



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

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FILED
SALT RIVER PIMA-MARICOPA
INDIAN COMMUNITY COURT
2017 AUG 14 PM 2:00

In the Matter of:

C. H., d.o.b. 02/08/2008,

A minor,

And concerning

**KIERSTIN ANDERSON, SRPMIC
LEGAL SERVICES,**

Appellant,

and

COLLEEN RENTERIA (GUARDIAN).

Case No.: APJ-17-0005

Juvenile Court Case No.: J-16-0193

OPINION AND ORDER

STATEMENT

This is a matter that arose from a Petition for Permanent Guardianship of Minor Child. After an Evidentiary Guardianship Hearing, the Juvenile Court entered an Order Appointing Permanent Guardian of a Minor. The minor's Guardian Ad Litem (GAL) was not present at the Evidentiary Guardianship Hearing, but the Juvenile Judge conducted the proceeding in the GAL's absence and did not allow a substitute GAL to participate. The GAL appeals from the guardianship order, urging this Court to find that Community law requires the presence of the minor's assigned GAL at an Evidentiary Guardianship Hearing or, in the alternative, to find that the Juvenile Court must allow a substitute GAL to participate in that hearing. For the reasons set forth below, the appeal is GRANTED.

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DISCUSSION AND FINDINGS

Nature of the Action.

The Juvenile Court previously entered orders of dependency and permanency regarding this minor. Salt River Juvenile Court Case No. J-14-0110. For an indeterminate time during the dependency proceedings, Guardian Ad Litem (GAL) Kierstin Anderson (Anderson), an employee of the SRPMIC Legal Services Office (LSO), made appearances for the GAL appointed by the Court pursuant to Salt River Ordinance (S.R.O.) §11-160(e) due to the original GAL's resignation from LSO. See, Order Appointing GAL, April 18, 2014. Subsequently, the minor's maternal grandmother filed a Petition for Permanent Guardianship pursuant to S.R.O. §11-176. Salt River Juvenile Court Case No. J-16-0193. In these circumstances, a hearing for permanent legal guardianship must be conducted consistent with Community law, see S.R.O. §11-176(d), and specifically with S.R.O. §10-119(g), (h), and (i) of Community Code. See, S.R.O. §11-176(h).

The Juvenile Court, pursuant to S.R.O. § 11-176(g), is required to conduct a guardianship hearing consistent with S.R.O. § 10-119(g). On the day and time set for that hearing, GAL Anderson unavoidably was not present due to illness. Two other GALs from LSO were present at that hearing. The Juvenile Court, declaring it had a choice to continue the hearing or proceed in the absence of Anderson, chose to proceed with the hearing. At that hearing, the two GALs present urged the Court to allow a substitute GAL to participate in the hearing, which the Juvenile Court declined to allow. The Juvenile Court then proceeded with the hearing, noting as a matter of record GAL Anderson's prior position in the dependency proceedings regarding the appropriateness of the grandmother as a guardian, which prior position presumably was favorable. The Juvenile Court then made findings in favor of the permanent guardianship petition, and approved the same. Guard. Ord., p. 4.

Anderson appeals from that judgment approving permanent legal guardianship asserting an abuse of discretion because the Juvenile Court's choice to proceed with the Evidentiary Guardianship Hearing in the absence of the GAL and not allowing a substitute GAL to participate was contrary to Community law. We will consider this matter under an abuse of discretion standard to review if the decision of the Juvenile Court was based on an erroneous interpretation of law.

Issues Presented

The two issues presented by Appellant are as follows:

1. Is a GAL's recommendation essential when the Juvenile Court appoints a permanent legal guardian for a minor? and
2. When the appointed GAL is not available for a hearing, may the LSO provide another GAL as an appropriate substitute?

Appellant's Brief, p. 5. Appellant does not appeal the appointment of minor's maternal grandmother as Permanent Guardian. Appellant does not appear to be "aggrieved by the verdict or final judgment", however Appellant brings this action in order to "[r]esolve an important issue completely separate from the merits of the action." We review this appeal under S.R.O. Chapter 5, Article V, Rules of Civil Appellate Procedure, Rule 2(b) Special Action rather than Rule 2(a) Final case-dispositive orders and judgments in civil cases.¹

Regarding Appellant's Issue #1, we believe the more definitive question to be: "Is a GAL's participation in an Evidentiary Guardianship Hearing, which would include the contemporaneous recommendation by the GAL, essential when the Juvenile Court is convened for the purpose of appointing a permanent legal guardian for a minor?" We will address both issues after first considering the purpose and function of GALs, in addition to a detailed review of permanent legal guardianship proceedings arising from a juvenile dependency case.

