
**In the Matter of a Minor Child,
L.J.Y., Appellant,
vs.
T.T., Appellee.**

**SWITCA No.97-002-FMTC
FMTC No. J-525-95.11
FMTC No. 96-011**

Appeal filed March 3, 1997

**Appeal from the Fort Mojave Tribal Court,
Wilbert Naranjo, Judge**

**Alan Toledo, Esq. for the Tribe and Appellee
Linda Sauer, Esq. for appellant**

Appellate panel: Rodgers, M. Juan, Flores

SUMMARY

During the hearing on appellee's petition for custody of his child, held the same day as the petition was filed and after appellee alleged that appellant was a negligent parent, the trial court, with no supporting evidence, treated the matter as a neglect petition by the Tribe, and removed the child from appellant's custody to that of the paternal grandparents, first temporarily and thereafter, permanently. The trial court refused to reconsider appellant's petition for reconsideration for the reason that the grounds raised were, by tribal law, left to the jurisdiction of the appellate court. Appellant appealed, alleging substantial violations of tribal and federal law which denied appellant due process and equal protection. Reversed and remanded.

OPINION

This is an appeal from a final judgment of the trial court removing the minor child from the custody of its mother, appellant L.J.Y., and granting custody of the child to his paternal grandparents, Mr. and Mrs. A. T. The Court concludes, based on the facts and analysis discussed below, that the procedures used by the trial court removed the child from his mother's custody without due process of law, violating the Indian Civil Rights Act. The court below erroneously applied tribal law. The trial court orders entered in this matter must be vacated. However, because the facts in the record below do suggest that the Fort Mojave Indian Tribe Social Services office may have information that would support a petition of child neglect by the mother, it is in the best interests of the minor child that the order in this case be stayed to allow for a petition to be filed and a new proceeding be properly heard. Consistent with the law as set out in the Fort Mojave Indian Tribe law and order code, this Court must, in making any order affecting the custody of a child, take into consideration the best interests of the child.

Therefore, it will be the order of this Court that the lower court orders in this case be vacated, but that this Court will stay an order requiring immediate placement of the minor child in the custody of appellant subject to receipt of certification from the trial court that:

- (1) Within five days of the filing of this opinion and order, a hearing was held in which the trial court established scheduled visitation of no less than twice a week between appellant and the minor child; and
- (2) The Department of Social Services or the Fort Mojave Indian Tribe has filed within ten days of

this order a petition alleging that appellant has neglected the minor child, and, if deemed necessary, a written motion for a temporary custody order, alleging with specificity the acts or failures to act that constitute the alleged negligence and the need for an immediate placement in the custody of another and all documentation required by tribal law; and

- (3) That any such petition, motion and all documents presented to the court with the petition and motion have been served on appellant within five days after the filing of the petition and motion; and
- (4) That a hearing on any motion for a temporary custody order was scheduled no less than ten or more than fifteen days after the date that appellant was served with the petition and motion; and
- (5) That a hearing on any petition was scheduled no less than thirty or more than sixty days after the date that appellant was served with the petition.

The trial court shall certify to this Court that each of these events have taken place no later than three days after the event takes place. If certification is not received by this Court in a timely manner, the Court shall enter its order of immediate return of the minor child to the custody of the Appellant.

PROCEEDINGS BELOW

L.J.Y. and T.T. are the natural parents of the minor child. T.T. and the minor child are enrolled members of the Fort Mojave Tribe. L.J.Y. is a member of one of the Colorado River Indian Tribes and now resides on the Colorado River Indian Tribes Reservation. When T.T. filed a petition for custody of his son with the Fort Mojave Tribal Court, all parties resided on the Fort Mojave Indian Reservation.

