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

LORI BIG TALK,
PETITIONER/Appellant,

vs.

Appeal No. 091

VERA BIG TALK,
RESPONDENT/Appellee.

THIS APPEAL is from a restraining order issued against appellant, restraining her from removing her 2 year old child from the Fort Peck Indian Reservation. The restraining order was obtained by petitioner's mother and grandmother of the child. Honorable Terry L. Boyd, Associate Judge, presiding.

FOR PETITIONER/Appellant: Melvin L. Eagleman, Sr. Lay Counselor, P. O. Box 781, Poplar, Montana 59255

FOR RESPONDENT/Appellee: Melissa Schauers, Lay Counselor, P. O. Box 214, Wolf Point, Montana 59201

CIVIL: A PETITION UNDER V CCOJ 301 MUST BE FILED BEFORE A CHILD IS REMOVED FROM THE PARENT AND CUSTODY TEMPORARILY CHANGED AND THERE IS AN INDIAN CUSTOM THAT ABUSED, ABANDONED AND/OR NEGLECTED CHILDREN ARE RAISED BY THE GRANDPARENTS AND THIS ARRANGEMENT IS PREFERABLE UNDER V CCOJ 306(2) (d) (ii).

Argued: December 1, 1989 Decided: December 1, 1989

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

HELD: THE ORDER TO RESTRAIN GRANTING TEMPORARY CUSTODY OF THE MINOR CHILD TO THE GRANDPARENTS AND TEMPORARY RESTRAINING ORDER RESTRAINING THE MOTHER FROM REMOVING THE CHILD FROM THE RESERVATION BE AND THE SANE HEREBY ARE AFFIRMED. THIS MATTER IS REMANDED TO THE TRIBAL COURT FOR THE REQUIRED HEARING ON THE GRANDMOTHER'S OCTOBER 24, 1989 PETITION ALLEGING THE MINOR CHILD IS NEGLECTED AND REQUESTING SUCH ORDERS AS THE COURT MAY DEEM PROPER WITHIN THE TIME CONSTRAINTS IN THE CCOJ FROM THE DATE OF THE FILING OF THIS OPINION.

FACTS:

On October 24, 1989, a Petition was filed by Vera Big Talk acting on behalf of the Assiniboine and Sioux Tribes and alleged that her grandson, a minor Indian child born on March 22, 1987 was then within the tribal jurisdiction of the Fort Peck Indian Reservation and neglected. The reason of the alleged neglect were as follows:

"My daughter's boyfriend abuses her often. She has been to a battered wife Shelter (witnesses to this: H.B. SIMPSON and LAURA TSEBETSAYE) She has no home to take my grandson to she is constantly on the move. I have had my grandson living with me and taking care of him since July, 1989. He needs a secure and stable homelife (sic)."

On October 30, 1989, Associate Judge Terry L. Boyd issued an "Order to Restrain" restraining appellant and mother, Lori Big Talk, and persons in active concert from harassing, bothering or attempting to take the minor child from the residence of Vera Big Talk or outside the jurisdiction of the tribal court. This order also granted temporary custody of the minor child to appellee and grandmother, Vera Big Talk.

On November 8, 1989, a hearing was held on the temporary restraining order. A Temporary Order dated November 17, 1989 was issued continuing to restrain appellant from removing the child from the reservation and ordered home studies conducted on the homes of appellant and appellee prior to the next scheduled hearing.

On November 28, 1989, appellant filed A PETITION FOR THE RETURN OF A 2 YEAR OLD CHILD, WILLIAM BIG TALK. The reasons

"1. the petitioner was served the certificate OF SERVICE UNTIL AFTER THE "ORDER TO RESTRAIN" HEARING ON THE 8TH DAY OF NOVEMBER. 1989.

"2. THE CERTIFICATE OF SERVICE WAS NOT SIGNED BY A POLICE OFFICER BUT BY THE INITIALS, MF, WHO IS THE ATTESTING CLERK OF COURT, MYRNA.

