

























No. A-CV-24-82

COURT OF APPEALS OF THE NAVAJO NATION

January 10, 1983

Bella GEORGE, Appellant,

vs.

Bobby GEORGE, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Albert Hale, Esq., for Appellant, Window Rock, Navajo Nation (Arizona), William P. Battles, Esq., for Appellee, Window Rock, Navajo Nation (Arizona)

This is an appeal from the Findings of Facts, Conclusions of Law, Judgment and Orders entered by the District Court at Window Rock (Henry Whitehair, Judge). While this case reveals a procedural quagmire, it is nevertheless important that some kind of order be established for judicial economy and for the expeditious outcome for the parties in this domestic matter.

This is a divorce case in which the sole issue is the amount of monthly child support and the disposition of the outstanding support arrearage. There have been several hearings and equally as many orders entered that have created diverse results and delay to the final outcome.

I. Procedural Background

The parties were granted an absolute divorce by the District Court at Window Rock (Harry D. Brown, Circuit Judge) on June 27, 1980 wherein the plaintiff was ordered to pay as child support Two Hundred (\$200.00) Dollars per month. A Motion for Reconsideration was filed by the plaintiff on July 2, 1980. A Stay of Execution was granted by this Court on February 18, 1981. An Order of Continuance was issued by the District Court on April 7, 1981. It was not until June 25, 1981 that the Motion for Reconsideration was resolved with the judgment being affirmed once again for the defendant. On September 24, 1981 this Court decided the Appeal filed by the plaintiff-appellant on September 2, 1980 dismissing such action as being untimely. In addition the prior Stay of Execution ordered on February 18, 1980 was vacated.

No action occurred in this case until defendant brought forward a Motion for an Order To Show Cause on May 11, 1982 as to why the child support payments were not being made. On June 29, 1982 the District Court (Harry D. Brown, Circuit Judge) entered a Judgment

and Order reflecting several terms of the initial divorce decree. In addition, the Court ordered the following:

1. That the plaintiff pay \$200 per pay period for a total of \$400.00 per month.
2. That there was an arrearage of \$4,630.00 plus \$500.00 for attorney's fees for a total of \$5,130.00.
3. That \$200.00 shall be applied for the monthly child support and \$200.00 shall be applied for the outstanding arrearage.

The procedural outcome of this case does not end at this juncture. On July 8, 1982, this Court, through Acting Chief Justice Robert B. Walters, issued an Order to Remand for Hearing in Chief. The Court ordered, inter alia, that the Order to Show Cause be vacated, that a Writ of Prohibition be denied, that a Stay of Execution shall be in effect prohibiting the enforcement of the then existing Final Judgment, and that \$150.00 be paid per month for child support as a condition for the Stay of Execution with the previously adjudged support and arrearage amounts discontinued.

On August 31, 1982, in accordance with this Court's to Remand for Hearing in Chief, Findings of Fact, Conclusions of Law, Judgment and Order were entered by the District Court (Henry Whitehair, Judge). In its ruling, the District Court ordered the plaintiff to pay \$150.00 per month as child support and a total \$50.00 per month toward the reduction and elimination of the \$4,000 arrearage found to be due and owing. In addition, the Court granted the defendant the costs of her action.

However, defendant-appellant filed an appeal with this Court from the August 31, 1982 Findings alleging that such Findings were entered without defendant-appellant's attorney being present and that the District Court's Judgment and Order were without facts and evidence sufficient to warrant the disposition recited in the Findings. As a result, defendant filed a Motion for Reconsideration in the District Court. The District Court reopened the above order to allow counsel the opportunity to submit Proposed Findings of Fact and Conclusions of Law. Counsel has filed the requested Findings and the District Court is presently preparing its decision.

II. Conclusions and Order

In light of the fact that the District Court had jurisdiction in this matter and has reopened the case for reconsideration by allowing counsel the opportunity to submit their respective Findings, the Court hereby denies without prejudice and without determination on the merits this appeal pending the resolution of the case by the District Court.

[REDACTED]

No. A-CV-10-81

COURT OF APPEALS OF THE NAVAJO NATION

January 13, 1983

HERBERT MORGAN, et. al., Appellants,

vs.

THE NAVAJO NATION, Appellee.

[REDACTED]

[REDACTED]

[REDACTED] Karl Johnson and Lawerence Long, DNA-People's Legal Service, Inc., Window Rock, Navajo Nation (Arizona) counsel for appellants; William Riordan, Navajo Department of Justice, counsel for appellee.

CASE BEFORE THE COURT

This is a case arising under the grazing laws of the Navajo Nation. The District Court made a determination of ownership and forfeiture, as required by Sections 1306 and 1307 of the Navajo Tribal Code, and appellants Green and Morgan brought their appeal before this court on the judgment entered on February 20, 1981, claiming the District Court and the Navajo Nation were not in compliance with the applicable livestock statutes and that the judgment was not supported by substantial evidence.

An appeal was granted, and the matter was heard by a full panel of the Navajo Court of Appeals. Pending an opinion in the matter the parties entered into a certain "agreement of compromise and settlement of claim" on December 27, 1982. That agreement provides that the Morgans and the Greens will withdraw their appeal upon the payment of \$32,500.00 to them. The Advisory Committee approved the agreement on January 5, 1983.

An unusual aspect to this case is that although the appellants are represented by counsel, they have chosen to approach the Court of Appeals directly, without the assistance of their counsel. They have not made a proper appearance under our rules of procedure, and they seem to think that this court is yet another administrative agency to be approached, not knowing there are specific procedures to be followed in order to avoid unfairly hearing only one side of the case. All persons coming before a court are bound by its rules and procedures, and this case could be brought to a conclusion by the full court upon the briefs and arguments submitted. However the appellants have submitted copies of the agreement they entered into with the Navajo Nation and the resolution of the Advisory Committee appropriating the money for the settlement, and the court has confirmed the stipulated arrangement with the Department of Justice.

Under law it is unusual to allow the dismissal of a case on stipulation following its submission to the full court after argument. However

[REDACTED]

the Court of Appeals has the authority to dismiss a case in such a situation, particularly where the parties have reached an agreement in harmony. Courts should always encourage and accept agreements to avoid a litigated decision, except in situations where some one may be injured by the agreement. In this case it appears that all the necessary parties to the appeal have come to an agreement and that the agreement will not harm any individual.

There is a presumption that the decision of a trial court is correct, and that presumption will be applied here. This court will presume that the judgment of the Window Rock District Court was correct and that the appeal should be terminated solely because of an agreement of the parties which does not admit fault or liability.

Therefore the agreement of December 27, 1982, as ratified and acted upon by the Advisory Committee on January 5, 1983 is hereby accepted by the Court of Appeals and, because the matter before the court is now moot, this appeal is hereby DISMISSED for a lack of probable cause.

[REDACTED]

No. A-CV-31-82

COURT OF APPEALS OF THE NAVAJO NATION

January 17, 1983

Lee F. JOHNSON, Appellant,

vs.

NAVAJO ELECTION COMMISSION

and

ADOLPH JUNE, JR., Real Party in interest, Appellees.

[REDACTED]

[REDACTED]

[REDACTED]

Lawrence A. Ruzow & Allen Sloan, Esq., for Appellant, Ruzow & Sloan, Window Rock, Navajo Nation (Arizona), Faith R. Roessel, Esq., for Appellee, Vlassis & Ott, 1545 W. Thomas Rd., Phoenix, Arizona.

I. STIPULATION

Appellant, Lee F. Johnson, and Appellee, Navajo Election Commission, being represented by counsel, it is hereby Stipulated as follows:

1. The Navajo Election Commission shall make available to counsel for Appellant a true copy of the Kaibeto Chapter Poll Book from the November 2, 1982 General Election within two (2) weeks after entry of an Order approving this Stipulation. The Navajo Election Commission shall also make available or cause to be available such other relevant documents as are agreed by counsel for Lee F. Johnson and counsel for the Navajo Election Commission.

2. The Navajo Election Commission shall hold a hearing de novo on Lee F. Johnson's amended Statement of Grievance at a date time, and place mutually acceptable to counsel for Lee F. Johnson and counsel for the Navajo Election Commission. The scheduling shall be such as will give Lee F. Johnson sufficient time to review the Kaibeto Chapter Poll Book and other discovery materials and prepare for such a hearing.

3. Pursuant to the provisions of Section 2 of the Navajo Election Law (Navajo Election Commission 1982 Edition) and 11 N.T.C. §2 (Navajo Tribal Council Resolution CD-70-78), Lee F. Johnson shall continue as Navajo Tribal Council Delegate from the Kaibeto Election Community until this election dispute is resolved.

4. Any further action in the Navajo Court of Appeals, including record separation, briefing or oral argument shall be stayed until the Navajo Election Commission hearing de novo provided for in this Stipulation has taken place.

[REDACTED]

DATED: January 13, 1983.

CERTIFICATION

I hereby certify that a copy of the foregoing has been mailed this 14th day of January 1983, via Certified Mail, Return Receipt Requested to:

Mr. Adolph June, Jr.
P.O. Box 7105
Kaibeto, AZ 86503

/s/ Lawrence A. Ruzow

II. ORDER

The Court having reviewed the pleadings previously filed herein and the Stipulation of counsel and good cause appearing therefor:

IT IS ORDERED THAT:

1. The Stipulation is in all respects approved.
2. The briefing, argument and record preparation directed in this Court's Order of January 6, 1983 is stayed until further Order of the Court.
3. Lee F. Johnson shall continue as Kaibeto Council Delegate until the election dispute is resolved.
4. The Order of January 6, 1983 in all other respects is reaffirmed.
5. The Clerk of Court shall provide a copy of this Order to counsel of record and mail a copy to Adolph June, Jr.

[REDACTED]

No. A-CV-38-81

COURT OF APPEALS OF THE NAVAJO NATION

January 19, 1983

Joseph PETERMAN, Appellant,

vs.

Joe and Margorie THOMAS, Appellees.

[REDACTED]

[REDACTED]

[REDACTED]

Andy G. Smith, Esq., counsel for appellant. Albert Hale, Esq., counsel for appellees.

This is an unusual case because it is a reverse paternity action in which the father wishes to establish his paternity to a child born of the female respondent-appellee. The appeal in this action was filed on September 1, 1981 and following delays over prehearing conferences the parties entered into an agreement on October 5, 1982 which was finally filed on December 20, 1982.

The stipulation and agreement of the parties is that Joseph Peterman is the father of the child who is the subject of this action, and that the appellees (who are the child's grandparents) shall have permanent custody of the child. There is an unusual provision that the parties may either agree to joint custody of the child or the father may petition for custody of the child when she reaches eight years of age. No child support is required under the agreement. As to visitation, the parties agree that the father will be given the right to gradually develop long-term visitation arrangements in order to protect the child's well-being. Finally, there is the unusual provision that the counsel for the parties may agree to the stipulated dismissal of this appeal.

There are a number of points to be developed in acting on the stipulation and the appeal. First of all, we have previously held that an appeal may be dismissed by stipulation. Therefore the appeal will be dismissed, since the Chief Justice finds no good reason to not do so. Second, in litigation the actions of an attorney are the actions of the party the attorney represents. Therefore the stipulation and agreement will be binding upon the parties absent any fraud or misrepresentation. Third, the court will never approve any agreement affecting the welfare of a child unless the agreement is found to be in the interests of the child. The Courts of the Navajo Nation are the representatives of the Navajo Nation in its guardianship of Navajo children.

This court will not approve the provisions as to custody except to the extent that her permanent custody shall be in the appellees, as agreed. The father will retain his natural right to apply to the court for custody of a child at any time he can show that there has been a

[REDACTED]

substantial change of circumstances which materially affect the physical, mental or moral well-being of the child. If the court finds, at some time in the future, that joint custody or custody in the father is in the interests of the child, then a change can be made. The father's rights will remain open; but the court makes clear here and now that only the child's interests will be factor in any change in the custody arrangement. Of course the parents of this child are ordered by the court to work together for the well-being and happiness of the child, and any custody arrangement they develop which is in the child's interests will be considered.

The provision of no child support will be adopted reluctantly, with the court ordering the father to consider his moral obligations to the child in deciding voluntary support.

The visitation provision is adopted, but the parties are ordered to submit to counseling should there be a disagreement as to what the word "gradual" means in developing visitation.

Otherwise the stipulation is approved, and this case is remanded to the Window Rock District Court for the entry of an order adopting the stipulation and agreement in accordance with this order.

[REDACTED]

No. A-CV-42-81

COURT OF APPEALS OF THE NAVAJO NATION

January 21, 1983

In the Matter of the Adoption of Four Children

[REDACTED]

Before Chief Justice Nelson J. McCabe, and Associate Justices Marie F. Neswood and Robert B. Walters. Opinion by the court.

[REDACTED]

Lawrence Long, Esq., for Appellant, (Alice Kellywood), Window Rock, Navajo Nation (Arizona). Joey Greenstone, Esq., for Appellee (Mary Archie) Chinle, Navajo Nation (Arizona).

INTRODUCTION

This opinion is based upon a sad set of facts - the adoption of four children without proper notice being given to their mother.

The natural father of these four children died in 1973, and after that the childrens' paternal aunt gained physical custody of them. In 1979 the paternal aunt filed a petition to adopt the children in the Chinle District Court. An adoption decree was entered on January 17, 1980 and at the time the four children, Thomas, Jonathan, Elizabeth and Jeffery were 15, 12, 10 and 7 years of age, respectively.

After the adoption petition was filed, home studies were done with recommendations that the adoption be permitted due to the instability of the natural mother. One report, dated January 3, 1980, indicates that the natural mother's sister told the mother of the adoption hearing which was to be held. Another report by a social worker, dated January 20, 1981, indicates that the natural mother said she was aware of adoption proceedings but felt powerless to change her lifestyle.

Following the entry of the adoption decree there were numerous attempts by the natural mother to overturn the decree for a failure to give her proper notice, but all her motions and petitions were denied by the various judges sitting on the case.

THE LEGAL ISSUE WHICH RESOLVES THIS CASE

The legal question which disposes of this case is very simple: Is the adoption decree void and ineffective because of a failure to give adequate legal notice to the natural mother?

THE DUE PROCESS QUESTION

There is utterly no question that the adoption decree in this case was absolutely void under the due process clauses of the Navajo Bill of Rights and the Indian Civil Rights Act. In a fact situation very similar to the one before us, the United States Supreme Court noted that "It is clear that failure to give the petitioner notice of the pending

adoption proceedings violated the most rudimentary demands of due process of law." Armstrong v. Manzo, 380 U.S. 545, 550 (1965). Notice to natural parents in adoption cases is absolutely required in order for a court to have jurisdiction to issue a decree, and if jurisdiction is not obtained through proper notice, then any judgment, decree or order is void for all purposes and ineffective from the beginning. Matter of Adoption of Hall, 566 P.2d 401, 402 (Mont. 1977). This court has followed this rule, voiding an adoption decree for a lack of notice and voiding a child custody decree for a lack of notice, even with the presence of the mother at hearings. Matter of Adoption of Tsosie, 1 Navajo R. 112, 113 (Ct. App. 1977); Lente v. Notah, 3 Navajo R. ____ (Ct. App., May 25, 1982).

The Navajo Tribal Code recognizes these principles of jurisdiction and requires that:

"No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of notice shall be kept as part of the record in the case." 7 NTC Sec. 604.

It may be argued that in this case the natural mother did in fact receive notice of the suit because she was told of it by a relative and acknowledged knowledge of it to relatives. It can be further argued that the social work report in the file telling of such notice to the natural mother satisfies the statute as evidence of the receipt of notice. This kind of notice does not satisfy the statute and it does not satisfy the requirements of due process because it is not reliable notice. Where a person has a right under the Navajo Bill of Rights or the Indian Civil Rights Act, that right cannot be lightly passed over. A right has no meaning unless the means of protecting it is effective, and we hold that service of notice of the pendency of a lawsuit upon an individual is ineffective unless the notice is served by a peace officer of the Navajo Nation (i.e. a commissioned Navajo police officer or other law enforcement officer) or a person designated by the court. The only evidence of such proper service of notice is a written statement by the serving officer that the individual was served on a certain date in a certain method. Of course this method of notice can be waived by an acknowledgment of service by the person who is to be given notice or the entry of a written appearance by the person or his or her counsel. In any event, there must be evidence in writing of proper notice to persons in a law suit. (We do not ignore the fact there may be certain kinds of cases in which notice by means of publication is proper).

As instruction to the Trial Judges, this court directs that no judge enter a final judgment, decree or other order unless the file of the case is checked by the judge for evidence of proper notice and service of process.

THE STATUS OF THE CHILDREN FOLLOWING THIS ORDER

As the time of the adoption decree the children ranged from ages 7 to 15. Now, almost three years later, they are, respectively, 10, 13, 15 and 17. The file of the case shows that the children were in the

physical custody of their paternal aunt for a number of years prior to the adoption, and given the passage of time it would not be in the childrens' interests to simply void the adoption decree and return them to the custody of their mother. In a similar situation one court has voided the adoption decree and left custody of the child with the otherwise adoptive parents. In the Matter of the Adoption of Hall, 566 P.2d 401 (Mont. 1977). This court has done the same in a case involving a void child custody decree in a divorce matter. Lente v. Notah, 3 Navajo R. ____ (Ct. App., May 25, 1982). Therefore, given the age of the children and the passage of time, the court will order custody of the children in the paternal aunt pending further proceedings on an adoption or final custody. Also, given the age of the children, the court will permit reasonable visitation of the children by their natural mother. Further custody proceedings and visitation questions may be directed by the District Court.

The adoption decree of January 17, 1980 is hereby VACATED and this cause is REVERSED and REMANDED to the District Court for proceedings consistent with this opinion.

[REDACTED]

No. A-CV-26-82

COURT OF APPEALS OF THE NAVAJO NATION

January 24, 1983

Allen TOM, Appellant,

vs.

Irene B. TOM a/k/a Irene JOHNSON, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Wilbert Tsosie, Esq., of Shiprock, Navajo Nation (New Mexico) for Appellant, and Loretta Morris, Esq., of DNA People's Legal Services, Inc., Crownpoint, Navajo Nation (New Mexico) for Appellee.

ARGUMENT BEFORE THE COURT

The briefs filed by the parties show that the legal question before this court is rather simple. On November 15, 1976 the trial court ruled that appellant Allen Tom was the father of two children and ordered him to "pay in the amount of \$50.00 child support to plaintiff. . . ." In November of 1981 the appellee, Irene B. Tom, asked the court to modify its judgment to read "\$200.00 per month child support." Following a hearing, on September 28, 1982 the district court found that there was an oversight in the original order, and that it should have said "\$50.00 per month." The court denied the request to raise the amount of child support and another to order back child support payments. \$50.00 per month was ordered.

On appeal the father of the children argues that the original judgment could be read to be a one-time support payment of \$50, that the order was defectively vague and that the court could not modify the original order in any way.

The Chief Justice must now decide whether there is probable cause to grant an appeal.

THE VAGUENESS QUESTION

Is there a fair dispute of the law applicable to this situation so as to require a hearing by the full court of appeals?

The general principle of certainty in a judgment is that

"It is a fundamental rule that a judgment should be complete and certain in itself, and that the form of the judgment should be such

as to indicate with reasonable clearness the decision which the court has rendered, so that the parties may be able to ascertain the extent to which their rights and obligations are fixed, and so that the judgment is susceptible of enforcement in the manner provided by law. A failure to comply with this requirement may render a judgment void for uncertainty." 46 Am.Jur.2d, Judgments Sec. 67.

