SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY
COURT OF APPEALS
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GLORIA VASQUEZ,

Appellant/Respondent

In the Matter of:

M. WB

(DOB: 02/18/2005)

Appeal Case No.: **APJ-22-0001**

Trial Case No.: J-19-0064

OPINION AND ORDER

Before: Justices Robert N. Clinton, Siera Russell and Mary Guss

This matter is before the Court on the appeal of the Permanent Guardian, Gloria Vasquez, (Permanent Guardian or Guardian) from an adverse order of the Juvenile Court dated January 31, 2022 (Juvenile Court Order) granting a Petition to Remove Guardian (Petition) filed by the Guardian ad Litem in this matter. For reasons more fully explained below, this Court reverses the Juvenile Court Order, directs the Permanent Guardian to be restored and M.WB (the Juvenile) be returned to her care and custody immediately, and the Petition to be dismissed with prejudice.

Background

Appellant was appointed as M.WB.'s permanent legal guardian by the SRPMIC Juvenile Court on August 21, 2019. The Juvenile was a dependent child since October 30, 2018, and the permanent guardianship with his grandmother achieved permanency for him. The Juvenile Court retained jurisdiction over the child and guardian pursuant to S.R.O. §10-123(a)(1) by requiring the guardian and Social Services to submit an annual report.

In March 2021, Guardian had a total of ten children living in her home along with two other adults (Aunt and Uncle) during the pandemic lockdown. On March 10, 2021 four of these children (E.C., S.W.Jr., A.W. and D.WB. or "the four children") reported to the Salt River Police Department (SRPD) and Child Protective Services (CPS) physical abuse by Guardian, Aunt and Uncle, along with neglect by not being provided adequate food, basic necessities and medical care. A Dependency Petition on the four children was filed on March 16, 2021, with the Juvenile Court naming Guardian along with the parents. The allegations as to Guardian were physical abuse and neglect. While noting she wished to retain the guardianship of the remaining children, the Permanent Guardian voluntarily relinquished guardianship of the four children, resulting in Guardian being dismissed from the Dependency Petition.

On April 26, 2021, the child's GAL filed the Petition to Remove Guardian of M.WB alleging three grounds for removal pursuant to S.R.O. § 10-124(a)(3). At trial, the GAL presented testimony of witnesses and Petitioner's exhibits were admitted.The parties agreed to strike the testimony of GAL's witness Sandy Corral along with Plaintiffs Exhibits 11 and 12.

At the hearing on the Petition to Remove Guardian for M. WB, the Guardian ad Litem, the Petitioner, basically sought to try the grounds for removal of the four children that had never been presented to the Court since the Guardian had *voluntarily* relinquished guardianship of the four children in the prior proceeding. At the hearing in this matter, the Guardian ad Litem never presented any evidence whatsoever of abuse or neglect of M. WB. The Guardian ad Litem claimed in her opening statement that S.R.O. § 10-124(a)(3)(h) does not require that M. WB be a victim of abuse, only that “a child” have suffered such abuse at the hands of the Permanent Guardian. A summary of the hearing follows derived primarily from the excellent, accurate, and detailed description provided in the Initial Brief of the Appellant.[1]

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1 Both parties provided truly excellent and very helpful briefs to this Court. The Court thanks counsel for both sides for their diligent and helpful efforts on behalf of their clients.

Witness Kimberly Dent, Pediatric Nurse Practitioner

Petitioner's witness, Ms. Dent testified that on March 12, 2021, at the request of CPS Investigative Case Manager Ari Marquez and Detective Campos, she completed individual physical evaluations on the four children due to reports of physical abuse and neglect. The children were: E.C. (12 years/ 11months old), S.W.Jr. (14 years/9 months old), A.W. (14 years/4 months old), and D.WB. (15 years/1 month old). Ms. Dent did not conduct a physical evaluation of M.WB. or any other children in Guardian's home.

Ms. Dent testified that all the four children's vital signs (body weight, height, BMI, heart rate, temperature), along with specific examinations including head/neck, eye, ear, oral, cardiovascular, lung, abdominal, extremities, musculoskeletal, and neurological were all in normal range. The four children's general appearances were noted as no apparent distress, cooperative with the exam, awake, well developed, well nourished, and well groomed, with only E.C. noted to appear withdrawn.