SEC. 303 OF THE CCOJ, SEC 303. INITIAL HEARING. "THE COURT SHALL MAKE ALL TRASONABLE (sic) ATTEMPTS TO NOTIFY, BY TELEPHONE OR OTHER MEANS, THE CHILD, THE CHILD'S PARENT OR GUARDIAN OF THE TIME AND PLACE OF THE INITIAL HEARING,

"3. ASSOCIATE JUDGE/JUVENILE JUDGE, TERRY BOYD STATED IN COURT ON THE 8TH DAY OF NOVEMBER, 1989 THAT THERE WAS NOT A CHILD-CUSTODY HEARING PRIOR THAT THERE IS ONLY THIS ORDER TO RESTRAIN HEARING. HE STATED THAT HE WAS GRANTING THE PETITION BY VERA BIG TALK, ON 10-30-1989.

"4 THAT THERE IS ONLY THIS ORDER TO RESTRAIN HEARING. HE STATED THAT HE WAS GRANTING THE PETITION BY VERA BIG TALK, ON 10-30-1989.

"5. WITHOUT A DUE PROCESS CHILD CUSTODY HEARING, THE COURT GRANTED TEMPORARY CUSTODY OF THE MINOR CHILD WILLIAM BIG TALK, TO VERA BIG TALK, TITHOUT (sic) THE PERMISSION, AGREEMENT OR ATTENDANCE OF THE NATURAL MOTHER, LORI BIG TALK, THEREBY SEPARATING THE CHILD FROM HIS

MOTHER.

"6. THE NATURAL MOTHER, LORI BIG TALK, WANTS HER SON, WILLIAM BIG TALK BACK IN HER CUSTODY, WHERE SHE IS MAKING PREPARATIONS TO LIVE IN GLASGOW, MONTANA. AWAY FROM THE INTERFERENCE OF HER MOTHER, MRS. VERA BIG TALK. "LORI HAS PLANS TO COMPLETE HER HIGH SCHOOL EDUCATION, through the G.E.D. process.
"SHE WILL PROVIDE HER OWN BABY SITTER WHILE SHE UNDEGOES (sic) THIS TRANSFORMATION."

The appeal was granted and oral arguments were held on December 1, 1989. During oral arguments, after a somewhat lengthy colloquy between Justice Melbourne, Vera Big Talk and Melvin Eagleman, this Court was given a custom which it would apply in the instant case. This Court also determined it may not have been provided with a complete file. A recess was taken and it was discovered this Court had not received a complete file. Before delving further into and addressing the above, the Court will set out two (2) issues to be addressed based on the six (6) reasons in appellant's petition.

This Court will address the following issues:

1. Whether appellant was denied due process of law when her minor child was removed from her and placed into the custody of the grandmother.
2. Whether there is an Indian custom abused, abandoned and/or neglected children are preferably raised by the grandparents, under V CCOJ 306(2) (d) (ii), and this custom should be recognized by the Tribal Court under IV CCOJ 501(c).

I.

Appellant was not denied due process of law when her minor child was removed from her and placed in the custody of the grandmother. Title V of the CCOJ governs the handling of an allegedly neglected child. A neglected child is defined in V CCOJ 102(d) as follows:

A child:

"(1) whose parent, guardian or custodian fails to provide the minimal care which a reasonably prudent parent would provide in the circumstances for the subsistence, education, and welfare of the child or

"(2) who has special physical or mental conditions for which the child's parent, guardian or custodian neglects or refuses to provide a reasonable level of special care; or

"(3) whose parent, guardian or custodian is unable to discharge his/her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity.

"A child shall not be deemed neglected if the reason for failing to provide adequate care for the child is the indigence of the parent or guardian.

"Minimal care shall mean provision of adequate food, clothing, shelter, medical care, and day—to-day supervision. In determining whether minimal care has been provided, the Court shall apply the standards prevailing in the community." (Emphasis Added.)