However that does not mean that any judgment which may be vague or uncertain is invalid. Courts are permitted to review their judgments to say what they mean, and that review is not an act of changing the judgment. Id. Sec. 72. Judgments are just like any written document, and the main thing to look for when reviewing a judgment is the intention of the court which made it. Id., Sec. 73. In trying to construe a judgment a court can look at the entire document and read it, along with the entire record of the case, the applicable law and rules of procedure, the kind of proceeding and what it accomplishes and like matters. Id. Sec. 76. The court's review should be such as to give the judgment force and effect, and there is a presumption that the court intended to make a valid judgment. Id., Secs. 73, 74.

One last important principle is that judgments are to be given a practical construction, and not a highly-technical one. Id., Sec. 75.

Therefore the situation in this case should be viewed to see if there is a vagueness in the judgment causing a genuine question of law in dispute.

APPLICATION OF A RULE OF PRACTICAL CONSTRUCTION

- Navajo Custom Law

It is plain under the customary law of the Navajo People that a father of a child owes that child, or at least its mother, the duty of support. It is said that if a man has a child by a woman and fails to pay the woman money to support it, "He has stolen the child." In other words, the man who receives the benefit and joy of having a child is a thief if he does not share in the worldly burdens of taking care of it. This Navajo custom lays the groundrule of support, and the conclusion to be drawn from the principle given is that a man must pay as much as is necessary for the child, given his abilities and resources at any given time.

The Anglo-European legal rule is the same. See Clark, The Law of Domestic Relations in the United States, Sec. 6.2 (1968). The foundation for the English and American rule is stated in very basic terms:

"The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injur-

ious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right to receiving maintenance from the parents." 1 Blackstone, Commentaries on the Laws of England 447. (Emphasis in the original).

- The Practical Application of the Duty to Support

The appellant father is, in effect, asking the court to let him off completely free of any obligation to his children other than a one-time payment of \$50. Courts cannot accept arguments which would make a basic obligation a farce. It is obvious, given the duty to support children in a way which fits the parent's ability and property that there is a continuing a changing obligation. Therefore it is ridiculous to assume that the only obligation the father had was to pay \$50.

This practical approach is reinforced by common knowledge of the legal principle that a court order fixing child support can be modified at any time. In this case the mother came into court asking for an arrearage payment and an increase of child support, and the father cannot be said to be injured or prejudiced by the court's order refusing an increase or payment of an arrearage.

MODIFICATION OF JUDGMENTS

Rule 23 of the Navajo Rules of Civil Procedure gives the court the power to reopen a case to correct errors in the interest of justice. The failure to put the words "per month" in the original judgment was certainly an error that justice required to correct. This is not a situation where the doctrine of res adjudicata applies, since the mother was not asking for relief which had already been ruled upon (as in whether there was paternity in the first place), but she was only asking for an interpretation and clarification of the original judgment.

CONCLUSION

This case stands as a good warning to members of the Navajo Bar and the Navajo Judiciary that judgments must be carefully prepared in order to fully and clearly express the intent of the court. Judgments should be carefully prepared by counsel, carefully read by judges and executed only if the court is satisfied the judgment is proper. While there are mechanisms to correct vague or sloppy judgment documents, justice requires that the drafting be done correctly in the first place. This saves litigants the pain and expense of more litigation, and it saves work for the courts.

The appellant's moving documents on appeal show no debatable question of law with respect to the fact situation posed, and therefore there is no probable cause to grant an appeal.

APPEAL DISMISSED.

[REDACTED]

No. A-CV-20-82

COURT OF APPEALS OF THE NAVAJO NATION

January 24, 1983

Paul RATION, Appellant,

vs.

Mattie ROBERTSON, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Frank J. Lally, Esq., for Appellant, Gallup, New Mexico. Irene Toledo, Esq., for Appellee, Crownpoint, Navajo Nation (New Mexico).

This is a case in which a man and a woman, living in a common law relationship, have a dispute over the right to property and contributions in acquiring the property. The trial court rules in favor of the woman and held that she would keep a 1978 Ford Thunderbird car finding "That the tradition of the Navajo people dictates that a male give up certain property rights upon the dissolution of a 'common law' relationship."

On appeal the man raises the question, "May the court deny appellant his property rights solely on the basis of gender?", and he argues that the custom found by the trial court conflicts with the Equal Rights provision of the Navajo Bill of Rights. That right very simply states that "Equality of rights under the law shall not be abridged or denied by the Navajo Nation on account of sex."

The Chief Justice is unable to properly evaluate the file and matters in this case as he is required to do because of the inadequate and conclusory brief filed by the man and the lack of argument on the important question by the woman.

This case simply is not ripe for a review, and the Court of Appeals will not consider the important matter of the Equal Rights provision eliminating an ancient Navajo custom in the absence of proper briefs on the part of counsel, giving detailed discussion of the law as it can be found in the decisions of courts interpreting Equal Rights provisions and the arguments on the adoption of the Equal Rights Amendment.

Therefore the court enters the following ORDERS:

1. The parties shall, on or before February 14, 1983, file simultaneous briefs on the question posed in the appeal;
2. The briefs of the parties shall set forth their arguments on the applicability of the Navajo Equal Rights provision in detail, with citation to appropriate authorities;
3. Should the appellant fail to file a brief or should the arguments set forth in it fail to raise a legitimate argument showing there is probable cause in support of his argument, this appeal will be dismissed.

[REDACTED]

No. A-CV-07-81

COURT OF APPEALS OF THE NAVAJO NATION

February 24, 1983

AI JOHNSON, Appellant,

vs.

Alta SINGER, Appellee.

[REDACTED]

The Court of Appeals, consisting of Honorable Chief Justice, Nelson J. McCabe, Associate Justices Marie F. Neswood and Robert Walters convened on this 23rd day of February, 1983 for oral arguments and the court finds:

That counsel, John Chapela, for plaintiff-appellee motioned for remanding the entire case to District Court for a retrial to resolve inconsistencies and to deal with the issues of awarding attorneys fees.

That the defendant-appellant, Al Johnson, approved the remand through his previous counsel, Kee Yazzie Mann, who is also currently suspended from practicing before the Navajo Courts by the Navajo Nation Bar Association.

IT IS THEREFORE ORDERED that the entitled matter be and is hereby remanded to the Window Rock District Court for a retrial.

So ordered.

[REDACTED]

No. A-CV-21-82

COURT OF APPEALS OF THE NAVAJO NATION

March 9, 1983

Michael BENSON, Petitioner,

vs.

Peterson ZAH, et al., Respondent.

[REDACTED]

[REDACTED]

[REDACTED]

Leonard Watchman, Esq., Window Rock, Navajo Nation (Arizona) for Appellant. Albert Hale, Esq., Window Rock, Navajo Nation (Arizona) for Appellee.

This appeal must be dismissed on procedural grounds. The action in the Window Rock District Court was originally dismissed by the Honorable Tom Tso on July 26, 1982 for the failure of the petition to state a claim. The plaintiff moved to set aside the dismissal and filed his notice of appeal. On October 1, 1982 the original order dismissing the action was set aside by the trial court. There were further proceedings and an opportunity for the parties to fully present the law applicable to the matter, and on November 11, 1982 the District Court finally dismissed the plaintiff's claims for failure to state claims recognized by law. A counterclaim by the defendant remained, but it was voluntarily dismissed with the approval of the court on March 2, 1983.

The appeal before the Court was resolved by trial court action in setting the dismissal aside, and there is no appeal on file from the final order. Therefore there is nothing to be heard.

There is no probable cause to hear this matter and it is hereby DISMISSED for failure to present a justiciable controversy.

[REDACTED]

COURT OF APPEALS OF THE NAVAJO NATION

April 4, 1983

IN THE MATTER OF THE ADMISSION TO THE
NAVAJO NATION BAR ASSOCIATION OF

Donald JUNEAU, Donald R. WHARTON,
Peter BREEN, Rosemary Ann BLANCHARD,
Susan K. DRIVER, Craig Jones DORSAY,
Theodore William BARUDIN, Lawrence A. ASCHENBRENNER,
Gary Edwin LARANCE, and Bruce J. FRIEDMAN

[REDACTED]

Upon the Motion of the Navajo Nation Bar Association for the admission of the above-named persons to said association and for the admission of the above-named persons to the practice of law before the Courts of the Navajo Nation, and the above-named persons having been administered the Oath and otherwise qualifying for admission, and it appearing that the Motion is well-founded and should be granted;

IT IS THUS HEREBY ORDERED that the Motion is hereby granted and the Clerk of Court of Appeals is hereby instructed to enter their names upon the rolls of those persons admitted to practice before the Courts of the Navajo Nation.

[REDACTED]

No. A-CV-10-81

COURT OF APPEALS OF THE NAVAJO NATION

April 22, 1983

Herbert MORGAN, et.al, Appellants,

vs.

THE NAVAJO NATION, Appellees.

[REDACTED]

The order dated January 13, 1983 mistakenly recites that William Riordan, Esq. of the Department of Justice is the counsel for the appellee. He advises the court that is not the situation.

Therefore it is ORDERED that Mr. Riordan's name be striken from the opinion.

[REDACTED]

No. A-CV-20-82

COURT OF APPEALS OF THE NAVAJO NATION

April 25, 1983

Paul RATION, Appellant,

vs.

Mattie ROBERTSON, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Frank J. Lally, Esq., Gallup, New Mexico, for Appellant. Irene Toledo, Esq., Crownpoint, New Mexico, for Appellee.

When this matter came in order for the setting of a hearing on appeal the court was advised by Frank J. Lally, Esq., counsel for the appellant, that it was moot and a motion to dismiss the appeal for mootness would be filed. Since that representation was made no such motion has been filed, and now it shall be DISMISSED for failure of the appellant to prosecute his appeal.

SO ORDERED.

[REDACTED]

No. A-CV-02-83

COURT OF APPEALS OF THE NAVAJO NATION

April 26, 1983

Anderson SKEET, Appellant,

vs.

Belinda SKEET, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

James J. Mason, Esq., Gallup, New Mexico, for Appellant. Donna C. Chavez, Esq., Window Rock, Navajo Nation (Arizona) for Appellee.

Due to the failure of the appellant to raise a matter which was not raised in the trial court, there is no probable cause for an appeal and the appeal will be dismissed.

The District Court of McKinley County, New Mexico granted a divorce decree to the parties and accepted their stipulation that the appellant husband would pay the appellee wife \$1,500 per year. The stipulation indicated that the amount of support was based on "petitioner's present ability to pay." The decree was rendered in 1981 and it is alleged the appellant failed to make payments for the years 1981 and 1982.

On January 21, 1983 a default judgment for arrearages in favor of the appellee was entered by the court, based upon an acceptance of the New Mexico decree. Thereafter an appeal was filed and a motion for reconsideration was filed with the district court the same day.

The motion for reconsideration recites the "ability to pay" provision of the decree and urges the adoption of the legal doctrine of retroactive modification of a decree in order to eliminate an arrearage. The problem with the motion was, and is, that the trial court was given no sound reason for reopening the default. The trial court was presented with no excuse as to why a default should be excused, and this court is given no reason to excuse it. The question of retroactive modification should be decided by this court, but that will be done in another case - one properly before us.

With regard to the motion for an expedited appeal, counsel is commended for giving an example of a motion well-made, with a supporting affidavit. However, counsel is advised that matters in the affidavit which do not go to the immediate need for a hearing and which are inflammatory and calculated to place a party in a bad light are not approved. This is, statements of an injury inflicted on a party by another which are not a part of the issues in the case or a foundation for a motion can only be taken to sway the court in favor of the injured party out of sympathy. Such matters cannot be allowed.

The appeal in this case is hereby DISMISSED.

No. A-CV-16-81

COURT OF APPEALS OF THE NAVAJO NATION

April 27, 1983

Tom Alex YAZZIE, Appellant,

vs.

Annie Lane YAZZIE, Appellee.

Appeal from the District Court for the District of Tuba City, the Honorable Robert B. Walters presiding.

This is an appeal from a default divorce judgment entered by the District Court on April 14, 1981. The judgment recites that the case came on for trial on April 9th with the plaintiff being absent but represented by counsel. It also recites that the parties had been served with a Notice of Hearing and the default of the plaintiff was entered due to his failure to appear.

The file on appeal in this case does not show that a motion for reconsideration was brought before the district court, and there is no indication in the appeal papers that any request for relief from the default judgment was made.

The appellant complains that although on March 31, 1981 a Notice of Hearing for a hearing to be held on April 9th was sent by his counsel, he (the appellant) did not receive the notice until April 14, 1981 and that it was received opened. In argument the appellant says that the postal mail was handled poorly by the Trading Post and that the plaintiff's mail was mistakenly taken by someone and not returned until after the trial date. The appellant contends the service by mail was not proper.

The file in this matter shows that the court gave notice of the April 9th hearing on March 26, 1981 by delivering a copy of the Notice of Hearing to "Mr. George thru Office box." Obviously the appellant's attorney received the notice.

The appellant argues that 7 NTC Sec. 604, which provides that notice of suits must be given with an ample opportunity to appear, and that statute requires reasonable notice. While the statute was obviously intended to regulate the initial service of process giving notice of suit, it is arguable that it can also include reasonable notice of every crucial state of the proceedings. The Clerk of court complied with the statute, and there is no cause to fault thirteen days notice, exclusive of the service day and the day of hearing. The trial court had jurisdiction because of the reasonable date and period of time of the actual notice

[REDACTED]

and because service of notice upon counsel is sufficient. Conner v. Union Automobile Ins. Co., 9 P.2d 863, 864 (Cal. App. 1932). The court finds that as far as the jurisdiction of the district court to enter a default judgment is concerned, thirteen days service by the court and eight days service (again excluding the mailing and hearing date) are reasonable, and the court finds no probable cause to find to the contrary.

In addition to the reasonableness of notice question, there is the matter of the proceedings - or lack of them - in the trial court. There is no evidence before this court that the appellant attempted to have the default judgment overturned. It would appear that counsel was present for the April 9th hearing, and there is no assignment of error that counsel asked the court to set aside the default. It is a basic rule that in situations such as this where a party wishes to contest the validity of service of notice, he or she must appear and ask that the service be set aside. 45 Am.Jur.2d, Motions, Rules and Orders Sec. 17. Therefore this court will not act unless the trial court has been asked to review a alleged error.

There is no recitation by the appellant that he made a motion for reconsideration before the district court, and it is a jurisdictional rule of this court that "No appeal shall be heard unless the appellant has filed a Motion for Reconsideration with the District Court" R.5(d), Rules of Appellate Procedure. Therefore this court has no jurisdiction over this appeal.

For the three grounds assigned in this opinion, the above-captioned appeal is hereby DISMISSED.

[REDACTED]

No. A-CV-21-81

COURT OF APPEALS OF THE NAVAJO NATION

April 27, 1983

Sandra and Nez BRANCROFT, Appellants,

vs.

Alfred NEZ a/k/a John NEZ and
TUBA CITY MOTORS, INC., Appellees.

[REDACTED]

[REDACTED]

[REDACTED]

Patricia J. Arthur, Esq., Tuba City, Navajo Nation (Arizona) for Appellant, Steve Verkamp, Esq., Flagstaff, Arizona, for Appellees.

7 NTC Sec. 801 provides that the Chief Justice must review reasons stated for an appeal in order to grant or deny the appeal on the basis of probable cause for review of the decision of the Trial Court. This case, as it is with many matters which come to the Court of Appeals, contends that the district court came to an incorrect conclusion as a matter of law, and factual matters are argued. It is extremely difficult for the court to evaluate the factual and record assertions of counsel in the absence of specific findings of fact and conclusion of law made by the district court. The Chief Justice cannot evaluate the contentions of the appellant if there are no stated findings of fact by the trial court or no conclusions of law to match against them.

Therefore this cause will be remanded to the District Court for the District of Tuba City for the making of findings of fact and conclusions of law in support of the prior judgment. The findings should be returned to this court no later than June 1, 1983, and they should be findings of the ultimate facts necessary to reach a conclusions as well as conclusions of law based upon those facts. This court recommends that the trial court immediately order counsel to submit draft findings of fact and law in order to assist it.

So ordered.

[REDACTED]

No. A-CV-09-82

COURT OF APPEALS OF THE NAVAJO NATION

April 27, 1983

COMMUNICATION WORKERS OF AMERICA AFL-CIO, District 8
Englewood, Colorado
Jerome BAILEY, Englewood, Colorado
Steven BEGAY, Tuba City, Arizona
Dennis SARKETT, Tuba City, Arizona
Zane WILLIAMS, Tuba City, Arizona, Appellants,

vs.

Jofina COAN, Appellee.

[REDACTED]

It appears from the record of this case that the decision from which this appeal lies was rendered on March 10, 1982. Excluding the date of the district court opinion the proper date of filing the appeal was April 9, 1982 - a Friday. Our appeals statute, 7 NTC Sec. 801(a), is jurisdictional, and Rule 2(c) of the Rules of Appellate procedure provides that "no appeal filed after the expiration of the thirty day period shall be allowed."

Therefore this appeal is DISMISSED and the judgment of the district court is final.

[REDACTED]

No. A-CV-35-79

COURT OF APPEALS OF THE NAVAJO NATION

April 28, 1983

William BATTLES, Appellant,

vs.

GENERAL ELECTRIC CREDIT CORP., Appellee.

[REDACTED]

Appeal heard October 5, 1982 before Acting Chief Justice Robert B. Walters and Associate Justices Homer Bluehouse and Tom Tso.

[REDACTED]

Albert Hale, Esq., of Window Rock, Navajo Nation (Arizona) for appellant, and Thomas J. Hynes, Esq., of Farmington, New Mexico for appellee.

[REDACTED]

This appeal involves assignments of error in the trial of the case before the district court. General Electric Credit Corporation (GECC) received an assignment of a retail installment purchase contract on a mobile home from Knott's Mobile Home Sales of Grants, New Mexico. GECC brought a repossession action in the dsitrcit court claiming it was entitled to remove the mobile home from the Navajo Nation due to non-payment of the sums due under the ratail installment agreement. William P. Battles, the purchaser, raised an affirmative defense which was in essence that of estoppel, saying that if the repossession were permitted that would cause fraud or unjust enrichment. In addition, Battles raised three counterclaims. First, the GECC had had hired him as a tribal court advocate to represent it in bringing repossession cases and that it owed \$100,000 for such representation; Second, that the required disclosures mandated by the Truth in Lending Act were not made at the time of the purchase of the mobile home; And, third, that Section 50-15-7 NMSA was violated for failure to furnish a copy of insurance required under the contract.

Following a number of discovery motions, the trial of the case was set for November 1, 1982. At that time Battles' attorney failed to appear for trial, and Battles made a pro se motion to continue the trial of the case, which was denied, and the trial proceeded. The judgment of the trial court found that Battles admitted default on the retail installment purchase agreement and gave a judgment of repossession. The judgment did not make any findings to address the estoppel claim, and it denied the Truth in Lending claim as being barred by a one year statute of limitations under that act. On the counterclaim for attorney's fees the court ruled that the defendant failed to prove the amount of his damages (tacitly finding he had represented GECC). The court did

find a violation of Sec. 50-15-7(c) NMSA, and barred the collection of any unpaid finance charge under the agreement.