Ms. Dent testified that she had concerns of physical abuse for all four children based on the children's self-reporting to her, but that she could not say with any medical certainty what caused the injuries, and it was not her role to determine if the children were being truthful in their disclosures. Ms. Dent observed E.C. and S.W.Jr. with linear scars on their arms. On cross-examination Ms. Dent admitted these findings were minor injuries and scratches, which would not result in serious physical injury or death. A.R. reported being hit with a belt on her bottom resulting in bruises and blisters, but Ms. Dent did not observe these injuries due to the child wishing not to be examined on her bottom. Ms. Dent did observe A.R. with various bruising, abrasions and scars on her extremities and upper thigh. Ms. Dent observed scars on D.WB.'s knuckles on his right hand, which the child stated was from defending himself against family members hitting him. Ms. Dent testified that her statement regarding these scars being defensive in nature was based

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The Court also notes that some of the facts described below involving rationing or withholding of food occurred during the COVID-19 pandemic while the family was in lockdown, making grocery shopping difficult at best – an important context hardly noted or considered by the Juvenile Court.

solely on the history D. WB provided and nothing more.

Ms. Dent testified all four children disclosed that the refrigerator and pantry where the food was kept was locked and they did not have access to the food except for what the Guardian provided. Further, she testified all children indicated they were only given water to drink. E.C. and A.W. reported the Guardian provided dry cereal and peanut butter sandwiches for food; whereas S.W.Jr. and D.WB. reported being given only peanut butter sandwiches for food. A.R. reported food was used as a form of punishment by the Guardian and the other six children (other than the four-reporting neglect) in the home were able to eat whatever they wanted. D.WB. disclosed hoarding and stealing food because the food was not enough. Ms. Dent did not conduct a nutritional assessment on these children, as such an assessment is not within her expertise. Ms. Dent testified that the children appeared well nourished, and all were in the normal ranges for height, BMI and weight, but nonetheless she had concerns about nutritional neglect.

Ms. Dent testified and recorded in all the examination reports her concerns of physical abuse and nutritional neglect based on the children's reports of being provided limited variety of food and water with no access to additional food due to the refrigerator and pantry being locked. She opined, "Adolescence is a period of rapid growth, and they require a variety of food and calories to meet their daily nutritional requirements." Ms. Dent stated, A diet deficit in nutrition can have an adverse effect on brain development, cognition, and behavior that can extend into adulthood. Overall, this is worrisome for child physical abuse and neglect, specifically nutritional neglect." As to A.R. and D.WB., Ms. Dent expressed the concern of"withholding food as punishment can result in short and long term emotional and psychological effects."

Social Services Investigative Case Worker with CPS Ariadna Marquez

Petitioner's witness Ms. Marquez conducted a joint CPS investigation with the Salt River Police Department (SRPD) on March 10, 2021, into the allegations of abuse and

neglect by the four children. Ms. Marquez spoke to each child individually and all reported the same allegations. CPS and SRPD decided that forensic interviews of the four children would be necessary given a criminal child abuse investigation also occurring. Ms. Marquez along with the SRPD went to the Guardian's home in the early morning hours on March 11, 2021 and observed the other six children (M.WB., R.W., B.WB., L.W., S.W., C.M.Jr.) in the home. The home was found clean. It had running water and there was plenty of food in the unlocked pantry, two refrigerators and cabinets that were stocked with food. Some medications were found, and Guardian was advised by CPS to lock the medications out of reach of the children. The Guardian explained the pantry was kept locked because thirteen people lived in the home and the family would just go through the food fast and it was hard for her to provide for everyone. At this time the family was under "stay-at-home orders." According to Ms. Marquez, the six children did not show any visible signs of abuse or neglect, did not appear malnourished and no safety concerns were noted.

CPS proceeded to offered the Guardian an out-of-home safety plan if Guardian could identify a safety monitor who the four children could live with while the ongoing CPS/SRPD investigations determined if the home was safe for the four children to return. Guardian did not have a relative who could serve as safety monitor; therefore, CPS served Guardian a notice of removal at that time. CPS did not remove any of the six children still in the home.

During her investigation on March 10 and 11, 2021, Ms. Marquez noted that the four children did not report to her any concerns about the safety of the remaining six children in the home. Only two of the four children reported any use of alcohol or substance abuse going on in the home. The four children expressed that they could no longer keep what was going on the home "a secret"; Ms. Marquez testified that such statements alone did not give her concern.

