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

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

**IN THE MATTER OF:**

N.A.F.

(DOB: 4/21/10)

Minor Child,

DONNA FRAGUA and JACOB FRAGUA,

Appellants

v.

NICHOLAS ANTONE SR. and  
SUNSHINE WHITEWOLF,

Appellees

Appeal Case No.: APJ-19-0002

Trial Case No.: J-17-0167

**OPINION AND ORDER**

This matter is before this Court on the second, and this Court hopes the last, appeal in this proceeding filed by Petitioners/Appellants, Donna FRAGUA and Jacob FRAGUA, the permanent guardians of N.A.F., a minor child, to terminate the parental rights of Respondents/Appellees, Nicholas Antone, Sr. and Sunshine Whitewolf. Their effort to terminate the parental rights of the biological parents was expressly filed as a prelude to the adoption of N.A.F. For the second time, the Juvenile Court denied the Petition and, for the second time, this Court finds it must reverse the decision of the Juvenile Court and remand the case for an evidentiary hearing and findings related to Appellee Nicholas Antone Sr. in conformity with the requirements of Sections 10-82 and 10-83(b) of the Salt River Pima-Maricopa Indian Community Code of Ordinances (Salt River Code).

### **STANDARD OF REVIEW**

Since the second dismissal of the Petition to Terminate Parental Rights was entered without hearing and based on what the Juvenile Court thought was a legal presumption, the standard of review in this matter is de novo. The Salt River Code establishes four standards of review for an appellate case: de novo, abuse of discretion, clearly erroneous, and substantial evidence for jury verdicts. See Appendix. Rule Committee Note to Rule 12(c)(6), pg. CD5:68. Under the de novo standard of review, this Court affords no deference to the lower court's determination and reviews the case on the same standard applied by the trial court. This standard is used for questions of statutory interpretation, jurisdiction, and questions of law. In this case, the issues Appellants raise on appeal involve solely questions of law and statutory interpretation, based upon the Juvenile Court's interpretation and application of Section 10-82 of the Code. Consequently, this Court applies the de novo standard of review to this appeal.

### **FACTS AND PROCEEDINGS BELOW**

This proceeding to terminate the parental rights of Respondents/Appellees, Nicholas Antone, Sr. and Sunshine Whitewolf is a follow-up to an initial dependency proceeding brought by the Community in the Community Juvenile Court. On April 21, 2010, N.A.F. was born to Salt River, Department of Corrections inmate, Sunshine Whitewolf, who was then incarcerated after being convicted of multiple counts of having committed a crime against a child. Whitewolf apparently had a prior CPS history including eight (8) CPS referrals spanning from 2002-2008 for medical neglect of a child, negligent death of three (3) of her children, as well as neglect due to domestic violence and alcohol abuse.

The Salt River Pima-Maricopa Indian Community, Office of the Prosecutor, filed a Petition for Dependency on April 28, 2010, and shortly after birth, N.A.F. was placed with Appellants Donna FRAGUA and Jacob FRAGUA. In that proceeding, N.A.F. was found on October 10, 2010, to be in need of assistance and declared a ward of Court. On March 20, 2015, following consent of the parents to the placement, the Juvenile Court appointed Appellants Donna FRAGUA and Jacob FRAGUA, as the child's permanent guardians. Mr. Fragua, is an enrolled member of the Pueblo of Jemez, and he and his wife have adopted or have been appointed foster parents for several children from the Salt River Pima-Maricopa Indian Community. Despite the fact that Section 11-169(b) expressly requires that "[a] permanency disposition for all dependent children shall be made within 12 months of the protective custody hearing unless a judge determines that reasonable efforts to prevent the removal are unnecessary" and Section 11-177 expressly contemplates adoption as part of that permanency disposition, the Juvenile Court in its March 20, 2015 Order stated "that the dependency case is deemed closed." In the dependency proceeding the Juvenile Court perhaps believed without so finding (erroneously as the unnecessarily protracted history of this case demonstrates) that the appointment of Petitioners/Appellants Donna FRAGUA and Jacob FRAGUA constituted a *permanency disposition*.