T.T. filed the petition for custody of his son on November 17, 1995. The grounds given in the petition for removing the child from the custody of its mother were "[w]elfare and safety of my child. I feel that she has caused undue hardship on myself, family and son". What the petition did not allege, in any manner, was that the minor child was neglected, abused in any way, or otherwise in any danger of harm. A hearing on the petition was held on the same day. At the hearing, T.T. and his mother, Mrs. A. T., made several allegations of negligence on the part of L., all of which she denied. No evidence, other than these oral and unsubstantiated allegations of negligence, was presented to the Court.

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This action was a dispute solely between the two parents. However, during the hearing, the trial court clearly treated the matter as if a charge of negligence had been made against L. J. Y. by the Fort Mojave Tribe. T.T. and his mother were permitted to present allegations of negligence. However, the trial court, based solely on these unsupported allegations, made a determination that there would be a child custody placement pursuant to the Indian Child Welfare Act before L.J.Y. had any opportunity to make any statement to refute the allegations. The transcript of the Court hearing is as follows:

Judge: L., do you have something to say to the Court, now is your opportunity.

(Portions omitted)

L. Y.: Okay, who is [sic] I supposed to have court with, him or her?

Judge: You're going to court with whoever the Court feels -- in this case, there's going to be a child custody placement, just for your information.

L. Y.: Okay

Judge: The child custody placement issues will be adhered to in the same aspects for guidelines set forth in the Indian Child Welfare Act. Okay?

L. Y.: Okay.

(Portions omitted)

Judge: So in cases of child custody matters, if you are going to court against somebody, you will be going to court against the Fort Mojave Indian Tribe.

Transcript of November 17, 1995 hearing at pages 4-5. Later in the hearing, L. asked to be able to refute statements made about her by Mrs. T.. The trial court responded:

Judge: ...[I]f I let you say things against what she said, then I'm going to have to let her say things back.

L. Y.: That's all right. That's all right.

Judge: Are you ready for a full-fledged hearing on this?

L. Y.: Yes I am.

Judge: Because if the court decides, you may lose your son altogether today after today's hearing, are you ready for that?

L. Y.: Yes, because they're making false accusations towards me and I'm going to do everything I can to keep my son.

Judge: Be careful of what you say because everything that you say can be used against you.

Transcript of November 17, 1995 hearing at pp. 16-17. At a later point in the proceedings, the Judge repeated his warning against L. saying anything. Transcript of November 17, 1995 hearing at p.19. An employee of the Fort Mojave Social Services Department appeared at the hearing, and made an on-the-spot recommendation for placement of the minor child with his paternal grandparents. This recommendation was followed by the court in a temporary custody order entered on that same day, although no motion for a temporary custody placement was made and no evidence was presented to support such a placement. Significantly, the record reflects that this social worker had been checking in on L. and the minor child, but had not taken any action to initiate a proceeding on behalf of the Tribe alleging neglect by L.

Thereafter, the case proceeded as if the petition had been filed by the Fort Mojave Tribe, with the tribal prosecutor representing the father, T.T.. The temporary custody order was in effect until February 8, 1996 when, after a hearing, permanent legal custody was granted to the paternal grandparents. On March 28, 1996, L. filed a petition with the trial court for return of custody. This action was consolidated with the previous petition of the father. L., having obtained legal counsel asked the court to dismiss the petitions in both cases and vacate the prior orders of the court. The trial court did so on an order entered on October 3, 1996, after concluding that the placement of the minor child with Mr. and Mrs. T. violated Fort Mojave law and was based on inadmissible evidence given by the director of Social Services at the November 17, 1995 hearing. On October 18, 1996, the tribal prosecutor filed a motion for reconsideration of the court's October 3, 1996 order and for a stay of execution. There is no evidence in the record to establish that L. was served with the motion. On the same date that the motion was filed, the trial court granted the stay of execution and set oral arguments on the motion for reconsideration. On October 31, 1996, the trial court vacated the order of October 3, 1996. On November 26, 1996, the trial court denied the motion for reconsideration, concluding that the

trial court was without subject matter jurisdiction to consider the motion because the grounds for the motion were matters that tribal law left to the appellate court. L.J.Y. then filed this appeal stating as the grounds: (a) irregularities and improprieties occurred substantially prejudicial to the rights of appellant; and (b) substantial violations of tribal and federal law denied appellant due process and equal protection of the law.