Before having a child subject to the jurisdiction of the Fort Peck Tribal Court system, a petition must be filed pursuant to y CCOJ 301. This section reads as follows:

"Any person may submit to the Tribal Court a petition to have any child subject to the jurisdiction of the court declared abused, neglected, abandoned, delinquent, or a status offender. Such application shall include (a) the name, address, and telephone number of the applicant, the child and, if known, the child's parents, guardian, or custodian; (b) the reason(s) why the applicant believes the child is abused, neglected, abandoned, delinquent, or a status offender; (c) supporting credible evidence, including affidavits or written statements from social workers, other child care professionals, or members of the community." (Emphasis Added.)

In the file first presented to this Court, there was no petition. This Court did receive copies of the following: Order to Restrain dated October 30, 1989; Petition for a Restraining Order dated October 30, 1989; and Certificate of Service which indicates appellant received a copy of the temporary restraining order on November 9, 1989. These documents were not sufficient to provide appellant due process as provided under Title V of the CCOJ. This Court was in agreement to dismiss the proceedings and return the child to its mother. Before doing so, this Court recessed to allow counsel time to provide this Court with a petition if one had been filed.

Upon returning from recess, this Court was supplied with a copy of the Petition dated October 24, 1989. This Court should not have to remind the Clerk of the Tribal Court of the necessity of strict compliance with I CCOJ 209 for the proper adjudication of the rights of all parties to an action. This section reads as follows:

"Within five days after a notice of appeal is filed in a criminal case or a petition for review is filed in a civil case, the Clerk of the Tribal Court shall certify and filed with the Court of Appeals all papers comprising the record of the case."

Because I CCOJ 209 was not followed, this Court did not have the petition filed by grandmother and would have been required to dismiss the proceedings and return the child to the mother for lack of due process. This result may not have been the disposition in the "best interest of the child" according to V CCOJ 306(d). This section reads as follows:

" ...

"(1) Best interest of child. The Court shall make such disposition as is in the best interest of the child.

"(2) Abused, neglected, or abandoned children. The Court shall order one of the following

dispositions, listed in suggested order of preference:

"(i) to the custody of the parent of guardian subject to such counseling, treatment, or other services as are deemed necessary to keep the child in the home;

"(ii) to the custody of a person related by blood or marriage to the child on or off the Reservation;

"(iii) to the custody of an approved Indian foster care home;

"(iv) to the custody of the Hope Ranch or other approved institution (sic) on the Reservation; or

"(v) to the custody of a non-Indian foster care home or institution on or off the Reservation, provided that such home or institution shall not be used for delinquent children as well.

"In addition, the Court may prescribe such counseling or treatment for the custodial parents as it deems necessary.

"(3) Determining and changing placements. In determining which of several relatives shall have placement of the child under subsection (2), the Court shall consider their ability to provide adequate food, shelter, medical care, love and emotional support, and day-to-day supervision. The Court shall also take into account the desires of the child. In its discretion, after the child is placed under subsection (2), the Court may hold a hearing to consider a change in placement. In deciding whether to hold a hearing or to change placement, the Court shall consider the best interests of the child."

". . . ."

The Court will compare the Temporary Order in light of the preferences set forth in V CCOJ 306(d), the custom wherein grandparents raise their abused, abandoned and/or neglected grandchildren and discuss the effect on the parties herein. The Temporary Order ordered the following:

"1. The Defendant is Ordered not to remove the child from the jurisdiction of the Court,

"2. The Defendant is allowed reasonable visitation with the child within the confines of the residence of Plaintiff,

"3. That the Defendant is Ordered Restrained from leaving the residence of Plaintiff with the child or removing the child from said residence without a responsible adult accompanying to which the Plaintiff has consented,

"4. It is Ordered that Home Studies shall be conducted on the homes of the Plaintiff and the

Defendant prior to the next scheduled hearing,"

As stated previously, the October 30, 1989 Order to Restrain restrained and enjoined the mother and persons in active concert from harassing, bothering or attempting to take the minor child from the residence of the grandmother and outside the jurisdiction of the court. This order also granted temporary custody of the minor child to the grandmother until a hearing could be held. As also previously stated, the Temporary Order further restrained the mother from removing the child from the reservation and gave the mother reasonable visitation with the child within the confines of the residence of the grandmother.

