Tim Roller, Appellee,
vs.
Pueblo of Santa Clara, Appellant.

SWITCA No. 93-014-SCPTC
SC No. CR-92-0091

Appeal filed 1993

Appeal from the Santa Clara Pueblo Court,
Dennis Silva, Judge
Tim Roller, *pro se*

Evelyn Juan, Chief Judge, Southwest
Intertribal Court of Appeals

ORDER OF DISMISSAL

THIS MATTER coming before the court on its own motion to dismiss this matter because the court has not been provided the documentation necessary to proceed on this matter,

IT IS HEREBY ORDERED that this case be and hereby is dismissed.

Jennifer Hickman, Appellant,
vs.
Pueblo of Santa Clara, Appellee.

SWITCA NO. 93-025-SCPTC

Appeal filed 1993

Appeal from Santa Clara Pueblo Court,
H. Paul Tsosie, Judge
Jennifer Hickman, *pro se*

Evelyn Juan, Chief Judge, Southwest
Intertribal Court of Appeals

ORDER OF DISMISSAL

THIS MATTER coming before the court on its own motion to dismiss this matter because the court has not been provided the documentation necessary to proceed on this matter,

IT IS HEREBY ORDERED that this case be and hereby is dismissed.

Serafin Vigil, Jr., Appellant
vs.
Pueblo of Nambe', Appellee

SWITCA NO. 94-003-NTC
Nambe Pueblo No. CR-183-94

Appeal filed February 7, 1995

Appeal from the Pueblo of Nambe Tribal Court,
H. Paul Tsosie, Judge
Serafin Vigil, Jr., *pro se*

Evelyn Juan, Chief Judge, Southwest
Intertribal Court of Appeals

ORDER OF DISMISSAL

THIS MATTER coming before the court on its own motion, the court having issued its order on February 17, 1995, directing that the parties to this appeal comply with rule 17 of the Southwest Intertribal Court of Appeals appellate rules, and the parties having failed to comply with rule 17 to prepare an appellate record,

IT IS HEREBY ORDERED that this appeal be dismissed.

Johnny Chris Paul, Pablito Paul, Richard Paul, and Donald Albert Paul, Appellants/Plaintiffs,
vs.
Southern Ute Indian Tribe, and Leonard C. Burch, Vida Peabody, Jay Frost, Ray C. Frost, Lilian Seibel, Marvin Cook, and Howard Richards, Individually and in Their Capacity On the Southern Ute Tribal Council, Appellees/Defendants.

SWITCA No. 95-002
No. 94-CV-17-SUTC
No. 95-AP-01-SUTC

Appeal filed February 17, 1995

SUMMARY

Plaintiffs appeal from a dismissal of their complaint which allege an arbitrary denial by the Southern Ute Indian Tribal Council of their adoption into the Tribe. The tribal court dismissed the complaint, relying on the tribal constitution and Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The

tribal court found that the constitution vested sole jurisdiction for membership eligibility in the tribal council and that Santa Clara Pueblo v. Martinez did not provide for a waiver of tribal sovereign immunity, holding that the tribal court lacked jurisdiction and the Tribe and its council members were protected by sovereign immunity. The appellate court affirms the decision that the tribal court lacked jurisdiction and the tribe and its council members are protected by the principle of sovereign immunity. Parenthetically, the appellate court notes that the tribal statute of limitations and the equitable doctrine of laches provide additional protection for the Tribe and its council.

Appeal from the Southern Ute Tribal Court,
Jim D. James, Judge Pro Tem
Michael Wanger, Attorney for Appellants
Maynes, Bradford, Shipps & Sheftel, by
Geoffrey M. Craig, Attorneys for Appellees

Appellate Panel: Ames

OPINION

In February of 1994, Johnny, Pablito, Richard, and Donald Paul filed a complaint in the Southern Ute tribal court alleging they had been denied membership in the Southern Ute Indian Tribe by arbitrary action of the tribal council in 1962, 1974, and 1989, some 32 years, 20 years and 5 years prior to the filing of the complaint.[1]

Appellants alleged that at the time of their birth and at the time of the first and second application for adoption or readmission, persons with their quantum of Southern Ute Indian blood were eligible for adoption: "subject to the tribal council's power to reject an applicant." Complaint, paragraph 4. The appellants also alleged that the tribal council afforded them an opportunity for hearing on their adoption in 1974, but, it appears that they failed to avail themselves of the opportunity to be heard in the tribal council forum following that offer.

