



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

10,005 E. OSBORN RD. SCOTTSDALE, AZ 85256 (480)362.6315

IN THE MATTER OF:

M.M., DOB 10/09/2015

and

B. W., DOB 12/15/2016

Minor Children.

Salt River Pima Maricopa Indian Com-
munity, Office of the Guardian ad Litem,

Appellant,

And

Marissa Marrufo, Mother

Appellee,

Case No.: **APJ-17-0007 on appeal**

Cases below: J-17-0191 and J-17-0192

OPINION and ORDER

FILED
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY COURT
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This appeal was timely filed following the entry of orders by Judge Wilbur in each of the juvenile cases below granting the Notice of Change of Judge filed by the Guardian ad Litem. As the order granting a change of judge was not a final order in these cases, this appeal is pursuant to Rule 2(b) of the Rules of Civil Appellate Procedure applying to special actions. The written orders granting the change of judge were issued a week after a verbal discussion had occurred on the record in the two cases at which Judge Achin stated that the Notice of Change of Judge was moot.

The GAL duly filed his opening brief and an Appellee's brief was filed on behalf of

the mother of both children. No other briefs were received. The relief sought is a reversal of the orders granting the Notice of Change of Judge. As there appears to be no legal basis for such relief and, further, as an Order is precisely the appropriate response to the Notice of Change Judge originally filed by the GAL, the appeal is denied and the decision below is affirmed.

Facts and Proceedings

The two minor children involved in these underlying cases (J-17-191, M.M. and J-17-192, B.W.) have the same mother and different fathers. From their inception the two cases have been handled together by the juvenile court, though there are occasional slight differences in the filings or orders for each. Notice of Removal was filed concerning both children on June 19, 2017 (Docket, No. 1) and Dependency Petitions were submitted two days later (Docket, No. 2). An initial Protective Custody hearing took place on June 23, at which a postponement was entered by Judge Deer and nothing substantive took place. Basically, the same scenario occurred on July 29, again before Judge Deer. Also on June 29, Joshua Fry, of the Community's Legal Services Office was appointed as Guardian ad Litem in both cases.

A Notice of Change of Judge specifically referencing Judge Deer was filed by Mr. Fry on July 7, in both 07-191 (Docket, no. 23) and 192 (Docket, no. 22). A protective custody hearing for the two cases was next held on July 14th. Judge Achin presided. Up to that time no order had been issued either orally or in writing concerning the Notice of Change of Judge. What orders had been entered in the two cases prior to July 14th

(mostly concerning scheduling matters) had been signed by Judge Deer. After July 14, Judge Deer did not again participate in the cases although the reason for that does not appear of record.

Near the end of the July 14 hearing, Judge Achin commented that there was a Notice of Change of Judge pending, and added that the motion was moot. No explanation was given; no attorney or party disagreed with the judge. There was no written order entered memorializing that mootness decision or dealing with the change of judge request in any way.

Two written orders were subsequently signed by Judge Wilbur which did grant the Change of Judge in the M.M. and B.W. cases. The first order -- which appears only in case J-17-0191 -- bears the handwritten date of July 19 above the court's signature. (Docket, no. 24) This date appears to be in error as the hearing at which the Change of Judge was discussed was not held until July 20. At that July 20 hearing Judge Wilbur stated on the record that the case was not previously assigned to Judge Deer; that the court would nevertheless grant the Change of Judge, to count as the GAL's one opportunity per the court rule, and that Judge Achin would hear the case after the current hearing.

There is also a written order in case J-17-0192, B.W., dealing with the Notice of Change of Judge. That is a three-page Order entered following the Protective Custody Hearing (Docket # 24). Under "Others [sic] Orders of the Court" the following language appears: "2. Notice of Change of Judge filed on July 7, 2017 is GRANTED and GAL

has exercised his as of right challenge.” This Order, signed by Judge Wilbur, bears the typed-in date above her signature, “SO ORDERED on July 20, 2017” (Docket, no. 25).

On August 1, 2017 the Guardian ad Litem filed his Notice of Appeal “as to the trial court’s final order, degree [sic] or judgment of July 14th, 2017 and July 21st, 2017 granting the Guardian ad Litem’s Notice of Change of Judge....” The legal grounds for the appeal are not stated, nor is particular relief requested in the Notice of Appeal. In his opening brief, the GAL asks that this court “reverse the order granting the GAL’s Notice of Change of Judge in the event it is necessary the GAL file a future Notice in the present case.”