Ms. Marquez made the referrals for the four children to undergo medical exams by Ms.

Dent and was present for each exam on March 12, 2021. Ms. Marquez advised Ms. Dent before the physical exams of the four children's allegations of abuse and neglect. Ms. Marquez testified that Ms. Dent's reports were consistent with the disclosures made by the four children to her and SRPD regarding abuse and neglect, meaning the children were not being properly fed in the home.

On March 12, 2021, Ms. Marquez was present for only two forensic interviews of A.W. and D.WB., but testified she reviewed all four children's forensic interviews. Ms. Marquez's testimony regarding the two forensic interviews she observed was that the children's disclosures were consistent about the physical abuse, not having enough food, not feeling safe in the home and that they were the only children in the home having these experiences. Ms. Marquez testified these interviews were enough to "substantiate the allegations." On March 15, 2021, Guardian expressed to CPS that she wanted to voluntarily relinquish guardianship of the four children.

Based on the investigation and up until that time, a Dependency Petition on the four children was filed on March 16, 2021, with the Juvenile Court naming Guardian along with the parents. The allegations as to Guardian were physical abuse and neglect, while noting she wished to relinquish the guardianship of the four children. Guardian voluntarily relinquished guardianship of the four children, resulting in Guardian being dismissed from the Dependency Petition.

Ms. Marquez testified she believed M.BW., along with the other five children remaining in Guardian's home, was safe. This conclusion was based on a multi-membered team that had interviewed the four removed children and seven of the ten children (including M.WB.) who underwent forensic interviews. All accounts were consistent that the four removed children were the only children subjected to the reported abuse/neglect. None of the children interviewed/questioned by CPS or in a forensic interview disclosed M.WB. was the subject of any abuse. There were no obvious, visible signs of any child abuse or neglect as to the six children in the home. Based on conversations during the

investigation with the family, and the six remaining children in the home, the safety concerns around the four removed children were no longer a current safety concern in Guardian's home.

Additionally, Ms. Marquez found M.WB., who was sixteen, to be" ... older and able to care for himself. He's also able to speak and say his needs and wants or if his needs are not being met or if his safety is threatened in any way." On June 9, 2021, while Guardian was at work, Ms. Marquez testified that she spoke with M.WB. in the home. When she asked M.WB. about the pantry being locked, M.WB. stated that since the four children were removed the pantry was no longer locked and he had access to the food at all times. Ms. Marquez testified specifically regarding M.WB.'s other statements during the home visit:

> "So, I asked him if he could speak with me. He was hesitant at first, but he complied. I asked him how he was doing. He said he was doing fine. He reported, I let me pretty much speak freely at first. He said he, excuse me, kind of had an idea of why I was there that day. And he was upset initially and stating that he could not believe what the other children had done and how much they had messed things up, those were his words, in the house. I asked him how he felt now that the other four children were gone. He said that things were a lot better. That they weren't as stressed, they were also his words, about being in the house. He said that everything was just more peaceful. And that he knew that it was wrong to feel happy that they were gone, but that's how he felt. He said he was glad that they were gone. I asked him ifhe felt safe in the house. He said yes. He said that he's always felt safe. He said that he grew up really without a mom and that the grandmother really is his mom. I asked him if felt that we needed to find an alternative placement for him. He became very sad. He said he did not have anybody. He said that they had always grown up without a lot of relative involvement. He said that being in the house with grandmother was the only home he knew and that he, if he were to be removed from there that he knew that he would end up in a group home like, like the other children, and he did not want that." "He said that he felt safe. That things were a lot better and that he did not want to leave. He said that if, he felt that he was not being treated right that he would be more than comfortable in telling other people, even if it was not CPS."

Ms. Marquez's assessment was that M.WB. was not vulnerable as to the alleged abuse

or neglect and a lack of risk existed as to M.WB. Based on her investigation, Ms. Marquez concluded that there was no risk of serious physical injury or substantial risk of serious physical injury or death to M.WB. if he remained in Guardian's care and there was no immediacy of threats or danger to M.WB., which she stated was CPS's standard for removal of a child from the home. No other incidents or reports as to child safety had been reported about Guardian's home from the remaining children since the removal of the four children.