In February, 1995, after briefing and a hearing, the tribal court granted the Tribe's motion to dismiss, holding that the tribal court lacked subject matter jurisdiction, the tribal council is vested with exclusive authority to determine membership, and that the doctrine of sovereign immunity precluded suit against the tribe and the individually named council members.

The Paul brothers have appealed the tribal court's decision dismissing their complaint.

Appellants argue that, by implication, the Southern Ute Indian Tribe's and tribal officers' sovereign immunity were waived by the Indian Civil Rights Act of 1968, 25 U.S.C.A. §1302 as amended, and that they were deprived of due process.

The Tribe's position, in response, is that sovereign immunity, tribal statutes of limitations, and laches are bars to the appellants' complaint.

This Court rejects the plaintiffs/appellants' arguments and affirms the decision of the Southern Ute tribal court.

The Southern Ute tribal constitution provides that "[t]he Council shall have power to pass ordinances . . . covering the adoption of new members . . . ." (article II, section 2) and the tribal council "shall have the sole authority and original jurisdiction to determine eligibility for enrollment. . . ." (article II, section 4).

The By-laws, article VII, section 1, provide that "[t]he inherent powers of the southern Ute Indian Tribe, . . . shall be exercised by the Southern Ute Indian Tribal Council. . ." which, among other things, was empowered to "enact ordinances and codes to protect the peace, safety, property health and general welfare of the members of the Southern Ute Indian Tribe . . . and to govern the administration of justice through the tribal courts, prescribe the power, rules and procedures of the tribal courts in the adjudication of cases invoking . . . civil actions . . . real and personal property of tribal members within the reservation . . . ."

Significantly, no constitutional provision nor by-law provides for the waiver of the Tribe's or its officers' sovereign immunity.

The tribal council in 1965, 1976, 1981, 1985, and 1991 passed ordinances approved by the Superintendent Consolidated Ute Indian Agency which, among other things, in mandatory language provided that "[t]he decision of the Southern Ute Indian Tribal Council in granting or denying adoption shall be final . . . and shall not be subject to appeal or review." See ordinances of the Southern Ute Tribe, nos. 21, 30, 30-A, 85-01 and 91-01.

[1] Although both appellants and appellee attach evidentiary exhibits to their briefs, they are not and have not been made a part of the record on appeal. For that reason those exhibits are not considered by this Court. SWITCARA ## 15 and 16.

In their opening brief on appeal, the plaintiffs concede that "[t]he Tribal Council has original and exclusive jurisdiction . . . with regard to tribal membership." Southern Ute Indian Tribal Code, Title I, section 1 1-115, sovereign immunity, provides "[t]he Southern Ute Indian Tribe shall be immune from suit in any civil action and its officers and employees shall be immune in any civil action and its officers and employees immune from suit for any liability arising from the performance of their official duties."

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the United States Supreme Court recognized that: "Indian tribes are 'distinct, independent political communities, retaining their original rights' in matters of local self-government. (citations omitted). Although no longer 'possessed of the full attributes of sovereignty,' they remain a 'separate people, with the power of regulating their internal and social relations.' (citations omitted) They have power to make their own substantive law in internal matters, see *Roff v. Burney,* 168 US 218, 42 L. Ed 442, 18 S Ct 60 (1897) (membership); (citations omitted). . . ." 436 U.S. 49, at 55. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. (citations omitted) 436 U.S. at 58. "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally express'." 436 U.S. at 58. The Supreme Court points out that Indian Civil Rights Act (ICRA), "§1303 can hardly be read as a general waiver of the Tribe's sovereign immunity.", 436 U.S. at 59, and the ICRA does not impose a wholesale extension of constitutional requirements upon tribal governments. 436 U.S. at 62.

In *Martinez,* the Court points out that although tribal courts have been recognized as appropriate forums for adjudication of personal and property interests of Indian people, "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies. . ." 436 US at 66. Experts in the area also recognize that historically Indian tribes have bestowed upon their leaders and/or their councils exclusive jurisdiction for making decisions effecting tribal interests. Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.), 247-8 By constitutional provisions and tribal ordinances, the Southern Ute Indian Tribe has established the tribal council as an appropriate forum for the determination of tribal membership.