LEGAL ANALYSIS

Tribal Law Violations

To this day, the minor child remains with his paternal grandparents. It was not until L.J.Y. was in court, with no notice sufficient to allow her any opportunity to prepare a response to a petition for custody filed by the natural father of the child, that she learned, for all practical purposes, that the Fort Mojave Tribe was charging her with negligence and removing her son from her custody. When she subsequently prevailed on challenging this unprecedented court procedure, the trial court entered *ex parte* orders staying the court order in her favor. These procedures do not comply with the minimum requirements of due process as required by the Indian Civil Rights Act, apply the Indian Child Welfare Act erroneously, and do not comply with the law of the Fort Mojave Indian Tribe as set forth in the Fort Mojave Indian Tribe law and order code. Therefore, we must reverse.

Our review of the proceedings below leads us to conclude that the trial court confused a custody dispute between two parents which is governed by chapter F of article IV of the Fort Mojave Indian Tribe law and order code with a petition alleging that a child is neglected under the provisions of the chapter B of article IV. These two sections address distinctly different situations. Where a petition is filed by a parent under chapter F, the tribe is not a party to the proceeding. The petition merely sets out a claim between the two parents. When a petition is filed under chapter B, it is because tribal officials or any member of the Tribe alleges that a child is neglected, dependent or delinquent and needs the care and protection of the court. The distinction between the two situations is clear. Chapter B applies where a child is at risk of danger due to neglect; it does not apply when two parents are quarreling over who should have custody of a child. What is also apparent is that the procedure followed by the court in this proceeding does not comply with the provisions of either chapter.

When a parent seeks custody of a child under the Fort Mojave Indian Tribe law and order code, the parent

must file a petition. Upon a showing of good cause, the court can permit other interested parties to intervene. Article IV, chapter F, §476(d). However, in the absence of a finding of good cause, the matter is one that is strictly between the parents. Pursuant to §478(a) a party can seek a temporary custody order. However, the motion for a temporary custody must be supported by "an affidavit or verified petition setting forth detailed facts supporting the requested order". §484. The affidavit or verified petition must be given to all other parties so they can file opposing affidavits. *Id.* The trial court "shall deny the motion unless it finds that adequate cause for hearing the motion is established by the pleadings, in which case it shall set a date for hearing on why the requested order . . . should not be granted"(emphasis added). Tribal law also mandates that notice of any child custody proceeding must be given to a child's parent "who may appear, be heard, and file a responsive pleading" Article IV, chapter F, §476(e).

In this case, T.T. did not make any motion to the court for a temporary custody order. There was absolutely no request before the court to remove the minor child immediately from its mother's custody. Furthermore, even if the initial petition is treated as such a motion, it did not set forth any detailed facts that would support the removal of a child from the custody of a parent. Significantly, it did not allege any specific facts at all, or even allege any negligence on the part of the mother. Thus, on its face, the petition, if treated as a motion for a temporary custody order, did not establish any cause for a hearing. Under these circumstances, the Fort Mojave Indian Tribe law and order code requires the trial court to deny any motion for temporary custody. Even if the petition had set forth adequate facts, Fort Mojave law requires the court to look to the best interests of the child in deciding whether to enter a temporary custody order. All relevant factors may be considered, including, (1) the wishes of the child's parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and inter-relationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school and community; (5) the mental and physical health of all individuals involved. In the case of the minor child, the court did not make any findings that, under this written law, would support a conclusion that it was in the child's best interests that a temporary custody order be entered. Finally, while the trial court did give notice to L.J.Y. that a hearing would be held, it is clear that she was not given any notice of the negligence allegations subsequently made to the court by the father and grandmother of the minor child. Appellant

was also denied the opportunity to file a responsive pleading before a hearing. In short, appellant was denied any notice as to the actual allegations made against her, and she was denied any meaningful opportunity to respond to the unsubstantiated allegations. Therefore, the issuance of the temporary custody order did not comply with tribal law concerning custody disputes between parents of a child.

