FORT PECK TRIBAL COURT OF APPEALS
FORT PECK INDIAN RESERVATION
ASSINIBOINE AND SIOUX TRIBES
POPLAR, MONTANA
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In the Matter of the Custody of
MARIAH WATCHMAN, born /91
a minor Indian Child

Appeal No. 242
(sometimes mislabeled as 238)

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O P I N I O N

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This matter arises from an Order issued on August 23, 1995 by the Honorable Robert Welch, Associate Judge of the Fort Peck Tribal Court, accepting jurisdiction of a Petition filed by Cynthia Turcotte (herein "CYNTHIA") requesting custody of her minor daughter, Mariah Watchman (herein "MARIAH"). Respondent to the Petition is Lindsay Watchman (herein "LINDSAY"), Mariah's father. Mary L. Zemyan, Esq. of Wolf Point, MT for Cynthia and Laura Christoffersen, Esq. of Wolf Point, MT. For Lindsay.

Justice Sullivan writes for a unanimous Court.

FACTUAL OVERVIEW AND PROCEDURAL HISTORY

Cynthia and Lindsay met during high school in 1990 while both were attending a boarding school operated by the Bureau of Indian Affairs in Chemawa, Oregon. Cynthia became pregnant by Lindsay, giving birth to Mariah on 1991 in Missoula, MT. Shortly thereafter they were married and returned to Pendleton, Oregon, the home of Lindsay's mother. Lindsay joined the Air Force and left for boot camp in Alabama in October, 1991. Cynthia and Mariah also left Oregon in October, 1991 to move in with relatives in Wolf Point, MT until Lindsay finished boot camp. In January, 1992, the family was reunited and moved to Mountain Home Air Force Base, Idaho. In July, 1992, Cynthia separated from Lindsay, taking Mariah, and once again, moving in with relatives in Wolf Point, MT. The parties were separated for approximately eight months until February, 1993, at which time they agreed that Cynthia and Mariah would return to Idaho for an attempt at reconciliation. The attempt failed and it was agreed that Mariah would stay with Marian Gwin, Cynthia's mother, in Wolf Point, while Cynthia stayed in Idaho for a few more weeks in order to sign documents relating to the parties' divorce. In their stipulation the parties apparently agreed that custody of Mariah would go to Lindsay with visitation to Cynthia.

In late March, 1993, Cynthia returned to Wolf Point. Approximately one month later she received a copy of the final Idaho divorce decree[1] enclosed in a letter from Lindsay, wherein he stated that he would come to Montana for Mariah during the second week of July. In contrast to the pick up date specified in his letter, Lindsay came to Wolf Point on May 22, 1993, picked up Mariah and returned her to his mother's home in Pendleton, Oregon. Shortly thereafter, Cynthia went to Pendleton and brought Mariah back to Wolf Point. In July, 1993, Cynthia filed a Petition for custody in our Tribal Court and obtained a temporary custodial order. A hearing was held on August 27, 1993, Cynthia appearing *pro se* and Lindsay appearing with his attorney, Laura Christoffersen, Esq. of Wolf Point. The Court, the Honorable Leland Spotted Bird presiding, issued its' order declining jurisdiction and instructed Cynthia "to follow appropriate legal avenues in the State of Idaho to contest custody if she so desires as the Fort Peck Tribal Court is not the appropriate forum in which to hear the issues presented."

Lindsay then picked up Mariah at her maternal grandmother's house and returned her to Idaho. Cynthia exercised visitation rights during the summer of 1994. In November, 1994, Lindsay received orders changing his duty station from Idaho to Germany. He contacted Cynthia to determine whether there would be any problem with him taking Mariah to Germany[2]. Apparently the parties agreed that Mariah could accompany him to Germany, and Lindsay, noting that he would depart for Germany in June, 1995, made special arrangements for Mariah to be with Cynthia for an extended visit prior to his departure date of June 15, 1995. On March 18, 1995, Cynthia picked up Mariah in Pendleton and returned with her to Wolf Point pursuant to the parties agreement that Mariah be returned to Lindsay in early summer prior to his departure for Germany.

On June 21, 1995, Cynthia once again petitioned our Tribal Court for custody, citing a material change in circumstances. A hearing date of August 17, 1995 was calendared. Attempts to personally serve Lindsay failed[3]. On August 16, 1995, during a telephone conference between the two attorneys, Lindsay's attorney disclosed that Lindsay was sitting in her office. Cynthia's attorney immediately effected personal service.