The record of this case is further illuminated by findings contained in an order denying a motion for reconsideration. Those findings were that "no documentation" was presented to show an attorney and client agreement with GECC; that although there was testimony on attorney's fee agreements it was not contested by GECC; that the counterclaim or offset should have been filed separately "so the case would not have become confused;" and that "Truth in Lending laws are laws that apply outside the Navajo Nation and has no application to this case." The court went on to grant a rehearing of the case, but it later recognized it had lost jurisdiction due to this appeal and withdrew its exercise of jurisdiction.

On appeal Battles makes four assignments of error:

1. The court abused its discretion in denying a motion for continuance when defense counsel failed to appear;
2. The uncontested evidence at trial that money was owed for legal fees could not lead to a conclusion they were not proven;
3. The plaintiff was required to go forward with evidence on the issue of the amount of fees owing, and the failure to do so required judgment for the defendant on his counterclaim;

The issue of whether or not the Truth in Lending Act's one year statute of limitations applies in a situation such as this was not raised, so therefore it will not be discussed.

THE DENIAL OF A CONTINUANCE

Unfortunately the record below does not tell us why the attorney for the defendant did not appear at the November 1st trial, but on November 15th the court issued an order to show cause against the defendant's attorney for contempt proceedings due to the failure to appear. The record does not show the disposition of that order. As far as this court can tell, counsel simply did not appear and the defendant was compelled to go forward with his defense and counterclaims alone.

Perhaps the trial judge had in mind the fact that Mr. Battles is a member of the Navajo Bar and, due to the fact the trial pleadings said Battles handled a number of repossession cases, he should be able to handle his own repossession case.

The general rule on continuances is that the trial court has the discretion to grant them or not. 17 Am.Jur.2d, Continuance Sec. 3. However that discretion must be used in a sound and legal manner, and not one which is arbitrary or capricious. Id. The rule on continuances in Arizona is that

"It is well settled . . . that a motion for continuance is directed to the sound discretion of the trial court, and unless that discretion has been abused the trial court's ruling will not be disturbed by a reviewing tribunal." Dykeman v. Ashton, 446 P.2d 26, 29 (Ariz. App. 1968).

In New Mexico it is that the

". . . matter of the continuance of a cause rests within the sound discretion of the trial court and will not be interferred with upon appeal, unless it appears that the trial court has abused its discretion." Houston Fire and Casualty Insurance Co. v. Falls, 354 P.2d 127, 235 (N.M. 1960).

While this general rule is commonly known, it does not give much guidance to a trial court. The use of discretion calls upon the court to consider many surrounding circumstances, such as the practical consequences of the party having to go to trial and the opposing party having to suffer a delay. It calls upon counsel to clearly and precisely give the court good reasons for a continuance, to show that prejudice will result if the continuance is not granted and to state specific, concrete reasons to the court. The preferred means of doing this, both for the trial court to be able to rule and this court to review the exercise of discretion, is to present a detailed, written motion to the court with a supporting affidavit. Otherwise, if counsel do not adequately support or document their motions for continuances, the trial court will not overturn the denial.

Where counsel fail to appear at trial, courts do not view the absence with much favor. 17 Am.Jur.2d, Continuance Sec. 12. However, the question of granting or refusing a continuance for the absence of counsel can depend on many factors such as

- Whether other adequate representation is available (such as another attorney from the firm or new counsel);
- The degree of diligence a party shows in getting new counsel (so seeking counsel is not used as a delaying tactic);
- The timeliness of the applicaton for a continuance (being whether the party approached the court as soon as the nonappearance of counsel became apparent or the party otherwise acted quickly);
- The extent to which a continuance would cause additional expense or inconvenience;
- The prejudice to a party in having to go to trial without the counsel who was engaged to try the matter. Id.

There are many factors, but a showing of prejudice to the party asking for the continuance is the element common to all of them.

In the case of Finch v. Wallberg Dredging Company, the Idaho Supreme Court held that where a party's attorney withdrew three days before trial and the new attorney did not have enough time to prepare for a complicated case, a continuance should have been granted. 281 P.2d 136, 138 (Idaho, 1955). In Moss v. State Farm Mut. Auto. Ins. Co., the plaintiff's attorney withdrew ten days before trial, the plaintiff was not notified of the trial date and the case was dismissed for failure to appear at trial. That was held to be error. 328 So.2d 495 (Fla. App.). In Marpco, Inc. v. South States Pipe & Supply the defendants attorney withdrew on the day of trial, and the defendants did not know of the trial date or the attorney's intent to withdraw, so it was held a continuance should have been granted. 377 So.2d 525 (La. App. 1979).

This court is aware that it is impossible for an attorney to try a case without proper preparation. Indeed, this court has complained about inadequate preparation of counsel for a long time. In the Finch

case the court recognized that an attorney does not simply pick up a file and try a case, and certainly Mr. Battles could not be expected to do the same. Where there is reliance upon another to do something as important as to try a lawsuit, then there cannot be an expectation that even a party who is a member of the bar can be prepared. We hold that under the circumstances there was sufficient prejudice to the defendant in having to try his own case unprepared that a continuance should have been granted.

THE UNCONTROVERTED EVIDENCE QUESTION

Battles says that he testified about the attorney-client agreement with GECC and the fees owing to him, and that the testimony was not contradicted by any testimony or evidence from GECC. The trial court record shows documentation in support of the defendant's claim, although it does not show a written attorney-client agreement or any written evidence of the amount owing.

The defendant asserts his counterclaim as to attorney's fees was shown and that there being no testimony to the contrary, the trial court should have ruled in his favor.

The case law presented by the defendant presents the proposition that a court cannot disregard uncontradicted testimony unless: (1) The witness is impeached; (2) The testimony is equivocal or has improbabilities in it; (3) There are suspicious circumstances surrounding the transaction testified about; or (4) There are inferences which can be drawn from the facts and circumstances of the case that either contradict the testimony or cause reasonable doubt on the truth or accuracy of the testimony. Frederick v Younger Van Lines, 393 P.2d 438 (1964); O'Donnell v. Manes, 436 P.2d 577 (Ariz. 1968).

This proposition is acceptable, and it has been the law for several centuries. Thus in 1770 Lord Mansfield instructed a jury that in a libel case where it was shown that a book was sold in the defendant's shop and that testimony was unrebutted, it (the jury) must take the evidence as being conclusive. Rex v. Almon, 5 Burr. 2686, 98 Eng. Rep. 411 (K.B. 1770). This is a rule of common sense.

However, it may not help the defendant here. The paper trial of the case points strongly to an attorney-client relationship between GECC and Battles. There is no paper trail as regards any amount of money owing. Therefore the trial court could well have found one of the four exceptions above to be present and properly concluded that there were no damages proven.

The point of reversal, however, will be the conflicting findings of the trial court.

The court found there was "no documentation" for an attorney and client agreement, but an oral contract or implied contract could be easily concluded from the documentary evidence. The court did find that attorney's fee agreements were not contested by GECC, implying there was an attorney and client relationship.

There was apparently some confusion as to the law and issues in the case because the trial court found confusion in the pleadings.

Although there appears to be some recognition of an agreement with GECC, no damages were found. These are conflicting findings and should be resolved.

[REDACTED]

In sum, the apparent confusion in the trial court, perhaps caused by the failure to continue the matter, has lead to conflicting findings. We agree with the trial court that the matter should be reheard.

BURDEN OF GOING FORWARD

This issue will be left to the trial court in a less confusing set of circumstances. Normally the party having a claim is required to go forward on his claim and prove it. In this case the defendant could have, and can, simply subpoena any of the plaintiff's agents who may have information on the point and put them on the stand as defendant's witnesses.

DISPOSITION

For the foregoing reasons, the judgment of the district court is REVERSED, and this cause is remanded for a new trial.

[REDACTED]

No. A-CV-28-80

COURT OF APPEALS OF THE NAVAJO NATION

May 2, 1983

Kenneth WILLIE, Appellant,

vs.

Ada WILLIE, Appellee.

[REDACTED]

Appeal heard October 4, 1982 before Chief Justice Nelson J. McCabe and Associate Justices Robert B. Walters and Tom Tso.

[REDACTED]

Joey Greenstone, Esq., Chinle, Navajo Nation (Arizona) for the appellant, and George A. Harrison, Esq., of Farmington, New Mexico for the Appellee.

[REDACTED]

In this appeal we are called upon to decide whether benefits under the Railroad Retirement Act of 1974 can be community property for the purpose of a divorce, and whether money held in an Individual Indian Money Account (IIM Account) can also be considered to be community property.

The decision of the district court was that both funds were the community property of these parties.

While the court has been urged to apply state law to this matter, federal law controls the nature of the accounts and Navajo law controls the property relations of the parties, therefore the appropriate law will be applied to the appropriate situations here. 7 NTC Sec. 204.

THE RAILROAD RETIREMENT BENEFITS

Any benefits given under the Railroad Retirement Act of 1974 are reachable by court orders only to the extent allowed by federal law, and there is a United States Supreme Court decision which controls our decision on this point. In Hisquierdo v. Hisquierdo the California Supreme Court found that the benefits would be coming from the husband's employment during marriage, and held they were community property under California's community property law. 439 U.S. 572, 580 (1979). The United States Supreme Court noted that one of the statutes regulating the benefits contained a flat bar on reaching the funds by any legal process and held that it kept the states from treating them as a community property. Id. pp. 576, 590. The reason for this statute was to protect the fund and "to make it sure that the annuitant gets the pension." Id., p. 576, n. 7. Therefore we must hold that Railroad Retirement Act of 1974 accounts and funds cannot be included in the

community property of Navajo couples.

There is, however, an exception to the rule that these funds cannot be reached. Under 42 U.S.C. Sec. 659, federal benefits can be reached for child support or alimony obligations. Id., pp. 7-8, 16. The Supreme Court cautioned that a court may not offset an award of community property to make up for the fact that the retirement benefits cannot be reached, but a spouse can be compensated by alimony.

Therefore the district court's award of railroad retirement benefits to the wife as a community property was incorrect.

THE INDIVIDUAL INDIAN MONEY OR TRUST ACCOUNT

Again, the reachability of these monies would appear to be a matter of federal law. There is no specific authority for these accounts under Title 25 of the United States Code, but the stated justifications for term under federal regulations are 25 U.S.C. Sec. 2 (authority of the Commissioner of Indian Affairs in management of Indian affairs and relations) and 25 U.S.C. Sec. 9 (authority for the President to prescribed Indian affairs regulations). Therefore we look to the regulations to answer our question.

Very simply put, the regulation permits the Secretary of the Interior to pay out monies from IIM accounts for judgments rendered by a tribal court under tribal law. 25 C.F.R. Sec. 104.9. Therefore, as far as the Federal law which creates the account is concerned, tribal law will determine whether or not a legal debt exists.

It is important to remember that the government of the United States has not interfered in the local law field of domestic relations law, and state family law has not been interfered with in the field of property except when the state rule would do "major damage" to "clear and substantial" federal interests. Hisquierdo, supra, at p. 581. That same doctrine applies to Indian nations. Margold, "Power of Indian Tribes." 55 Interior Decisions 14, 40 (Solicitor's Opinion, Oct. 25, 1934). Therefore we refer to Navajo law to finally take care of the problem of whether these funds are community property.

Community property law is based on the idea that a marriage is a community to which each spouse contributes by building it up, and to which each spouse has an equal right when it dissolves. Meyer v. Kinzer, 12 Cal. 147, 251 (1859). There are exceptions to what property is included in the community, such as property acquired before marriage or property which is inherited or a gift, but individual as opposed to community ownership depends upon the method and timing of obtaining it. Hisquierdo, supra, at p. 578.

Under Navajo law all property acquired by a spouse during the marriage is community property, except for property which is a separate gift or inheritance and except for the earnings of a wife while she lives separate and apart. 9 NTC Sec. 205. There is another statute which gives definitions of what is separate and non-community property. That part of the statute which deals with the husband tells us that all property owned by him before the marriage or property he obtains by gift or inheritance is his separate property and it is not to be counted as a part of the property of the community. 9 NTC Sec. 202(a).

Therefore, since that statute also includes "the increase, rents, issues and profits" of the exempt property, there must be a determination of where the property came from.

THE FINDINGS OF THE TRIAL COURT

It is clear that the railroad retirement benefits cannot, as a matter of law, be included in the community property. As to the remaining problems on appeal, this court is in no position to either make a determination of whether the IIM account is community or separate property or whether the amount of alimony awarded is adequate or excessive. The trial court does not have the full authority to "provide for a fair and just settlement of property rights between the parties," but the findings of the trial court do not show us how the final settlement was determined. Normally alimony will be left within the sound discretion of the trial court where it considers the needs of the parties and the resources available to satisfy those needs.

DISPOSITION ON APPEAL

This case is REVERSED and remanded to the Chinle District Court for a determination of the nature of the IIM or Trust Account as community or separate property and in order to make findings as to the factual basis for the alimony awarded.

[REDACTED]

No. A-CV-03-80

COURT OF APPEALS OF THE NAVAJO NATION

May 2, 1983

GENERAL ELECTRIC CREDIT CORP., Appellant,

vs.

Raymond BECENTI, Appellee.

[REDACTED]

Appeal heard October 5, 1982 before Chief Justice Nelson J. McCabe and Associate Justices Homer Bluehouse and Tom Tso.

[REDACTED]

Thomas J. Hynes Esq., Hynes, Eastburn & Hale, of Farmington, New Mexico for the Appellant, and Michael Taylor-Shaut, Esq., Wayne H. Bladh, Esq., and Michael C. Nelson, Esq., DNA-People's Legal Services, Inc., for the Appellee.

[REDACTED]

The situation before the court is a common one to the field of consumer law. A consumer purchases something under a retail installment contract, something goes wrong, there is an action to repossess the article, and the consumer defends using consumer protection laws. This of course requires the court to interpret the applicable statutes which provide modern consumer protection. In this case the court is called upon to apply and construe New Mexico consumer protection statutes, which is required by our 7 NTC Sec. 204(c).

In this case the appellee (the consumer) decided to buy a mobile home from A-1 Mobile Homes, Inc. Apparently he did not have the full down payment for the mobile home, so he made an arrangement to give A-1 a partial down payment and pay the remainder at the time of the delivery of the mobile home. When the first part of the down payment was made a form retail installment contract was signed, and the consumer says he had to sign it a second time and did not receive a copy until the mobile home was delivered.

The heart of this case is the sufficiency of the retail installment contract. The consumer defended against a repossession action on the basis that the contract did not have the information required by law. He says required items of information were missing including:

1. The signature of the seller;
2. The date of the expiration of the insurance;
3. The buyer's address;
4. The date installment payments were to begin;
5. The amount of the final installment;

6. The date of the contract was signed; and
7. A description of purchased insurance.

NMSA Sec. 58-19-7A(3) clearly requires delivery of a copy of the contract to the buyer, and it must be a true copy. For the purpose of determining whether or not the requirements of Sec. 58-19-7 have been complied with, the court will refer to the buyer's copy, since it is a carbon copy of the original and reflects the state of the statutory disclosures at the time of the transaction.

Looking at the contract copy labelled "DUPLICATE - For Buyer" in the district court file, we note the following problems:

1. There is no seller's signature to assure the buyer the document is binding upon it;
2. There is no expiration date shown for the fire, theft and combined additional coverage so the consumer can protect himself in case of lapse and to see what he is paying for;
3. The buyer's address is not filled in. (This may not be material, but it could raise questions of jurisdiction and venue with regard to enforcing the contract);
4. While it may not be material under the contract that there is no date specified for the installment payments to begin, since the contract is not dated the clause that makes them being one month after the contract date is inoperative. Strictly speaking, the installment payments would begin at the consumer's option;
5. No final installment amount is shown, so the consumer does not know whether it is the same as the others or there is a surprise balloon payment; and
6. The contract is undated; NMSA Sec. 58-19-7 requires the signatures of the parties, completion of the contract as to all essential provisions, the residence of the buyer, and the absence of blank spaces. Therefore it appears to the court that this particular retail installment contract violated the statute, and the district court was correct in its finding that such was the case.

Next comes the problem of what can be done about the fact the statute was not complied with. NMSA Sec. 58-19-11B provides that should there be a "willful violation" of Sec. 58-19-7, that conduct "shall bar recovery of the finance charge, delinquency and collection or other charges whatsoever by the owner or holder of the retail installment contract."

The parties have provided a good deal of argument and presented precedent to define the word "willful." It is conceded that the contract does not comply with the statute, and only a categorization of the seller's conduct as "willful" will bring the penalties into play.

We choose to define the term in commercial and consumer law context because what the court is being called upon to do is construe a state consumer statute. In doing so we are attempting to find the intention of the New Mexico Legislature when it passed the statutes we are dealing with, and surely when the legislators enacted the Motor Vechile Sales Finance Act of 1978 it was thinking of business conduct by sellers of motor vehicles which could be called "willful."

Unfortunately there appear to be no readily-available precedents in the consumer statute context to guide the court in applying the term "willful" to the situation here. The appellant provided the court with one useful precedent in the case of Mercado v. Brennan, which stated:

"Willfullness in violating a regulatory statute implies not so much malevolent design as action with knowledge that one's acts are prescribed or with careless disregard for their lawfulness or unlawfulness. 173 F.2d 554, 555 (1949) (Price ceiling violation).

Another price control case brought us the definition that

". . . the term 'willfull' means intentional, knowing, voluntary, or deliberate, as distinguished from accidental involuntary, or unintentional." Haber v. Garthly, 67 F.Supp. 774, 776 (D. Penn. 1946).

A modern "price freeze" case gives us the definition that

". . . the term "willfully" cannot be conduct purposely done by one "who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements" United States v. Futura, Inc., 339 F. Supp. 162, 168 (D. Fla. 1972).

Condensing these elements, which have been derived from regulatory statutes much like the ones before us, we can eliminate bad or evil purposes or acts from our consideration. What the New Mexico Legislature intended was to set down standards to regulate the sale of motor vehicles which are financed. It intended that the covered dealers know what they were to do in connection with retail finance contracts and punish conduct where there are knowing violations of the act or a careless disregard for the act. Surely it meant to punish violations of the act which are intentional, knowing or voluntarily as well as dealer conduct which is plainly indifferent to the requirements of the act.

What is to be drawn from this is that courts will not impose that statutory penalty for mistakes, oversights or technical violations of the act. However the courts will penalize conduct which is clearly violative of the act.

In this case the seller complains that its conduct was reasonable under the circumstances and therefore not willful. First of all, the court takes notice that A-1 Mobile Homes, Inc. is a merchant of no small repute. Secondly, the court knows that successful business can operate in this day and age only through a complete knowledge of the laws under which they must operate. Third, the court is aware that there are many sources of information for businesses on what their legal requirements are. Therefore the court concludes that A-1 had knowledge of the law.

A-1 also had knowledge of what is required of it through the use of a standard, printed retail installment contract and disclosure form. The one in the court file is a standardized form, identified as being form DL-29-1T (10-73), suitable for use in the States of Montana, Nebraska and New Mexico. The blanks were there on the form to be used, and we note the standard rule of contractual interpretation that form contracts are to be construed against the person providing them.

We construe this contract as providing the merchant with knowledge of what disclosures were required, and we have seen the violations complained of on the very form furnished the consumer.