Title IV, §411(b) states that the court's jurisdiction "shall be invoked upon the filing of a petition by any member of the Tribe, any police officer, or a counselor alleging that the child is neglected, dependent, or delinquent, and needs the care and protection of the court." While T.T. is a tribal member, the petition he filed with the court did not allege that L. was neglecting the child. The petition in this case simply was not sufficient to initiate proceedings under chapter B, either.

Title IV, §411(a) provides that any person can inform the court that a child may be neglected. However, that does not constitute the initiation of a custody proceeding. Rather, under this section, the court must make a preliminary inquiry "to determine whether the interest of the Tribe or the child requires further action. If, based upon this inquiry the court determines that it should act to protect the child, "it shall direct a petition to be filed. . . ." In this case, the court conducted no preliminary inquiry and did not, at any time direct any representative of the Tribe to file a petition alleging that the minor child was neglected. Thus, this process was not used by the court.

Having made the determination that none of the procedures set out in tribal law for custody proceedings were correctly applied, it becomes clear that the court's procedures in this case, particularly treating the case as one of the Tribe versus the mother, was a grave violation of tribal laws; it denied L. all of the procedural safeguards built into the law. This initial legal error was compounded as the court below continued to treat this as a matter of the Tribe versus an allegedly neglectful mother throughout the course of the proceedings.

Invalid Application of the Indian Child Welfare Act

The Indian Child Welfare Act is a federal law that governs child custody proceedings as that term is defined in federal law. Federal law defines these proceedings to be actions concerning the custody of Indian children who are removed from the custody of their parents, such as foster care placement, termination of parental rights, pre-adoptive placement and adoptive placement. 25 U.S.C. §1903. It has been held not to apply to custodial actions

between parents. *Confederated Tribes of Colville Reservation v. Superior Court of Okanogan County*, 945 F.2d 1138 (9th Cir. 1991); *DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989). Thus, it was legally erroneous for the trial court to treat this court action as one arising under the Indian Child Welfare Act. Furthermore, the Indian Child Welfare Act only applies to state courts, not tribal courts. In some instances tribes have voluntarily adopted the placement preferences in the Act on their own. Here, however, the written law of the tribe has its own preferences for child custody placements pending a hearing on a petition of neglect. See article IV, chapter B, §415. The written law also has its own preferences for child custody placements after a determination of neglect after a hearing. See article IV, chapter B, §424. In a proceeding between two parents, if one parent is successful in challenging the custody of the other, the successful parent is awarded custody, not the grandparents. See article IV, chapter F. Rather than invoke the federal Indian Child Welfare Act, the trial court should have followed tribal law. It did not and that constitutes legal error.

The Indian Civil Rights Act

This federal statute prohibits an Indian tribe, when exercising the powers of self-government from denying "to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. §1302(8) The first step in a due process analysis is to establish whether a liberty or property interest is at issue. If no such interest is implicated, then there can be no denial of due process. It is well established that parental rights are a component of the concept of liberty in federal jurisprudence. *Parham v. J.R.*, 442 U.S. 584 (1979); *In re Nina P.*, 31 Cal.Rptr.2d 687, 26 Cal.App.4th 615 (Cal.App. 1 Dist. 1994). While the concepts of liberty and due process do not always have the same definition in tribal law, this liberty interest is recognized and protected in the Fort Mojave Indian Tribe Law and Order Code. §434 states:

Before depriving any parent of the custody of his child, the court shall give due consideration to the preferred right of parents to the custody of their children, and it shall not transfer custody to another person, unless the court finds from all circumstances in the case that the welfare of the child or the public interest requires it.