At trial, CPS's position was Guardian should not be removed and it would be in M.WB.'s best interests to remain in the home. In Ms. Marquez's assessment, Guardian had cooperated, maintained positive, regular contact with CPS while following all in-home services recommendations with a good mindset. Guardian had provided M.WB. with a safe environment while meeting his basic needs. M.WB. reported feeling safe in the home and it would negatively impact M.WB. to be removed as he would have to be placed in a group home as CPS did not have any permanent placements, even for the other four children.

Ms. Marquez followed up with M.WB. in July of2021 at an unannounced visit to the home. Ms. Marquez observed his demeanor to be more outgoing and he seemed in "better spirits." M.WB. stated that things were going good for him, and he was considering getting a job at Walmart, which Guardian supported. He enjoyed being at home instead of school because of the pandemic. He expressed he continued to feel safe in the home and did not want to leave his mom/grandmother as "things were finally happy in the home."

Upon redirect examination Ms. Marquez acknowledged that she was familiar with some situations in which not all children in a home are the targets of abuse, but the abuse is focused on one particular child; however, she could not confidently answer if that were the situation occurring in Guardian's home. Ms. Marquez confirmed that she felt the level of abuse substantiated as to the four children rose to serious physical, substantial

risk of harm; thus, resulting in their removal from the home and later a dependency was filed.

The Court asked Ms. Marquez if she had been ready to proceed with the Dependency Petition filed as to the four children and Guardian, before the Guardian had been dismissed as a party from the Dependency case. Ms. Marquez answered "yes". The Judge asked Ms. Marquez if she was testifying in the context of the removal trial that the Dependency Petition allegations against the Guardian regarding the four children are true and Ms. Marquez answered in the affirmative. Next, the Court inquired of Ms. Marquez what the general practice of Social Services is regarding a person applying for guardianship and if a background check is performed and if the petition for guardianship is affected by a history from Social Services. Ms. Marquez answered in the affirmative that this is the practice.

SRPD Detective Carlos Campos

Detective Campos responded to the Salt River Family Advocacy Center on March 10, 2021, regarding the four children's allegations of abuse and neglect in Guardian's home. Detective Campos accompanied CPS to the Guardian's home that evening. Detective Campos observed all seven children's forensic interviews. (E.C., A.W., S.W.Jr., D.WB., M.WB., B.WB., and R.W.) Detective Campos testified that the case was referred to the"Tribal Prosecutor's Office" but was declined for prosecution. His testimony was he was "unable to come up with enough information to prove or disapprove the allegations" of physical abuse, neglect and mistreatment in not being fed appropriately and food being withheld as punishment. Detective Campos read from his report that there was a lack of physical evidence and conflicting statements amongst the multiple children and adults involved, causing him to believe the criteria for criminal charges to be filed were not met. He testified that the four children reporting abuse provided one set of allegations and the other three children who were interviewed later gave conflicting and opposite statements. Detective Campos stated that the children found in Guardian's

home at the time of the walk-through with CPS appeared normal and healthy and nothing alarming or out of the ordinary observed.

As to M.WB.'s forensic interview, Detective Campos confirmed M.WB. said he was never physically abused. Detective Campos observed M.WB.'s interview in real-time. Detective Campos interviewed Guardian as part of the investigation. Guardian described her methods of disciplining the children included talking to them and sending them to their rooms. Guardian explained the reason she locked the pantry was due to the children taking or hoarding food especially, sweets and junk foods. Guardian described how mealtimes were managed in the home for so many people. Guardian said that the Uncle would get involved when the children were physically fighting to break up the fights.

Mesa Police Department Forensic Interviewer Drue Siekman

On March 17, 2021, Ms. Siekman conducted video-taped forensic interviews of S.W.Jr. and E.C., with Detective Campos and a CPS case worker observing. Ms. Siekman also authored a report after the children's interviews. Ms. Siekman summarized at trial that during S.W.Jr.'s forensic interview he disclosed "chronic physical abuse" of himself and the other three children (E.C., A.W. and D.WB.) and "chronic neglect" by the withholding of food. "Chronic" was the word Ms. Siekman used to describe S.W.Jr.'s disclosures. Ms. Siekman testified S.W.Jr. disclosed that the food in the home was locked, and he resorted to stealing food, as did the other three children, especially D.WB. Ms. Siekman testified that during E.C.'s forensic interview, she disclosed various incidents in which she or another child was physically hit or scratched. E.C. disclosed the limited food the four children were provided like S.W.Jr. had also described, as a baggie of dry cereal in the morning and peanut butter sandwiches later in the day if food was provided. E.C. described an incident in which the four children were punished for stealing food by having to sleep outside in the cold during the night. E.C. also disclosed not being provided feminine products and being told by Guardian and Aunt to use underwear or