The conduct of the seller is not excusable and certainly there is no explanation for it. If there was to be a special arrangement on the sale, that is what pre-sale or other special agreements are for. The seller simply did not comply with the law, either by giving specific disclosures or by completing its own form. The form itself is evidence of willfulness due to the patent knowledge of the statutory requirements and the obvious disregard or indifference to them.

We further find that the district court's application of the penalty statute was correct because it declares the rights of the consumer to the noncollection of the finance charges.

There is still an adequate repossession remedy for the appellate because of the fact the district court order provides for the full payment of the principle price of the mobile home.

The decision of the district court was correct, and for that reason it is AFFIRMED.

[REDACTED]

No. A-CV-09-81

COURT OF APPEALS OF THE NAVAJO NATION

May 2, 1983

Laurita Gail HARDING, Appellant,

vs.

Sylvia METTEBA, Appellee.

[REDACTED]

Appeal heard on October 6, 1982, Chief Justice Nelson J. McCabe and Associate Justices Robert B. Walters and Tom Tso presiding.

[REDACTED]

John A. Chapela, Esq., of Window Rock, Navajo Nation (Arizona) for appellant, William Sheperd, Esq., DNA, Peoples-Legal Services, Window Rock, Navajo Nation (Arizona) for appellee.

The full court, having reviewed the file of the matter, is not satisfied with the record. The trial court's judgment does not state where the incident occurred, the specific acts of negligence which gives rise to liability or the items of damage included in the judgment. In order to fully review a trial court's judgment there must be findings of fact and conclusions of law which give reasons for a judgment and support the grounds for judgments.

Therefore this cause is REMANDED to the Window Rock District Court for the entry of more complete findings of fact and conclusion of law.

Upon the entry of findings and conclusions the parties may move the court for a further hearing on appeal.

[REDACTED]

No. A-CV-27-81

COURT OF APPEALS OF THE NAVAJO NATION

May 5, 1983

Grace BENALLY, Dorothy JIM, Appellants,

vs.

Mary Ford JOHN, Thomas STEVENSON, Appellees.

[REDACTED]

Appeal heard October 6, 1982 before Chief Justice Nelson J. McCabe and Associate Justices Robert B. Walters and Tom Tso.

Earl R. Mettler, Esq., of Farmington, New Mexico appearing for the appellants and George A. Harrison, Esq., Farmington, New Mexico, appearing for the appellees.

[REDACTED]

[REDACTED]

This is a jurisdiction case, raising the question of the sovereign authority of the Navajo Nation against that of the United States. The legal question presented is the extent of the exclusive judicial authority of the Courts of the United States and the scope of jurisdictional power of our own courts. More specifically we are dealing with the subject of allotted land within the Navajo Nation, which is allocated and managed by the United States. The policy factors at play are the international law rules that it is the duty of the United States to not intervene in the internal or external affairs of the Navajo Nation and that the Navajo Nation should decline the exercise jurisdiction over the public property of the United States destined for public use. Brownlie, Principles of Public International Law, p. 254 (1966); Briefly, The Law of Nations, p. 243 (1963).

We are dealing with concepts of governmental interest, jurisdiction over persons, territorial jurisdiction and subject matter jurisdiction, and therefore the interests of the governments, persons and judicial bodies involved are very important. We also deal with the nature of the property involved, its source, ownership, regulation and control.

The facts giving rise to this suit are these:

On April 29, 1980 the appellants here, Grace Benally and Dorothy Jim, filed a petition for the guardianship of their grandmother, Mary Ford Deschilly (who was also known as Mary Ford and E Kid des pah), for the limited purpose of bringing an action for the recovery of property allegedly fraudulently obtained. The property recited in the petition was an "allotment." The claim was that in 1978, while the grandmother was incompetent, certain individuals had her put her thumbprint on a deed, thereby illegally passing interest to the allotment. That act was allegedly one of fraud and undue influence, and a lawsuit would be

necessary to recover the allotment on the ward's behalf. The prayer of the petition only indicated the purpose of the petition was to bring suit, and it did not indicate what court would entertain the suit.

However the petitioners also filed a complaint for the cancellation of the deed, and they recited that the parties reside within our territorial jurisdiction that the conveyance was fraudulent since the woman was not competent (and defendants knew this) and that there was undue influence exercised upon her. The complaint prayed the court to require the defendants to execute and file a deed back and that they give an accounting of the proceeds of the property.

On June 3, 1981 the Honorable Henry Whitehair dismissed the action for a lack of jurisdiction. This appeal followed.

In the meantime, there have been Indian probate proceedings with respect of the estate of the woman who executed the deed. In the Matter of the Estate of Ford, No. IP GA302G 81 (Office of Hearings and Appeals, Gallup, N.M.). While the person who was the subject of the guardianship and the proposed beneficiary of the lawsuit died on January 27, 1981, almost five months before the district court dismissal, no party has moved to dismiss the suit for mootness or a lack of proper party plaintiffs. However, since the issue here is capable of repetition, yet evading review and it is one which we may expect may subject the appellees to the same action again, we find the case to still be one in controversy and reviewable by this court. See Carafas v. LaVallee, 391 U.S. 234 (1968) and Weinstein v. Bradford, 423 U.S. 147 (1975).

This appeal has four issues presented:

1. Do our courts have jurisdiction over the parties and the subject matter of the District Court suit?
2. Is the fact there has been no determination of the competency of the decedent one of relevance in jurisdiction?
3. Do our courts have jurisdiction over an individual for the purpose of requiring him or her to transfer an allotment interest?
4. Was venue in the Shiprock Court proper?

The court has decided that it is necessary to address the first and third issues only. While the availability of a remedy may sometimes be a factor in jurisdiction, we do not reach that question here in a direct way. Since venue was not ruled upon by the trial court, we will not do so.

PRELIMINARY OBSERVATION CONCERNING OUR JURISDICTION TO DECIDE NAVAJO JURIDICTON

The Administrative Law Judge of the Office of Hearings and Appeals presiding in the Indian probate case has already gratuitously ruled on this appeal, basing her ruling upon the matters before this court. This court is not pleased by the conduct of a foreign agent in interfering with our function by deciding this appeal for us. The administrative law judge has seen fit to determine our jurisdiction and to predict the outcome of litigation should this court hold there is jurisdiction. This agent of a department and a government which is required by its own laws to respect the self-determination and autonomy of this court has seen fit to predict that the likelihood of the underlying action prevailing is "practically nil;" that any action in the tribal court would be futile because of a predicted noncooperation of BIA

[REDACTED]

employees; that incompetency at the time of signing the deed cannot be determined by us because it would call into question BIA trust responsibility; that we lack the jurisdiction to determine the validity of the deed; and that the action could not be heard without the presence of the United States. The determination of our law and procedure was unnecessary to the probate proceeding, and it constitutes a bold and arrogant intrusion into our internal affairs, invading the sovereignty of the Navajo Nation. See, Brownlie, above, p. 254.

It is our authority to determine our jurisdiction, and the Hon. Administrative Law Judge is reminded that her appellate body, the Interior Board of Indian Appeals, has similarly so held when the Bureau of Indian Affairs attempted to oust it of jurisdiction in an Indian affairs matter. St. Pierre and the Original Chippewa Cree v. Commissioner of Indian Affairs, 9 IBIA 203, 218-219 (1982).

Therefore this court, the duly-constituted organ of Navajo Government designated to give final review of such matters, will proceed to decide the jurisdiction of the Navajo courts in this matter.

THE JURISDICTION QUESTION

We do not find the absolute ruling of the Office of Hearing and Appeals that there is no tribal court jurisdiction where allotted land is involved persuasive. One authority notes that the statutes limiting inconsistent tribal laws "do not directly restrict tribal court jurisdiction." Cohen, Handbook of Federal Indian Law, p. 343 (1982 Ed.). As to whether the allotment jurisdiction statutes indeed preempt tribal court action, that question is uncertain. Id. and p. 628. When there are federal rights which are enforceable in state courts, that doctrine should apply to tribal courts as well, where there is jurisdiction over the person or property. Id. p. 344. As Alexander Hamilton noted in The Federalist Papers No. 82:

"The National and State systems are to be regarded as One Whole. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate and principles of national justice and the rules of national decisions." Quoted in Terry v. Kolski, 254 N.W.2d 704, 406 (Wisc. 1977).

This court of course is empowered, with the consent of the Secretary of the Interior, to apply federal law. 7 NTC Sec. 204(a). (The question remains as to whether the allotment jurisdiction statute is one which has been reserved to exclusive federal court jurisdiction).

A starting point in jurisdictional questions is the governmental interest of the jurisdictions involved. Ehrenzweig, Conflicts in a Nutshell, Sec. 8 (1965). The question of contacts with the jurisdiction to subject a person or his property to court jurisdiction is not helpful here because such jurisdiction need not be exclusive. Texas v. New Jersey, 379 U.S. 674, 678 (1965). Therefore an examination of the governmental status and interests of the United States and the Navajo Nation is where we will begin.

THE SOURCE OF NAVAJO JURISDICTIONAL AUTHORITY

It is an elementary foundation block of United States - Indian nation relationships that Indian nations are sovereign and derive their sovereignty from their preexistence to the United States and their dealings with the United States as independent sovereigns. When sovereign Indian nations dealt with the United States by treaty, they did so in an international law sense. Further, they did not receive their lands and powers from the United States but only ceded lands and privileges to it. That is true of the Navajo Nation and must be remembered in connection with the Treaty of 1868.

These same principles apply to the jurisdiction of our courts. This is how our powers are derived:

"The plaintiffs would argue that there is found no provision in the Federal Constitution for Indian courts. None is necessary. As already indicated, the Constitution, by authorizing the making of treaties with them, while not in and of itself establishing the sovereignty of the tribes, nevertheless does recognize their sovereignty. As interpreted by the United States Supreme Court, that sovereignty is absolute excepting only as to such rights as are taken away by the paramount government, the United States. Under this view, not even a Congressional Act would be necessary to establish the legality of the . . . Tribal Courts. However, regulatory powers over these judicial establishments have been exercised to promote uniformity, gradual assimilation and other ends . . . We accordingly hold that not only do the Indian Tribal Courts have inherent jurisdiction over all matters not taken over by the federal government, but that federal legislative action and rules promulgated thereunder support the authority of the Tribal Courts." Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Reservation, 231 F.2d 89 (Emphasis in the original).

Therefore we hold that our courts have inherent jurisdiction over all matters not specifically denied by the Navajo Tribal Council or taken over specifically by the government of the United States. We also hold that our authority is a retained authority, not dependent upon a grant from the United States, and that such authority will be exercised in concurrent jurisdiction with the United States, where concurrent and not exclusive tribal jurisdiction lies. That is the present situation in the area of criminal law as well as other areas United States v. Wheeler, 435 U.S. 313, 328, 328 f.27 (1978).

THE ALLOTMENT JURISDICTION STATUTE

The statute which deals with allotment claims provides that an

Indian "may" bring an action in a United States district court and that such courts have jurisdiction. 25 U.S.C. Sec. 345. The statute is permissive and not mandatory, and indeed one court decision (not directly involving an allotment) held that cases to transfer allotments to and from Indians can be brought in state court. United States v. Candelaria, 271 U.S. 432 (1926). It must be remembered that the district courts of the United States are courts of limited jurisdiction and have only those powers which the United States Congress gives them. In contrast, our courts are courts of general jurisdiction with few jurisdictional limitations as regards the subject matter of the suits brought before us. Therefore 25 U.S.C. Sec. 345 was necessary in order to give the United States courts jurisdiction over allotted land, while we generally have jurisdiction over all territory within the Navajo Nation. There is, however, precedent that land actions under 25 U.S.C. Sec. 345 are under exclusive federal court jurisdiction. McKay v. Kalyton 204 U.S. 458 (1907). It would appear to us that we do indeed have jurisdiction over Sec. 345 actions, but we will defer that question for a later ruling and confine ourselves to the action which is now before us on appeal.

We are speaking here of governmental interests. We do not know in which portion of the Navajo Nation the land in question here lies, but we assume it lies in an area added to the Navajo Nation by the United States after the treaty of 1868. The General Allotment Act was an assimilationist piece of legislation, and given the fact allotted land lies largely in the eastern part of the Navajo Nation, the land here must have been a part of those lands added to carry out the act. If so, then we are talking about lands given to the Navajo Nation with a condition attached to them, the condition being they would be held for individuals and alienated under the authority of the Untied States. In other words, there is a strong federal interest in those lands and their transfer, and interest which is not assumed by the government of the Navajo Nation. That being the case, it has been the policy of the executive and legislative arms of the Navajo Nation to permit the United States to engage in such transactions, and under the doctrine of immunity in the exercise of jurisdiction over a foreign state and its property, we should not normally exercise jurisdiction over such matters. Briefly, The Law of Nations, pp. 243-244 (1963). In other words, since the activities of the United States in the area of allotted lands have been permitted and the sphere of interest of the United States has been consistently exercised, our courts should defer to the United States as a matter of comity when dealing with allotted lands.

ACTIONS NOT WITHIN THE SPHERE OF INFLUENCE OF THE UNITED STATES

The Navajo courts will not try allotment actions where the United States would have to be a party. We urge the Navajo Government through its attorney general to clarify the application of 25 U.S.C. Sec. 345 to permit action by our courts in oder to avoid deciding that question as a judicial matter. (We will decide that matter if called upon to do so in a proper case).

However allotment actions involving the United States are not the only remedy available to an individual. An individual may choose a United States Court if the desire is to compel BIA Officials to make an

actual transfer of allotted land, but in this case we have a situation where the plaintiffs below desire only a declaration that the transfer was fraudulent and coercive and a judgment requiring the current individuals holding the deed to the land to sign it back and account for its use. The United States may or may not accept a deed from such individuals, but a Navajo court can order them to sign one and hold them in contempt if they refuse to do so.

The limits of this holding are that the Navajo courts will not directly deal with allotment titles until the law is further clarified, try title to allotted land or attempt to compel United States officials to transfer it, but in any action where action upon the person only is demanded, our courts may act. We have precisely the situation in Conroy v. Conroy, where the Oglala Sioux Tribal Court was held to have the authority to deal with allotted land as a necessary incident to divorce jurisdiction. 575 F.2d 175 (C.A. 8, 1978). The Navajo Nation inherently has the authority to protect its members from fraud, deceit, undue influence, overreaching, unconscionable conduct, torts and the other kinds of personal conduct the civil law is designed to regulate. For centuries equity jurisdiction, which we clearly have, has been designed to act upon the conscience, i.e. the person, in order to correct bad conduct. The first equity judges, the chancellors, were the king's personal agents, sent by him to correct injustices by enforcing his will against wrongdoers. It is nonsense to say that the Navajo Nation does not have such authority to act upon the person of individuals who commit civil wrongs. Our courts have the authority to declare that a wrong has been committed and, in equity cases, to give an individual an order to correct the wrong. In this case the inherent equitable jurisdiction of our courts can require the execution of a deed back by an individual or individuals, and it can jail them if they do not obey a court order. This does not involve the Bureau of Indian Affairs or the majesty of the United States, it involves a Navajo court applying Navajo law to Navajo parties to settle a Navajo dispute. The Treaty of 1868 and the pledge of the United States to respect preexisting Navajo sovereignty means nothing if Navajo affairs cannot be settled by Navajo courts.

Therefore we hold there is jurisdiction for the matter raised in the trial court.

ORDER

Based upon the foregoing discussion, this cause is REVERSED and REMANDED to the District Court for the Shiprock District with instructions to proceed in accordance with this opinion.

[REDACTED]

No. A-CV-01-83

COURT OF APPEALS OF THE NAVAJO NATION

May 5, 1983

In the Matter of the Applications to Practice in the
Courts of the Navajo Nation as Associate Members
of the Navajo Nation Bar Association of:

Lawrence A. ASCHENBRENNER

Craig Jones DORSAY

Susan K. DRIVER

Bruce J. FRIEDMAN

Don JUNEAU

Donald R. WHARTON

[REDACTED]

Chief Justice Nelson J. McCabe, presiding.

The six individuals named above have successfully completed the Navajo Nation Bar examination, and on Navajo Justice Day 1983 they took their oaths of office. Therefore this original action for special authority to practice law pending their admission to the bar should be dismissed for mootness.

These individuals, who were hired by the Department of Justice to work as members of its staff, are to be commended for their concern that they not be guilty of contempt of this court by engaging in the unauthorized practice of law, and so that they will have a record which is clear and without doubt, they are deemed to have been admitted to practice, *nunc pro tunc*, from the date of their employment by the Navajo Nation.

No. A-CV-01-82

COURT OF APPEALS OF THE NAVAJO NATION

May 6, 1983

Sandra HELP, Appellant,

vs.

Fred SILVERS aka Fred SILVER FOX, Appellee.

Appeal heard October 4, 1982 before Acting Chief Justice Robert B. Walters and Associate Justices Homer Bluehouse and James D. Atcitty. Opinion by Acting Chief Justice Walters.

Nona Lou Smith, Esq., and Leonard Watchman, Esq., of Window Rock, Navajo Nation (Arizona) for the appellant, and Frank J. Lally, Esq., of Gallup, New Mexico for Appellee.

THE CASE BEFORE THE COURT

This case involves the underlying legal question of whether the trial court made a correct decision in awarding child custody, and the very important questions of record on appeal and conflicting jurisdiction between a trial court and the Court of Appeals.

The action in the trial court began as a paternity action and it grew into a child custody dispute over three minor daughters. At first the child custody question was resolved in favor of the father by one judge, and later another reheard the case after this appeal was filed and changed custody to the mother. The custody decree was entered on December 18, 1981, the notice of appeal was filed on January 18, 1982, a motion for reconsideration was granted on February 24, 1982, and another judge retried the case on April 15, 1982. The motion for reconsideration was made the same day as the notice of appeal, and it was granted 37 days later.

On appeal the argument that children of tender years should be in the custody of their mother was made, and that argument was reinforced by arguments from Navajo custom and tradition.

The legal problems which are of most concern here are (1) the jurisdiction of this court with regard to the issues before it; (2) the adequacy of the finding of the trial court; and, (3) the application of the Navajo Equal Rights Amendment to the tender years doctrine.

THE JURISDICTION OF THE DISTRICT COURT AFTER APPEAL

The most bothersome question involves the action of the district

court after the appeal. Rule 5(d) of the Rules of Appellate Procedure requires an appellant to file a motion for reconsideration with the trial court. In this case that motion was filed exactly the same day as the appeal. The rule creates problems because where, as here, the trial court acts, this court is often ousted of its jurisdiction over the case.

The answer to the question of jurisdiction is quite simple. Rule 5(d) requires the trial court to rule on the motion for consideration within five days. This rule means that the trial court must dispose of the motion within five days of its filing, and where the motion is filed the same day as the notice of appeal, there is little likelihood of interfering with the duty of the Chief Justice in reviewing the appeal under 7 NTC Sec. 801(b).

We hold that where a trial court fails to rule upon a motion for reconsideration within five days of its filing, the motion will be treated as being automatically denied.

It has been argued that aside from Rule 5(d) of the Rules of Appellate Procedure that the broad equitable authority of the trial court to reopen judgments in the interests of justice will permit a trial court to act while an appeal is pending. We answer this argument by holding (1) that when an appeal is perfected the trial court has no further jurisdiction over a case because that jurisdiction has been transferred to this court, where it will remain until the appeal is disposed of, and (2) that where this court has jurisdiction over a case the trial court cannot open, vacate, or set aside an order or judgment which is appealed from. 4 Am.Jur.2d, Appeal and Error, Secs. 352-353.

