
**FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA**

IN THE MATTER OF THE CUSTODY OF:
C.Y.P.,
A Minor Indian Child

Appeal No. 097

THIS APPEAL is from an order issued on January 4, 1990 holding that a custody and support agreement dated February 6, 1989 invalid and allowing the father to remove the child from the reservation to the state of Arizona for thirty (30) days. The Honorable Terry L. Boyd, Associate Judge presided.

FOR APPELLANT/Petitioner: Isabelle Florence Youpee, Montana Legal Services, 204 First Avenue South, Wolf Point, MT 59201

FOR APPELLEE/Respondent: Clayton Reum, Lay Counselor, Box 38, Wolf Point, Montana 59201

CIVIL: THERE MUST BE COMPLIANCE WITH IV CCOJ 308 BEFORE AWARDING TEMPORARY CUSTODY; IT IS NOT IN THE BEST INTERESTS OF A CHILD TO HAVE ONE PARENT DENYING THE OTHER PARENT'S VISITATION RIGHTS; AND THE ORDER WHICH FOUND A PREVIOUS AGREEMENT OF THE PARTIES INVALID, MADE THE CHILD A WARD OF THE TRIBAL COURT AND PERMITTED THE FATHER TO REMOVE THE CHILD FROM THE RESERVATION CONTRARY TO THE PROVISIONS IN THE CCOJ DENIED THE PARTIES DUE PROCESS OF LAW AND WAS IN EFFECT A FINAL ORDER.

Argued: January 5, 1990 Decided: January 5, 1990

OPINION by Arnie A. Hove, Chief Justice, joined by Gary James Melbourne and Floyd G. Azure, Associate Justices.

HELD: THE PARTIES AND/OR THE TRIBAL COURT DID NOT FOLLOW PROPER PROCEDURE IN FEBRUARY OF 1989 AND JANUARY 4, 1990. THE MATTER IS HEREBY REMANDED TO TRIBAL COURT FOR THE FEBRUARY 7, 1990 HEARING ON MOTHER'S PETITION WITH DIRECTION TO PROCEED PURSUANT TO VI CCOJ 304(a) AND (b). TEMPORARY CUSTODY OF THE CHILD IS CONTINUED WITH FATHER UNTIL THE HEARING CONDITIONED UPON FATHER ASSURING CONTINUED CONTACT WITH MOTHER AND THE APPROPRIATE SOCIAL SERVICES' AGENCY IN ARIZONA.

FACTS:

C.Y.P. is the child of Appellant Kristen Low Dog (hereinafter referred to as mother) and Appellee Raymond Alondo Perales

(hereinafter referred to as father). The child is three (3) years old and child and mother are enrolled members of the Fort Peck Tribes. Mother and father were never married.

On February 6, 1989, the parties entered into an agreement entitled "Stipulation: Child Custody and Support". The parties indicate the agreement is in accordance with the decision of October 10, 1988 of the Fort Peck Tribal Court. There is no transcript or any other record reflecting the October 10, 1988 decision.

In the agreement, the parties mutually agreed to conditions and stipulations as follows:

1. Each party shall be responsible for the care, supervision, and well-being of C.Y.P. for six (6) months out of each year. The father shall have custody from December 26th through June 26th; and the mother shall have custody from June 27th through December 25th, except for 1989 in which the custody shall be as follows: Kris shall have custody from February 1, 1989 to July 1, 1989, and then Raymond shall have custody from July 2, 1989 to November 1, 1989, after which custody shall go back to Kris until December 26th, 1989.

2. Each parent shall have equal and reasonable visitation during the time the other parent has custody of C.Y.P. Visitation shall be scheduled with prior notice, but there is no limit as to the amount of the visits, that being dictated by time, distance and the personal schedules of each parent.

3. In the instance of more than 400 miles of distance between both parents, one month out of the six-month period shall be set aside in which C.Y.P. shall spend that period with the other parent. That month is at the discretion of the visiting parent and again shall be dictated by personal schedules.

4. It is mutually agreed that there will be no limits or unreasonable restriction, on the noncustodial (sic) parent's visitation rights.

5. It is agreed by the father, again in accordance with the decision of the Fort Peck Tribal Court, that during the time that the mother has custody of C.Y.P., there shall be child support payments made by the father in the amount of One Hundred Fifty Dollars (\$150) minimum per month. There shall be no child support conditions placed on the mother.

6. This agreement shall be binding until C.Y.P. reaches her 4th birthday. At that time both parents shall decide in the best interests of C.Y.P. where she should spend her school years. Custody will then be divided into periods of 9 months and 3 months. If an agreement cannot be reached and all reasonable measures have been used, it is agreed that the Fort Peck Tribal Court shall render a decision on the matter.

