CHEYENNE RIVER SIOUX TRIBAL COURT OF APPEALS
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER SIOUX INDIAN RESERVATION

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WAKAN ZEPHIER, DEFENDANT/APPELLANT, v. WILLARD WALTERS, III, PLAINTIFF/APPELLEE.	)	Appeal No. 15A06 MEMORANDUM OPINION AND ORDER

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Per Curiam (Chief Justice Frank Pommersheim and Associate Justices Taylor Bald Eagle and Franklin Duchenaux)

I. Introduction and Background

This case involves a custody dispute concerning the minor child, W. W., who was born on March 31, 2010. The father of W. W. is Willard Walters, III, appellee herein. The mother is Wakan Zephier, appellant herein. Willard Walters and Wakan Zephier never married. Mr. Walters is an enrolled member of the Cheyenne River Sioux Tribe and Ms. Zephier is an enrolled member of the Sisseton Wahpeton Oyate. The minor child, W. W., is an enrolled member of the Cheyenne River Sioux Tribe.

Both parents recognize that the Cheyenne River Sioux Tribal Court has exclusive jurisdiction over this custody proceeding. All prior actions involving custody of W. W. have taken place in the Cheyenne River Sioux Tribal Court. No other court has ever asserted jurisdiction. As a result, jurisdiction is not an issue in this case. Both parties agree that this is the appropriate court in which to resolve the issue of custody.

Disagreement between the parents over custody and visitation has existed for quite some time. The disagreements have largely been honorable and free from bitterness and name calling. They have been most often occasioned by the parties moving and relocating in pursuit of

educational and employment opportunities without timely notice and adequate communication with the other parent.

These difficulties came to impass when Ms. Zephier moved to Hawaii with W. W. in November 2014. At that time, Ms. Zephier and Mr. Walters had joint legal custody but Ms. Zephier had primary physical custody of W. W. pursuant to the trial court's custody order of May 31, 2013. Mr Walters asserts that he had only sporadic telephone and internet communication and no in person contact with his daughter after Ms. Zephier and W. W. moved to Hawaii. He further contends that he never consented to the Hawaii relocation of Ms. Zephier and W. W..

Mr. Walters subsequently filed a *pro se* motion in the trial court to change primary physical custody from Ms. Zephier to himself. Much procedural confusion ensued. Ms. Zephier sought a continuance of the scheduled hearing, but it was denied on technical grounds. Due to long distance miscommunication with the court clerk's office, Ms. Zephier did not appear either in person or telephonically at the custody hearing of June 16, 2015. The trial court awarded primary physical custody of W. W. to the father, Willard Walters III. The written (default) order was issued on June 23, 2015, but Appellant claims to have never received it.

Having retained counsel, Ms. Zephier promptly filed a motion to stay the order changing primary physical custody from Ms. Zephier to Mr. Walters and also requested a rehearing on the custody decision. The motion for the stay and rehearing on custody was granted in a written order on September 11, 2015.

Mr. Walters then hired his own attorney. Discovery and visitation discussions took place between the parties and their counsel. Ms. Zephier and Mr. Walters agreed to summer 2016 visitation on the Cheyenne River Sioux Reservation with W. W. traveling from Hawaii to spend the summer with her father on the Cheyenne River Sioux Reservation in South Dakota. Mr. Walters subsequently fired his attorney and did not return W. W. to her mother in Hawaii as the

parties agreed. W. W. remains on the Reservation to this day with her father and members of his family, where she attends school and is enrolled in the first grade.

Upon the failure of Mr. Walters to return W. W. to Ms. Zephier in Hawaii, Ms. Zephier promptly filed a motion for an "emergency hearing"[1] to contest father's failure to return the minor child to her mother as he agreed. This motion was filed on July 11, 2016.

A hearing on custody finally took place on July 19, 2016[2]. Ms. Zephier appeared telephonically from Hawaii. Her attorney, Mr. Jeff Connolly, appeared in person. Mr. Walters appeared *pro se*. Testimony was given by both parties. The hearing also contained some unexplained procedural matters. Without any notice to Ms. Zephier, a guardian ad litem had apparently been previously appointed *sua sponte* by the court. The guardian ad litem both testified and submitted an unsigned written report. No written order appears in the record appointing said guardian ad litem.