socks. E.C. disclosed the other six children in the home were treated differently, better and were given different kinds of food than the four of them. Ms. Siekman testified that neither child disclosed in their forensic interviews that M.WB. was physically abused or fed only peanut butter sandwiches or cereal or that he stole food.

Court's Comments

Following closing arguments and just prior to taking the matter under advisement, the Court commented on the legal analysis it would take and how the ruling would be determined as to the decision of the involuntary removal of Guardian pursuant to S.R.O. §10-124(a)(3). The Court stated that while there had been a question on whether M.WB. had been abused, the Court was focusing on the Guardian's actions or capabilities; therefore, the Court's ruling would be based solely on whether the GAL proved by clear and convincing evidence the allegations in the Petition. The Court further indicated that the decision is a determination of whether Guardian did not uphold her duties as permanent legal guardian. The Court acknowledged M.WB. wanted to remain with Guardian. The Court expressed no desire to further distress M.WB. Guardian's Advocate urged the Court to hold an in-camera interview with M.WB. who wanted to address the Court. The Court declined to hold an in-camera interview with M.WB. as he had not been called as a witness.

Order Formal Hearing on Petition to Remove Guardian

Four months later, on January 31, 2022, the Court issued its written order granting the Petition to Remove Guardian based only on one alleged ground: Guardian willfully and intentionally inflicted serious or chronic emotional abuse upon a child. S.R.O. § 10-124(a)(3)(h). The findings of fact focused on the four children removed from Guardian's home and their allegations of abuse and neglect, but no factual findings were made specifically as to M.WB. or his best interests. The Court made one specific finding:

"13. The Court FINDS that the actions of the guardian upon the four child victims

make her unsuitable to be legal guardian of any other child."

The Court also noted that it gave “considerable weight” to “[t]he statement read into the record by witness Pediatric Nurse/Practitioner. Kimberly Dent that “. . . withholding food as punishment and/or not providing enough food can result in short term and long term emotional and psychological effects.” The Court made its conclusion that grounds to involuntarily remove Guardian existed pursuant to S.R.O. § I0-124(a)(3)(h) and " ... it was not in M.WB.'s best interests to allow Guardian to remain, due to lack of suitability and character." The Court's Order also purported to find “that the actions of the guardian upon the four child victims makes her unsuitable to be a legal guardian of any other child.”

Appellant filed a Motion to Reconsider with the Court on February 4, 2022, which the Court denied on February 11, 2022.

Appellant filed a timely Notice of Appeal on February 9, 2022 and later filed an Amended Notice of Appeal on Feburary 24, 2022. This appeal ensued.[2]

Discussion

This matter involves the *Permanent* Guardian for the Juvenile at issue in this case.

S.R.O. § 11-168 states an important permanency policy which governs the Tribal Courts in all juvenile matters:

> **Sec. 11-168. Permanency policy.**
>
> (a) The policy of the Community is to protect the best interests of its children and to promote the stability of its families by setting forth standards that reflect its cultural values *while providing children a stable foundation in a permanent home. Every child deserves a permanent and stable home, and to be protected from emotional and mental harm caused by separation*

2 In her Initial Brief, Appellant requested oral argument in this matter.The Court has determined that since most of the dispositive issues in this case involve questions of law and were well briefed by both sides, oral argument would not materially advance the Court's understanding of the issues and would substantially delay final resolution of this appeal to the detriment of the Juvenile. For this reason the Appellant's request for oral argument is denied.

from his or her family and uncertain temporary placement.

(b) Consistent with these policies, all departments and agencies of the Community, and the Community court, shall protect dependent children from unnecessary prolonged separation from their parent(s) and extended family and from uncertain temporary placement.