There is no question that, but for the comment about the Notice’s mootness, it was entirely appropriate for Judge Wilbur to enter orders granting the change of judge in each of these cases. The question is whether that mootness comment changes the orders’ appropriateness in a way that works harm to the appellant. This Court finds that it does not, for the reasons given below.

This is a good time for this Court to again urge as a best practice to promote consistency and clarity that the SRPMIC Trial Courts adopt a procedure that notifies parties in writing of the judge assigned to hear their case as we originally suggested in the case *In re I.C., Z.I.C., Z.A. C., A.N.C., A.M.C., C.C., A.L.C.*, APJ-16-0006 (2016). Ideally, such a notice would be issued as early as possible in each case. Here that was not done, and that failure is in some part responsible for the confused state of the change of judge request.

The court rule regarding a change of judge is found in Chapter 4, Section 36 of the SRPMIC Ordinances which states, in part:

A party wishing to exercise the right to change of judge shall file a pleading entitled "Notice of Change of Judge.:" The notice shall be signed by the party, it shall state the name of the judge to be changed, and it shall neither specify grounds nor be accompanied by an affidavit. The request for change of judge shall be immediately honored.

The GAL's motion in the combined juvenile cases stated that, "Per the order and Notice setting the protective custody hearing, Judge Raymond Deer was assigned to the case and appeared at the protective custody hearing on June 29th." (Docket, no. 22). It is clear that the Guardian reasonably believed that Judge Deer had been assigned to the cases and, further, that the Notice was intended to remove Judge Deer from them.

What is unclear in this case is the basis of Judge Achin's comment on July 14 that the Notice of Change of Judge was moot. Nothing in either the written or the oral record of the hearings prior to that date provides a clue. If Judge Achin knew that the case was now assigned to her that knowledge was not shared in any formal or informal way. Nor was there any reason given for substituting Judge Achin for Judge Deer, if that is indeed what occurred.

Granting a change of judge is mandatory. As we noted in *In re I.C., supra*, if the Notice is timely filed there is no discretion to deny the request, as the rule requires that it "shall be immediately honored". "Immediately" is not defined anywhere in the

Ordinances, but its dictionary definition is abundantly clear and means "without delay." "Immediate" is defined as "occurring at once, instant." (The American Heritage College Dictionary, 4th ed., 2010).

By the time Judge Achin made her "mootness" comment at the July 14th hearing, the GAL's Notice of Change of Judge was already a week old. It should have been signed during that week, removing the only judge who had appeared in any proceedings or signed any written orders in the cases up to that time, namely Judge Deer. If the GAL concurred that the Notice was moot, it would have been sensible and good practice, promoting a clear trial record, to file a Withdrawal of that motion. Otherwise granting the motion was required. By doing nothing, and filing an appeal when Judge Wilbur did sign the order, the GAL is essentially trying to take two bites of the same apple. He filed a Notice and obtained (by whatever means; that could certainly be clearer than this record provides) a new judge in the cases. Now, he seeks to have the order giving him his requested relief reversed, so that he can potentially remove a future judge assigned. The law does not permit him to do that.

If there is any error in this case it would be the oral comment that the Notice of Change of Judge was moot. But no one has appealed that judicial comment and it is not the kind of egregious error that the Court of Appeals should consider on its own. No one changed their position because of the comment or relied upon it to their prejudice. Basically, what happened in the cases below is that the GAL received the precise relief requested in his Notice. That it occurred in a somewhat confused and unusual manner is unfortunate but does not change those basic circumstances.

The unclear manner in which the result was reached below does encourage this Court to invite all participants in the Salt River Community Courts to do their best to always establish clear trial court records. That did not happen here.

The Appellate Court also takes this opportunity to remind parties pursuing appeals that the Court Rules clearly indicate the information required to be included in the parties' briefs. Rule 12(c) lists the required contents of appellant's brief, as follows:

- | | |
|-----------------------------------|---------------------------|
| (1) A table of contents | (5) A statement of issues |
| (2) A table of authorities | (6) An argument |
| (3) A statement of the case | (7) A short conclusion |
| (4) A statement of facts relevant | |

Subsection (g) of the rule allows the court to "strike a brief which does not substantially conform" to the rule's requirements. Several of the listed items were missing from Appellant's Brief in this case. While the brief was accepted on this appeal, that is no guarantee that non-conforming briefs will be accepted in the future.

ISSUED this 28th day of November, 2017.

Electronically approved 11/28/2017

/s/

Judith Dworkin, **Justice**

Electronically approved 11/28/2017

/s/

Mary E. Guss, **Justice**

Electronically approved 11/28/2017

/s/

Jan Morris, **Justice**

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