



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

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FILED
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY COURT

**IN THE MATTER OF
N.A., Jr. d/o/b 4/21/2010**

Case No.: **APJ-18-0001**

(Case below: J-17-0167)

**DONNA FRAGUA and JACOB
FRAGUA,**

Appellants,

-V-

**SALT RIVER PIMA MARICOPA
INDIAN COMMUNITY,**

Appellee.

OPINION and ORDER

This case arises out of the denial of a Petition for Termination of Parental Rights. The Petition was filed by the Permanent Guardians of N.A., who obtained their guardianship appointment on May 20, 2015, in the course of a dependency case involving the minor child. Two years later they filed the Petition for Termination, in hopes of clearing the way for them to adopt N.A.

A hearing on the Petition was held on November 2, 2017. Following that hearing, which included Appellants' testimony and evidence, the court dismissed the Petition. The dismissal was based on the Petitioners not meeting their burden of proof and the court not finding the termination to be in the child's best interests.

This appeal was timely filed and briefs submitted. The court has considered those materials as well as the record of the Termination case below and the order in the dependency case which granted Appellants permanent guardianship of the child. Based on all these materials and the application of the appropriate Salt River ordinances, the decision of the trial court dismissing the Petition is vacated and the case remanded for further proceedings consistent with this opinion.

PRELIMINARY MATTERS

Appellants requested that the Court schedule oral argument on this appeal, pursuant to "Salt River Ordinance § 4-33, Rule 13". Rule 13(a) of the Rules of Civil Appellate Procedure states that, "The court of appeals may consider the appeal without oral argument if the court ... finds that the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral arguments." Because the written briefs and trial record adequately address the issues in this case, the Appellate Court declines to set oral argument.

On January 31, Appellee filed what is captioned Sur-Reply, but which is, in effect, a Motion to Strike Appellants' Reply Brief and which will be treated as such by the Appellate Court. The basis of the request to strike that brief is that it was untimely filed pursuant to Rule 12(l) of the Appellate Rules of Civil Procedure. However, that subsection applies only to appeals in which a minor is a party to or the subject of the appeal. Such is not the case here. The Petition for Termination is adjunct to a Petition for Adoption of the minor child, both pursuant to SRO Chapter 10 (Domestic Relations),

Article III (Adoption) where the subject is the termination of parental rights, although the minor child is a person-in-interest; it is not an SRO Chapter 11 custody or dependency action regarding the child or an appeal in which the minor is a party. Strictly speaking, a Sec. 10-82 action is between the biological parents of the minor child and any of the permissive petitioners delineated in Sec. 10-82, in this case, the Permanent Guardians. Rule 12(l) does not apply. The Motion to Strike is denied.

The standard of review to be applied in this appeal is de novo.

FACTS AND PROCEEDINGS

Before the present action was filed, a dependency case involving N.A. proceeded through the juvenile court at Salt River. On October 4, 2010, N.A. was made a ward of the court in that proceeding. On March 20, 2015, Donna and Jacob Fragua, who had had custody of the child since April, 2010, were appointed the Permanent Guardians of N.A. pursuant to a written order of the juvenile court. That order also stated, "that the dependency case is deemed closed..." Chapter 11, Article VII requires that a permanency hearing be held with respect to a dependent minor and the court appears to have treated the permanent guardianship as that permanency disposition here. No proceedings occurred in the dependency case after the Fraguas' appointment as Permanent Guardians.

The present action for termination of parental rights was filed on May 22, 2017, in a new case with a new case number. It was made clear on the face of the Petition (Paragraph 9) that the ultimate goal was adoption of the minor child by Appellants.

Appellants (Petitioners below) cited Section 10-82 of the Salt River Code of Ordinances as the applicable legal authority for the termination. After extensions of time requested by Respondent Father, an evidentiary hearing on the termination issue was held on November 2, 2017.

Respondent Father appeared with counsel at the hearing, but presented no evidence.

Respondent Mother was given notice of the hearing by publication but did not appear.

Appellants appeared and testified at the hearing.

At the conclusion of the hearing, the Juvenile Court Judge found "that the moving petitioner has not met the required burden of proof and it is not in the best interest of the child to have parental rights terminated." An order was entered denying the Petition for Termination of Parental Rights and affirming the Permanent Guardianship of Appellants.

The testimony of Appellants during the November hearing indicated that there had been no physical visits between Respondent Father and the minor child in the previous three years, that there had not been any real direct contact between them in the previous year and that the most recent action by Respondent Father was to send a Christmas gift for the minor in 2016. There had been no contact, visits or communication of any nature between the Respondent Mother and the minor in the year preceding the evidentiary hearing. No other evidence or testimony was presented at the termination hearing.

Arguments presented at the November evidentiary hearing indicated that Respondent Father believed that by consenting to the permanent guardianship of N.A.

with Appellants he was "providing for the child." Further, he believed that his parental rights should be suspended but not terminated, and that the cultural ties and history the minor had with the O'odham and Pee Posh peoples would possibly be lost if he were adopted by Appellants following termination of the mother's and father's parental rights.

In its oral comments at the conclusion of the evidentiary hearing, memorialized in the November 6 order, the court found that the minor's cultural ties needed to remain, that termination was not in the minor's best interests and that permanent guardianship is exactly like adoption except for minor technical matters. Therefore the Petition for Termination was to be dismissed and the Permanent Guardianship affirmed, which is what the court's written order did, citing S.R.O. §11-25(a)(2) and 11-184.

DISCUSSION

The legal authority invoked by the juvenile court to exercise its jurisdiction to hear and decide the termination proceeding is inappropriate. Section 11-178 informs that Section 11-184 of the Salt River Code of Ordinances specifically applies to "termination of parental rights as a permanency disposition." The remainder of Article VII's sections deal with pre-permanency proceedings and decisions. As noted above, the permanency decision with respect to N.A. was made in 2015.

Therefore the appropriate code sections to apply with respect to this Termination petition are those applicable to adoption cases. These sections are found in Chapter 10, Sections 10-77 through 10-85. Termination of parental rights is specifically addressed in § 10-82, where several grounds are listed, any one of which would justify and allow the filing of such a petition, including abandonment, neglect, willful abuse, and inability to discharge parental responsibilities.

Unlike a Chapter 11 dependency case involving pre-permanency termination of parental rights, Chapter 10 has no specific requirement for a finding that the termination

is in the best interests of the child (although other provisions require a finding that *adoption* is in the child's best interests). The November 2 hearing focused on the evidence which affected the factual basis for termination (or not) of parental rights. The standard of proof required in considering the proffered evidence at a termination hearing under §10-83 (b) is a preponderance of the evidence. The Juvenile Court should have considered specifically whether one or more of the grounds for termination specified in Section 10-82 called for termination of parental rights in this case.

CONCLUSION

For the reasons outlined above, the November 6, 2017 written decision of the trial court is VACATED and this case is remanded to the Juvenile Court for a determination of whether parental rights should be terminated pursuant to Chapter 10, Section 10-82 and Section 10-83(b) of the Salt River Code.

ISSUED this 20th day of April, 2018.

Electronically approved 4/20/2018

/s/
Paul Bender, Justice

S E A L

Electronically approved 4/20/2018

/s/
Mary Guss, Justice

Electronically approved 4/20/2018

/s/
Jan Morris, Justice