(Emphasis supplied). Section 11-168(b) expressly directs the Community courts to adhere to this permanency policy. Since the Juvenile here has known the Permanent Guardian (his grandmother) as his "mom" for most of his life, the Guardian ad Litem must present an extraordinary compelling case to interfere with this relationship months before the Juvenile became an adult. For various reasons enumerated below, the Guardian ad Litem completely failed to present such a case.

A. Contrary to the Argument of the Guardian ad Litem and the Theory of the Juvenile Court, Section 10-124(a)(3)(h) of the Salt River Ordinance Requires Proof of Abuse of the Juvenile Involved in the Guardianship, Not of Another Child, for Termination of a Permanent Guardianship.

The parties and the Juvenile Court agreed that the dispositive section of the Salt River Ordinances was Section 10-124(a)(3)(h). That section reads as follows:

(3) Grounds for involuntary removal of a guardian. Any one of the following allegations proven by the Community at trial shall be grounds for the involuntary removal of a guardian:

. . .

h. The guardian willfully or intentionally inflicted serious or chronic emotional abuse upon *a child*; **. . . .**

(Emphasis supplied). The parties clearly disagree, however, as to the meaning of "a child" as used in Section 10-124(a)(3)(h). Starting with the Opening Statement at the hearing in the Juvenile Court, the Guardian ad Litem has consistently maintained that "a child" means any child, not the child subject to the guardianship in question. The entire case advanced at the hearing by the Guardian ad Litem to support removal was based on that theory. The Permanent Guardian disagreed and has maintained that "a child" means the child subject to the guardianship, arguing that the Permanent Guardian

cannot be removed without some showing of abuse of the juvenile in question and that such removal is in the best interest of that juvenile. The Juvenile Court erroneously adopted the position of the Guardian ad Litem, noting that the issue before that court in the removal proceeding was not whether the Juvenile had been abused but the suitability of the Permanent Guardian.

This Court finds that the interpretation of Section 10-124(a)(3)(h) advanced by the Guardian ad Litem, and accepted by the Juvenile Court, is in error as a matter of law. Overlooked by all parties and the Juvenile Court in interpreting Section 10-124(a)(3)(h) is another closely related subsection that permits removal of a permanent guardian where " [t]he guardian has had a separate guardianship or parental rights as to *another child* involuntarily terminated." S.R.O. §10-124(a)(3)(f).

When juxtaposed with Section 10-124(a)(3)(h) the express language of Section 10-124(a)(3)(f) demonstrates the drafters of the former section meant "a child" to refer to the child subject to the guardianship, not some other child. First, and most important, Section 10-124(a)(3)(f) demonstrates that when the code drafters meant to refer to "another child" they did so expressly, not by substituting the article "a" for the article "the" in Section 10-124(a)(3)(h), as argued by the Guardian ad Litem. The express reference to "another child" two subsections above Section 10-124(a)(3)(h) indicates that "a child" in that subsection references the child subject to the guardianship in question. Second, clearly had the Permanent Guardian not voluntarily relinquished guardianship over the four children in the prior proceeding, she might have been removed as Permanent Guardian for the Juvenile under Section 10-124(a)(3)(f) had she been adjudicated to have abused the four children and *involuntarily* been removed as their guardian. But that is not what happened! She voluntarily relinquished her guardianship without any adjudication and was dismissed from the case. The theory advanced by the Guardian ad Litem, and apparently accepted by the Juvenile Court, would enlarge the grounds for removal of a guardian beyond what Section 10-124(a)(3)(f) permits. That result not only flies in the face of the intent of the drafters as reflected

by the clear difference in language used in Sections 10-124(a)(3)(f) & (h), it also would deny the Permanent Guardian any effective legal notice of the consequence of her voluntary relinquishment of the guardianship of the four children – a serious due process problem which needs little more discussion. Put simply, the Guardian ad Litem simply cannot use a proceeding under Section 10-124(a)(3)(h) to adjudicate abuse of another child or children and ascribe to that adjudication, the limited consequences set forth in Section 10-124(a)(3)(f). Finally, where permanent guardianships of minors are involved, this more limited reading of "a child" as used in Section 10-124(a)(3)(h) is virtually compelled by the permanency policy of Section 11-168 discussed above. Where no abuse of the minor involved in the guardianship has been shown, the Community courts have no justification for interfering with the permanent home of the minor under the guardianship.