The Court, the Honorable Robert Welch presiding, conducted a two day hearing commencing on August 17th. At the conclusion of the hearing, the Court accepted jurisdiction and granted Lindsay temporary custody for a sixty day period pending the submission of a home study, a mental evaluation and a alcohol evaluation for both parents. Knowing that Lindsay was taking Mariah to Germany during the sixty day period, the Court declared Mariah a ward of the Court to insure its' continuing jurisdiction. The parties were to submit to the evaluations and home study in sufficient time for the reports to arrive at the Court on or before October 23, 1995, at which time, the Court would make its final order regarding custody of Mariah. The Court's order was reduced to writing and filed on August 23, 1995.

On August 30, 1995, Lindsay appealed citing that 1) the Order declining jurisdiction issued in August, 1993 was res judicata, barring the issue of custody in the instant action; 2) Lindsay's rights under the Soldiers' and Sailors' Relief Act had not been considered and determined; 3) the Court had failed to properly consider and determine whether effective and proper service was had on the respondent; 4) the Court had improperly determined that a change of circumstance had occurred; and 5) the Court improperly declared Mariah a ward of the Court. Concurrent with his appeal, Lindsay requested that this Court stay the Tribal Court Order pending the appeal.

On October 12, 1995, this Court granted Lindsay's request for stay, vacating the October 23, 1995 hearing date.

On February 13, 1996, Cynthia requested that our Chief Justice Beaudry be recused in that Cynthia had consulted with him during the summer of 1993 in his capacity as the Fort Peck Tribes' ICWA attorney. On March 7, 1996, Chief Justice Beaudry voluntarily recused himself.

On September 19, 1996, this Court issued its' order setting oral argument and further, that the two remaining sitting justices would hear and rule on the case unless an objection was made. Neither party entered an objection and after various continuances of the oral argument date were granted, the parties agreed for this Court to render its' decision without oral argument.

ISSUES PRESENTED

The issues are limited to those specified in the Petition for Review filed on August 30, 1995[4]:

1. **Whether the order declining jurisdiction, issued by the Tribal Court in August, 1993, served as *res judicata* thus precluding the Tribal Court from accepting jurisdiction in August, 1995?**
2. **Whether Lindsay was denied any rights, privileges, or remedies, pursuant to the Soldiers' and Sailors' Relief Act?**
3. **Whether proper and effective personal service was made on Lindsay?**
4. **Whether the Tribal Court improperly determined that a "change of circumstance" had occurred?**
5. **Was Mariah improperly declared a ward of the Tribal Court?**

STANDARD OF REVIEW

It should be noted from the outset that the order appealed from is denominated: "Temporary Custody Order". **Title I CCOJ Section 201** provides: "The jurisdiction of the Court of Appeals shall extend to all appeals from ***final orders*** and judgments of the Tribal Court. The Court of Appeals shall review de novo all determinations 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". ***(our emphasis).***

In the first instance we must distinguish between an "order or judgment" and an "appeal". We review only ***final*** orders or judgments. **Title 1 CCOJ Section 201.** Thus, an appeal can only be taken from a ***final*** order or judgment. However, as we recently held in **In Re: Ricker FPCOA#**[5], an appeal can be ***interlocutory***. An appeal is ***interlocutory*** when there is a final determination of some collateral matter distinct and severable from the general subject of the litigation. Even though litigation on the main issue continues, nonetheless, an appeal is authorized. (See **Ricker, supra @ p.4** for our requirements and **3 Witkin, California Procedure, Appeal, @ 11, p. 2151** for a more general discussion.)

Regarding the case at bench, we must first question whether the order appealed from herein is

"final" for the purposes of appeal. As noted earlier, the order appealed from is entitled, "Temporary Custody Order".

We recognize that whether an order is labeled "interlocutory", "temporary" or "final" is not determinative of its appealability. It is not the label but rather the substance and effect of a court's judgment or order which determines whether or not it is appealable.

We also recognize that it is sometimes very difficult to determine whether the Court's decree is a 'final order or judgment' within the meaning of that term as used in our **CCOJ** concerning appeals. We note that this Court has not adopted a general rule applicable in determining whether an order or judgment is final or merely interlocutory. Accordingly, we hold that as a general test, that when an order or judgment leaves no issue for future consideration except the fact of compliance or noncompliance with its' terms, then that order or judgment is final for the purposes of appeal. On the other hand, if the order or judgment leaves anything further in the nature of judicial action on the part of the Court, which action is essential to the determination of the rights of the parties, then that order or judgment is interlocutory.