Guardians Ad Litem

Details regarding GALs are contained in S.R.O. § 11-160. The GAL program was created and established within the LSO "to provide representation to individuals pursuant to cases filed under this chapter [11] and chapter 10." S.R.O. § 11-160(b). To this end, the LSO is mandated to "adopt rules and policies necessary and appropriate for the administration of the program." *Id.* The purpose of GALs under the Community's Code is to "ensure that an individual's best interests are protected." S.R.O. § 11-160(a). Concomitantly (and a bit redundantly), the function of a GAL is "to protect the individual's best interests throughout the legal action." *Id.* This requirement is reiterated within the general authority and duties of GALs found at S.R.O. § 11-

¹ All parties are reminded that this Court expects full and strict compliance with Salt River Rules of Civil Appellate Procedure, Rules 2, 4, and 12 regarding their submissions.

160(f)(6) (the GAL shall "[a]dvocate for the best interests of the individual by participating in appropriate aspects of the case."). Potential GALs must meet specific qualifications that are enumerated in § 11-160(d). First among those rigorous qualifications is a requirement that a GAL "must be an attorney or advocate who is admitted to practice in Community court." S.R.O. § 11-160(d)(1). "A guardian ad litem shall be appointed to represent a minor child's best interests in any dependency proceedings." S.R.O. § 11-160(e)(1).

As relevant to this appeal, key among the actions to be taken by a GAL are:

The guardian ad litem shall attend all hearings and participate in all telephone or other conferences with the court unless a particular hearing involves only issues completely unrelated to the individual.

S.R.O. § 11-160(g)(7), and

The guardian ad litem shall be allowed to present and cross examine witnesses, offer exhibits and provide independent evidence as necessary. The guardian ad litem shall be allowed to provide the court with recommendations based upon an investigation and knowledge of the case.

S.R.O. § 11-160(g)(9).

Dependency, Permanency and Guardianship

In a child dependency case in the Juvenile Court pursuant to *Chapter 11 - Minors* of the Salt River Code, once a finding of dependency has been made, the Juvenile Court must decide whether the dependent child can remain in, or be returned to, the custody of his parent(s) or whether permanent out-of-home placement is in the child's best interest. S.R.O. § 11-174(b)(5). When permanent legal guardianship is considered as a permanency disposition in a juvenile dependency case, in addition to any substantive or procedural requirements in Chapter 11, S.R.O. §11-176(h) provides that the hearing for permanent legal guardianship "shall be conducted consistent with section 10-119(g), (h) and (i)."² The Juvenile Court must schedule an evidentiary hearing, S.R.O. §10-119(g)(1)(a), and that hearing must comply with the "Evidentiary guardianship hearing rules" set forth in S.R.O. §10-119(g)(2). At the Evidentiary Guardianship Hearing, the Juvenile Court is mandated to "review the contents of the petition *and hear any*

² Chapter 10 – Domestic Relations, Article IV – Guardianship, Division 2 – Guardians For Minors, §§10-114 – 10-150.

additional evidence in order to determine whether there is clear and convincing evidence that the guardianship is in the best interests of the child” S.R.O. §10-119(g)(1) (emphasis added). In addition, S.R.O. § 11-160(g)(9) provides that “[t]he guardian ad litem *shall be allowed* to provide the court with recommendations based upon an investigation and [the guardian ad litem’s] knowledge of the case” (emphasis added).

The Instant Case

In the dependency case from which this matter arises (Salt River Juvenile Court Case No. J-14-0110), the Juvenile Court appointed a GAL for the minor. After the original GAL left her employment with LSO, Anderson then made appearances in her GAL capacity. After the requisite dependency proceedings, the Juvenile Court subsequently entered an order requiring permanent placement. The minor’s maternal grandmother subsequently filed a Petition for Permanent Guardianship pursuant to S.R.O. §11-176 which was assigned Salt River Juvenile Court Case No. J-16-0193. Because the guardianship petition was handled by the Juvenile Court as a collateral action to achieve permanency disposition of the dependency case which remained open and pending, Anderson continued to participate in her court-appointed GAL capacity “throughout the legal action” of the guardianship petition pursuant to S.R.O. § 11-160(a).

The Evidentiary Guardianship Hearing was convened as scheduled. Anderson did not appear due to sudden illness. In her stead, two other GALs employed by LSO, Ms. DeOliveira and Mr. Fry, appeared. Ms. DeOliveira, without citing any legal authority, advised the court she was appearing for Anderson. The court, similarly without citing any legal authority, indicated that the appearance of the “assigned” (i.e., the court-appointed) GAL was required “unless they had filed something with the Court getting permission to have a substitution.” Recording of 3/9/17 Hrg. at 0:3:23. The court further indicated that it had two choices, either continue the hearing due to the absence of the appointed GAL or proceed with the hearing in the absence of the GAL. Recording of 3/9/17 Hrg. at 0:6:09. The Juvenile Court chose to proceed with the Evidentiary Guardianship Hearing without Anderson, and without allowing any other GAL to participate. Recording of 3/9/17 Hrg. at 0:7:21. At the conclusion of the hearing, the Juvenile Court granted the Petition for Permanent Guardian of Minor Child, concluding that the collective favorable recommendations for permanent guardianship supported the proposed guardianship as being in the child’s best interests.