7. Visitation shall always be as much as reasonably possible.

8. This agreement shall be as binding as though it were an order of the court. Any custody dispute shall be decided in the Fort Peck Tribal Court.

The agreement although signed was never approved by an order of the Fort Peck Tribal Court and on February 6, 1989, David Dick was permitted to withdraw as mother's counsel. During the period from February 6, 1989 to the present, the child has resided with mother.

On January 2, 1990, father filed a Motion for Order to Show Cause with the Tribal Court. Father requested the Tribal Court to issue and order to mother to show cause why she should not be ordered to honor the February 6, 1989 agreement entered into by the parties concerning custody and support of their minor child C.Y.P. On January 2, 1990, an Order to show cause was issued by Associate Judge Boyd in which mother was ordered to appear on January 4, 1990 at 8:30 a.m. The mother was required to show cause why the Tribal Court should not issue an order compelling her to abide by the February 6, 1989 agreement pertaining to custody and support of C.Y.P.

On January 4, 1990, mother filed a Petition for Custody and Support. In the petition mother requested sole permanent custody, care and control of C.Y.P., subject to reasonable rights of visitation of the father.

At the hearing January 4, 1990, the Tribal Court found the February 6, 1989 agreement invalid. The Tribal Court further ordered that father was permitted to take the child from the reservation to his home in Arizona.

On January 4, 1990 after the hearing, mother filed a Request for Stay on Appeal. The request contained certain facts previously mentioned herein and was based on the following:

That a show cause hearing was held on January 4, 1990 as to why the tribal court should not issue an order compelling Kristen Low Dog to abide by an agreement of February 6, 1989, pertaining to custody and support of C.Y.P. The Honorable Terry L. Boyd presided. The custody and support agreement was found to be invalid as to its binding effect on either party because it had not been recognized or ordered by a judge of the tribal court.

Judge Boyd, after concluding the agreement was not binding, ordered that the child be made a ward of the tribal court and decided that the natural father, Raymond Perales should be allowed to take the 3-year old child off the reservation to the state of Arizona for an extended period of time of at least 30 days. Judge Boyd took this action without evidence of the conditions of Mr. Perales' home life in Arizona.

The minor child is an enrolled Fort Peck tribal member, as is the mother, Kristen Low Dog. Mr. Perales is non-Indian. The minor child is 3 years of age and has been in the custody of her mother on the reservation for her entire life. Mr. Perales has had minimal contact with the minor child since February, 1989, when he moved to Arizona, and as such, Mr. Perales is a stranger to the child.

Kristen Low Dog has filed a Petition for Custody and Support of C.Y.P. in the tribal court and service of the Summons and Petition was accomplished on the Respondent, Raymond Perales on January 4, 1990.

The relief requested was "That the Appellate Court issue a stay as to the removal of the child from the Fort Peck Indian

Reservation and that the child be ordered to remain with her natural mother until the Appellate Court can review this matter."

On January 4, 1990 at about 4:58, father filed a Motion to Vacate Order of Stay and Request for Emergency Hearing and the same was granted. The reasons for the appeal were as follows:

1. That there is no authority for the appeal under the Tribal Code in that appeals may only be taken from final orders duly entered by the lower court. Such statement is based on Title I, section 207 which clearly states as follows;

THE PETITION FOR REVIEW MUST BE TAKEN WITHIN 15 WORKING DAYS FROM THE DATE OF ENTRY OF THE FINAL ORDER OR JUDGMENT APPEALED FROM BY FILING SUCH PETITION WITH THE CLERK OF THE TRIBAL COURT.

2. THAT (SIC) MOVANT REQUEST THAT THIS MATTER BE HEARD IMMEDIATELY AS NOT TO CAUSE AN UNREASONABLE BURDEN AS MOVANT HAS TRAVELED (SIC) A GREAT DISTANCE TO PICK UP HIS DAUGHTER.

The relief requested was that the matter be set for hearing at 9:30 on January 5, 1990 and that this Court vacate its order restraining the father from taking the child with him to his home in another state. The emergency hearing was scheduled for and held at 9:30 a.m. January 5, 1990.

At the hearing the parties and their lay counselors were present. This Court did not have the complete Tribal Court file, however, it did have the relevant necessary documents and received pertinent testimony from the parties.

During the testimony, this Court was able to establish several uncontradicted facts. The parties agreed that on February 6, 1989 they had signed an agreement as to custody and support. Father admitted he was not current in his support payments under the agreement and mother admitted father had not been allowed to exercise the joint custody agreed to on February 6, 1989. Mother contends this is because she was forced by her attorney and others to sign the agreement. The parties also agreed that on January 4, 1990, the Tribal Court had found the February 6, 1989 agreement invalid.