Judge Carroll subsequently issued a written "custody order" on August 2, 2016. The order recognized joint legal custody in Ms. Zephier and Mr. Walters, but awarded primary physical custody to Mr. Walters with reasonable visitation to Ms. Zephier. Oddly, this order makes no reference to the stay of September 11, 2015 or appellee's failure to return the minor child, W. W., to Ms. Zephier as he agreed.

A timely notice of appeal was subsequently filed. Oral argument was held before this Court on March 10, 2017. Ms. Zephier appeared in person and was represented by counsel[3]. Mr. Walters appeared *pro se*.

II. Issues

The primary issues raised in this appeal are three-fold, namely:

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[1] Perhaps, it is more accurate to understand this "emergency hearing" as a show cause proceeding on why primary physical custody should not be returned to Ms. Zephier.

[2] Yet this hearing was ambiguous as to its subject matter and scope. Was it the rehearing on custody as recognized in the Court's order of Sept. 11, 2015 or the "emergency hearing" on the motion, filed on July 11, 2016, challenging Mr. Walters' failure to return W. W. to Ms. Zephier in Hawaii? Or both?

[3] Ms. Zephier was represented by Nathan Chicoine, who replaced Mr. Jeff Connolly when he was named a State Circuit Judge in Pennington County, South Dakota.

A) Whether Ms. Zephier was denied due process the hearing of July 19, 2016;

B) Whether the trial court failed to comply with the requirements of the Cheyenne River Sioux Tribal Code as they pertain to "the best interests of the child"; and

C) Whether the trial court failed to comply with the requirements of the Cheyenne River Sioux Tribal Code as they pertain to the appointment and participation of the guardian ad litem in this matter.

Each issue will be discussed in turn.

III. Discussion

A. Due Process

The guarantee of due process is embedded in both the Indian Civil Rights Act of 1968, 25 USD §1302(8) and Lakota tradition and custom. See e.g. *Clement v. LeCompte*, No. 93-09-A (CRST CT. OF APP. 1994), *Thompson v. CRST Board of Police Commissioners*, 23 IND. L. REPTR. 6046 (CRST CT. OF APP. 1996). The essence of due process is governmental respect for all individuals subject to its authority. This respect is often translated pragmatically in legal proceedings to mean notice and the opportunity to be heard.

The appellant asserts, without contradiction, that the July 19, 2016 hearing was never noticed as a "custody hearing" but merely as an "emergency hearing" dealing with Mr. Walters alleged failure to return the minor child, W. W., to her mother in Hawaii at the completion of the agreed upon "summer visitation". This failure of adequate notice deprived Ms. Zephier of due process and compromised her opportunity to prepare and to be 'heard' on the issue of custody. This lack of due process was compounded by the failure of the trial court to address the "emergency motion" and its allegation of Mr. Walters' violation of the parties' visitation agreement. Lastly, see the discussion *infra* of the due process infractions relevant to the appointment and use of a guardian ad litem in this proceeding.

B. Best Interests of the Child and the 'Tender Years' Doctrine

The Cheyenne River Sioux Tribal Law and Order Code contains a specific provision that states:

> In determining custody, the court *shall* consider the best interest of the child and the past conduct and demonstrated predilections of each of the parties and the *natural presumption that the mother is best suited to care for young children* (Emphasis added).

Cheyenne River Sioux Tribe Law and Order Code Section 8-3-10.

This "natural presumption" is usually referred to as the 'tender years' doctrine. The most common definition of this presumption is that the custody of young children should be awarded to the mother. This presumption has been significantly modified by many courts to be less of a dispositive presumption and more of one of many relevant factors to be considered in determining the "best interest of the child." See e.g., Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299 (1994).

This approach to the tender years doctrine is directly reflected in the text of Cheyenne River Sioux Tribal Law and Order Code Section 8-3-10. The "natural presumption" is relevant in determining the "best interests of the child", but it is not dispositive. It is simply one of many factors. It is also a mandatory not discretionary consideration. The use of the word "shall" in Section 8-3-10 leaves no doubt in this regard.

Despite this statutory directive, Judge Carroll's custody order makes no reference whatsoever to this section of the Tribal Code and the failure to do so constitutes reversible error. In addition, it is noted that Judge Carroll did not make any reference to this section of the Tribal Code in his earlier custody order of June 23, 2015.

