



**SALT RIVER
PIMA-MARICOPA INDIAN COMMUNITY
Court of Appeals**

10,005 E. OSBORN RD. SCOTTSDALE, AZ 85256 (480) 850-8115

In the Matter of:

**A. K. W. (d.o.b. 10/11/05),
a minor,**

And Concerning:

**MALCOLM WOOD,
Appellant,**

And

**LISA MIGUEL,
Appellee.**

Case No.: APC-14-0001

**Cases below: CF-10-0135,
CF-14-0016, CF-14-0020,
CF-14-0023**

OPINION

**Before Jan W. Morris, Judge Pro Tempore, Siera T. Russell, Judge Pro
Tempore, and Richard J. Trujillo, Judge Pro Tempore**

PER CURIUM

BACKGROUND

{1} On April 22, 2010, Appellant/Petitioner filed his petition for custody of the parties' son A.K.W., Case No. CF-10-0135, accompanied by a request for immediate temporary custody, alleging his belief that his son, A.K.W., might be imperiled due to the registered sex offender status (sex offenses against a minor) of Appellee's partner (who later became Appellee's husband), R.L.M. who was allegedly living in Appellee's residence along with the minor.

{2} On April 30, 2010, the trial judge found that "RLM's status as a convicted and registered sex offender . . . threatened the safety" of A.K.W. and granted Appellant/Petitioner's request for temporary custody.

{3} After a full hearing on October 19, 2010, the same judge in his October 26, 2010 Order ("October 26 Order") "found RLM is not living/residing with" Appellee/Respondent (emphasis in original), and "found the allegation that RLM poses an imminent threat to [A.K.W.] to be unsubstantiated." (Emphasis in original). This Court notes that both of these "findings" are actually conclusions rather than factual findings, and further notes that the judge does not offer a full and complete recitation of facts that support these conclusions. The judge awarded (i.e., restored) custody of the minor to Appellee/Respondent with visitation for Appellant/Petitioner. Although the October 26 Order does not explicitly so state, it implies that the April 30, 2010 temporary custody order in favor of Appellant/Petitioner was vacated. Similarly, the October 26 Order implies that Appellant/Petitioner's original petition for custody was denied since "physical and legal custody" was awarded to Appellee/Respondent. The October 26 Order represents the final judgment on the issue of legal custody in CF-10-0135.

{4} Additional pleadings were filed in late 2013, including CF-14-0020 dealing with temporary custody and CF-14-0023 dealing with immediate temporary custody.¹

{5} The trial court ultimately held a hearing on CF-14-0020 and CF-14-0023 on November 6, 2013 and issued its Order on November 7, 2013 ("November 7 Order"). At that hearing, the temporary custody order previously issued in CF-14-0020 was vacated with custody being restored to Appellee as previously ordered in CF-10-0135. While the November 7 Order does not indicate the specific disposition of CF-14-0023, the judge's conclusion that "the mental health injury or safety [sic] of said minor is not seriously impacted or impaired residing with Respondent" is indicative that the heavy legal burden for justifying emergency temporary custody was not met. It is from this Order that Appellant's appeal arises.

{6} Appellee filed her Motion to Dismiss the appeal with this Court on March 10, 2014, four days before scheduled oral argument, challenging this Court's

¹ Appellant, in his Notice of Appeal, mistakenly refers to Case No. CF-14-0016 which is a pleading regarding visitation submitted by the minor's grandparents, and is unrelated to this appeal.

jurisdiction to hear this appeal on the ground that the November 7 Order is not a verdict or a final judgment from which an appeal can arise.

{7} At oral argument on March 14, 2014, Appellant waived the time limit for filing a written response to the Motion to Dismiss and agreed to respond orally. At oral argument, Appellant asserted that Appellee's Motion to Dismiss is untimely and must be denied.

DISCUSSION

{8} First addressing the timeliness of Appellee's Motion to Dismiss, Appellant relies on Sec. 4-32, Rules of Civil Appellate Procedure, Rule 12(g) which provides that this Court can strike any brief that does not conform to the requirements of Rule 12 generally, including timeliness limitations in Rule 12(a). However, Rule 12(g) refers to *briefs*, not to *motions*. Motions are governed by Rule 10 which does not include any time limitations that on their face would serve as a basis for a challenge to the motion's timeliness. Appellant's contention that the substance of the Motion to Dismiss *could* have been raised in a response brief is unavailing since jurisdictional challenges can be raised at any time, and the Rules do not specify a particular vehicle (either brief or motion) that *must* be used.