Further testimony revealed, Father had come to the reservation to pick up the child at the request of mother for a stay with him at his home in Arizona. There was some testimony as to a possible medical problem experienced by the mother which made it difficult for her to care for the child and that was why she requested father to take the child. Upon his arrival, father claimed mother had refused to allow him to take the child. Father claimed he had cared for the child before for a period of about one (1) month at the request of the mother. Mother agreed father was testifying truthfully regarding the above.

At the conclusion of the proceeding, this Court held the parties and Tribal Court did not follow proper procedures under the CCOJ. This Court determined the parties February 6, 1989 agreement was not properly drafted to include an order for approval by the Tribal Court nor was the same presented to the Tribal Court for issuance of an appropriate order approving the same. This Court also determined the Tribal Court had not followed procedure under Title VI of the CCOJ in relation to child custody actions and temporary custody awards.

The issues presented and to be addressed by this Court are as follows:

1. Whether this Court had jurisdiction to hear an appeal from the Tribal Court's January 4, 1990 order under the CCOJ.

2. Whether there is authority for the Tribal Court's order of January 4, 1990 awarding temporary custody to the father, the non-custodial parent, in this child custody proceeding when mother had filed a petition the same day.

I.

There is authority to hear appeals under I CCOJ 202 of all orders which are in effect final orders. This section reads:

The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence. The Court of Appeals, or the Chief Justice alone, shall have jurisdiction:

(a) to take all necessary steps to preserve and protect the jurisdiction of the Court;

(b) during the pendency of any criminal appeal, to release the appellant on his/her own recognizance or on bail pursuant to Section 206(e) of this Code; and

(c) to make any order appropriate to preserve the status quo or to protect any ultimate judgment of the Court of Appeals.

In this case, the Tribal Court issued an order which found a previous agreement of the parties invalid. This order also made the child a ward of the Tribal Court and permitted the father to remove the child from the reservation until a hearing scheduled for February 7, 1990. In effect, the order was a final order as to the validity of the February 6, 1989 agreement. Furthermore, the order granted temporary custody of a three (3) year old child to a previously non-custodial parent until the holding of a hearing February 7, 1990 and there was no evidence as to the conditions of either parent's home life.

Under I CCOJ 202, this Court has authority to review de novo the Tribal Court's January 4, 1990 order on issues of law. Any factual determination are not to be set aside if supported by substantial evidence. As a matter of law, the January 4, 1990 temporary custody order was inappropriate. In reviewing the facts as presented and determined at this Court's proceeding, there is substantial evidence for permitting the father temporary custody.

VI CCOJ 304, 304(a), and 308 deal with determining custody of a child. These sections and there applicability will be discussed herein. Title VI CCOJ 304 reads in full as follows:

(a) In any action for annulment or divorce, or concerning the custody of a child born to the parties out of wedlock, the Court shall have authority to determine the custody of any child of the marriage, or any other child in the custody of either party under eighteen (18) years of age. The Court may grant custody to one (1) parent, or may grant joint custody, specifying the periods during which each parent shall have custody. In each case, the Court shall determine the visitation rights, if any, of the non-custodial parent. (Emphasis

added).

(b) The determination of custody shall be based on the best interests of the child, and there shall be no presumption that a parent is better suited to be custodial parent based on that parent's gender. Where appropriate, the Tribal Court may also order that the non-custodial parent make periodic payments to cover a portion or all the expenses of care and education of the child. Orders concerning child custody may be modified at any time, on motion of either party, following an additional home study and hearing as provided in Section 303(e) of this Title. In determining the best interests of the child, the Court shall consider the relative ability of the parents to provide adequate food, clothing, shelter, medical care, love and emotional support and day-to-day supervision. The Court shall also take into account the desires of the child. Difference in financial means alone shall not be the deciding factor.

Title VI CCOJ 304(a) deals with how a proceeding to determine custody, support and visitation is commenced. This section reads:

The Court shall have authority to determine custody of children as between parents and legal guardians, or as between parents or legal guardians and anyone with actual physical custody of the child, either pursuant to a court order or otherwise, where there is no divorce or annulment proceeding pending. Such a custody proceeding shall commence with the filing of a written petition by the parent or legal guardian. In ruling on a custody petition, the Court shall employ the standards set forth in Section 304, and may order periodic support payments as set forth in that section. After the Court rules on the petition, neither party may file another custody petition for six (6) months absent a substantial change in circumstances. Any such change shall be described in the petition. Where abuse, neglect, or abandonment of the child is suspected, a petition may be filed under Section 301 of Title V at any time.