By failing to fully comply with the intent and spirit of Section 11-169(b) to create a permanent disposition for N.A.F, the final order of the Juvenile Court in the dependency proceeding left it up to the Petitioners/Appellants Donna FRAGUA and Jacob FRAGUA to attempt to create the kind of familial permanency every child deserves and which the Salt River Code expressly contemplates. They commendably shouldered that responsibility by filing with the Juvenile Court on May 22, 2017 the Petition to Terminate Parental Rights involved in this case. Paragraph 9 of that Petition clearly indicated that the purpose of the Petition was to facilitate the ultimate permanent disposition of the placement of the child through adoption. After some continuances, the Juvenile Court held an evidentiary hearing on the Petition on November 2, 2017. While both Nicholas Antone, Sr. and Sunshine Whitewolf were given due notice of the evidentiary hearing, only the biological father, Nicholas Antone appeared at the hearing. The whereabouts of the biological mother, Sunshine Whitewolf, currently are unknown and she has been served by publication.

At the November 2, 2017, the Petitioners, Donna FRAGUA and Jacob FRAGUA, presented evidence supporting their Petition. Respondent father Nicholas Antone presented no evidence whatsoever. The testimony at the hearing indicated that Antone had no physical contact with the child for the preceding three years and the only support provided had been to send the child a Christmas gift in 2016. The mother Sunshine Whitewolf had no contact whatsoever. Antone simply argued that by consenting to the permanent guardianship in the dependency proceeding, he believed he was providing support for the child within the meaning of Section 10-82. At the conclusion of the hearing, the Juvenile Court denied the Petition to Terminate and ruled that "the moving petitioner [sic] has not met the required burden of proof and it is not in the best interest of the child to have parental rights terminated."

The FRAGUAs filed a timely appeal of this initial denial. On April 20, 2018, this Court by its Opinion and Order vacated the Juvenile Court dismissal of the Petition to Terminate Parental Rights and remanded the case to the Juvenile Court with directions to determine "whether parental rights should be terminated pursuant to Chapter 10, Section 10-82 and Section 10-83(b) of the Salt River Code." Specifically, this Court noted that the determination must be made on the basis of the evidence and the standards set forth in those Code provisions. This Court found that the Juvenile Court reliance on the "best interest of the child" standard ignored those requirements and its ruling seemed to ignore the one-sided nature of all evidence presented at the hearing and failed to apply that evidence to the standards expressly established by Sections 10-82 and 10-83(b) in its findings.

On remand, the Juvenile Court failed to conduct a new evidentiary hearing and also failed to comply with the mandate of this Court. Specifically, while the Juvenile Court originally noticed a new evidentiary hearing, it was later rescheduled as a motion hearing. Following that motion hearing, the Juvenile Court on May 1, 2019 entered a new ruling based upon the November 2, 2017 evidentiary hearing. Without hearing any new evidence, the Juvenile Court denied Appellants' Petition for Termination of Parental Rights. Its May 1, 2019 Order found that to satisfy Section 10-82(b):

the Court must find that Petitioners met their burden regarding both elements of the alleged abandonment: a. That the Parents left the child without any provision for his or her support; *and* b. That the Parents left the child without any communication for six months on [sic] longer. Regarding the first element, the Court *FINDS* that by each parent signing the written consent and allowing for the appointment of the Permanent Guardians, Respondent Parents made reasonable provision for the permanent care, control and support of the child. As a result of the permanent guardianship, Respondent Parents in fact avoided leaving the child without any provision for his or her support. [Emphasis in original]

The Juvenile Court also found that since Appellants had not met their burden of proof regarding "the first element, Petitioners cannot prevail on their allegation of abandonment."

Appellants filed a timely Notice of Appeal. Appellants and Appellee Antone filed briefs in this appeal but Appellee Whitewolf, whose whereabouts are unknown and who was served by publication, filed no submissions and made no appearance. Following the helpful briefing of the matter by the parties appearing in this appeal, this Court finds that the case involves a simple issue of the application of law and, consistent with Rule 13(a) of the Salt River Rules of Civil Appellate Procedure, does not require oral argument.