Thus the entire legal theory of the Petition advanced by the Guardian ad Litem and accepted by the Tribal Court offered no justification under the Salt River Ordinances for the removal of the Permanent Guardian. Consequently, the Order of the Juvenile Court was in error as a matter of law.

B. Even Were the Court to Accept the Interpretation of Section 10-124(a)(3)(h) Offered by the Guardian ad Litem, No Abuse of the Type Required by That Section is Shown on This Record, As A Matter of Law

In the Petition, the Guardian ad Litem alleged three grounds for removal of the Permanent Guardian: (1) The Guardian willfully or intentionally inflicted serious or chronic emotional abuse upon a child; (2) The Guardian engaged in egregious conduct that poses a risk to a child's wellbeing; and (3) the guardian had knowledge of emotional or physical abuse or neglect of a child and failed to protect that child from such harm. The Juvenile Court expressly found that the second and third grounds had not been proven, a finding not contested in this appeal. Thus, even if this Court were to accept the more expansive definition of "a child" as used in Section 10-124(a)(3)(h), it would

have to find that the record contained evidence that the Guardian willfully or intentionally inflicted serious or chronic emotional abuse upon a child.

Section 10-124(a)(3)(h) expressly requires proof of "serious or chronic *emotional abuse*." (Emphasis supplied). It deals with emotional, not physical, abuse, the latter being covered by other subsections. Chapter 10, unfortunately, contains no express definition of emotional abuse. The Permanent Guardian argues, and this Court agrees, that in the absence of such a definition in Chapter 10, the Court should look to the related Chapter 11, dealing with Juveniles, in the context of the removal of a Permanent Guardian for the Juvenile. Salt River Ordinances Section 11-2 defines abuse in relevant part as:

> Abuse means . . .infliction of or allowing another person to cause *serious emotional damage as evidenced by severe anxiety, depression, withdrawal or aggressive behavior* and which emotional damage is caused by the acts or omissions of an individual having care, custody and control of a child.

(Emphasis supplied). Plainly the italicized language in the definition requires that the serious emotional abuse actually be causing, not merely posing a risk of, the described emotional damage – severe anxiety, depression, withdrawal or aggressive behavior.

While the Guardian ad Litem presented evidence of behaviors by the Permanent Guardian directed toward the other four children that she claimed constituted emotional abuse, absolutely no medical, psychological or other evidence was presented of severe anxiety, depression, withdrawal or aggressive behavior. While one child did appear a bit withdrawal at one interview, no evidence suggested that such withdrawal constituted any type of emotional pattern for that child. Rather, the Guardian ad Litem and the Juvenile Court relied on the theory that the actions of the Permanent Guardian *could cause*, rather than had in fact caused, such emotional damage. Specifically the Guardian ad Litem presented, and the Juvenile Court expressly "gave considerable weight" to "[t]he statement read into the record by witness Pediatric Nurse/Practitioner. Kimberly Dent that 'withholding food as a punishment and/or not being provided enough

food *can result* in short term and long term emotional and psychological effects." Order, Findings and Conclusions of Law, ¶ 12(a). Not only does this statement not expressly say, although it may imply, that the "emotional and psychological effects" it discusses were adverse or detrimental, it also completely fails to meet the express standards of the definition of abuse found in Section 11-2. The testimony does not state that any of the four children in question *had actually* suffered any of the emotional damage listed in the statutory definition of abuse, merely that "emotional and psychological effects" "can result" from behavior of the type the Permanent Guardian directed toward the four children. That testimony was insufficient as a matter of law to satisfy the definition of abuse set forth in Section 11-2. Thus, even were this Court to accept (which it does not) the more expansive definition of "a child" offered by the Guardian ad Litem for purposes of Section 10-124(a)(3)(h), the case presented by the Guardian ad Litem to substantiate the Petition would still fail since the Guardian ad Litem failed as a matter of law to prove abuse, as defined in Section 11-2. Emotional abuse under that section is not merely detrimental behavior that *could* harm a child, it is such behavior that *has* harmed the child "as evidenced" by the described adverse emotional effects.

C. Due Process of Law and the Rights of the Permanent Guardian

Both the Constitution of the Salt River Pima-Maricopa Indian Community and the federal Indian Civil Rights Act guarantee that a person will not be deprived of life, liberty or property without due process of law. SRPMIC Const. Art. XII, § 2; 25 U.S.C. § 1302(8). The Constitution of the Salt River Pima-Maricopa Indian Community specifically commands that due process of law be interpreted "as understood through the cultural experience of the people of this community."