The Petition this Court was eventually presented with was filed before the Temporary Order and on the same day as the Order to Restrain. In scrutinizing the Petition, it does meet the basic requirements of V CCOJ 301. The Petition alleges the minor child, who was living with the grandmother, was neglected and gave reasons previously set forth herein. In the Petition, the grandmother advised the court the minor child had been living with her since July, 1989.

At the November 8, 1989 hearing which resulted in the Temporary Order, the testimony of the grandmother established one of the reasons in the Petition, an abusive home situation. The grandmother's testimony went as follows:

Vera Big Talk: All that I can gather is from a lady that lived next door to them. Her name is Laura.... I can't pronounce her last name, but I can spell it. Its Te.... Oh, Tsevetseye. She called me on the phone and said that... I'm kind of concerned about your daughter, she said. If that was my daughter I'd ask, I'd take her home cause her man is quite violent. She said, I had to hide them in my trailerhouse her and the little guy. And, because Robert was getting violennt(sic). So, we took her into Gallup to a battered wives home, but it was full. So, then they took her over to a juvenile home but that was full. They didn't take mother and child(sic)....mother and children there, so they got a hold of a guy named H. B. Simpson, Jr. And her is the one that put them up in a hotel room. And, when Lori called me, well, then un. ..., the next morning..., well, he put her and Georgie on the bus and thats (sic) why she came home.

[Transcript p. 7, 1. 11 to p. 8, 1. 3.]

The testimony at the hearing by the sister, Lisa Big Talk also helped establish two (2) of the reasons in the Petition, an abusive and unstable home situation. The sister's testimony went as follows:

Mrs. Schauers: Okay, Haven't you recently been living or... or...
Lisa Big Talk: Yeah. I was living with them in New Mexico.
Mrs. Schauers: In New Mexico?
Lisa Big Talk: For a month.
Mrs. Schauers: For one month? Can you tell us what conditions you were living in?
Lisa Big Talk: Well, we were staying in hotels and the guy she was living with, well, he's a really heavy drinker, he's a federal drug informant and a lot of people are after him because they know thatwhat he does down there, and it is really unsafe for.... to be around him. And, she don't have, you know, any place to take George to. She did have a trailer house but they don't have it anymore. They just live in hotels here and there.
Mrs. Schauers: What happened to the trailerhouse that they had?

Lisa Big Talk: They got evicted.

Mrs. Schauers: You say the guy she lives with.... is that her boy friend.

Lisa Big Talk: Yeah.

Mrs. Schauers: And, he's a federal drug informant.

Lisa Big Talk: Yeah.

Mrs. Schauers: So, are they constantly on the move then?

Lisa Big Talk: Yeah, they're constantly running.

Mrs. Schauers: So you stayed with them for one month.

Lisa Big Talk: Un...huh.

Mrs. Schauers: And then you came back home to Brockton?

Lisa Big Talk: Because he's when he gets drunk, he's really wild. He had to go to jail a couple of times for that.

Mrs. Schauers: Did he ever treat you sister violent?

Lisa Big Talk: Yeah., Me, too. That is why I wanted to come home.

[Transcript, p. 2, 1. 10 to p. 3, 1. 14.]

The testimony of the grandmother also established that appellant voluntarily brought the child with her to the grandmother's home in Brockton and left the child when she returned to the allegedly violent boyfriend. This testimony of the grandmother was in two (2) parts and went as follows:

Mrs. Schauers: And, Vera, as I understand it, you've had Georgie in your custody for quite some time.

Lisa Big Talk: Yeah, Lori came back July 29th, and she stayed all through August, and she left.... Oh, August, and then she stayed in September, and she left in October. All through the month of October she was gone. But, I had the little guy.

Mrs. Schauers: And when she left, he stayed with you?

Lisa Big Talk: Yeah.

[Transcript, p. 6, 1. 24 to p. 7, 1. 7.]

Mrs. Schauers: So she was gone the month of October.

Vera Big Talk: Yeah.

Mrs. Schauers: Why did she leave?

Vera Big Talk: The guy she stays with kept calling her, so then she moved back with.... Oh, he came up here.