#### **DISCUSSION**

As this Court found in its first encounter with this matter, the applicable standards governing this Petition to Terminate Parental Rights are found in Sections 10-82 and 10-83(b) of the Code. Section 10-82 reads as follows:

##### **Sec. 10-82. Termination of parental rights.**

Any person or agency that has a legitimate interest in the welfare of a child, including but not limited to a relative, foster parents, physician or a private license child welfare agency, may file a petition for the termination of the parent-child relationship if *one or more* of the following grounds exist:

(1) The parent has abandoned the child or the parent has made no effort to maintain a parental relationship with the child. It shall be presumed the parent intends to abandon the child if a child has been left without any provision for his or her support and without any communication from such parent for a period of six months or longer. *If, in the opinion of the court, the evidence indicates that such parent has made only token efforts to support or communicate with the child, the courts may declare the child abandoned by such parent.*

(2) The parent has neglected or willfully abused the child.

(3) The parent is unable to discharge the parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that the condition will continue for a prolonged, indeterminate period of time.

(4) The parent is deprived of his or her civil liberties due to the conviction of a felony if the felony of which such parent was convicted is of such nature as to prove the unfitness of such parent to have future custody and control of the child, or if the sentence of such parent is of such length that the child would be deprived of a normal home for a period of years.

(5) *The parents have relinquished their rights to the child* to an agency or have consented to the adoption.

(Emphasis added). Section 10-83(b) expressly provides that:

The court's findings with respect to grounds for termination shall be based upon a preponderance of the evidence under the rules applicable and adhering to the trial of civil cases. The court may consider any and all reports submitted or ordered by the court for the assistance in making a determination.

Thus, as this Court found in the first appeal, the decision of the Juvenile Court in a Petition for Termination of Parental Rights must be based on findings with respect to the grounds for termination set forth in Section 10-82 based on "a preponderance of the evidence" presented at an evidentiary hearing. The Juvenile Court has now twice erroneously relied on Antone's consent to the permanent guardianship as conclusively preventing the termination of his parental rights. As explained below, such reliance was not only plainly misplaced, it erred as a matter of law.

The Order under appeal in this proceeding erred in two respects. First, it treats the unmarried biological parents in this proceeding as a unit, rather than separately analyzing whether the parental rights of *each* biological parent should be terminated

under the standards of Section 10-82. Second, and more important, the Juvenile Court's repeated reliance on Antone's consent to the permanent guardianship misreads the language and intent of Section 10-82 and fails to separately make the findings required by Section 10-83(b) based on an evidentiary hearing.

The Petition to Terminate the Parental Rights sought to terminate the rights of both biological parents. While the biological father, Nicholas Antone, Sr., appeared and contested the Petition, the biological mother, Sunshine Whitewolf, has not done so and her whereabouts are unknown. While the Juvenile Court focused on the biological father, no evidence was presented suggesting that Sunshine Whitewolf has had any contact with or provided any support for the minor child since birth. In fact, her whereabouts currently are unknown and she has been served by publication. Thus, given these facts, her prior criminal record of child abuse, and the prior findings of negligent death of three of her other children, absolutely no justification exists for failing to find the requirements of Section 10-82 satisfied with respect to the biological mother, Sunshine Whitewolf. Accordingly, the Court erred in treating the biological parents as a unit and failing to separately apply the requirements of Section 10-82 to each parent. Since no evidence contradicts that presented by the Appellants regarding the basis for terminating Sunshine Whitewolf's parental rights, this Court finds that the standards of Section 10-82 have been satisfied by her complete abandonment of the child as well as the fact that she was "deprived of his or her civil liberties due to the conviction of a felony if the felony of which such parent was convicted is of such nature as to prove the unfitness of such parent to have future custody and control of the child" within the meaning of Section 10-82(4).



Accordingly, as to Sunshine Whitewolf, the Order of the Juvenile Court must be reversed and remanded with directions to enter an Order granting the Petition as to the biological mother thereby terminating the parental rights of Sunshine Whitewolf to the minor child.