THE TRIAL COURT RECORD

The decision which caused this appeal simply stated that the father was a "fit and proper person" to have custody of the children, and that it was in their "best interests" for them to be in his custody. The court reviewed the complaint that there were none of the many factors of the best interests test to support the judgment.

The complaint is well taken. There must be special findings of fact by a trial court to support its judgment so the Court of Appeals will know whether the facts and law found justify it. Therefore we hold that trial courts must make findings of fact and conclusions of law, in opinion form or finding form, in order to support their judgments. In re Marriage of Capener, 582 P.2d 326, 328 (Mont. 1978). Those findings must be "more than a mere report of the evidence; they must be a finding of those ultimate facts on which the law must determine the rights of the parties." 4 Am.Jur.2d, Appeal and Error, Sec. 414.

Therefore, in the future, the court will remand matters which inadequate findings of fact and law for such a determination by the trial court. This action will be remanded for the same purpose.

THE NAVAJO EQUAL RIGHTS AMENDMENT

Although this action is being remanded with guidance on the procedural aspects of the case, the trial court will require guidance on the "tender years" doctrine.

Over centuries of English and American law there have been many changes in presumptions as to who should have custody of a child. In early English law it was the father who had the right to

custody, changing to a presumption in favor of the mother and finally ending up with an equal right to custody. Clark, The Law of Domestic Relations, pp. 584-585 (1968).

The "tender years" doctrine presumes that the mother is the superior custodian, all other things being equal, and there is now a question of whether such a doctrine violates the equal rights of men and women before the law. Resolution CF-9-80, enacted in February of 1980, very simply provides:

"Equity of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex."

Interestingly, there appear to be no interpretations of the constitutions of states with equal rights provisions determining the effect of this sort of civil rights protection on the tender years doctrine, but the trend clearly appears to be away from any presumption that the mother is the better custodian of a child simply due to her sex. See Wetzler v. Wetzler, 570 P.2d 741 (Alaska, 1977); Porter v. Porter, 518 P.2d 1017 (Ariz. App. 1974); In re Marriage of Carney, 598 P.2d 36 (Cal. 1979); Neis v. Neis, 599 P.2d 305 (Kan. App. 1979); Libra v. Libra, 484 P.2d 748 (Mont. 1971); Arnold v. Arnold, 604 P.2d 109 (Nev. 1979); Smith v. Smith, 564 P.2d 307 (Utah, 1977), etc.

The correct analysis is that there is no presumption that the mother is the proper custodian of a young child. The child's age is but another factor to be considered when ruling upon custody questions. It may well be that the father's relationship to a young child and his equal or superior ability to care for the child would require a trial court to award him custody.

The proper analysis of the Navajo Equal Rights guarantee is that there can be no legal result on account of a persons sex, no presumption in giving benefits or disabilities gaged by a person's sex and no legal policy which has the effect of favoring one sex or the other.

For this reason, there can be no presumption that a young child should be in the care of the mother. There can be no rule that a young child should be in the care of the mother. There can be no accepted policy that a young child should be in the care of the mother.

What remains? Unlike other states that retain the rule that "all things being equal" a child of tender years will be with the mother, but like the states which have abolished the doctrine, this court will not permit its use. The trial courts must take all factors affecting a child into account and consider the relationship of the child to its parents in all things. It is the relationship that is important, not a mere rule-of-thumb, and the child's age is important only in consideration of its relationship to the parents.

ORDER

Based on these considerations, this action is hereby REVERSED and REMANDED to the Window Rock District Court for further proceedings consistent with this opinion.

[REDACTED]

No. A-CV-03-82

COURT OF APPEALS OF THE NAVAJO NATION

May 12, 1983

Karen JAMES, Appellant,

vs.

Officer Peterson LITTLE, et.a., Appellees.

[REDACTED]

In this case the Chinle District Court entered an order for Summary Judgment and Dismissal of Plaintiff's Complaint with Prejudice on February 8, 1982. Such order summarily dismissed all of the named defendants, except Mr. Lee Desmond, finding that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

7 N.T.C. Sec. 801(b) requires the Chief Justice to decide whether there is probable cause to grant an appeal. This appeal is from a summary judgment in which the district court has dismissed all but one defendant thereby leaving plaintiff the opportunity to continue her case against Mr. Lee Desmond. Thus, there is no final judgment from which an appeal can be raised. Rule 2(a) of the Navajo Court Rules of Appellate Procedure.

Therefore, the Court of Appeals makes the following order:

1. Plaintiff's notice of taking appeal is hereby DISMISSED for lack of full adjudication by the Chinle District Court.
2. This cause is remanded to the Chinle District Court for a determination to the liability of the remaining named defendant.
3. This cause is further remanded for proceedings consistent with this opinion.

No. A-CV-51-81

COURT OF APPEALS OF THE NAVAJO NATION

May 12, 1983

Bertha DAVIS, Appellant,

vs.

THE NAVAJO TRIBE, et. al., Appellees.

[REDACTED]

[REDACTED]

[REDACTED]

Richard George, Esq., Tuba City, Navajo Nation (Arizona) for Appellant,
John Chapela, Esq., Window Rock, Navajo Nation (Arizona) for Appellees.

This is an appeal from an order of the district court dismissing a wrongful employment dismissal case for "lack of a cause of action." In June of 1978 the plaintiff filed an action reciting that she was a probationary employee of the Crownpoint Woman Infant Children (WIC) Program and had been terminated. While normally this would not give the plaintiff the right to any action for wrongful dismissal, she claimed that the dismissal was done without a hearing required by employment policy and the Due Process Clause of the Indian Civil Rights Act, and that the information given out about her employment slandered her and made it impossible for her to obtain employment.

On July 11, 1980 the district court found that the slander count of the complaint had not been proven, but found that the plaintiff's civil rights had indeed been violated and a grievance hearing was ordered.

On November 5, 1981 the district court found that a proper hearing had been conducted, that all administrative remedies had been exhausted (including one available to the plaintiff that she waived through in action) and that there was nothing left to the case. The court had earlier found that it should not intervene in an administrative employment matter, and apparently held to that view when it dismissed the action. The district court file discloses no new pleadings making further claims on behalf of the plaintiff.

The appeal is brought before the Court of Appeals on complaint that the order of dismissal was vague and that the personnel policies were also vague.

The district court order was not vague. While the court file is huge and it is difficult to trace the progress of the case because of the bulk, it is clear that the plaintiff made three claims in law, two of which were resolved by an administrative hearing on the merits. The other was resolved by the court on the merits when it found the defamation claim was not proved. Therefore the court merely found that the

case was moot and dismissed it. There is no challenge to the mootness ruling.

As to the administrative proceedings and policies, the American rule, as harsh as it may be, is that an employee at will has no remedy for firing unless:

- (1) The employee is tenured by contract;
- (2) The employee is tenured by practice of employment (i.e. the custom of the workplace);
- (3) The employee is protected by civil rights legislation or a constitutional guarantee;
- (4) The employee's firing violates protected speech policies;
- (5) Public policy has been violated (e.g. firing for refusing sexual advances by a supervisor or firing for filing a worker's compensation claim); or,
- (6) There is some other identifiable legal protection which has been breached.

Defamation actions are fashionable in the employment law field these days, and they may or may not relate to employment, depending upon the circumstances.

Here is an employee at will, who could be fired for any reason. The employee's fair hearing rights were violated, but that matter was cured. The defamation action was not renewed in the district court and it was not addressed in this appeal. This court finds no merit in the points raised on appeal, and the file discloses no other post-administrative hearing claim which should have been addressed by the trial court.

The court finds there is no probable cause for appeal as required by the provisions of 7 N.T.C. Sec. 801(b), which is a jurisdictional statute, and therefore this appeal must be dismissed.

So ORDERED.

[REDACTED]

No. A-CV-06-82

COURT OF APPEALS OF THE NAVAJO NATION

May 13, 1983

Doris CLEVELAND, et.al., Billy YAZZIE and
Mary UPSHAW, Appellants,

vs.

THE NAVAJO NATION, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Nona Lou Smith, Esq., Window Rock, Navajo Nation (Arizona) for
Appellants, Benjamin Curley, Esq., Window Rock, Navajo Nation (Arizona)
for Appellee.

The motion for reconsideration of this court's order of dismissal
having been carefully considered by the court, it is denied for failure
to state good cause. It appears that the failure to comply with the
prior order of the court was not the fault of Nona Lou Smith but that
of inadequate office systems and understaffing. While this order may
appear to be harsh under the circumstances, there is a principle of
finality in litigation which requires that contested matter finally and
permanently be put to rest.

[REDACTED]

No. A-CV-05-83

COURT OF APPEALS OF THE NAVAJO NATION

May 13, 1983

Virgil WYACO, JR., Appellant,

vs.

Cynthia M. WYACO, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Lawrence A. Ruzow, Esq., Ruzow & Sloan, Window Rock, Navajo Nation (Arizona) for Appellant. John Chapela, Esq., Window Rock, Navajo Nation (Arizona) for Appellee.

This is an order made after a review of the reasons given in support of the appeal. The issue at the time of such a review is whether the appellant has stated facts and circumstances, as well as arguments of law and policy, which give the court probable cause to grant an appeal. 7 N.T.C. Sec. 801(b).

The district court, by the Honorable Henry Whitehair, entered lengthy and very specific findings of fact and conclusions of law with respect to the financial relations, obligations and property interests of the parties, and the court, by the very clear opinion of the Honorable Tom Tso, discussed the law of waiver applicable to the case and the facts requirng the application of that law.

The findings and conclusions of the trial court, particularly where they are concrete and specific, are presumed to be correct in fact and law unless there reasons to believe the facts are unproven or the law is misconstrued. That presumption has not been overcome in this case. It appears that the law of waiver was correctly stated by the district court and the factual findings remain unchallenged by the arguments of the appellant. Therefore the presumption of the correctness of a judgment has not been sufficiently overcome as to reaquire a hearing on appeal.

The motion of counsel to withdraw is rather general, but it is well-taken, and it is granted.

This appeal is hereby dismissed.

[REDACTED]

No. A-CV-06-80

COURT OF APPEALS OF THE NAVAJO NATION

June 10, 1983

Alice and Bobby WILLETO, Appellants,

vs.

Harriet SPENCER and Stanley MANUELITO, Appellees.

[REDACTED]

[REDACTED]

A review of the matters on file in this appeal shows that there is no certificate of service of the notice of appeal and brief upon the opposing parties or their counsel by means of personal delivery or certified mail service. The appellees claim that their counsel only received the notice of appeal and not the brief, and that service was not made by means of certified mail. The lack of a certificate of service showing the service required by the rule supports the appellee's representation to the court in their reply brief. Therefore the appeal will be dismissed for failure to comply with the rule as to service.

A review of the file also shows that there is not probable cause to accept the appeal, as provided in 7 N.T.C. Sec. 801(b). The trial judge was in the best position to understand the circumstances under which a withdrawal of appearance by the appellants' counsel was granted and the circumstances leading to the entry of a judgment dismissing the case. The Court of Appeals accepts the detailed findings of the District Court insofar as it dismisses the action for a failure to prosecute or be prepared for trial.

[REDACTED]

No. A-CV-04-82

COURT OF APPEALS OF THE NAVAJO NATION

June 13, 1983

Carl WHITEHORSE, Appellant,

vs.

THE NAVAJO NATION, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Leonard Tsosie, Esq., DNA-People's Legal Service, Crownpoint, New Mexico, for Appellant. Herman Succo, Esq., Crownpoint, New Mexico, for Appellee.

On October 19, 1982 the Crownpoint District Court entered an order on a motion for reconsideration following the summary punishment of the defendant for a contempt of court committed in the presence of the court. The order vacated on the ground that the defendant was improperly punished for a direct contempt of court which should have been punished as an indirect contempt under our rules, but the court left in place its prior order that the defendant was required to pay the sum of \$1,000 for the benefit of his two children on a child support arrearage. The \$1,000 was paid as a "cash bail bond," and this court notes that those funds should have been paid to the children for past support.

A motion to dismiss this appeal has been filed on the ground that it is not timely. The order was dated October 19th, and the Notice of appeal and supporting brief were filed with this court on November 19, 1982. The motion to dismiss is well-taken.

This court has repeatedly ruled that the 30 day period of time for the filing of an appeal is a matter of statute and it is jurisdictional. This court does not have any jurisdiction unless the statute is complied with to the letter. Although this appeal was filed one day late, still this court does not have the discretion to accept the appeal.

Therefore this court has no choice but to dismiss this appeal.

[REDACTED]

No. A-CV-06-82

COURT OF APPEALS OF THE NAVAJO NATION

June 13, 1983

Doris CLEVELAND, et.al., Billy YAZZIE and
Mary UPSHAW, Appellants,

vs.

THE NAVAJO NATION, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Nona Lou Smith, Esq., Window Rock, Navajo Nation (Arizona) for Appellants. Benjamin Curley, Esq., Window Rock, Navajo Nation (Arizona) for Appellee.

After this appeal was filed, the Navajo Nation, through its prosecutor, admitted the allegations of the appeal stating that "The Appeal is well taken and the relief therein requested should be granted." The court, in reviewing the appeal documents, noted that appellees Roanhorse and Bennett were parties to the action, and there was no indication that they were served with the notice of appeal and brief, as is required by the rule. The court also indicated that if these parties had not been served, they should be.

Following various procedural mishaps, the appellants have moved that this appeal be reinstated after its dismissal for failure to provide the court with proof of service or service upon the two parties. The motion and affidavit of the appellants shows that these two parties' identities (?) and addresses are unknown and that reasonable efforts have been taken to locate them, without success.

The trial record of this action should have reflected the full names and addresses of the parties for the purposes of service on appeal. This court accepts the representations of counsel and hereby dismisses this appeal for the purpose of remanding this case to the District Court for the entry of judgment in accordance with the admission of the Navajo Nation that the contentions of the appellants are well-taken.

[REDACTED]

No. A-CV-15-82

COURT OF APPEAL OF THE NAVAJO NATION

June 15, 1983

NAVAJO NATION, ex rel. DIVISION OF SOCIAL WELFARE
in the interest of TWO MINOR CHILDREN

[REDACTED]

[REDACTED]

[REDACTED]

Navajo Nation, ex rel Division of Social Welfare, In re the Interest of T.Y. and E.Y. Minors. (Appellants) F.D. Moeller, Esq., Farmington, New Mexico.

This is an appeal from the entry of child placement in which the minor children seek to overturn that ruling.

It is the standard policy of the Navajo Courts to caption cases involving minor children in such a way as to conceal their identity from the public. This is in the interests of the children, and it is done here.

FACTUAL SETTING

In February of 1980 Navajo Children's Legal Services brought a children's action in the name of the Navajo Nation using an ancient practice of acting as a relator to the court. 9 Anne. (1711)(British statute). That action was for the purpose of terminating the parental rights of two parents who had allegedly abandoned their children.

Following a finding that the Navajo Police could not make personal service of the petition upon the natural parents, the court ordered service by publication, and on November 13, 1980 the court, finding due notice to the parents in accordance with law, found that the children had been abandoned, and it terminated the parental rights of the natural parents. The children were placed under the guardianship of the New Mexico Department of Human Services for the purpose of an adoption.

Subsequently the Division of Social Welfare of the Navajo Nation intervened in the action without a motion to intervene or substitute parties, and it recaptioned the case as the relator, using the name of the Navajo Nation. The intervention was for the purpose of asking that the children be placed in the joint custody of the New Mexico Department of Human Services and the Navajo Social Welfare agency for the further purpose of placing the children for adoption. An order granting that motion was entered by the court on May 14, 1982.

On May 21, 1982 the children entered the picture by making a written appearance through "guardian and custodian and counsel." A few days later on June 3, 1982, a motion for reconsideration was filed,

and it interestingly recited that the two children had been put into an adoptive placement with two individuals, that the amended order was illegally granted without a hearing given due process to the children and the custodians, and that court should grant an adoption to the foster parents.

An appeal was also taken from the May 14th order.

On July 21, 1982, a stipulation of the attorney for the Division of Social Welfare with that of the custodial parties was filed which named the custodial parties as petitioners for adoption, it agreed to the adoption of the children by them, and the appeal would be dismissed. An adoption decree was entered the same day.

Obviously, from the recitation of the facts, the court has a few questions.

THE QUESTIONS THE COURT HAS BECAUSE OF A REVIEW OF THE FILES

1. The appeal file shows no motion to this court asking its leave for a dismissal of this appeal. May parties obtain a dismissal of an appeal by not filing a motion with the Court of Appeals and obtaining its leave to do so?

2. Who is the real petitioner and relator in the district court action? Is it the Division of Social Welfare or the Navajo Children's Legal Services? Who is standing as the relator?

3. The district court file shows no proof of publication of notice to the parents. Is this a valid adoption?

4. Court documents appear to show the same attorney representing the interests of the adoptive parents and the children. Who was counsel representing and what authority did he have to do so?

5. Did the proposed adoptive parents have any standing to appear before the court as parties to the action or to act on behalf of the children?

6. Is this appeal moot?

The court is very disturbed by the state of the district court file and the proceedings it reflects. What is most disturbing is that there is not evidence of proper service of process by publication upon the natural parents, and this court wants assurance that the record of the district court shows a proper, legal and valid adoption.

The court is also disturbed by the appearance of parties out of nowhere without motions to intervene, identifying their interests. The court is concerned with the standing of the adoptive parents, particularly where they asserted rights on behalf of children without any apparent authority to do so and where they suddenly ceased purportedly acting to enforce the children's rights to due process.

Normally the Chief Justice is confined to making a determination of probable cause reviewing appeals. 7 NTC Sec. 801(b). In this case the Chief Justice will not only comment upon the probable cause for this appeal, but upon these other disturbing aspects. See 7 NTC Sec. 371. This is done because of the lack of Navajo precedent and the need to instruct the court below and counsel as to what should have been done in this case.

DISMISSAL OF APPEALS

This is a case in which there was subsequent action after the filing of the notice of appeal which has made the grounds for appeal moot. This court will not rule upon whether or not the district court had jurisdiction to act after the filing of the notice of appeal and will assume for the purposes of this case only that it did. This case comes before the Chief Justice on the record, and there is no motion to dismiss the appeal pending before the court. It is of course standard appellate procedure that the leave of the court of appeals must be obtained before an appeal can be dismissed or withdrawn. 5 Am.Jur.2d, Appeal and Error Sec. 920. The Court of Appeals may dismiss an appeal on its own motion. Id. Sec. 918. Therefore this matter is properly before the court.

THE PROPER PETITIONER

This action was commenced in the name of the Navajo Nation by Navajo Children's Legal Services, and later the Division of Social Welfare took over without a motion to intervene or a motion to substitute parties, again using the name of the Navajo Nation.

The name of the Navajo Nation as a party plaintiff or a petitioner cannot be thrown around or used freely by anybody. 7 NTC Sec. 604 provides:

"The Chairman of the Navajo Tribal Council or such person as he shall delegate is authorized to bring an action in the name of the Navajo Tribe, in any case where the Navajo Tribe is a Plaintiff, in the Courts of the Navajo Tribe."