{9} Chapter 4, Sec. 4-32, Rules of Civil Appellate Procedure, Rule 2(a) provides that "any party aggrieved by the verdict or final judgment in a civil action may bring an appeal", and it was pursuant to this authority that Appellant filed his Notice of Appeal, *see* Appellant's Brief in Support of Appeal, p.5, requesting as his relief a stay on the November 7 Order pursuant to Sec. 4-32, Rule 16(a)(2)(A)(iii), *see* Appellant's Notice of Appeal, p.1. Clearly, there was no jury to render a verdict in this case, so we must determine whether the November 7 Order was a final judgment.

{10} As noted *supra*, the November 7 Order, while referencing CF-10-0135 (and that case's final judgment dated October 26, 2010), actually disposed of the matters raised in CF-14-0020, a *temporary custody* matter, and CF-14-0023, an *immediate temporary custody* matter. Because the November 7 Order disposed of these requests for temporary relief, neither case elicits a final judgment or a permanent change to a prior final judgment by the trial court. While it is true that Sec. 4-32, Rule 2(c)(3) does provide that a temporary custody order may be appealed through

a special action pursuant to Sec. 4-32, Rule 2(b), that is not the mechanism Appellant chose to use.

{11} Even if Appellant *had* chosen to initiate his appeal as a special action, it does not appear he could have met all three required criteria set forth in Sec. 4-32, Rule 2(b), and in particular criterion (1), since the record from the trial court indicates that further action regarding a requested change to the October 26, 2010 final judgment has yet to be considered and decided at a hearing presently scheduled for March 31, 2014.

CONCLUSION

{12} The Rules of Civil Appellate Procedure do not establish any time limitation or other impediment to filing motions with the Court of Appeals at any time prior to the disposition of the appellate case. Consequently, Appellee's Motion to Dismiss cannot be viewed as untimely. In any event, jurisdictional challenges can be raised at any time. Appellant's contention to the contrary fails.

{13} We agree with Appellee's assertion that, because the November 7 Order is not a verdict or a final judgment, we are without jurisdiction to entertain this appeal. Consequently, the appeal must be dismissed.

{14} An appeal pursuant to Sec. 4-32, Rule 2(a) does not lie from a trial court order that makes temporary custody modifications. In contrast, if, as a result of the upcoming March 31, 2014 hearing, there is a change of custody regarding A.K.W. from the original legal custody order in Case No. CF-10-0135, any resulting order might constitute a modification of the existing full custody order of October 26, 2010 from which an appeal potentially could lie.

{15} We further note (for the benefit of all trial judges) that it is far easier for this Court, and likely for litigants as well, to decipher judicial orders in proceedings involving multiple case designations if each case number is separately discussed and decided in the judge's written order. Ideally, rather than jumbling together findings and conclusions from various cases in no particular order, each case number should be discussed individually in great detail within the trial judge's ruling or written order either by numerical designation or chronologically.

{16} Having said that, we also anticipate for the sake of clarity that at the upcoming hearing scheduled by the trial judge on the issue of any potential change in custody from the October 26 Order, the trial judge will consider and address the full panoply of applicable factors that are relevant to the best interests of the minor in a custody determination, including the effect of the Community's SORNA laws on the issues of custody and visitation or parenting time if that issue is raised by either party. We further anticipate that the judge, in his order, will provide detailed factual findings regarding each relevant factor to support the legal conclusions drawn and relied upon to formulate his decision. Such clarity is expected for all judicial decisions in the interests of justice, and serves two purposes: to inform the parties precisely how the decision was achieved; and, to demonstrate that due process was afforded to all parties.

{17} The Motion to Dismiss should be granted.

THEREFORE, IT IS THE ORDER OF THIS COURT that:

1. Appellee's Motion to Dismiss is GRANTED;
2. Appellant's appeal of the November 7 Order is DISMISSED;
3. Appellee's Motion to Reset Briefing is rendered moot.

SO ORDERED this 21st day of March, 2014.

Electronically approved 3/21/2014

/s/

Jan W. Morris, Judge Pro Tempore

Electronically approved 3/21/2014

/s/

Siera T. Russell, Judge Pro Tempore

Electronically approved 3/21/2014

/s/

Richard J. Trujillo, Judge Pro Tempore

SEAL

FILED
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