We now apply this test to the five issues raised on this appeal.

The Tribal Court accepted jurisdiction of this matter over the objections of Lindsay, who argued vigorously that the Tribal Court's declination of jurisdiction in August, 1993 was *res judicata*. Lindsay was left with no choice but to proceed, that is, comply with the Court's order. Nothing was left to do on the part of the Court regarding jurisdiction, it had made its' order and the order accepting jurisdiction was final. Therefore, that portion of the order is appealable.

In the second issue, Lindsay complains of being denied certain rights under the "Soldiers' and Sailors' Relief Act". **50 USC App §501 et. seq.** Our analysis of this issue is made easier if we rephrase Lindsay's objection: "The Tribal Court has failed to afford me with all of my rights under the Soldiers' and Sailors' Relief Act ***up to this point in the litigation.***" ***If*** the Tribal Court has denied or deprived Lindsay of any of the Act's provisions, he can petition the Tribal Court, citing chapter and verse of the Act, and the Court can rule accordingly. Thus, the Tribal Court is left with "(some)thing further in the nature of judicial action on the part of the Court, which action (could be) essential to the determination of the rights of (Lindsay)". Accordingly, this portion of the order appealed from is interlocutory and not ripe for appeal.

In his third issue, Lindsay complains that the Tribal Court did not have effective personal service. The Tribal Court ruled that personal service was effectively made on Lindsay, therefore, Lindsay was left with no other choice but to comply with the Court's order. You either have personal service or you do not have personal service. As in the case of jurisdiction in **Issue #1**, the Tribal Court's order was final and that portion of the order is appealable.

The fourth issue Lindsay raises deals with whether there was a change of circumstance warranting the Court's intervention into the existing custodial order. We note that the Tribal Court awarded temporary custody of Mariah to Lindsay, pending home studies and full parental evaluations. While we do not invoke the "no harm, no foul" rule, we do not see how this portion of the order has adversely

affected Lindsay. Nonetheless, ***if*** Lindsay has been adversely affected, the Court can still act to cure it own error. Once again, we find that if "anything further in the nature of judicial action on the part of the Court, which action is essential to the determination of the rights of the parties, then that order or judgment is interlocutory". Thus, that portion of the order, wherein the Tribal Court found a change of circumstance had occurred, is interlocutory in nature and not appealable at this time.

Lindsay's final issue complains that the Tribal Court improperly declared Mariah a ward of the Court. It is our understanding from the record that the Tribal Court declared Mariah a ward of the Court in anticipation of awarding temporary custody to Lindsay so he could take Mariah to Germany pending the Court's final determination of custody. The Tribal Court may, or may not, continue this protective stance when it determines final custody. Thus, as in **Issues #2 and #4**, there is work left to be done by the Tribal Court. Accordingly, that portion of the order declaring Mariah a ward of the Court is interlocutory in nature and not ripe for appeal at this time.

Before leaving the issue of the Tribal Court's decision to make Mariah a ward of the Court, we feel compelled to offer an advisory opinion. We strongly believe that the Tribal Court acted ***only*** in the best interests of Mariah and we applaud that decision as both wise and courageous. We will not reverse such a decision unless we are given very specific controlling authority that the Tribal Court exceeded its' authority.

In summary, **Issues #2, #4, and #5** are interlocutory, and therefore, not ripe for appeal at this time. **Issues #1 and #3** arise from those portions of the order that are final and appealable. We now address those issues.

DISCUSSION

Did the Tribal Court's August, 1993 declination of jurisdiction preclude the Tribal Court's consideration of jurisdiction in August, 1995 on the basis of res judicata?

Lindsay urges that the doctrine of res judicata "requires that the lower court act in conformity with its prior order declining jurisdiction when the parties remained residents of the same jurisdictions[6] as they had at the time of the August 27, 1993 order". (See Appellant's Opening Brief, p. 2, lines 22-23).

First, we note that the use of the doctrine of "res judicata" in child custody matters should be approached with great caution. While the doctrine serves a great purpose in preventing "piecemeal" litigation, its' use in dissolution proceedings differs in that issues of alimony, child support and child custody, are modifiable, with the Courts retaining jurisdiction. Specifically, in child custody cases, the "change of circumstances" standard, while finding it roots in the doctrine of res judicata, contemplates that there will be changes during a child's minority. These changes give rise and cause for a review of previous orders of the Court. Therefore, what a Court does today in the best interest of the child, may not serve the child's best interests later on. It is with this caution in mind that we address the August, 1993, Tribal Court order declining jurisdiction.