In this case the action was not brought by the chairman of the Navajo Tribal Council, and there is nothing to show that either Navajo Children's Legal Services or the Division of Social Welfare was designated or authorized to use the name of the Navajo Nation to bring this action on its behalf. This may be shown by a specific authorization, an enabling statute or an approved plan of operations of a governmental agency. The court should have ascertained whether either of these agencies had the authority to bring the action in the name of the Navajo Nation, and which agency was the proper petitioner.

The two organizations used "relator" practice in using the name of the Navajo Nation.

"A relator is a party in interest who is permitted to institute a proceeding in the name of the People or the attorney general when the right to sue resides solely in that official." Brown v. Memorial National Home Foundation, 329, P.2d 118, 133 (Cal. App. 1958).

"At common law, strictly speaking, no such person as a relator to an information is known, he being a creature of the statute of 9

Anne. In this country, even where no similar statute prevails informations are allowed to be filed by private person desirous to try their rights, in the name of the attorney-general, and these are commonly called relators." 2 Bouv. Law Dict. 2863; Cited Id. See Also, 59 Am.Jur.2d. Parties Sec. 7.

There must be proper consent to bring an action in the name of the people or the Navajo Nation, and it should clearly appear that the petitioner or plaintiff has the authority to bring an action on behalf of the Navajo Nation. 7 NTC Sec. 603; Brown v. Memorial National Home Foundation, 329 P.2d 118, 134 (Cal. App. 1958).

The practice of bringing actions to protect dependent and neglected children in the name of the Navajo Nation is specifically approved, since the Navajo Nation is the protector of its children. See, 9 NTC Sec. 1001. It appears that who may be a petitioner in such cases is unclear. 9 NTC Sec. 1151 provides that proceedings in children's cases are commenced by a petition. However, "any person may, and any peace officer shall, give the court any information in his possession that a person is or appears to be a child, within the jurisdiction of the court." 9 NTC Sec. 1151. Thus it is unclear whether the Navajo Nation is the sole petitioner for these cases or whether any individual may petition the court. While this question will be answered at some time in the future by a decision of this court or legislative action, the better practice is for the duly-constituted child welfare authorities and the duly-acting attorneys (i.e. Navajo Nation Bar members) of the Navajo Nation to bring these actions.

Where a person who is not a party of record wishes to take part in proceedings or have some control over the case, this is done by means of an application to the court either as an intervenor or as a substituted party 59 Am.Jur.2d, Parties Secs. 129, 216, 220. Intervention without motion or application of the Division of Social Welfare should not have been permitted without a determination of whether it was a proper intervening party or a proper substituted party. The court should always consider the right of a party to bring an action.

These irregularities will not effect the final outcome of this adoption matter, but they are important nonetheless and proper procedures will be followed in the future.

PROOF OF SERVICE

There is no proof in the file of this action that notice of the action was published or served upon the natural parents of the children. 7 NTC Sec. 604 states:

"No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of notice shall be kept as part of the record in the case." (Emphasis supplied.)

The file has a great deal of discussion about publishing notice in the termination action due to an inability to make personal service upon the parents, but there is no proof of service as required by the statute. The order for termination of parental rights recites proper notice, and since the record of a judgment is presumed to speak the truth, that recital is deemed to be true. 46 Am.Jur.2d, Judgments Sec. 40. However, where the judgment only says that there was proper notice for jurisdiction, that is not enough, and the judgment can be attacked for a lack of jurisdiction. Id. Sec. 41. In other words, due to a lack of proof in the file showing proper publication of notice in the termination action, we have a voidable adoption. See 9 NTC Sec. 1252, 1256.

Therefore the district court is instructed to immediately require proof that there was publication of proper notice in this case and to obtain proof of that publication. If not, the court shall, on its own motion, reopen the adoption and enter the decree in the proper fashion.

We have statutes to terminate parental rights to children who have been neglected or who are dependent to protect those children. We have statutes for the adoption of children for the protection of the rights of the children and the adoptive parents. These are important rights, and the placement of a child for adoption or permanent custody should be final. It should not be possible to overturn an adoption or a permanent custody order because of the failure to accord due process to someone entitled to notice. Therefore it is shameful, irresponsible and highly unprofessional for any adoption decree or custody judgment to be entered without making certain that each and every due process or statutory requirement is completely fulfilled. A decree or judgment of a Navajo Court must carry not only the presumption of truth but the guarantee of validity.

CONFLICT OF INTEREST

In this case the people who wanted to adopt the children brought a motion to reconsider on behalf of the children and then turned around later and petitioned the court for adoption. The same attorney "represented" the children and the proposed adoptive parents. There was no motion to intervene or for a guardian ad litem application on either the behalf of the children or the proposed adoptive parents.

This procedure not only breaches the principle that permission to intervene in a case is required, but the principle that counsel must at all times avoid conflicts of interest. Disciplinary Rule 5-105(A) of the Code of Professional Responsibility of the Navajo Nation Bar Association prohibits lawyers from representing differing interests. It is not necessarily in the interests of a child to have a foster parent or proposed adoptive parent assert his interests in litigation, and it is not proper practice for an attorney to enter a case to represent the rights of children and then turn around and represent the rights of individuals who claim an interest in the children. This is a conflict of interest and it should not be allowed without a specific finding by a court that there is in fact no conflict of interest. In this case it will be assumed that the district judge recognized the situation and found that there was no conflict of interest, but in children's cases the representation of both a child and a custodial party by an attorney is specifically disapproved.

STANDING OF PROPOSED ADOPTIVE PARENTS

The proposed adoptive parents were probably aware that foster parents are not constitutionally entitled to notice and an opportunity to be heard before the removal of children placed with them. Smith v. Organization of Foster Families, 431 U.S. 816 (1977). In a situation such as this, the question is whether people in such a situation have standing, i.e. the right to assert rights before the courts. The rights of children are normally represented by parents or guardians, and those rights are asserted by the appointment of someone to represent the children's interests, preferably including independent counsel to act on their behalf. Id. at 841 f.44.

Whenever there is to be a change in the custodial arrangements of a child before the courts, due process requires that there be a hearing. The child's rights to due process also require that his or her interests be adequately protected. While the adoptive parents here did not have standing of themselves to attack the custody order, the children did. Therefore their interests should have been represented through either a proper application to act as their independent guardians or the appointment of counsel on their behalf.

The situation in this case is definitely not sanctioned as a proper procedure for protecting the interests of children.

DISPOSITION

This case is apparently moot, and there is no probable cause for the appeal to proceed to a hearing before the full appellate panel. However the procedural history of this case is an example of what should be avoided in parental termination cases and adoptions, and this case is remanded to the district court for proceedings to make certain that the adoption is final and will remain final. The children are the only important parties in this case, and their interests should be properly guaranteed by a final adoption decree which has the guarantee of finality and propriety.

SO ORDERED.

[REDACTED]

No. A-CV-29-82
A-CV-06-83
A-CV-08-83
A-CV-09-83
A-CV-10-83

COURT OF APPEAL OF THE NAVAJO NATION

June 24, 1983

In the Matter of the Practice of Law in the
Navajo Tribal Courts by: Melody K. ELKINS, Ronald D. HAVEN,
Inja NELSON, Alene DELEGARITO and Donna Carole BRADLEY,
Petitioners,

vs.

THE NAVAJO NATION BAR ASSOCIATION, Respondent.

[REDACTED]

Appeal heard before Chief Justice Nelson J. McCabe, Associate Justices Robert B. Walters and Tom Tso.

Paul Frye, Esq., Window Rock, Navajo Nation (Arizona). Richard George, Esq., Tuba City, Navajo Nation (Arizona). Lawrence Long, Esq., Window Rock, Navajo Nation (Arizona).

The above-captioned matter came before the Court of Appeals on June 23, 1983, and the court is entering its preliminary order on the status of the five petitioners in order to give an immediate disposition of their petitions. The ability to practice law, either as an associate member of the bar or as a regular member of the bar, is a pressing matter in which the rights of the petitioners, and the public, represented by the Navajo Nation Bar Association, should be dealt with immediately in the interests of competent legal representation.

Therefore the court makes the following ORDERS:

1. As to petitioner Elkins: The court notes that Ms. Elkins is not eligible for associate status in the bar due to the fact she is not Navajo. Therefore she would not normally be eligible to practice law under supervision as an associate member of the bar. However the court notes that Ms. Elkins has lived and worked within the Navajo Nation for a number of years, first as a teacher and then with the Justice Department. Given the fact that the Justice Department has certified her competency and given the fact that the courts must support efforts for the Navajo Nation to obtain and be represented by competent counsel, this court hereby admits the petitioner to associate status under the rules of the bar association pending her bar examination.

The court cautions that this special admission is done in this instance only and it is done only because of Ms. Elkin's period of time working in the Justice Department, and the court urges the Navajo

Nation Bar Association to consider the policy factor that the Navajo Nation needs competent counsel and decide whether a special association rule should be adopted for situations such as this.

2. As to petitioner Ronald D. Haven: The record of this case and oral argument shows that the Navajo Nation Bar Association has not had an opportunity to review the special circumstances presented by Mr. Haven's petition, and the court remands the matter to the bar association for action.

3. As to petitioner Inja Nelson: The record of this case and oral argument shows that the Navajo Nation Bar Association has not had an opportunity to review the special circumstances presented by Ms. Nelson's petition, and the court remands the matter to the bar association for action.

4. As to petitioner Delgarito: The court has been advised that Ms. Delgarito's application for associate status was denied by the Admissions Committee and granted by the Board of Governors of the Navajo Nation Bar Association. The court accepts the decision of the Board of Governors and Ms. Delegarito is admitted as an associate member.

The court also notes that the Hopi Tribal Court grants reciprocity to qualified Navajo individuals with respect to practice in that court, and this court accepts Hopi Bar members for admission to our bar upon examination. Therefore the special exception granted Ms. Delegarito to associate membership is within the policy of reciprocity and mutual respect for the courts of another Indian nation.

5. As to petitioner Bradley: Ms. Bradley is admitted to practice as an associate member because of the concession of the Navajo Nation Bar Association that she may be so admitted as an associate member under the supervision of the Attorney General or her designate.

6. The court suggests to the Navajo Nation Bar Association that it consider seriously the problem of special exceptions for Navajo Government employees as associate members pending their examination and admission to the bar, and the court suggests that the bar association clarify its appeals procedures with respect to the denial of applications for associate membership.

7. The opinion of the court explaining the law supporting the decision of the court will be forthcoming following the next session of the Court of Appeals.

[REDACTED]

No. A-CV-07-83

COURT OF APPEALS OF THE NAVAJO NATION

June 29, 1983

IN THE MATTER OF THE SUSPENSION OF CERTAIN
NAVAJO NATION BAR MEMBERS

[REDACTED]

[REDACTED]

[REDACTED]

Albert Hale, Esq., Window Rock, Navajo Nation (Arizona) for Members and Petitioners.

The Navajo Nation Bar Association has made a verified motion to suspend certain bar members for nonpayment of dues as required by the bylaws of the said association.

It appearing to the court through verification of the Navajo Nation Bar Association that the persons whose names are appended hereto have failed and refused to pay bar dues, it is hereby

ORDERED that:

1. The persons whose names are appended hereto are hereby suspended from practice in all Courts of the Navajo Nation;

2. Those named persons must make a reapplication for Admission to the Bar Admissions Committee of the Navajo Nation Bar Association and meet the guidelines for such admission as established by said Committee.

FINAL SUSPENSION LIST
as of May 23rd, 1983

Mr. George J. ADSON, Post Office Box 2131, Tuba City, AZ 86045
Mr. Lindbergh ALFRED, B.I.A. Law Enforcement, Window Rock, AZ
Mr. Wayne H. BLADH, P.O. Box 5472, Santa Fe, NM 87501
Mr. Eric N. DAHLSTROM, Post Office Box 68, Sacaton, AZ 85247
Mr. Michael I. JEFFREY, Post Office Box 808, Barrow, Alaska 99723
Mr. Robert A. MARTIN, P.O. Box 1189, Albuquerque, NM 87103
Ms. Mary L. NEWELL, 603 Bremen Street, Silver City, NM 88061
Mr. John E. SCHINDLER, 23 South Carbon Ave. #7, Price, UT 84501

[REDACTED]

No. A-CV-18-83

COURT OF APPEALS OF THE NAVAJO NATION

July 29, 1983

Marie LONG, et. al., Appellants,

vs.

In re the Petition of:
Zonnie SLOWTALKER, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Richard George, Esq., Tuba City, Navajo Nation (Arizona).

The above-entitled matter having been reviewed for an appeal from the final order of the Tuba City District, this Court finds:

1. The request for appeal is untimely, 7 N.T.C. §801; Rule 2(c) Navajo Rules of Appellate Procedure.
2. The request is defective, Rule 2(c) Navajo Rules of Appellate Procedure which states:

"The Notice of Appeal, the brief, the fee and the copy of the final judgment shall be filed with the Clerk within thirty calendar days of the date the final judgment or order being appealed was entered in the record by the District Court. No extension of time within which to file the appeal shall be granted, and no appeal filed after the expiration of the thirty day period shall be allowed."

3. Therefore the request for appeal should be denied.

It is therefore ORDERED, ADJUDGED and DECREED that the request for appeal is hereby DISMISSED.

No. RE: RM-CR-53-82
RM-JV-53-82

COURT OF APPEALS OF THE NAVAJO NATION

August 22, 1983

Felicitia ERIACHO, Petitioner,

vs.

Major Robert HENDERSON, Division of Public
Safety, The Navajo Tribe, Window Rock, Arizona

and

B.I.A. LAW ENFORCEMENT AGENCY
Ramah, New Mexico, Respondents.

Casey Watchman, Esq., Donna C. Chavez, Esq., Navajo Legal Aid and
Defender Service, Window Rock, Arizona, Advocate & Attorney for
Petitioner.

The Court having received the stipulation of the parties to
dismiss this cause with prejudice and good cause finding,

THEREFORE, IT IS HEREBY ORDERED that the case against
Felicitia Eriacho dismissed with prejudice and that the entire police and
jail records associated with this cause be expunged from her record.

[REDACTED]

No. A-CV-03-81

COURT OF APPEALS OF THE NAVAJO NATION

September 8, 1983

Howard SMITH, Appellant,

vs.

Mary Jean CURLEY, Appellee.

[REDACTED]

[REDACTED]

Albert Hale, Esq., Window Rock, Navajo Nation (Arizona) for Appellant.
Nona Lou Smith, Esq., Window Rock, Navajo Nation (Arizona) for Appellee.

On July 12, 1983, this court entered its order requiring the appellant to either file a notification of readiness to proceed on the basis of the brief on file or to file an amended brief addressing the findings of fact and conclusions of law filed in this matter after the original appellate brief was filed.

As of the date of this order the previous order of this court has not been complied with by the appellant, and it is hereby ORDERED that this appeal shall be DISMISSED for failure to prosecute the appeal.

[REDACTED]

No. A-CV-16-83

COURT OF APPEALS OF THE NAVAJO NATION

September 26, 1983

Bert and Susie WAUNEKA, Appellants,

vs.

Franklin NESWOOD, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Gary E. Larance, Esq., Window Rock, Navajo Nation (Arizona) for Appellants. Eric R. Biggs, Esq., Window Rock, Navajo Nation (Arizona) for Appellee.

This opinion deals with the meaning of the requirement that appeal papers be served by delivery and by means of "personal service or by certified mail." 6(a), Rules of Appellate Procedure. The facts in this case lead to the determination made by the court. The notice of appeal in this case was filed on July 5, 1983. The appeal is from a judgment of the Window Rock District Court on June 2, 1983. The certificate of service on the notice of appeal indicates that the notice was "delivered" to opposing counsel on July 5th.

The file also contains a photocopy of an envelope addressed to Eric Biggs, dated July 12, 1983. The envelope was apparently one for first class mail, since there is a 20 cent stamp on the envelope.

The appellee has moved to dismiss the appeal on the ground that Rule 6(a) was not satisfied. There was a subsequent motion to amend the appeal by adding a certificate of service showing service of a copy of the appeal papers by means of certified mail on August 25, 1983.

Apparently there was an attempt to make personal service upon the appellee's counsel on July 5th, but he was not in his office. The problem is that even if Mr. Biggs was not in his office at DNA, there is nothing in the record to show service upon him by leaving a copy of the papers with his secretary. This court must dismiss actions which are not filed within the statutory period because it is jurisdictional. However the court will have to look at the substance of what happens when looking at service questions. It should be noted that the courts indicate that service requirements should be complied with, "although minor deviations from the specified procedure will not necessarily be fatal to the appeal." 4 Am.Jur.2d, Appeal and Error Sec. 320. Some courts require that "personal service" rules be complied with by actual service upon the person to receive the document, while others have upheld service on a guardian or at a place of residence. See, Tripp v. Santa Rosa Street Railroad Company, 144 U.S. 126 (1982); "Service", 'Personal Service', Black's Law Dictionary, p. 1534 (4th Ed. 1968).

The rule is properly interpreted as indicating that service of appeal documents must be made on the same date as the appeal is filed, or if the filing is by mail, the appeal papers should be sent to the clerk of court and counsel at the same time. A service by first class mail is not a "minor deviation" from our role. "Personal Service" for the purposes of our rule will include personally delivering copies upon the individuals entitled to notice (the opposing party or his counsel) or leaving copies at the place of residence of the opposing parties or with the office secretary or staff person of counsel.

In this case there is no showing there was any attempt to either leave copies with the attorney for the appellee or to mail the papers to him by certified mail on the date they were filed. Therefore service was improper.

The court also notes that the proper date for the filing of the appeal was July 2nd, and not July 5th and that the jurisdictional requirement was not met.

Finally, certificates of service must show the precise method of service upon counsel or a party, and they must show the exact date of service.

Therefore this appeal is hereby DISMISSED.

[REDACTED]

No. A-CV-32-81

COURT OF APPEALS OF THE NAVAJO NATION

September 27, 1983

Dennis L. BEGAY, Appellant,

vs.

Maureen R. BEGAY, Appellee.

[REDACTED]

[REDACTED]

Forrest Buffington, Esq., Window Rock, Navajo Nation (Arizona) for Appellant. Genevieve K. Chato, Esq., Window Rock, Navajo Nation (Arizona) for Appellee.

The documents on file in this appeal hardly fit the requirement of 7 NTC Sec. 801(a) that a request for permission to appeal be a document "stating the reasons why he wants to appeal."

Courts of appeal are not required to search the district court record for errors which should be raised by counsel in well-prepared briefs. Here there is a general statement in a "Brief on Appeal" that it would be an abuse of discretion not to grant the motion for reconsideration (apparently made in the trial court). There is a bare assertion that the appellant was inadequately represented by counsel at trial, but there is no argument on that point and there is nothing on the face of the appeal to satisfy the Chief Justice there is probable cause for believing so.

This case file is an example of the kind of appeal which does not satisfy the probable cause requirements of 7 NTC Sec. 801.

The appeal is DISMISSED.

[REDACTED]

No. A-CV-47-81

COURT OF APPEALS OF THE NAVAJO NATION

September 27, 1983

Virginia and Danny HALWOOD, Appellants,

vs.

Nowetathlie BEDONIE, Appellee.