It is here appropriate to refer to the district court's opinion in *Martinez* wherein the district court pointed out that tribal membership is a delicate matter effecting the cultural identity of the tribe itself and that it should be the tribe's's determination of who and what rules will best "promote cultural survival." 402 F. Supp. 5 (1975) as reported at 436 U.S. at 55. Tribal membership is a determination to be made by the people of the tribe "not only because they can best decide what values are important, but also because they must live with the decision every day. . . ." *Id.* at 55.

Having established the tribal council as the exclusive and sole forum for the determination of tribal membership, the tribal court lacked jurisdiction and the principle of inherent sovereign immunity of the Tribe protects it and its tribal officials. The decision of the tribal court dismissing appellants' complaint is therefore affirmed.

The statute of limitations for the Southern Ute Indian tribal court provides that no action may be brought against a sheriff or any other officer after six months from the date of the accrual of the cause of action, and no other action of a civil nature may be brought after two years have passed from the accrual of the cause of action. Southern Ute Tribal Code, § 1-2-110.

Although not necessary to the decision of this Court, it is noted that this matter dates historically more than twenty and in excess of thirty years. Although given the opportunity for a hearing before the tribal council in 1974, the appellants chose not to accept that invitation. The tribal code, statutes of limitations and the equitable doctrine of laches are defenses in this matter as well. To the prejudice of appellees, time, memories and witnesses pass, not to be reclaimed.

It is therefore ordered that the judgment of the tribal court is affirmed and the clerk of the court is ordered to be [*sic*] enter an order of judgment in this matter consistent with this opinion.

IT IS SO ORDERED.

Pueblo of Zuni, Plaintiff,
vs.
Eddy Epaloos, Defendant.

SWITCA NO. 95-005 ZTC
Zuni No. CR 95-3202, 3206

Appeal filed June 22, 1995

Appeal from the Zuni Pueblo Court,
William Tsikewa, Sr., Judge
Claudia Ray, Attorney for the Pueblo
Robert Irelan, Attorney for the Defendant

Evelyn Juan, Chief Judge, Southwest
Intertribal Court of Appeals

ORDER OF DISMISSAL

THIS MATTER coming before the court on its motion, it appearing that the Zuni Pueblo tribal court has dismissed this matter and it has become moot, it should be dismissed by the Southwest Intertribal Court as well;

THEREFORE, IT IS ORDERED that this cause be and hereby is dismissed.

Thomas Rea, Appellant,
vs.
Wilfred Madrid, *et al.*, Appellees.

SWITCA No. 97-003-UMUC
UMU CIO CV. No. 94-0022

Appeal filed February 3, 1997

Appeal from the Ute Mountain Ute Court of Indian Offenses, Eldon M. McCabe, Judge

Robert Glenn White for the Appellant
Eric J. Stein for the Appellee

Appellate Panel: Abeita, James and Rodgers

ORDER

THIS MATTER coming before the court on its motion to dismiss this case number for being issued improvidently before the matter was filed with this court, and the matter is now before this court as SWITCA no. 97-009-UMUC,

IT IS HEREBY ORDERED that this case be and hereby is dismissed.

Cynthia Evanston, Appellant,
vs.
Samson Evanston, Appellee.

SWITCA No. 97-001-FMTC
FMTC No. C10164-96

Appeal filed March 3, 1997

Appeal from the Fort Mojave Tribal Court, Wilbert Naranjo, Judge
Cynthia Evanston, *pro se*

Appellate Panel: Rodgers, Flores, E. Juan

ORDER

THIS MATTER comes before the appellate court on the petition for appeal filed by Cynthia Evanston. The court, *en banc*, having reviewed the petition for appeal finds that the petitioner has not set forth facts or legal argument which would entitle her to appeal pursuant to section 211 of the Fort Mojave Indian Tribe law and order code.

THEREFORE, it is the order of the court that the petition for appeal should be, and hereby is, denied.

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.

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 in 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 there 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

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.

Anita Holmes, Petitioner-Appellee,
vs.
Delbert Holmes, Respondent-Appellant.