The August 27, 1993 order states in part:

> "1. This court should decline jurisdiction in this matter as custody with regard to the minor child has previously been litigated in the State of Idaho. The State of Idaho issued its order on April 13, 1993 directing that primary custody of the minor child be placed with Respondent, Lindsay Watchman.
>
> 2…
>
> 3. The Petitioner is directed to follow appropriate legal avenues in the State of Idaho to contest custody if she so desires as the Fort Peck Tribal Court is not the appropriate forum in which to hear the issues presented."

Our Tribal Court heard this matter in August, 1993, only four months after the issuance of the Idaho order. In would be reasonable to infer that the Tribal Court was invoking **Title VI §304(a)** of our **CCOJ** wherein it requires that a six month period elapse between custody orders unless there is a substantial change of circumstances. As previously noted, only four months had elapsed between the April, 1993 Idaho order and the August, 1993 hearing. On the other hand, it would be ludicrous to suggest that our Tribal Court should decline jurisdiction *simply and only* because the issue of custody was previously litigated in the Idaho Court on April 13, 1993. Apparently, Lindsay agrees with this analysis inasmuch as he argued in August, 1993, in his "Brief in Support of Motion to Dismiss for Lack of Jurisdiction" :

> "The second issue is also dispositive of this case. Title VI, Section 304(a) provides in pertinent part:
>
> > 'After the Court rules on the petition, neither party may file another custody petition for six (6) months absent a substantial change in circumstances.'
>
> In this action the court in Idaho ruled in favor of the father (with the mother's full knowledge and consent) on April 13, 1993. Even applying this court's own rules, a custody petition should not be entertained for six months following the entry of the Idaho decree. *Thus*

this court should not even consider a change in custody until October 13, 1993." @**pp. 7-8 (our emphasis)**

In our opinion, our Tribal Court was declining jurisdiction because the matter was fresh off the Idaho docket and thus not ripe for reconsideration in our courts due to the six month provision in §304(a). We also note that under the provisions of **28 USC 1738A**, the Tribal Court may have determined that jurisdiction was not proper *at that time* due to the fact that Lindsay and Mariah were both residing in Idaho and therefore, Idaho retained jurisdiction.

Accordingly, we find no basis for the invocation of the doctrine of res judicata as to the August 23, 1995 order accepting jurisdiction.

Did the Tribal Court have proper and effective personal service of Lindsay?

According to the record, Lindsay was in his attorney's office in Wolf Point on August 16th when counsel for Cynthia called. During that telephone conference, Lindsay's counsel indicated that Lindsay was in her office in Wolf Point and counsel for Cynthia immediately took steps to have him personally served. Lindsay contends that one day to prepare for such an important hearing was inadequate. We agree that one day is not enough, however, we do not agree that Lindsay had only one day. Immediately upon filing her petition on June 21, 1995, Cynthia attempted to serve Lindsay in Oregon and Idaho. Both attempts failed. On July 7, 1995, Cynthia published her summons in the Wotanin Wowapi, the newspaper serving the Fort Peck Reservation. On July 11, 1995, Lindsay filed a Special Appearance, Motion to Dismiss for Lack of Jurisdiction and Lack of Service of Process and Motion to Quash Temporary Custody Order and a ten (10) page brief in support of his contentions. On July 13, 1995, Cynthia petitioned the Tribal Court for an Order of Publication and obtained the order on July 14, 1995, with publication following for four (4) successive weeks on July 20th, July 27th, August 3rd, and August 10th. Personal service of the summons was effected upon Lindsay on August 16th. At the hearing on August 17th, Lindsay argued through his attorney, that Cynthia had advised him when he had called to make arrangements to pick Mariah up for the trip to Germany, that she (Cynthia) was going to file in Tribal Court for permanent custody (See Court Transcript, August 17, 1995, p 4, lines 8 through 14). All of these events, taken together, show that Lindsay had knowledge of the forthcoming hearing. However, the fatal blow to Lindsay's "lack of service of process" argument came a few minutes later into the hearing. The Court had just assumed jurisdiction and then asked:

"**Judge Welch**: Okay. So, we'll proceed. This Court has taken jurisdiction and also recognition of the divorce decree. So, the next step is…what do we do next?
Laura Christoffersen: Well, Your Honor, we're here on the Order to Show Cause why temporary custody should not be granted to Ms. Turcotte. *We're willing to proceed on that, today*. *My client is here from Germany. It's going to be **very difficul**t for him **to ever***

> ***return for another hearing**. So, from his point of view, he needs to give the testimony that he can give, today, and have a decision. He has tickets bought for the child to return to Germany, if the Court so orders. He cannot afford to come back again. It's been expensive."* (**id.@ p. 33, line 21, through p. 34, line 8**) (emphasis ours).