[REDACTED]

[REDACTED]

A review of the file of this matter for the purpose of making a determination of probable cause under 7 N.T.C. Sec. 801(b) discloses that the file does not contain a certified copy of the judgment or order being appealed. There is also no indication in the file that a motion for reconsideration was ever made in the District Court. Rule 2 of the Rules of Appellate Procedure requires the filing of a certified copy of the judgment or order attacked on appeal, and Rule 5(d) requires the filing of a motion for reconsideration. The appeal file should disclose the making of such a motion.

Due to noncompliance with the clear and easy Rules of Appellate Procedure, the above-entitled appeal is hereby dismissed.

[REDACTED]

No. A-CV-04-83

COURT OF APPEALS OF THE NAVAJO NATION

September 27, 1983

Bessie DESCHENIE, Appellant,

vs.

Elouise NEZ, Dorothy NEZ and Laura MIKE, Appellees.

[REDACTED]

[REDACTED]

Casey Watchman, Esq., Window Rock, Navajo Nation (Arizona) for Appellant. Richard George, Esq., Tuba City, Navajo Nation (Arizona) for Appellee.

The above-captioned appeal is hereby dismissed for the failure to make a motion for reconsideration in District Court, as required by Rule 5(d) of the Rules of Appellate Procedure. Further, a review of the matters on file in the District Court and this court discloses no probable cause for the granting of an appeal under the provisions of 7 NTC Sec. 801(b).

No. A-CV-27-80

COURT OF APPEALS OF THE NAVAJO NATION

September 27, 1983

Julia K. BEN, Appellant,

vs.

Lorenzo BEN, Appellee.

William P. Battles, Esq., Fort Defiance, Navajo Nation (Arizona) for Appellant.

The matter on file in this case appears to be an original action on a foreign decree (Navajo County Superior Court, Arizona) with respect to child support and the disposal of community property.

While the Courts of the Navajo Nation do recognize foreign judgments and will enforce them under principles of comity, this is not the Navajo Court for an action on a foreign judgment. The general jurisdiction of this Court, other than specific grants of jurisdiction for special actions, encompasses only appeals from the final judgments and orders of the District Courts of the Navajo Nation. 7 NTC Sec. 302.

Therefore this action is dismissed on the motion of the court for a lack of jurisdiction.

Nos. A-CV-29-82
A-CV-06-83
A-CV-08-83
A-CV-09-83
A-CV-10-83

COURT OF APPEALS OF THE NAVAJO NATION

September 30, 1983

IN THE MATTER OF THE PRACTICE OF LAW
IN THE COURTS OF THE NAVAJO NATION

Original proceedings heard June 23, 1983 before Chief Justice Nelson J. McCabe and Associate Justices Tom Tso and Robert B. Walters.

The petitioners appeared pro se, and the Navajo Nation Bar Association was represented by Michael C. Nelson, Esquire, of Window Rock, Navajo Nation (Arizona).

Order issued admitting Melody K. Elkins, Alene Delgarito and Donna Carole Bradley as associate member practitioners and remanding the applications of Ronald D. Haven and Inja Nelson to the Navajo Nation Bar Association for further consideration and action.

We previously entered our order in these consolidated cases on the date of hearing due to the urgency of deciding the status of these applicants for bar membership. This opinion is rendered for the purpose of clarifying the reasons for the action taken in the order, reviewing the authority of the courts with respect to bar admissions and outlining the relationship between the Courts of the Navajo Nation and the Navajo Bar Association.

THE REGULATION OF ATTORNEYS

From the earliest times it has been the courts and only the courts which have fixed the qualifications of attorneys and admitted them to practice. Sir William Blackstone stated the rule of law to be that "No man can practice as an attorney in say... courts, but such as is admitted, and sworn an attorney of that particular court." III Commentaries on the Laws of English 26; See also, Serjeant Pulling, The Order of the Coif, pp. 203-204 (1884). That is the general rule of law in the common law jurisdictions of the world.

When the Navajo Tribal Council gave the Navajo Courts rulemaking authority (7 NTC Sec. 601) and the authority to prescribe conditions for the admission of attorneys (7 NTC Sec. 606) in 1959, it was the intent of the council that the rule reported by Sir William Blackstone over 200 years prior would be the rule of Navajo law as well. This is discussed more fully in the decision, In the Matter of Practice of Battles, 3 Navajo R. 82, 10 Indian L. Rep. 6022 (Ct. App. 1982).

The purposes of court regulation of attorney admissions and the practice of law are to guarantee that the public will have their cases presented properly and that it will receive adequate and accurate legal advice. Professional competence in the practice of law is not any easy thing to judge. For a number of years there was a recognition that there needed to be an association of those who practice law before the Navajo Courts in order to assist the courts and to improve the quality of legal services in the Navajo Nation. That recognition culminated in the formation of the Navajo Nation Bar Association, and on October 18, 1978 the Judges of the Courts of the Navajo Nation approved the articles of association and bylaws of that organization. Sec. 103(b) of the articles of association adopted the organizational purpose "To regulate the admission of practitioners to the Bar of the Navajo Courts, so as to insure competence and scrupulous adherence to ethical standards among the members of the Bar." The Navajo Nation Bar Association has greatly assisted the Courts of the Navajo Nation by screening individuals for bar membership, setting membership standards, administering bar examinations and disciplining members of the bar. These services are invaluable and they assure that the members of the Navajo bar themselves have a strong voice in the standards of their profession.

However, the relationship between the courts and the bar must be clarified for the purpose of these cases.

As will be discussed in the next section, there are occasions when problems arise regarding the eligibility of individuals to practice before the Navajo Courts. While the courts have generally delegated the functions of bar admission to the Navajo Nation Bar Association, they should not and cannot delegate fully the functions which are allocated solely to the courts under the Navajo system of government. In other words, while the bar associations screens, fixes general admissions standards and administers bar examinations, the ultimate responsibility and authority for the admission or non-admission of an individual to the practice of law in the Navajo Nation is that of the courts. Normally, the courts make a determination of eligibility and admit individuals to the bar after initial screening take place before the Navajo Nation Bar Association. In that situation the court does not delegate its powers and authority of admission to the bar but only delegates some of its functions in setting standards and screening. Occasionally, situations will arise in which an individual does not fit the standards fixed by the bar, and then individuals cannot be barred from directly petitioning the courts for admission. The reason for this is that the courts, and only the courts, have the ultimate authority in this area.

It is proper for the courts to permit the bar association to set admission standards since it is in actuality a partner in the process of regulating the practice of law. Normally the standards set by the bar will be strictly followed, and special exceptions based upon considerations of necessity, equity and justice will be rare.

Therefore the Navajo Nation Bar Association continue in the exercise of functions delegated to it by the courts with the blessing of the courts and their thanks.

THE SITUATIONS HERE

In general, one can become a member of the Navajo Nation Bar Association (which is an integrated bar) only after taking a bar examina-

tion. Part III. A, Navajo Nation Bar Association Bylaws (the bylaws). Before one can take the bar examination one must reside or be permanently employed within the territorial jurisdiction of the Navajo Nation and be at least 18 years of age. III.A, 2, Bylaws. There are status restrictions as well. One must either be admitted to a state bar or be either a member of the Navajo Tribe or a "federally-recognized Indian Tribe" which gives members of the Navajo Tribe the right to practice before its courts. III. B.3, Bylaws.

These particular applicants seemed to fall between the cracks of the rules, and they petitioned the court reciting special conditions.

Melody K. Elkins is a non-Indian. She was hired as an attorney for the Navajo Department of Justice and she wished to practice law until she could take the examination. She was not eligible for associate membership, which permits an individual to practice pending taking the exam, and she petitioned the court in order to not engage in the unauthorized practice of law until she took the exam. There should be a special class of associate membership to apply in special cases such as this. The Navajo Department of Justice needs to select the finest attorneys it can for its staff, and those selected must be able to perform their duties until they qualify by taking the examination. This court of course supports the Navajo Nation's right to be represented by competent attorneys, and Ms. Elkins is known to the court to have been a teacher within the Navajo Nation for several years and to have been selected as an attorney with the Department of Justice.

Ronald D. Haven took a leave of absence as a law student at the University of Arizona School of Law and took a position with DNA-People's Legal Services, Inc., as a legal assistant. Haven is an enrolled member of the Navajo Tribe. At the time of the hearing on these applications it appeared to the court that Mr. Haven did not make a proper application to the bar admission committee and it had no opportunity to consider his qualifications as an associate member. Therefore the court referred his case to the admissions committee.

Inja Nelson is an enrolled member of the Navajo Tribe, and she made an application to practice because she is a student of tribal court advocacy at Navajo Community College and she is employed as a legal assistant with DNA-People's Legal Services, Inc. Since she had not applied to the bar admissions committee and it did not have an opportunity to review her qualifications, her application was referred to the committee.

The situation of Alene Delgarito was quite special. She is a member of the Hopi Tribe and its Bar Association, and she was called upon to assume the practice of a member of the bar who was elected to the Navajo Tribal Council. She practices in the Tuba City area, which has a shortage of practitioners. While she claimed she was denied associate membership due to the fact she is not an enrolled member of the Navajo Tribe, since it appeared to the Board of Governors that there is reciprocity with the Hopi Tribal Court for Navajo practitioners, she was granted associate status. On March 25, 1983 the Honorable Delfred Leslie, Associate Judge of the Hopi Tribal Court, certified to the President of the Navajo Nation Bar Association "that the Hopi Tribal Court grants reciprocity to qualified Navajo individuals with respect to practice in our Tribal Court." Judge Leslie is thanked for his assistance in this case.

[REDACTED]

Donna Bradley is a member of the Navajo Tribe and admitted to practice in Arizona and New Mexico. She is an attorney with the Navajo Department of Justice. She has been admitted to practice as an associate member.

At the hearing of this matter the Navajo Nation Bar Association acknowledged that all petitioners except Elkins are eligible for associate membership. The individuals from the Department of Justice are eligible to associate with either the Attorney General or some other member of her staff, and the individuals from DNA are eligible to associate with attorneys with that organization.

CONCLUSION

These cases arose from peculiar circumstances which required the court to bypass normal bar admission procedures to examine the particular circumstances of each of the applicants. This procedure is not intended to fix a usual procedure for looking at admission applications, and applicants will be expected to first apply to the Navajo Nation Bar Association under its Rules and Procedures.

The Navajo Nation Bar Association has been of great assistance in the past in litigation involving its functions and in the operations of the courts, and it is again thanked for its participating in this case. The court was briefed well on the position of the association with respect to each applicant, and the interest of the applicants were taken into due consideration.

No. A-CV-31-82

COURT OF APPEALS OF THE NAVAJO NATION

September 30, 1983

Lee F. JOHNSON, Appellant,

vs.

Adolph JUNE, JR., Appellee.

Appeal heard April 20, 1983 before Chief Justice Nelson J. McCabe and Associate Justices Tom Tso and Henry Whitehair. Opinion by the Honorable Tom Tso.

[REDACTED]

Lawrence A. Ruzow, Esquire, of Window Rock, Navajo Nation (Arizona) appeared for appellant Johnson; Roy Ward, Esquire, of Flagstaff, Arizona appeared for respondent June; and Donald Juneau, Esquire, Assistant Attorney General of Window Rock, Navajo Nation (Arizona) appeared for the respondent Navajo Election Commission.

[REDACTED]

This is an appeal from the actions of the Navajo Election Commission with respect to the Navajo general election of November 2, 1982. This court has jurisdiction over such an appeal by virtue of the authority vested in it by the Navajo election statutes.

AN ELECTION IN DISPUTE

This dispute comes from the Kaibeto Chapter, where Lee F. Johnson was the council delegate to the Navajo Tribal Council. The initial results of the November 2nd election for council delegate appeared to show that Mr. Johnson had been defeated for re-election by a close vote of 309 to 300, and that Adolph June, Jr. had been elected in his place. Naturally Mr. Johnson challenged the election, given the initial vote spread, and a recount was conducted on November 9, 1982, giving 307 votes to June and 292 to Johnson.

Mr. Johnson began proceedings before the Navajo Election Commission to contest the election. His theories, in summary, were (1) that registered voters had been denied their right to vote; (2) ineligible persons were permitted to vote, and (3) some individuals were permitted to vote under the names of other registered voters. The grievance was filed with the election commission on November 9th, and it was dismissed by the Navajo Election Commission on December 20, 1982.

This appeal was filed on December 22, 1982.

Because of the fact that an election dispute has the potential of not only denying rights to political candidates but to their constituents, on January 6, 1983 Chief Justice Nelson J. McCabe granted this appeal and ordered an expedited hearing on appeal. Jurisdiction under Sec.

51.A(7)(e) of the Election Law of the Navajo Nation was noted, and the Chief Justice made orders to move the case along.

The counsel for the parties also recognized the importance of moving the case along and the necessity to discuss it, and on January 17, 1983 a stipulation was filed which provided for access to the election poll book and a new hearing before the Navajo Election Commission.

The file discloses later sharp disagreements over the meaning of the stipulation, but on March 10, 1983 a hearing was scheduled and held before the Navajo Election Commission, and it upheld the validity of the election.

In reviewing the conduct and findings of the Election Commission this court finds that it initially held a recount and found June to be the winner. The number of ballots was small enough that a recount which confirmed the eligibility of voters was a comparatively simple matter. While there may be a disagreement about the new hearing on March 10th, the court finds that a hearing date was set for March 10th and that there was an agreement about that date. The board set the hearing and the appellant and his counsel simply failed to show for it because they disagreed as to some matters. There was an opportunity to fully air Johnson's grievances, and that opportunity was passed up.

In any event, this court finds that the Election Commission carefully carried out its duties to review the validity of the election. Speculation on the conduct of an election is not enough to overturn it and this court will not disturb the finding of the commission that Johnson's grievance was speculation. This is particularly true when there were poll watchers present to know what was going on. Kaibito is small enough that had there been any effort to turn away eligible voters, allow ineligible voters to cast ballots or permit one person to vote in the name of another, this would have been seen and reported.

STANDARDS FOR REVIEW IN ELECTION CASES

The first principle we must outline is the fact that the Navajo Tribal Council has made the decision to set up the Navajo Election Commission as the body which determines the public policy of how elections are to be conducted. Noting that council decision, the question is whether the Election Commission carried out the responsibility given it. Where the court finds that the commission acted within the discretion given it, then its decision must be upheld. Once the court has found that the agency has been given discretion, the question is whether it acted within that discretion. See, Brodie and Linde, "State Court Review of Administrative Action: Prescribing the Scope of Review," 1977 Arizona St. L.J. 537 at 554 (1977).

The appellant raises the Indian Civil Rights Act in support of his claims, and our role must be generally the same in its standards as state standards, because

"The standard for setting aside a tribal election must be at least as restrictive as that applied in non-Indian local election cases under the Constitution." Means v. Wilson, 522

[REDACTED]

What are some of those standards?

First of all, we agree with the proposition that there is a presumption that an election which has been held has been held regularly and validly. Gardner v. City of Reidsville, 153 S.E. 2d 139, 144 (N.C. 1967). Another canon in election cases is that:

"Ordinarily...an election may be contested only for matters that would impeach the fairness of the result. Thus, mere irregularities or misconduct on the part of the election officers which do not tend to effect the result of the election are not ordinarily of themselves either a ground for contest, or proper matters of inquiry." 26 Am.Jur.2d, Elections Sec. 321

There was an excellent standard presented to this court by one of the parties, and we adopt it:

"The true policy of the law is to sustain elections, and they will not be set aside on the ground of fraud unless the facts are such as to definitely show that there has been such fraud in the conduct of the election that neither candidate can be adjudged to have been fairly elected. To set aside an election is to deprive all the voters who voted at the election of their ballot, and it is to deprive the person who is successful at the election of the office which he won. The result, therefore, of the election should not be lightly set aside. Appellant does not show that fraud was practiced against him. He only shows that it might have been practiced. There is nothing in the record to connect appellee in any way with the fraud or alleged fraud." Motley v. Wilson, 82 SW 1023 (Ky. 1904).

The standards for overturning elections are strict, as they should be in the absence of a clear showing of unfairness.

"All provisions of the election law are mandatory if enforcement is sought before election in a direct proceedings for that purpose; but, after election, all should be held directory only, in support of the results, unless of a character to effect an obstruction to the free and intelligent casting of the vote, or to the ascertainment of the result, or unless the provisions affect an essential element to the validity of an election, or that its omission shall render it void."

Lorang v. High School District "C" of Cascade County, 247 P.2d 477, 479 (Mont. 1952).

Therefore, to sum up the principles which we have adopted, this court applies the following standards to election disputes:

1. Election results are presumed to be regular and proper;
2. Irregularities or misconduct in an election which does not tend to effect the result or impeach the fairness of the result will not be considered;
3. Elections will not be set aside unless the facts definitely show such fraud and that there was no fair election.
4. After an election, election provisions are to be seen as directions unless the violations obstructed a free and intelligent vote, affected an essential element of a valid election or an omission of a direction voids the election.

THE ACTION OF THE ELECTION COMMISSION

This was a close vote, and a recount was held. There was a final hearing where there was an opportunity to show that there was some error which would change the outcome of the election. The presumption of regularity was not overcome; There was no showing of irregularities or misconduct to show a change of result or impeach the fairness of the election; There were no facts demonstrated to show fraud; And, there was nothing shown to show that a free intelligent vote was obstructed, an essential element of the election law was violated or that there was an omission which would void the election.

The court is reminded that the Navajo Tribal Council has given the Navajo Election Commission the discretion to decide election disputes. The functions of the court is to see whether the commission acted within that discretion, and we have received no evidence to show that it did not. Therefore it appears that the Election Commission carried out the mandate of the law, and this appeal is dismissed.

THIS OPINION

This court issued its order disposing of the appeal on April 20, 1983 reserving this opportunity to render an opinion which would be of assistance in further election matters. Since the entry of the order, which is the final order of the court, the Honorable Henry Whitehair has ceased to be a judge. Therefore this opinion is issued upon the authority of the Chief Justice and the remaining associated justice as if the absent judge had dissented.

[REDACTED]

No. A-CV-16-82

COURT OF APPEALS OF THE NAVAJO NATION

September 30, 1983

Mary MANN, Appellant,

vs.

THE NAVAJO TRIBE

and

Jerry A. McCABE, Appellee.

[REDACTED]

Appeal heard February 24, 1983 before Acting Chief Justice Robert B. Walters and Associate Justices Marie F. Neswood and Henry Whitehair.

[REDACTED]

William A. Goldsmith, Esquire, of Gallup, New Mexico, for the appellant, and Joseph L. Rich, Esquire, of Gallup, New Mexico, for the respondents.

[REDACTED]

This is an appeal in a negligence action, and it was tried as a trial de novo before the full Court of Appeals. This opinion constitutes the findings of fact and conclusions of law of the Court of Appeals in the matter tried to it.

THE FACTS

This case is a very sad example of the result of breaches of Navajo law at Navajo traditional ceremonies. While liquor is illegal in the Navajo Nation, there are those who do not only choose to break the secular law, but to defile a sacred Navajo ceremony by becoming intoxicated. In this case a breach of Navajo statutory and sacred law resulted in a death.