C. Guardian ad Litem

The Cheyenne River Sioux Tribal Law and Order Code specifically authorizes the judicial appointment of a guardian ad litem. Cheyenne River Sioux Tribal Law and Order Code Section 8-6-1. Nevertheless, there are several procedural provisions that guide this process. These requirements include the necessity that a guardianship proceeding be initiated by the filing of a petition, including a recognition that the "court may initiate proceedings to appoint a

guardian and said appointment reasonably appears necessary and no other person has initiated said proceedings." Cheyenne River Sioux Tribal Law and Order Code Section 8-6-3.

In addition, such a judicially initiated proceeding must nevertheless provide written notice to the parents and a hearing must be held. Cheyenne River Sioux Tribal Law and Order Code Section 8-6-3. If a guardian ad litem is appointed, it must be reflected in an "order appointing a guardian, [and] setting forth the scope of the guardian's authority." Cheyenne River Sioux Tribal Law and Order Code Section 8-6-4. None of this appears to have been done in the case at bar. The record in this case contains no written order appointing a guardian ad litem, much less any description of the scope of such an appointment.

Despite this glaring absence in the record, the Tribal Court's "custody order" of August 3, 2016 makes specific reference to the testimony of a guardian ad litem and the submission of an unsigned report by the guardian ad litem.

This course of action contains two "reversible" mistakes of law. First, it is another violation of due process. It certainly exceeds the basic bounds of fundamental fairness – both legally and culturally – to have a custody hearing that employs the use of a guardian ad litem without any notice to the mother about the very existence of the guardian ad litem, much less the unannounced participation of said guardian ad litem in the custody hearing.

To be clear, this court is not criticizing the appointment of a guardian ad litem in this case, but rather the *manner* of appointment and the *lack of notice* as to the participation of the guardian ad litem in the custody hearing. The manner of appointment and the lack of notice constitute violations of due process.

Second, as noted above, the manner of appointment of the guardian ad litem violates several provisions of the Cheyenne River Sioux Tribal Law and Order Code, namely those provisions that require the filing of a written petition, due notice to the parents, holding a hearing, and issuing a written order defining of the scope of the appointment. These violations of Cheyenne River Sioux Tribal Law and Order Code also constitute reversible error.

In sum, there were significant violations of due process in the (telephonic) hearing of July 19, 2016, as well as violations of the Tribal Code provision dealing with the tender years doctrine, set out in Cheyenne River Sioux Tribal Law and Order Code Section 8-3-10, and the procedure for appointing a guardian ad litem set out in the Tribal Code at Cheyenne River Sioux Tribal Law and Order Code Sections 8-6-3 and 8-6-4.

IV. Conclusion

For all the foregoing reasons, the custody order of August 3, 2016 is reversed and remanded for a prompt hearing on the primary physical custody of W. W.

In light of the importance of both the judicial and parental commitment to the "best interests" of this young Lakota child, the following guidelines *shall* apply:

1. Inasmuch as the minor child, W. W., is currently enrolled in the first grade and attending school on the Cheyenne River Sioux Reservation, *temporary* physical custody shall remain with the father, Willard Walters III.

2. An Interim Visitation Schedule for the mother, Wakan Zephier, must promptly be put in place within fourteen days of this order. If the parties fail to agree (in writing), the trial judge shall set interim visitation with or without hearing. Visitation by the Mother is critical for the well-being of the minor child and shall not be permitted to get lost in the tangles of time or a failure of the parties to communicate.

3. If the trial judge (or either parent) believes it is in the best interest of the child to appoint a guardian ad litem, they may do so. But as noted above, such a procedure must conform to the requirements of the Cheyenne River Sioux Tribal Law and Order Code.

4. There must also be a prompt full and fair hearing in accord with the dictates of due process and the Cheyenne River Sioux Tribe Law and Order Code to determine primary physical custody of the minor child, W. W., *before* the new school year begins for W. W. later this summer. This is absolutely central to the "best interests" of W. W. and trial court must insure that it takes place as soon as possible.

5. As noted at the outset, the courts of the Cheyenne River Sioux Tribe have exclusive jurisdiction in this matter and any order of the trial court on remand shall so state.

Lastly, the Court commends both parents – father Willard Walters III and mother Wakan Zephier – for their commitment to the well-being of the minor child W. W.. The absence of rancor and bitterness in this matter will hopefully enhance the likelihood of mutual agreement and commitment to achieve the "best interest" of this Lakota minor child.

Ho Hec'etu Ye Lo

IT IS SO ORDERED.

FOR THE COURT:

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Frank Pommersheim
Chief Justice

Dated April 17, 2017