

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

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FILED

IN AND FOR THE COUNTY OF COCONINO

Dan R. Slayton, Judge
Division 2
Date: April 11, 2019

Carrie Faultner, Judicial Assistant

O R D E R

STATE OF ARIZONA,

Plaintiff,

vs.

TIMOTHY MAX DURAN,

Defendant.

Case No. CR 2019-00338

ACTION: DEFENDANT’S MOTION TO MODIFY ORDER REGARDING CONTACT WITH VICTIM’S FAMILY

The Court summarily denies defendant’s motion to modify this Court’s no contact order between the defendant and his children. Defendant is correct that no findings were specifically made on the record. This Court was in error and will correct this error in this decision. *Samiuddin v. Nothwehr*, 243 Ariz. 204 404 P.3d 232 (2017).

1. Defendant’s children were the subject of an emergency guardianship. This Court is assigned to oversee and hear all guardianship matters in Coconino County. This Court was made aware of the request, and also made aware pursuant to its review of the emergency guardianship that there was also a pending dependency case in Division Four.
2. Upon review with Division One, who for reasons not relevant for this order had, at that time the guardianship case, it was made known that defendant had filed a notice of not contesting his rights as a parent to be severed. This issue is still pending before Division Four. It is an admission by defendant of his view of his parental rights.
3. Division One has issued an order of no contact between defendant and his children.
4. Defendant failed to advise this Court of the no contact order issued by Division One in his pleading.

5. Defendant failed to inform this Court as to how two superior courts issuing contradictory orders would be enforced.
6. Defendant failed to advise this Court of his notice of not contesting the severance of his rights as a parent.
7. Defense counsel failed to advise this Court as to how his client's not contesting the severance of his rights as the children's parent would affect the assertion of that parental right to contact in a criminal proceeding.
8. Defendant failed to cite this Court to applicable Arizona case law, i.e., Samiuddin v. Nothwehr, 243 Ariz. 204 404 P.3d 232 (2017), which deals with almost the identical issue of this Court's authority to order no contact between a father and his children at the arraignment:

We hold that due process and, by implication, Rules 7.2(a) and 7.3(b), require the trial court to make an individualized determination in setting discretionary pretrial release conditions that restrict parents' access to their minor non-victim children. Consistent with due process standards, a defendant has a right to be heard "at a meaningful time and in a meaningful manner," Mathews, 424 U.S. at 333, 96 S.Ct. 893, but a trial court is not generally required to conduct an evidentiary hearing. Nor is the trial court required to find evidence of actual harm to a minor non-victim child as a prerequisite to imposing a condition restricting contact; such a requirement would undermine the prophylactic value in release conditions fashioned to protect the community, including defendants' minor children. The trial court must, however, make findings and articulate its reasoning for determining that the condition is the least onerous measure reasonable and necessary to mitigate an identifiable risk of harm.

Samiuddin v. Nothwehr, 243 Ariz. at 212.

9. This Court has little information regarding the alleged facts of this case. However, if there is the slightest evidence that any of the defendant's children were witnesses to, or have knowledge of the allegations against the defendant such that they may be called as witnesses, this Court would certainly expect defense counsel to apprise this Court of that fact. Such an allegation or lack thereof, would certainly be part of any consideration of contact between defendant and his children. Defense counsel did not address this issue in his motion. This Court, therefore, has not been provided with information on this issue on which it can consider the effect of this order on either the defendant or the children. Harm to the defendant will not be presumed under the facts known to this Court.
10. This no contact order affects communication between the defendant and his children in the criminal case. Defense counsel has not shown how this order by both Division One

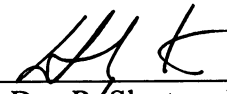
and this Court negatively impacts his rights in the dependency proceeding where both he and the children are represented by counsel.

This Court finds there is an existing no contact order issued by Division One prohibiting the defendant from having contact with his children. This Court further finds that the defendant has expressed his position to Division Four that he is not contesting the severance of his rights against him, although this notice is still pending before Division Four. This “no contest” would certainly affect his right to be considered as a parent of the children for purposes of contact. This Court further finds there exists at least some measure of allegation that the children would suffer harm if allowed contact with the defendant as reflected in the no contact order issued by Division One.

IT IS THEREFORE ORDERED Denying defendant’s motion to modify the no contact order issued by this Court.

4.11.19

Date



Dan R. Slayton, Judge
cc: Stacy Kreuger
Steve Harvey