As to the biological father, Nicholas Antone, Sr., the Juvenile Court erred in its reading, interpretation, and application of Section 10-82 and failed to comply with the mandate of this Court contained in the Opinion and Order in the first appeal. The Juvenile Court's Order dated May 1, 2019 focused only on the issue of abandonment set forth in Section 10-82(1) and failed to read even that subsection in its entirety. The introductory portion of Section 10-82 makes clear that a Petition for Termination of Parental Rights should be granted "if *one or more* of the following grounds exist." That section then lists five separately numbered grounds for such termination. The first ground, and the one exclusively focused on by the Juvenile Court, involves a finding that "[t]he parent has abandoned the child or the parent has made no effort to maintain a parental relationship with the child." That portion of Section 10-82(1) states the precise ground. The subsection then proceeds to indicate two separate evidentiary indicators relative to that specific ground. Specifically it states:

It shall be presumed the parent intends to abandon the child if a child has been left without any provision for his or her support and without any communication from such parent for a period of six months or longer. If, in the opinion of the court, the evidence indicates that such parent has made only token efforts to support or communicate with the child, the courts may declare the child abandoned by such parent.

In its May 1, 2019 Order the Juvenile Court focused virtually exclusively on the first of

these two sentences and ignored both the basic standard stated in the preceding sentence - abandonment of the child or making no effort to maintain a parental relationship – and the next sentence that clearly indicated that the Court could declare the child abandoned if the “parent has made only token efforts to support or communicate with the child.” The Juvenile Court thereby completely misread the presumption created by the first sentence quoted above. That sentence presumes abandonment “if a child has been left without any provision for his or her support and without communication from such parent for a period of six months or longer.” The Juvenile Court inverted the presumption created by that sentence and seemed to indicate that if a parent made some provision for support of the child, in this case by consenting to a permanent guardianship in an involuntary dependency proceeding, it must be presumed that they have not abandoned the child. But that is not what Section 10-82(1) states! In fact, the very next sentence of Section 10-82(1) plainly indicates that if a “parent has made only token efforts to support or communicate with the child, the courts may declare the child abandoned by such parent.”

Until termination of parental rights, biological parents have an obligation to financially support and attempt to maintain a parental relationship with their child to the extent permitted by law. Appointment of a permanent guardian for the child does not relieve a biological parent of the obligation to contribute to the support of the child, to the extent possible, or to attempt to maintain parental contact with the child. The last sentence of Section 10-82(1) makes plain that merely consenting to the appointment of a permanent guardian for the minor child did not relieve Respondent/Appellee Nicholas Antone, Sr. of

the obligation to provide financial support for the minor child, to the extent financially feasible, and to attempt to maintain parental contact with the child. The Juvenile Court therefore improperly converted a sentence about presuming abandonment into a legally non-existent presumption *against* finding abandonment if some provision for support was agreed upon irrespective of what efforts the parent thereafter made to discharge parental obligations. Thus, while Antone's action consenting to the permanent guardianship in the dependency proceeding four years ago, albeit in the context of an involuntary dependency proceeding, may provide a single piece of evidence suggesting he had not left the minor child completely without any source of support as of 2015, the last sentence of Section 10-82(1) makes perfectly clear that the Juvenile Court should also have considered what efforts Antone has made since 2015 to provide financial support for or maintain parental contact with the minor child. Since the Juvenile Court held no new evidentiary hearing and the 2017 hearing failed to provide much evidence of such financial support or parental contact, the record simply cannot sustain the May 1, 2019 Order entered by the Juvenile Court dismissing the Petition to Terminate Parental Rights.

Two other factors also indicate the legal error in the Juvenile Court's reading of Section 10-82 and 10-83(b). A separate ground for terminating parental rights set forth in Section 10-82(5) involves the Court finding that "[t]he parents have *relinquished their rights to the child* to an agency or have consented to the adoption." Thus, far from creating the presumption against a finding of abandonment found by the Juvenile Court, the consent to a permanent guardianship signed by Antone may very well constitute an entirely

separate grounds for *granting* the termination of his parental rights.<sup>1</sup> Second, Section 10-83(b) clearly indicates that the findings regarding the standards of Section 10-82 must be based on a preponderance of evidence presented at the termination hearing. The Juvenile Court relied *exclusively* on a consent to permanent guardianship signed by Antone in a separate and different proceeding – the dependency proceeding. While nothing prevented Antone from presenting that document in the termination hearing, he did not do so since he presented no evidence whatsoever. Thus, in relying on the consent document signed by Antone the Juvenile Court relied upon a document that was not technically presented in evidence in the 2017 termination hearing.