Title VI CCOJ 308 deals specifically with the issuance of a temporary order as to child custody. This section reads:

The Court may issue temporary orders during the pendency of an annulment or divorce proceeding as to child custody, alimony, and the possession of real and personal property, not held in trust for any individual. Such orders may be granted upon motion of either party, or on the Court's own motion. A hearing, for which ten (10) days advance notice shall be provided to the parties, shall be held prior to the issuance of such temporary orders, unless the Court determines that an emergency exists, or a party cannot be found, in which case such order may be issued ex parte. Emergency shall be interpreted to include, but not be limited to: a danger of physical abuse to the spouse or the parties' children, a severe emotional abuse, a lack of means for interim subsistence, or the danger the child will be removed from this jurisdiction. If an emergency is alleged by affidavit, an initial hearing and order shall be completed within twenty-four (24) hours of the filing of such affidavit. In addition, if the initial order is issued ex parte, a full hearing on the temporary order shall be held within ten (10) days. (Emphasis Added).

It is evident from the record before this Court that there was no compliance with IV CCOJ 308 or evidence to support the January 4, 1990 order. Although mother had filed a petition for custody of the child, no motion was made for temporary custody by either party nor does the record reflect the Court's own motion in a transcript of the January 4, 1990 hearing. Finally, the record does not reflect that the Tribal Court had determined an emergency existed.

In conclusion, this Court had jurisdiction to hear an appeal from the Tribal Court's January 4, 1990 order under the CCOJ. In addition, there was no compliance with VI CCOJ 308 and the issuance of the January 4, 1990 order denied the parties due process of law. Therefore, the Tribal Court erred when it issued the temporary custody order making the child a ward of the Tribal Court; allowing the father custody until the hearing in February; and allowing the father to remove the children from the reservation.

II.

Whether there is authority for the Tribal Court's order of January 4, 1990 awarding temporary custody to the father, the non-custodial parent, in this child custody proceeding when mother had filed a petition the same day.

There is no authority for the Tribal Court's order of January 4, 1990 where temporary custody was awarded to father, the non-custodial parent, in this child custody proceeding when mother had filed a petition the same day. This Court then needed to determine what relief, if any, the mother was entitled to under the facts herein.

Under the facts, this Court felt it would be appropriate to allow father to have custody of the child until the February hearing for several reasons. The testimony was uncontradicted that mother had requested father to come to the reservation and take the child for an undetermined or disclosed period of time. Also, in the past, father had custody of and cared for the child for an extended period of time of approximately one (1) month. There is also some indication from the facts that mother may be denying the father visitation with his daughter.

In Re The Matter of the Custody of R.F. and J.F., Appeal No. 080 (January 8, 1990), this Court recognized it was not in the best interests of the children to have one parent denying the other parent's visitation rights. Because the mother has had the sole care and custody of the child despite a previous stipulation of the parties to share custody, the father should be allowed to exercise reasonable visitation since it is important for C.Y.P. to also know her father. In addition, by mother's own admissions, father should be allowed reasonable visitation with the child and an award of temporary custody to father under the circumstances appears appropriate.

In conclusion, the parties and the Tribal Court did not follow proper follow proper procedure when no order was entered recognizing the February 6, 1989 stipulation of the parties. The Tribal Court did not follow proper procedure when it issued its order declaring the February 6, 1989 agreement invalid and granting father temporary custody. Despite these improper procedures, mother's own testimony established father should be allowed reasonable visitation with the child and the temporary custody was in the best interests of C.Y.P. Therefore, temporary custody with the father is continued until the February 7, 1990 hearing conditioned upon father assuring continued contact with mother and the appropriate social services' agency in Arizona to monitor the welfare of the child while with father.

JANUARY 4, 1990. THE MATTER IS HEREBY REMANDED TO TRIBAL COURT FOR THE FEBRUARY 7, 1990 HEARING ON MOTHER'S PETITION WITH DIRECTION TO PROCEED PURSUANT TO VI CCOJ 304(a) AND (b). TEMPORARY CUSTODY OF THE CHILD IS CONTINUED WITH FATHER UNTIL THE HEARING CONDITIONED UPON FATHER ASSURING CONTINUED CONTACT WITH MOTHER AND THE APPROPRIATE SOCIAL SERVICES' AGENCY IN ARIZONA.

DATED this _____ day of March, 1990.

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Gary James Melbourne, Associate Justice

Floyd G. Azure, Associate Justice