Therefore, appellant's rights to custody of her child are recognized as fundamental liberties under the law of the Tribe, and as such appellant cannot be denied her custodial rights without due process of law.

Due process is a fancy term for fair play. *Galvan v. Press*, 347 U.S. 522 (1954). While this term also must be defined in light of tribal custom and law, at a minimum, due process requires notice and the opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319 (1976). Notice must be reasonably calculated, under all the circumstances, to inform the respondent or defendant of the nature of the action filed against them. The opportunity to be heard is not met simply because a hearing is held. In fact, a trial type hearing is not a requirement in all circumstances. Rather, the question is whether, given notice, a party had a chance to understand the claims against them and present a defense to them. *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

Appellant was denied both of these minimal requirements of due process. The petition that was served on her was a petition for custody of a child filed by the child's other parent. There was no motion for a temporary custody order presented to her. Thus, she was not given any notice of the nature of the action filed against her. Similarly, the court hearing held on the same day that the petition was filed did not give appellant any meaningful opportunity to be heard. Appellant's opportunity to be heard was further limited by the actions of the trial judge who twice warned her against making any statements.

Beyond these minimum due process requirements, the concept of fair play requires that a government not act arbitrarily, capriciously or contrary to its own law. As set out above, the trial court did not accurately apply tribal law. Rather, it short-circuited the written law, and in doing so, eviscerated the procedural safeguards set out in the law to protect persons from arbitrary and capricious governmental action concerning their rights to custody of their children.

CONCLUSION

This Court must conclude that appellant's custodial rights to her minor son, as recognized and protected by the law and order code of the Fort Mojave Indian Tribe, were grievously violated by the trial court. However, as this is a matter that also involves a minor child, and because documentation in the record suggests that the trial court or the tribal social services department may have documentation that would support at the least an inquiry as to whether appellant has neglected her minor child, the court must also conclude that it is in the best interests of the minor child that the Tribe, through the tribal court or tribal social services, be given the

opportunity to act to protect the child from neglect, and that the minor child not be subject to a change in custody during a certain period in which the Tribe can determine whether to bring an action alleging neglect.

THEREFORE, IT IS THE ORDER OF THIS COURT that the orders of the trial court entered in this matter should be, and hereby are, vacated; and that the order of this Court requiring the immediate return of the minor child to the custody of appellant shall be stayed pending certification from the trial court of that the following events have occurred:

- (1) Within five days of the filing of this opinion and order, a hearing was held in which the trial court established scheduled visitation of no less than twice a week between appellant and the minor child; and
- (2) The Department of Social Services or the Fort Mojave Indian Tribe has filed within ten days of this order a petition alleging that appellant has neglected the minor child, and if deemed necessary a written motion for a temporary custody order, alleging with specificity the acts or failures to act that constitute the alleged negligence and the need for an immediate placement in the custody of another and all documentation required by tribal law; and
- (3) That any such petition, motion and all documents presented to the court with the petition and motion have been served on appellant within five days after the filing of the petition and motion; and
- (4) That a hearing on any motion for a temporary custody order was scheduled no less than ten or more than fifteen days after the date that appellant was served with the petition and motion; and
- (5) That a hearing on any petition was scheduled no less than thirty or more than sixty days after the date that appellant was served with the petition; AND

IT IS FURTHER ORDERED that the trial court shall certify to this Court that each of these events have taken place no later than three days after the event takes place. If certification is not received by this Court in a timely manner, the Court shall enter its order requiring immediate return of the minor child to the custody of the appellant.

Therefore, this Court shall stay the effect of this decision for a period not to exceed sixty days to allow the

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Tribe to determine whether a petition should be filed on behalf of the Fort Mojave Tribe, file and serve any such petition, and give L.J.Y. written notice of any hearing on the petition at least two weeks in advance of any such hearing. If the sixty days elapses without written notice to this court that all these steps have been taken, the order of this court shall issue directing the return of the minor child to appellant. Reversed and Remanded.

IT IS SO ORDERED.

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