Since the Juvenile Court failed in 2018 to conduct the evidentiary hearing it originally scheduled, the evidence on the record in this case derived solely from the November 2, 2017 hearing which is now almost 21 months out of date. It is possible that since that date Antone may have provided greater financial support for the child or made more aggressive efforts to maintain parental contact than demonstrated in the 2017 hearing. For this reason, this Court has determined that, unlike its disposition of the Petition with respect to the biological mother, it must reverse and remand this matter to the Juvenile Court to conduct an evidentiary hearing with respect to termination of Antone's parental rights to the minor child and for findings by the Juvenile Court on the standards set forth in Section 10-82, as interpreted in this Opinion and Order.

<sup>1</sup> The Court recognizes that Section 10-82(5) of the Salt River Code applies to parents who have "relinquished their rights to the child to an agency." Clearly the language referencing "an agency" contemplates *voluntary* relinquishment of parental rights without the initiation of dependency proceedings. This Court, however, cannot imagine that by adopting Section 10-82(5) the Community meant to exclude such voluntary consent to relinquish rights to a child in the context of an *involuntary* dependency proceeding where the voluntary consent to the permanent guardianship merely constituted a settlement of litigation that otherwise might have involuntarily produced the same result. Thus, it reads Section 10-82(5) to apply to the consent to the permanent guardianship signed by Antone.

One final observation should be offered by this Court. Given the importance that kinship roles and the familial relationship play in establishing identity and relationships in any Indian community, including the Salt River Pima Maricopa Indian Community, this Court understands and sympathizes with the extraordinary reluctance the Juvenile Court has demonstrated toward terminating the parental rights of a tribal member to facilitate adoption of the minor child by the Appellants, one of whom is a member of a different tribe. It is for similar reasons that the laws of some tribes, such as the Oglala Sioux Tribe of the Pine Ridge Reservation, do not permit termination of parental rights, relying instead exclusively on permanent guardianships to serve the permanency role played by adoption in many other jurisdictions, including Salt River. While the Salt River Pima Maricopa Indian Community Council is free to adopt this approach, it is not the one set forth in Sections 10-77 through 10-85 of the Salt River Code. Unless and until the Community Council changes the legal standards set forth in Sections 10-77 through 10-85 and abandons or limits termination of parental rights and adoption, it is the obligation of the Community Courts to enforce the Code as written, not as each judge wishes it was written. Section 11-176 of the Salt River Code clearly demonstrates that the current policy established by the Salt River Pima Maricopa Indian Community Council seeks to rapidly provide the greatest permanency for the minor child possible, including adoption, in the child's best interest. This provision suggests that such action perhaps originally should have been undertaken by the Juvenile Court in the dependency proceeding. The failure to do so delayed permanency for N.A.F. and the subsequent repeated reluctance of the Juvenile Court to enforce Sections 10-82 and 10-83(b) as written has further

delayed adoption of this 9 year old child by the only parent figures the child has known since birth. This Court hopes on remand that the Juvenile Court will rapidly conduct an evidentiary hearing in conformity with Sections 10-82 and 10-83(b) to provide N.A.F. the permanency to which every child should be entitled and which the policy established by Salt River Code contemplates.

### **CONCLUSION**

Based on the foregoing, the May 1, 2019 Order of the Juvenile Court is REVERSED and this case is REMANDED to the Juvenile Court with directions to (1) enter an order terminating the parental rights of Appellee Sunshine Whitewolf and (2) conduct a new evidentiary hearing on terminating the parental rights of Appellee Nicholas Antone, Sr. in order to make findings consistent with Sections 10-82 and 10-83(b), as interpreted in this Opinion and Order.

**ISSUED** this 28th day of August, 2019

S E A L

Electronically approved.

/s/

**Mary Guss, Justice**

Electronically approved

/s/

**Robert N. Clinton, Justice**

Electronically approved

/s/

**Siera Russell, Justice**