In *Santosky v. Kramer*, 455 U.S. 745, 753-4 (1982), the United States Supreme Court confronted the question of the due process rights of parents in proceedings to terminate their parental rights. The Court majority wrote in that case:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Since this Court is commanded to interpret the due process guarantees of SRPMIC Const. Art. XII "as understood through the cultural experience of the people of this community," we agree with the Permanent Guardian that an extended family member, here the grandmother, serving as Permanent Guardian should have the same due process rights as any natural parent in any proceeding to terminate or interfere with the permanent guardianship.

While this Court agrees with the Permanent Guardian that extended family members serving as permanent guardians have the same due process rights as natural parents, it does not agree with the implications of some of the arguments advanced by the Permanent Guardian. The Permanent Guardian impliedly argued that both natural parents and permanent guardians have some special substantive due process right to retain their relationship with the child, irrespective of their conduct. Plainly no parent or guardian has any property right in a child and their liberty interest in retaining their relationship with the minor is limited, as the *Santovsky* case held, to assuring that when a government "moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." In short, the due process guarantees at issue are procedural, not substantive.

As the United States Supreme Court held in *Goldberg v. Kelly*, 397 U. S. 254 (1970), the essence of due process of law in a civil proceeding involves adequate and effective notice and an opportunity to appear and defend. With two exceptions, the Permanent Guardian does not dispute that she was afforded adequate and effective notice and a lengthy hearing where she had a full opportunity to present her case and defend herself. Thus, with two exceptions, the procedural requirements of due process of law were fully satisfied in this proceeding.

The two exceptions involve the notice requirement of due process of law. First, while not clearly raised by the Permanent Guardian, had this Court interpreted "a child" in Section 10-124(a)(3)(h) to reference any child, the language of Section 10-124(a)(3) would have afforded the Permanent Guardian inadequate notice that her *voluntary* relinquishment of the guardianship over the four children could still result in loss of guardianship over the remaining children, a relationship she expressly sought to retain. This concern for due process of law clearly weighed in favor of interpreting Section 10-124(a)(3)(h) more

strictly, as this Court did above. Second, and more important, nothing in the Petition or the hearing provided the Permanent Guardian any notice that her guardianship rights over the other remaining children or potential other minors needing her assistance was at issue. Specifically, the Petition did not name the remaining children nor expressly request her disqualification from serving as a temporary or permanent guardian for any other children. Yet, the Order of the Juvenile Court expressly found "that the actions of the guardian upon the four children makes her unsuitable to be a legal guardian of any other child." In this finding the Juvenile Court erred since it denied the Permanent Guardian notice and an opportunity to be heard on that issue and thereby denied her due process of law.[3]

Conclusion

For the reasons stated above, this Court must REVERSE the Order of the Juvenile Court dated January 31, 2022, order that the Permanent Guardian be restored to her former duties as Permanent Guardian of the Juvenile, order that the Juvenile be immediately restored to her care and custody, and order that the Petition be dismissed with prejudice.

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3 While the Juvenile in question in this case was never directly a party to this proceeding or the appeal, this Court cannot help but notice that he too may have been denied statutory rights and perhaps due process of law when the Juvenile Court declined to interview him. Under S.R.O. § 11-174(4) at any permanency hearing involving the placement of a child, the Juvenile Court must take account of "[t]he child's desires if over the age of 14, or where otherwise deemed appropriate." This Court believes that the same rights should be afforded any juvenile over the age of 14 in any proceeding affecting their placement, including a proceeding under Section 10-124. The Juvenile in this case was 17 years of age at the time of the hearing. His advocate made clear that he wanted to address the Court and speak with the Judge. The Juvenile Court judge denied his request because he was not on the witness list supplied by the parties. While the juvenile's rights are not properly before this Court in this appeal, the Court cannot help but note that it believes that decision was erroneous so as to guide future conduct of the Juvenile Court.

ISSUED this, 8th day of June, 2022

S E A L

Electronically approved .

/s/
Robert N. Clinton, Justice

Electronically approved

/s/
Mary Gus, Justice

Electronically approved

/s/
Siera Russell, Justice