SWITCA No.97-008-FMTC
FMTC No. DO 17-96

Appeal filed 3/3/97

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

Anita Holmes, pro se
Delbert Holmes, pro se

Appellate panel: Rodgers, M. Juan, Flores

SUMMARY

In this dissolution of marriage case, appellant was ordered to pay spousal support to appellee for one year after he received notice that he had to present evidence of his financial status at a hearing. When he did not have such evidence, he was given additional time to present his evidence, which he did. The appellant appealed the order claiming that the trial court did not consider his evidence and he offers additional evidence on appeal. The decision below is affirmed.

OPINION

Appellant Delbert Holmes sought review of the trial court's judgment that he should have to make monthly payments to his former wife, appellee Anita Holmes, in the amount of five hundred dollars ($500.00) for a period of one year. Delbert Holmes sought appeal on two issues: (1) that there was additional evidence that should be considered for the first time on appeal in deciding whether he should have to pay this much money to Anita Holmes; and (2) that the trial court did not consider his financial statement in determining the amount that should be paid to Anita Holmes, and the failure to consider the financial statement was an abuse of discretion. At oral argument, Delbert Holmes argued that the trial court denied him due process of law because he was not given adequate notice of the need to prepare a financial statement prior to the hearing on the merits, and that if he been given adequate notice, his financial statement would have included additional financial commitments showing that a monthly payment of $500.00 to Anita Holmes would be unequitable. Anita Holmes argued that Delbert Holmes had sufficient notice, however, she acknowledged that she was aware of Delbert Holmes' financial difficulties and might agree to some other financial arrangement.

We affirm the decision of the trial court in all respects. Our review of the record in this case confirms (1) there was ample notice to Delbert Holmes that Anita Holmes was requesting a monthly payment of $500 or ownership of the home they had shared; and (2) Delbert Holmes had a reasonable period of time to prepare for a hearing on the question. The additional expenses Delbert Holmes wanted this Court to consider for the first time on appeal were known to him before the hearing in the trial court. Under these circumstances, it is not appropriate for an appellate court to consider evidence that was never presented to the trial court. Furthermore, the appellate court does not have the power to do that under the Tribe's law and order code. See FMIT code, §211(a)(2)(d). The appropriate procedure to seek a reduction in the amount of the monthly payment is to file a motion with the trial court to modify its' order. Either party can request modification at any time and the trial court can, based on evidence presented to it, modify its original order because of changed conditions.

Proceedings Below

On November 21, 1996, Anita Holmes filed a petition to dissolve her marriage to Delbert Holmes. Her petition also asked that she be awarded either spousal support of five hundred dollars ($500.00) per month or the home she shared with Delbert Holmes. The petition was served on Delbert Holmes on the same day, and he filed his response to the petition on December 12, 1996. He did not oppose dissolution of the marriage, however, he claimed the home as his sole property and objected to any award of spousal support. There were no disputes over the division of other property. The only contested issues before the trial court were (1) who would get the home Delbert and Anita Holmes had shared, and (2) whether Delbert Holmes should pay spousal support. On January 6, 1997, the trial court issued a notice scheduling a hearing in this case for February 5, 1997. On January 29, 1997, Anita Holmes requested a thirty day

postponement. The trial court rescheduled the hearing for February 20, 1997 in a notice dated February 11, 1997. There is no issue concerning whether Delbert Holmes received these notices.

On more than one occasion during the hearing, the court stated to the parties that if one of them was arguing a position, it was his or her responsibility to present evidence to the trial court to support that position. Anita Holmes provided the trial court with a financial statement and evidence in the form of bills which tended to establish the monthly expenses she claimed and the need for spousal support to cover rent if she was not awarded the home. Delbert Holmes was asked to present evidence of his financial condition to permit the trial court to determine what an equitable payment to Anita Holmes might be if Delbert Holmes was awarded the home. Delbert Holmes did not present anything other than pay stubs to the trial court initially, and the trial court stated that it would give him an additional day to bring in any documents to establish his financial condition.

Delbert Holmes took advantage of this opportunity and hastily prepared a financial statement and attached some copies of bills to establish his monthly expenses. Delbert Holmes delivered this to the trial court. The trial court thereafter issued its written order (1) dissolving the marriage, (2) giving Delbert Holmes possession of their former home and (3) awarding Anita Holmes a spousal support in the amount of $500.00 a month for one year.