The Juvenile Court also relied on its finding "that Ms. Anderson's position is on the record supporting the Petition." Guard. Ord., p. 2, ln. 21. This finding is contrary to the plain language of S.R.O. § 10-119(g)(1) requiring the court to "hear any additional evidence." How a court could make a finding that a proposed action is in a child's best interests without additional real-time evidence and recommendations from the one individual who is most responsible for protecting the best interests of the child, the GAL who is mandated to be present at such hearings, is unfathomable and defies logic, especially given the significant and permanent results of an Evidentiary Guardianship Hearing. In such circumstances, it can never be an acceptable practice to simply rely on a GAL's previously expressed position.

The Juvenile Court's findings and conclusion were clearly in error and contrary to law. The Community Code requires the presence and participation of a GAL at an Evidentiary Guardianship Hearing. The court's choice to proceed in the absence of a GAL denied the GAL her legislative mandate to attend all hearings, to present and cross examine witnesses, and to provide the court with recommendations based on her investigation and knowledge of the case.

Substitution of GAL

The Juvenile Court opined that the specific court-appointed GAL must attend the hearing unless that GAL filed a request with the court for substitution. The court cited, and we can find, no provision of the Community Code supporting this requirement. The LSO is authorized by law to adopt rules and policies necessary and appropriate for the administration of the GAL program. If there is an established rule or policy within LSO permitting the substitution of GAL for any particular hearing, the Juvenile Court must give deference to that rule or policy since LSO has legislative authority to so provide. Ideally, such a rule or policy should include, at a minimum, a pre-hearing written notice of substitution so the court is aware prior to the hearing. This is further supported by legislative authority allowing a guardian ad litem to "use appropriately trained staff to assist in the performance of the duties listed herein." S.R.O. § 11-160(e)(4). Because Community law allows another qualified individual to assist a GAL in the performance of their duties, and the Juvenile Court cited no legal authority to the contrary, a properly qualified substitute GAL should have been allowed to participate in the Evidentiary Guardianship Hearing.

Appellant also asserts that there exists a current court "practice" of allowing substitute representation for the Office of General Counsel, Defense Advocate Office and Tribal Prosecutor's Office when an assigned attorney is unavailable due to illness or other unforeseen circumstance. Appellant's Brief, p. 8. Assuming *arguendo* that this assertion is true, the court should allow a substitute GAL to stand in for an assigned GAL according to historical court practice since every guardian ad litem must be an attorney or advocate admitted to practice in Community court, and there is no apparent legal or practical distinction between GALs and other tribal government-employed attorneys and advocates such as prosecutors, defenders, and other government advocates. The Juvenile Court's denial to allow a substitute GAL to participate in the Evidentiary Guardianship Hearing was in error and contrary to law

CONCLUSIONS

SRPMIC law requires the appearance of a guardian ad litem at an Evidentiary Guardianship Hearing in order to present and cross examine witnesses, to provide the court with independent evidence, and to provide the court with recommendations based on the guardian ad litem's investigation and knowledge of the case. Community law also requires the Legal Services Office to adopt rules and policies necessary and appropriate for the administration of the guardian ad litem program, which rules or policies could include substitution of a court-ordered guardian ad litem at an Evidentiary Guardianship Hearing in the event an appointed guardian ad litem is unavailable due to sudden illness or other unforeseen circumstance, and the court must defer to such rules or policies. Community law also permits a guardian ad litem to use appropriately trained staff, presumptively including another qualified guardian ad litem, to assist in the performance of the guardian ad litem's duties. The Juvenile Court abused its discretion because of an erroneous interpretation of Community law and erred by not continuing the Evidentiary Guardianship Hearing or allowing a substitute guardian ad litem to participate in the Evidentiary Guardianship Hearing. The Appellant prevails on both issues raised in her appeal.

The Rules of Civil Appellate Procedure, Rule 12(c)(7), requires an appellant to include in its brief a short conclusion stating the precise remedy requested. Here, Appellant requests this Court to "instruct the Juvenile Court to permit any Guardian Ad Litem in the LSO to substitute for another Guardian Ad Litem in the same office." Based on our findings and conclusions above,

IT IS THE ORDER OF THIS COURT that:

1. Appellant prevails in this appeal on both issues raised;
2. In any Evidentiary Guardianship Hearing pursuant to a petition for permanent guardianship of a minor who is a ward of the court subsequent to a finding of dependency and order for permanency, Community law requires the appearance and participation of a guardian ad litem, and the hearing cannot proceed in the absence of a guardian ad litem; or
3. In the alternative, the Juvenile Court must give deference to any rule or policy of the Legal Services Office for the administration of the guardian ad litem program that permits a substitution of guardian ad litem in the event an appointed guardian ad litem is unavailable due to sudden illness or other unforeseen circumstance.

ISSUED this 14th day of August, 2017.

S E A L

Electronically approved 8/14/2017

/s/

Mary Guss, Justice

Electronically approved 8/14/2017

/s/

Judith Dworkin, Justice

Electronically approved 8/14/2017

/s/

Jan Morris, Justice

FILED
ALLIANCE FOR THE
ADULT COMMUNITY COURT
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