Mrs. Schauers: Her boyfriend did?

Vera Big Talk: Yeah. He came up here and that's how Lisa went back with her, down there.

Mrs. Schauers: So he came up here to get her. Um... When she left, why didn't she take Georgie with her then?

Vera Big Talk:

I didn't want her to take him after that Laura kept calling..., saying that her boyfriend is a violent person. And, him being a drug informant, too. I don't think its safe. I told that to Lori, too. I said, "I'm not trying to take Georgie away from you permanently....". I said, "I just want to keep him till you can get a permanent home to take him to". Cause, they're still living in hotels.... thats (sic) not... I even told her to stay, too, till after she asked for baby.

[Transcript, p. 8, 1. 14 to p. 9, 1. 8.]

The testimony of the grandmother and sister established the possible neglect and an abusive home situation. During oral arguments, Justice Melbourne established with the grandmother and appellant's counsel an extended family custom of grandparents assuming responsibility for providing for the care of abused, abandoned or neglected grandchildren. The extended family custom was brought into play in circumstances involving the grandmother in the instant case and appellant's own counsel. In this case, the grandmother had assumed the parental responsibility for the grandchild when the mother absented herself from the reservation.

The jurisdiction of the Court of Appeals is set forth in I CCOJ 202 which reads in applicable part as follows:

"The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Trial 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...."

In the instant case, the Tribal Court was correct in its determinations of law. The Tribal Court was also correct in its determinations of fact. As for placement of the minor child with the grandmother, under the Applicable laws section at IV CCOJ 501 this Court must give binding effect to any applicable custom. This section reads in part as follows:

In determining any case over which it has jurisdiction, the Court shall give binding effect to:

" ...

"(c) any applicable custom or usage of the Tribes not in conflict with any law of the Tribes or of the United States. Where doubt arises as to such customs and usages, the Court may request the testimony, as witnesses of the Court, of persons familiar with such customs and usages.

" "

In conclusion, the Tribal Court was correct in its removal of the minor child from the mother and placement with the grandmother. Therefore, this Court recognizes the extended family custom of the grandparents assuming the responsibility for the grandchild with the neglect of the child by the parent(s) or absence of the parent(s). This Court also finds the filings and proceedings herein have not denied due process to the mother.

There is an Indian custom abused, abandoned or neglected children are preferably raised by the grandparents as opposed to other persons related by blood or marriage on or off the reservation and this custom should be recognized by the Tribal Court as provided for in IV CCOJ 501(c).

This Court has discussed this Indian custom in some detail and will not go into another lengthy discussion. As previously noted herein, this Indian custom was discussed by the grandmother and Justice Melbourne and affirmed by appellant's counsel. Title V CCOJ 306(d) (2) (ii) may recognize this custom by giving preference to custody being awarded a person related by blood or marriage to the child on or off the Reservation, however, this is not very clear.

In conclusion, this Indian custom should be and hereby is identified. Therefore, Tribal Courts are directed to apply this Indian custom in child custody proceedings wherein grandparents have been raising the minor child for any period of time at the request and/or neglect of its parents.

IT IS THE UNANIMOUS DECISION OF THIS COURT THAT THE ORDER TO RESTRAIN GRANTING TEMPORARY CUSTODY OF THE MINOR CHILD TO THE GRANDPARENTS AND TEMPORARY RESTRAINING ORDER RESTRAINING THE MOTHER FROM REMOVING THE CHILD FROM THE RESERVATION BE AND THE SAME HEREBY ARE AFFIRMED. THIS MATTER IS REMANDED TO THE TRIBAL COURT FOR THE REQUIRED HEARING ON THE GRANDMOTHER'S OCTOBER 24, 1989 PETITION ALLEGING THE MINOR CHILD IS NEGLECTED AND REQUESTING SUCH ORDERS AS THE COURT MAY DEEM PROPER WITHIN THE TIME CONSTRAINTS IN THE CCOJ FROM DATE OF THE FILING OF THIS OPINION.

DATED this _____ day of January, 1990

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Gary James Melbourne, Associate Justice

Floyd G. Azure, Associate Justice
