

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2012-006869-001 DT

08/27/2012

HONORABLE KAREN POTTS

CLERK OF THE COURT
S. Yoder
Deputy

STATE OF ARIZONA

JAY ROBERT RADEMACHER
MARISCHA H GILLA

v.

ROBERT FISCHER (001)

DWANE M CATES
JOY BERTRAND
DANIEL MIRANDA

UNDER ADVISEMENT RULING

The Court has considered the State's Motion Requesting Court Order for Deposition or Forensic Interview of Minor Victims, the State's Motion to Appoint Guardian Ad Litem for Minor Victims, Victim Belinda Radder's and Her Minor Children's Objection to both of the State's Motions, Defendant's Response to State's Motion for Deposition, State's Response to Victim's Objection, and the oral argument of the parties and counsel for Belinda Radder and the minor children.

The State has charged Defendant with second degree murder in connection with the death of Norman Radder on December 30, 2010. Mr. Radder was the father of McKenna and Cassidy Radder, ages 9 and 11 respectively (hereinafter the "minor children"). Belinda Radder is the mother of the minor children. It is undisputed that the minor children and Mrs. Radder were at their home at the time of Mr. Radder's death. The police briefly interviewed McKenna Radder on the day of Mr. Radder's death. The police were told at the time of the interview that she was unaware that her father was dead, and thus the interview appears to have been brief with little information obtained other than the time in which McKenna went to sleep the night of the alleged homicide. Cassidy Radder has never been interviewed.

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The State's Request to Depose the Minor Children

The State seeks to depose the minor children under Ariz.R.Crim.P. 15.3(a). That Rule grants the court the discretion to order a deposition of a person under one of three circumstances. The second circumstance, applicable here, is when the person's testimony is material to the case or necessary to adequately investigate the offense, the person was not a witness at the preliminary hearing, and the person will not cooperate in granting a personal interview. The State has attempted to arrange interviews of the minor children through their mother, Mrs. Radder, and she has refused to allow the children to be interviewed. Mrs. Radder's opposes both the request for deposition and the appointment of a guardian ad litem grounded upon her claim that (1) the State cannot demonstrate that society's interest would be jeopardized by allowing the victims to refuse to be interviewed, and (2) the State cannot show that any conflict of interest between Mrs. Radder and the minor children exists justifying the appointment of a guardian ad litem. The Defendant has taken no position, other than seeking the right to be present behind a two-way window if a forensic interview is ordered.

The Court first addresses Mrs. Radder's claim that the State does not have grounds to take the depositions of the minor children. As a preliminary matter, the parties agree that the minor children are victims in this matter as they are the children of the decedent, Mr. Radder. And, while a victim has the right to refuse a deposition requested by a Defendant or his counsel, this right does not extend to a deposition requested by the State. *Constitution of the State of Arizona, Arti. II, Section 2.1(5); Ariz.R.Civ.P. 39(b)(11),(12)*. The question thus with whether the State has met its burden under Rule 15.3(a)(2). The Court finds that it has. The presence of the victims in the home at the time of Mr. Radder's death renders their testimony material to the case as the minor children may have witnessed or overheard events that can be related to their father's death, may assist in providing a timeline of events, and may provide facts relevant to Mr. Radder's state of mind earlier in the day, which may be material to the possible defense that Mr. Radder committed suicide. Moreover, the minor children did not testify at a preliminary hearing and the minor children's mother is refusing to allow them to be interviewed.¹ Thus, the State has the right to depose the minor children.

The State's Request for a Guardian Ad Litem

The State has also requested that this Court appoint a guardian ad litem for the minor children presumable solely in regard to their depositions. A.R.S. § 13-4403(A) provides that

¹ Mrs. Radder mistakenly argues that *S.A. v. Superior Court In and For County of Maricopa*, 171 Ariz. 529, 831 P.2d 1297 (App. 1992) requires the State to prove that society's interest in justice would be jeopardized before a victim may be deposed. This case did not so hold.

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“the rights and duties that are established by this chapter arise on the arrest or formal charging of the person...who [is] alleged to be responsible for a criminal offense against a victim” and “continue to be enforceable pursuant to this chapter until the final disposition of the charges.” A.R.S. § 13-4403(C) provides that if the victim is a minor, the victim’s *parent* may exercise all of the victim’s rights on behalf of the victim unless the criminal offense is alleged against that parent, in which case subparagraph (D) provides factors for the court to consider in appointing a representative to act on behalf of the minor. Ariz.R.Crim.P. 39(b)(8) provides that a victim has “[t]he right to be accompanied at any interview, deposition, or judicial proceeding by a parent or other relative, except persons whose testimony is required in the case.” Ariz.R.Crim.P. 39(b)(9) grants a victim “[t]he right to name an appropriate support persons...to accompany the victim to any interview, deposition, or court proceeding, except where such support person’s testimony is required in the case.”

The above statutes and rules preclude Mrs. Radder, as the children’s mother, from either accompanying the minor children at the deposition or advising the children of their rights under the law at this stage of the proceeding because her testimony is required in the case. Thus, the Court finds that the minor children are now in need of the appointment of a lawful representative to advise them of their rights and to accompany them to any deposition ordered by the Court or any interview that might subsequently be undertaken.

The Court disagrees that *Stewart v. Superior Court In and For County of Maricopa*, 163 Ariz. 227, 787 P.2d 126 (App.,1989) precludes the appointment of a guardian ad litem (or lawful representative) in this matter at this stage. In *Stewart*, the court noted that no rule or statute expressly granted the criminal division of the Superior Court with the authority to appoint a guardian ad litem for children who might be called as witnesses but nonetheless found that the court had such power. The appointment was ultimately denied based upon the facts of that case after the court analyzed whether there was a conflict of interest between the children and the parent. Since that case was decided, however, the Constitution was amended to add the Victims Bill of Rights, the above-cited statutes, and Rule 39 which expressly allows the criminal court to appoint a lawful representative for a victim in connection with the victim’s deposition. These statutes and rules not only expressly grant the court the authority to name a lawful representative, but also preclude Mrs. Radder from assuming that role.

For the foregoing reasons,

IT IS ORDERED granting the State’s Motion Requesting Court for Deposition or Forensic Interview of Minor Victims in part. The State’s request to take the depositions of McKenna and Cassidy Radder is granted, however these depositions are stayed until the court appoints a lawful representative to advise the minor children at this stage of the proceeding and

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to accompany them to the depositions. The Court may, after the evidentiary hearing, set forth conditions relating to those depositions.

IT IS FURTHER ORDERED setting an evidentiary hearing on **September 7, 2012 at 1:30 p.m.** to determine who should be named as the lawful representative of the minor children, McKenna and Cassidy Radder in regard to the State's request for a deposition. (Time allotted: 2 hours.)

This case is eFiling eligible: <http://www.clerkofcourt.maricopa.gov/efiling/default.asp>. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.