section 11-166 of the S.R.O. pending a custody hearing and further order of the court.

On January 13, 2017, the Appellant filed with the court a motion for stay pursuant to Rule 16(A) of the SRPMIC Rules of Civil Appellate Procedure and Section 11-29 of Chapter 11 of the S.R.O. The filing requested a stay of the January 12, 2017 order pending an appeal of that order. That same day, the Appellant also filed a notice of special action addressing and appealing the January 12, 2017 order. In addition, that day, the lower court issued an order denying the motion for a stay pursuant to rule 16(A) of the SRPMIC Rules of Civil Appellate Procedure. That filing denied Appellant's motion for a stay based on the language of Section 11-29 S.R.O. providing that a party may file an appeal of a juvenile matter where the order, decree or judgment appealed from directs a change of legal custody of a child. The court found that its order directed a physical change to an available relative placement consistent with Section 11-166 S.R.O. Therefore, it found sufficient cause to affirm the January 12, 2017 order.

III. DISCUSSION

Substantive law affords due process of law to all parties in every action before the SRPMIC court. *See*, SRPMIC Const. Art. XII, Section 2 and S.R.O. Section 11-100. The general elements of due process include sufficient notice and the right to a hearing in a court action. The subject of this appeal is whether the January 12, 2017 order violated Appellant's due process rights. We begin our analysis there.

According to the Appellant, the January 12 order was issued *sua sponte*. We agree simply because there is no evidence on the record that a hearing was held to address the placement of the minors between January 6, 2017 and the date of the *sua sponte* order. The court made its determination off the record without permitting the parties the opportunity to address the court's concerns. Therefore, we can only conclude that the court's findings and conclusions of law in the January 12, 2017 order were issued *sua sponte*.

In response to the *sua sponte* order, the Appellant raises several claims of violations of their due process rights including the fact that they did not receive notice of a hearing to address the court's concerns and there was no opportunity to be heard or to prepare their case before the court issued the *sua sponte* order. The Appellant notes that even if the court has made a preliminary determination in the matter, the parties still have the right, as a matter of due process of law, to be heard on all issues in a meaningful manner. Additionally, the Appellant argues that neither party requested a change of placement of the children. We must concur with this assertion because we find no record of notice to either

party setting a hearing to address the court's concerns and there are no pleadings filed by either party requesting a change of placement of the children. Further, there is no evidence on record of either party offering evidence to the court establishing a basis for a change of placement of the minors during the January 6, 2017 hearing.

We are somewhat confused why the court issued the *sua sponte* order. While presumably the order is based on some of the discussions that took place at the January 6, 2017 hearing, the court, according to the record, did not find issue with the minor's placement at the hearing and in fact it affirmed the placement. It appears from the *sua sponte* order the court may have presumed that the same or additional relatives were available to care for the minor children. However, as the Appellant correctly asserts, had the court further inquired into the placement of the children during the hearing it would have learned that relatives of the children were not capable of caring for them and the placement made to Canyon State Academy was due to the mother's and relative's concern that the children could not be properly cared for in the current placement and that no other relatives were available to care for the children. Therefore, while the court's concern may have been valid at some point in this case, most likely during the January 6th hearing, that concern should have been addressed with the parties on the record during an official court hearing setting further proceedings consistent with the results of that hearing.

Importantly, nothing in this decision is meant to undermine the extreme importance of the court's role in all children court matters. The court is always correct to question any party, on record, about the placement of children and whether such placement is in conformance with the law. However, if the court finds an issue with placement, the proper manner to address it is to hold a judicial hearing with notice to the parties and to provide a reasonable opportunity to respond to the court's concern during the hearing. Accordingly, for the foregoing reasons we find that the *sua sponte* order violated the due process right of the parties in the case.

Next, we address the motion for a change of judge. We find it was error to not grant the motion immediately. Section 4-36 of the S.R.O. requires the court to grant a motion for a change of judge immediately unless the judge has already ruled on a substantive issue in the case. The parties are in agreement, and we concur, that the court did not rule on any substantive matter at the January 6, 2017 hearing namely because the hearing was continued to give the mother an opportunity to retain legal counsel. Therefore, the change of judge request should have been granted immediately as a matter of right to the moving party, in this case the Appellant.

As to the issue of abuse of discretion, because we have already found error in the due process violation we do not find it necessary to discuss this issue. In addition, we also do not address the placement preference issue raised by the Appellant. However, we

note that the social services department is bound by the laws of the SRPMIC and the placement preference provisions are legislated to protect the placement of all children.

IV. CONCLUSION

The Court is in receipt of the motion to extend the deadline in filing the responsive brief. That motion was accepted and the brief was incorporated into the Court's record. The Court is also in receipt of the amicus brief filed in the case. However, it was not accompanied with a leave request to file the brief in accordance to the stated Rules of Civil Appellate Procedure. Therefore, we do not accept that filing and do not incorporate it into the order of the Court.

IT IS SO ORDERED.

ISSUED this 25th day of April, 2017

Electronically approved 4/25/2017

/s/
Justice Guss

SEAL

Electronically approved 4/25/2017

/s/
Justice Hosay

Electronically approved 4/25/2017

/s/
Justice Russell

I certify that a copy of this Order was delivered by hand delivery / certified mail / other by Affidavit Service **(specify) this** 25th **day of** April **, 2017 by:**

FILED
2017 APR 25 P 2:33
SALT RIVER-MARICOPA INDIAN COMMUNITY COURT