Procedural Due Process

We first address the issue of whether the trial court denied Delbert Holmes procedural due process. The elements of due process are straightforward: (1) notice of the facts alleged against a person, and (2) a meaningful opportunity to be heard in a meaningful manner. *Matthews v. Eldridge,* 424 U.S. 319 (1976). Part of the second factor is the requirement of adequate preparation time. *Id.* Adequate preparation time is necessary in order for a person to have a meaningful opportunity to be heard. If a person is hauled into trial court on the same day that the person is given notice of the facts alleged against him or her, the person is not really being given any time to prepare his or her defense, and is therefore being denied the second element of procedural due process. Whether there has been an adequate time to prepare a defense depends on the nature of the issues to be presented to the trial court - the more complex the issue, the more time needed for preparation. *United States v. Verderame,* 51 F.3d 249 (CA.11) *cert. denied,* ___ U.S. ___, 116 S.Ct. 405 (1995).

Delbert Holmes does not allege that the trial court did not give him notice of the hearing; only that he was not given notice of the need to present evidence of his financial condition at that time. The facts set out above establish that as of the date of his response, December 12, 1996, Delbert Holmes knew or reasonably should have known that the question of whether he should pay Anita Holmes spousal support, and if so, the amount of spousal support, would be presented to the trial court. Furthermore, where it is clear that an issue is disputed among the parties, a party has the burden of presenting evidence to a court to support his or her position. It is not a court's responsibility to inform a party of this burden. Delbert Holmes had over sixty days to put together evidence to present to the trial court showing why he should not have to pay spousal support, or the exact status of his financial condition. When Delbert Holmes did not have any evidence to present in support of his position, the trial court, in its discretion, permitted him to submit additional documentation after the hearing. The trial court was not required to do this. Thus, we conclude that Delbert Holmes had notice of the claim against him and more than sufficient time to locate documents and other evidence to support his position. Due process does not require more.

Consideration of the Financial Statement

The second issue to be addressed is whether the trial court abused its discretion in failing to take into consideration Delbert Holmes' financial statement and associated bills. As a practical matter, Delbert Holmes did not provide any basis for this Court to determine that the financial statement was not considered. The record below clearly shows that the trial court could reasonably conclude that such a payment was appropriate, taking into consideration the financial statement.

Delbert Holmes' financial statement included a monthly rental payment of nine hundred dollars a month. No evidence was submitted to support this expenditure. Anita Holmes' documents showed that the monthly payment on the home they had shared was at least six hundred dollars less than what Delbert Holmes was claiming as rent expenses on his financial statements.

The trial court awarded ownership of the home to Delbert Holmes. This relieved him of rental expense of nine hundred dollars a month, almost double the spousal support requested by Anita Holmes. However, this award resulted in a significant increase in Anita Holmes'

expenses, and the loss of any contribution she may have made to the equity in the home awarded to Delbert Holmes. Under these circumstances we cannot find the trial court's ruling to be unreasonable, or arbitrary. The evidence including the financial statement, shows that with the award of the home to Delbert Holmes, he would have sufficient income, even in light of his expenses, to pay spousal support, and conversely, with the loss of the home Anita Holmes would need at least temporary financial assistance to afford shelter. The record below confirms that the trial court carefully reviewed all the evidence and reached an equitable decision.

For the foregoing reasons the judgment of the trial court is affirmed.

IT IS SO ORDERED.

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outhern Ute Tribe, Appellee-Plaintiff,
vs.
Jerome Howe, Appellant - Defendant

SWITCA No. 97-010-SUTCA
SUTC No. 97-CR-081, 115, 116, 143
97-AP-01

Appeal filed on 6/12/97

Appealed from the Southern Ute Tribal Court,
J.J. Stancampiano, Judge

Kyle Ipson, attorney for the Tribe
Jerome Howe, appearing *pro se*

William S. Christian, Chief Judge, Southwest Intertribal Court of Appeals

ORDER OF DISMISSAL

THIS MATTER coming before the court on the request of the appellant-defendant, Jerome Howe, to dismiss this appeal, and it appearing that the Tribe has no objection to the dismissal;

IT IS THEREFORE ORDERED that this appeal be and hereby is dismissed.

IT IS SO ORDERED.