Whatever defect there may have been in effecting personal service on Lindsay, it was cured when the Court, after it assumes jurisdiction, allows Lindsay to orchestrate the proceedings by asking "What do we do next?" and Lindsay clearly waives any such defects by affirming to the Court that he is not only willing to proceed but implying that 'now is better than ever' because "(I)t's going to be very difficult…to ever return for another hearing." Lindsay's arguments that **Title IV §103** and **Title VI §301** of our **CCOJ**, the Parental Kidnapping Protective Act (**28 USC 1738A**) and the "Soldiers' and Sailors' Relief Act" (**50 USC App §501 et.seq**) each afforded him more time to prepare for the hearing than he was given, must surrender to his clear and unequivocal waiver.

The Tribal Court's Temporary Custody Order is affirmed in all respects as to those portions reviewed herein. The temporary stay issued by this Court on October 12, 1995, is dissolved and this matter is remanded to the Tribal Court with instructions to proceed with the hearing on its final custody order without further delay.

Dated December 19, 1996

BY THE COURT OF APPEALS:

_____
GARY P. SULLIVAN
Associate Justice

_____
GERALD M. SCHUSTER
Associate Justice

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[1] The Idaho decree was entered by default on April 13, 1993.

[2] Lindsay had previously received orders to report to England, however, he was forced to decline the assignment due to difficulty between he and Cynthia regarding Mariah.

[3] Cynthia attempted to serve Lindsay in Idaho, Oregon and Montana. He had departed for Germany as scheduled on June 15, 1995, ostensibly to return for Mariah at a later date.

[4] Lindsay's Petition for Review cites five (5) issues on appeal, however, in his supporting brief, Lindsay addresses only four (4) issues, three (3) of which appear on the Petition for Review. The second issue in his supporting brief "THE PARENTAL KIDNAPPING PROTECTION ACT, THE UNIFORM CHILD CUSTODY JURISDICTION ACT AND THE TRIBAL CODE ALL

REQUIRE THAT JURISDICTION OVER THE CHILD'S CUSTODY BE LITIGATED IN THE CHILD'S HOME STATE" does not appear in the Petition for Review and therefore is not properly before us.

[5]No appeal number appears on the face of this opinion. It is dated December 5, 1995.

[6]We note that the parties' residence in August, 1995 *had not* remained the same as they were in August, 1993. Lindsay was stationed at Mountain Home Air Force Base, Idaho in August, 1993. On, or shortly before, June 15, 1995, Lindsay was on his way to, or had already arrived at, his new duty station in Germany. Cynthia's petition was filed in the Tribal Court on June 21, 1995. Thus, at the time of the filing of Cynthia's custody petition, Lindsay was no longer a resident of Idaho. Inasmuch as he was abroad, not residing in any of the fifty states, we look to domicilary. At the hearing, Lindsay testified that his military "home of record" was Oregon. (Court Transcript, p. 95, lines 2 - 5). Therefore, his connections with the state of Idaho severed, Lindsay's legal residence reverted to his "home of record" state of Oregon. This analysis is very important to the second issue in Cynthia's brief regarding whether the Tribal Court could take jurisdiction pursuant to 28 USC 1738A (Full Faith and Credit for Child Custody Orders Act, also known as the Parental Kidnapping Protective Act {PKPA}). As an advisory to the parties, it appears to us that Lindsay does not have any connection with the State of Idaho as of June 15, 1995, that his "home of record" is Oregon, and that the Tribal Court would be authorized to accept jurisdiction under paragraphs(c),(d) and (f). It is clear to us that the State of Idaho would not be a proper state in that Idaho has no connection with any of the parties at this time, except that it was Lindsay's former residence. It should also be noted that according to Idaho case law, a child's domicilary follows that of the custodial parent. **Clark v. Jelinek 90 Idaho 592, 596; 414 P2d. 892, 893 (Idaho 1966);** see also **Restatement 2d Conflict of Laws, Section 22, comment b, 1989; People ex rel Noonan v. Wingate 33 N.E.2d 467 (Illinois 1941); In re: Skinner's Guardianship 230 Iowa 1016, 300 N.W.2d. 1; Peacock v. Bradshaw 194 S.W.2d 551 (Texas 1946); 25 AmJur2d Section 67**