On September 6, 1980, the second night of an Enemyway Ceremony (popularly known as a Squaw Dance), was held approximately one mile south of Arizona State Route 264 milepost 460.8. This location is near a popular picnic area called the Summit because it is at the summit of a small mountain between Window Rock and Ganado. As it is with many of these curing ceremonies, there are large numbers of people in attendance. Often family and clan members of the patient for whom the ceremony is held will attend, and many friends and acquaintances will also attend. On this particular night there were many in attendance at the Enemyway Ceremony, including Dan Mann, a 51 year-old man. The ceremony was held at night, and there was a good deal of drinking taking place.

The principle ceremony takes place in a special hogan, and a crowd gathers in an area nearby. On that night Mr. Mann did a great deal of drinking, and people noticed that he was highly intoxicated. At some time between 9:45 and 10:00 p.m. a witness saw Mr. Mann standing by a vehicle and then stagger away from it and the crowd into a sagebrush area around the crowd. He was found dead by the witness 30 to 45 minutes later. He had apparently been run over by a vehicle.

In reconstructing the events of that night and the death it was discovered that Officer Jerry A. McCabe had driven his police van in the area to make a security check of the ceremony for law violations or interference with it, and in the course of his check he drove the police panel truck in a circle and along a track around the dancers, participants and observers. The natural suspicion was that Officer McCabe had been responsible for Mr. Mann's death.

It is very important at this point to remember that whether or not Officer McCabe was the cause of Mr. Mann's death is entirely different from the question of whether he is legally liable for that death. Under Navajo statutory law, (Navajo common law not having been raised here), there can be no legal liability unless there was carelessness in causing the death. 7 N.T.C. Sec. 701(b). That is, that there was some legal duty which Officer McCabe owed to Mr. Mann, and which Officer McCabe breached, proximately causing the death.

There were many vehicles at the ceremony, and there were no witnesses to the fact that Officer McCabe's vehicle was the one causing the death. One witness said that his was the only vehicle driven around the circle at about the time of death, and we may accept that as a fact for the sake of argument.

The evidence shows that the police vehicle was properly equipped for rough country work, with proper lights for night work. McCabe drove his vehicle slowly around the assembled people, looking into the crowd and carrying out his assigned task of making certain the ceremony was protected. He was not aware of striking anything as he drove around the crowd, and it was only later that the death was discovered and the possibility of Officer McCabe causing it was raised.

The court is satisfied that the officer drove slowly and properly under the circumstances.

What duty was owed to Mr. Mann by Officer McCabe? Very simply the duty of carrying out police patrol duties in a manner appropriate for the crowd conditions, the time of day and the terrain. It is more than likely that Mr. Mann went out into the sagebrush and passed out. The sagebrush grows thick and tall, and it is easy for a man to be concealed in its growth.

The court weighed Officer McCabe's testimony and the description of the witnesses of the conditions, and it finds that the duty to conduct police patrol duties in a careful manner, considering the circumstances, was indeed carried out and it was not breached as to Mr. Mann.

While we may conclude that perhaps Officer McCabe's conduct was the proximate cause of death, it was not a proximate cause in breach of any duty.

While this court does not condone any careless driving through sagebrush in the dark near an Enemyway Ceremony, it can certainly be said that an individual who drinks himself into a stupor, passing out in the sagebrush, assumes the risk of someone driving over him. There

are limits to the requirements of the law in requiring drivers to take care for pedestrians, and there is certainly no policy requirement that this court tell an otherwise cautious driver that he must foresee the possibility of a drunk in the sagebrush at Enemyway Ceremonies.

This court rules in favor of the defendants, and although we do not make it a part of this ruling for the purpose of stating the law, those who break statutory and sacred law by drinking at Enemyway Ceremonies should be prepared to suffer punishment for their misconduct. While society should take the special needs of alcoholics into account, they should not be babied and they should be aware of their responsibilities to themselves and society. Mr. Mann's conduct was responsible for his death, and Mr. Mann's conduct decided his fate.

The court also notes that while the plaintiff's theory for recovery was a state law-based negligence one, our law applicable to this situation is that found in 7 N.T.C. Sec. 701(b), which provides for fair compensation where an injury is inflicted as the result of carelessness. "Carelessness" is actually the same legal standard as "negligence," but it is a matter of applying our statute rather than state law principles. This court also finds that although it may be said that the death was the result of an "accident," and the court could award a reasonable part of the loss suffered under 7 N.T.C. Sec. 701(d), there is no just or equitable consideration to cause it to do so. The Navajo Nation will not be required to pay the estate of Mr. Mann for his death, since it was his action which caused it. As a matter of public policy the court should not compensate drunks for injuries they cause themselves without a strong public policy reasons for doing so.

The decision of the Window Rock District Court is affirmed.

[REDACTED]

No. A-CV-07-82

COURT OF APPEALS OF THE NAVAJO NATION

September 30, 1983

NAVAJO TRIBAL UTILITY AUTHORITY, Appellant,

vs.

Mary Lynn FOSTER, Appellee.

Appeal heard February 25, 1983 before Chief Justice Nelson J. McCabe and Associate Justices Marie F. Neswood and Robert B. Walters.

[REDACTED]

Walter F. Wolf, Jr., of Gallup, New Mexico for Appellant Navajo Tribal Utility Authority and Lawrence Long, Esquire, of Window Rock, Navajo Nation (Arizona) for Apellee.

[REDACTED]

This is an appeal by an employer who resisted proceedings in the nature of garnishment for past child support in the District Court.

On October 29, 1981 the Navajo Tribal Utility Authority ("NTUA") was served with a writ of garnishment ordering its controller to withhold monies from Benjamin Lee's wages for child support and arrearages on that child support. The NTUA appeared in the District Court to contest the legality of the writ, and appeals the decision of the District Court upholding its original order. On Appeal the NTUA makes these contentions:

1. The Navajo Sovereign Immunity Act, CMY-42-80, bars any action against the NTUA for the purposes of collecting child support from the wages of its employees;

2. Garnishment is not authorized under Navajo law without a specific statute providing for it,

3. Under the circumstances, the writ of garnishment violated due process rights of the NTUA under the Indian Civil Rights Act; and

4. The District Court should have allowed the NTUA to raise the question of a violation of federal statutes restricting wage garnishment.

The heart of this case, and the legal problems which will be address first, is: Does Navajo law provide a legal remedy which may be used to compel employers to pay accrued wages to enforce child support orders or other judgments?

GARNISHMENT AS A REMEDY

There appears to be some confusion about garnishment as a remedy. One definition of the term is that:

"The term 'garnishment' denotes a proceeding by a creditor to obtain satisfaction of the indebtedness out of property or credits of the debtor in the possession of, or owing by, a third person." 6 Am.Jur.2d, Attachments and Garnishment Sec. 2.

It is also defined as:

"A warning to a person in whose hands the effects of another are attached, not to pay the money or deliver the property of the defendant in his hands to him, but to appear and answer the plaintiff's suit."

"A statutory proceeding whereby person's property money, or credits in possession or under control of, or owing by, another are applied to payment of former's debt to third person by proper statutory process against debtor and garnishee." Black's Law Dictionary, "Garnishment," p. 810 (4th Ed. 1968).

It is said that as a general principle of law, garnishment is "regarded as in derogation of the common law and to exist only by virtue of statute. Consequently resort to the statute is necessary to determine the extent and scope of the process." 6 Am.Jur.2d, Garnishment Sec. 9.

Both the definition of the procedure called garnishment and the legal principle that it is a creature only of statute are principles of general American law. They are not necessarily principles of Navajo law, and if they are found to be contrary to either authority granted by the Navajo Tribal Council or Navajo common law (either decisional or customary), then they will be disregarded. 30 Am.Jur.2d, Executions Sec. 88.

What we are talking about is looking to either money or property of an individual which is in the hands of another person in order to satisfy a court judgment or order.

Looking first to the Navajo Tribal Code, the court finds these provisions:

1. "In all civil cases, judgment shall consist of an order of the court awarding money damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some other act for the benefit of the injured party." 7 N.T.C. Sec. 701(a).
2. "Whenever the Court of the Navajo Tribe shall have ordered payment of money damages to an injured party and the losing party refuses to make such payment within the times set for payment by the court, and when the losing party has sufficient funds to his credit at the agency office to pay all or part of such judgment, the superintendent shall

[REDACTED]

certify to the Secretary of the Interior the record of the case and the amount of the available funds. If the Secretary of the Interior the record of the case and the amount of the available funds. If the Secretary shall so direct, the disbursing agent shall pay over to the injured party the amount of the judgment, or such lesser amount as may be specified by the Secretary, from the account of the delinquent party." 7 N.T.C. Sec. 704.

3. "A writ of execution shall be issued by the Clerk of Court and addressed to any Navajo policeman and shall direct him to seize and deliver to the Clerk of Court sufficient unrestricted and nonexempt personal property of the debtor to pay the judgment and costs of sale. It may specify the particular property to be seized." 7 N.T.C. Sc. 706.
4. "The Trial Court shall have power to issue any writs or orders necessary and proper to the complete exercise of its jurisdiction." 7 N.T.C. Sec. 255.
5. ". . . In addition to other remedies, the court may issue an order to any employer, trustee, financial agency, or other person within the territorial jurisdiction of the Tribe indebted to the parent, to withhold and pay over to the clerk of court, moneys due or to become due." 9 N.T.C. Sec. 1303 (Support of child not in its own home).

In addressing the argument of the NTUA over garnishment, it may be said that Navajo law clearly provides for garnishment as to monies held by the Bureau of Indian Affairs on behalf of individual Indians. 7 N.T.C. Sec. 704.

7 N.T.C. Sec. 701(a) gives general authority to the courts to direct the surrender of property to the injured party and it gives the court the authority to order the performance of some act for the injured party. This statute is not restricted to a defendant alone, and it is a grant of general authority. Our execution statute simply provides for an order to a Navajo policeman to seize the judgment debtor's property (including specified property), and there is no restriction that the property has to be in the judgment debtor's hands. While general American laws provide for proceedings which are supplemental to execution to get at property in the hands of a third person, they are not exclusive remedies, "and the possession of property of the execution debtor by a third person does not in itself operate to preclude the right to a levy of execution and a sale thereunder." 30 Am.Jur.2d, Execution Sec. 105.

It is clear that the Navajo courts may issue any writ or order necessary to carry out their jurisdiction, including all orders to enforce a court judgment or order. 7 N.T.C. Sec. 255.

Therefore there are the remedies of execution and proceedings in aid of execution. Specifically there are the procedures of wage execution and income execution. 30 Am.Jur.2d, Sec. 788.

We are not concerned with the labels which may have been used by the District Court. There appear to be proceedings for garnishment which are justified by our statutes and proceedings for wage execution.

If the garnishment procedure is utilized, then process issues to the person holding property for the judgment debtor, requiring him or it to tell the court what property is held and why it should not be turned over. In the situation of a wage or income execution, the writ of execution authorizes the seizure of monies held by third persons and, if they do not have funds payable to the judgment debtor, they can say so.

In order for there to be statutory authority for garnishment proceedings there need not be a statute with a headnote containing the magic word "garnishment". It is enough for the court to have the authority to grant the remedy. The Navajo Courts have such authority under the powers outlined in 7 N.T.C. Secs. 701(a) ("directing the surrender of certain property" and "the performance of some other act for the benefit of the injured party"), 706 ("seize and deliver . . . personal property of the debtor") and 255 ("any writs or orders necessary and proper to complete exercise of its jurisdiction").

Therefore both garnishment and the wage executions are available as remedies in the courts of the Navajo Nation. This court, as it is with the state courts, will exercise any judicial power which is not forbidden, and the broad grant of authority in the original legislative enactments which established the Navajo Courts will be exercised for the benefit of the Navajo People. See, Fitts v. Superior Court, 57 p. 2d 510, 512 (Calif. 1936).

There is an excellent policy basis for our ruling. Can we suppose that the Navajo Tribal Council would grant the courts the authority to order parents to support their children and then let the parents go free by simply refusing to pay that support from their pay checks? Will defaulting fathers or mothers be permitted to laugh at court orders, risking jail terms but not paying over for the support of their children? Can we assume that the Navajo Tribal Council intended that the judgment of its courts have no teeth?

This court does not create any new remedy today. This court does not engage in judicial legislation. We are only carrying out the plain import of the statutes which give the courts the authority to act.

As a matter of practical guidance to the trial courts, the procedures sanctioned by this court today are:

1. The issuance of a writ of garnishment requiring a third party holding sums payable to a judgment debtor to appear in court to state whether and in what amounts monies are owed to the debtor for the purpose of the entry of an order against the third party to pay the money over.

2. Applications to the court to issue a writ of execution upon the wages of a judgment debtor, which will be served by the Navajo Police by making an inquiry of the employer as to employment and wages owing, and receiving those sums permitted by Federal law.

SOVEREIGN IMMUNITY

While the Navajo Sovereign Immunity Act would normally apply in a case such as this, employers covered by the act should note that an exception to the Act is for suits to compel the performance of a responsibility under the laws of the Navajo Nation, and one such responsibility is compliance with Navajo Court proceedings. While there is general authority that garnishment proceedings are barred under the

doctrine of sovereign immunity, this court follows the precedent of Merritt-Chapman & Scott Corp. v. Public Utility Dist. There an attachment in a quasi in rem proceeding against a governmental instrumentality was permitted to stand unless it substantially interfered with the performances of public duties by that instrumentality. 319 F.2d 94 (C.A.2); cert. den. 375 U.S. 968. In addition to the fact that our law exempts actions to compel officials to perform their duties, there is no reason to apply principles of sovereign immunity to a quasi-governmental body solely for the purpose of using its immunity to shield a father who refuses to pay child support. There is no statutory purpose served by such result, and certainly it was not within the intention of the Navajo Tribal Council to say that funds which have accrued for payment to a tribal employee and have been set aside for that purpose are to be shielded from the law. The NTUA's own money is not at risk; Only the money which has been earned by an employee and is ready for payment to that employee is affected. We find no substantial interference with governmental operations caused by these procedures.

THE DUE PROCESS CLAIM

In essence the NTUA claims it is entitled to notice and an opportunity to be heard prior to the issuance of a writ of garnishment. This is a very important point, and to the extent that any interest of the NTUA may be injured or property may be taken from it, the assertion is correct.

Navajo Tribal Utility Authority says, "What if the wages owed are less than those in the court order?" Or, "What if the amount in the order would put us in violation of Federal law?" These are excellent questions, and there is a right to be heard.

However these are practical matters. If the normal garnishment procedure as recognized in general garnishment law is followed, then there will be notice to the employer and there will be no due process problem. In the case of wage executions, we hold that it is sufficient if there is an opportunity to be heard. In other words, if there is a writ of execution which the employer cannot comply with or which would place the employer in jeopardy of running afoul of some regulatory statute, then the employer will have the right to object or pay over clearly permissible amounts. It will be sufficient for the employer to advise the Navajo Police for the purposes of a return to the court by the police or for the employer to file an objection with the court and have an opportunity to be heard in that fashion. Attempts by employer to circumvent valid orders which can be paid legally will be dealt with severely as disobedience to a lawful court order.

FEDERAL LAW ISSUES

While the District Court correctly pointed out that the Federal statute in question was made for the protection of the defendant and he should be the one to come forward, since this case will be remanded for further proceedings in harmony with this opinion. The NTUA will have the opportunity to protect itself from potential liability by raising the issue on remand.

A NOTE ON JOE v. MARCUM

The NTUA has brought the Federal appeals case, Joe v. Marcum, to the attention of the Court of Appeals. 621 F.2d 358 (C.A. 10). That case holds that our code does not permit wage garnishment. Id. at 361. With all due respect to our sister court, it interpreted Navajo law as it saw it at the time for the purposes of a case over which it had jurisdiction. This court is the body which has the authority to make final determinations of Navajo law, excepting of course the Navajo Tribal Council when enacting legislation. Therefore we advise the Tenth Circuit Court of Appeals that it was wrong and ask that it abide by this decision in the future.

ORDER

This matter is remanded to the District Court for proceedings in accordance with this opinion.

[REDACTED]

No. A-CV-26-81

COURT OF APPEALS OF THE NAVAJO NATION

September 30, 1983

ZION'S FIRST NATIONAL BANK,
A Utah Corporation, Appellant,

vs.

Kenneth J. and Victoria JOE, Appellees.

Appeal heard May 9, 1982 Before Chief Justice Nelson J. McCabe and Associate Justices Robert B. Walters and Tom Tso.

F.D. Moeller, of Farmington, New Mexico for Appellant. William A. Goldsmith, Esq., Gallup, New Mexico for Apellee.

[REDACTED]

[REDACTED]

THE CASE

This is a simple and straight forward appeal. Originally an action was filed in the Shiprock District Court reciting a security agreement between Zion's First National Bank and Kenneth J. and Victoria M. Joe. The secured property under the agreement was a 1977 Chevrolet pickup truck. The complaint alleged the buyers had failed to make their payments, and it asked for leave to repossess the truck and \$2,617.04 in damages. After the action was filed there was a stipulation that a judgment in the total amount of \$1,147.33 would be entered against the defendants.

The judgment was entered on that stipulation on April 25, 1980, and it was issued by the Honorable Perry Garnenez. On May 12, 1980 the Honorable Marie F. Neswood issued a writ of execution on the judgment.

On April 13, 1981 the Honorable Henry Whitehair dismissed the action, stating "That chattel mortgage, 1977 Chevrolet pick-up, has been repossessed by plaintiff, therefore plaintiff have no cause of action".

Some of the problems with the judgment of dismissal were that there was no written motion before the court, there were no findings as to the grounds for reopening the judgment and the dismissal was inconsistent with the prior judgment and stipulation.

REOPENING JUDGMENTS

Rule 23 of Rules of Civil Procedure provides:

"At any time after the final order or judgment, the court may in the interest of justice reopen

a case in order to correct errors or to consider newly discovered evidence, or for any other reason consistent with justice."

Our law contains a common rule based upon the principle that courts are to be just and do justice. Because of this principle, courts are empowered to correct errors in judgments, reopen cases where new evidence requires a new hearing or otherwise take another look at a judgment where justice and equity clearly require it to do so.

Normally, a judge should not consider modifying or vacating a judgment without very serious reasons for doing so and without a specific written motion asking him or her to do so. Of course there may be times when the court discovers a lack of jurisdiction, gross-fraud or the need to clarify a judgment without an adverse hearing, but those times are rare, and the right of the parties to an action to have notice of the court's action and an opportunity to be heard on it always exists. The due process clause of the Navajo Bill of Rights always requires notice and an opportunity to be heard before any right created by a judgment is taken away or modified.

In this case the judge made an assumption, which is unsupported by the record, that the stipulation somehow provided that the defendants would keep the truck (and this may be assumed from the stipulation on file, which should have addressed the point of what was to happen with the truck specifically), and that it was the intention of the parties that should the truck be repossessed, the debt would have been eliminated.

The record before the court smacks of an approach of the judge by the buyers, and it was an illegal order which denied the due process rights of the bank. If the judgment was illegal or if there were equitable grounds for modifying it, there should have been a motion filed with the court which showed grounds for modifying the judgment and which gave the bank notice and an opportunity to be heard.

Therefore this action will be remanded to the Shiprock District Court for reinstatement of the original judgment of April 25, 1980 and the issuance of a writ of execution upon it.

The motion of William A. Goldsmith, Esquire, to withdraw as counsel for the defendants is granted as of its date. It should be noted that the defendants did not oppose this appeal and we may assume they recognized it has merit.

[REDACTED]

No. A-CV-23-81

COURT OF APPEALS OF THE NAVAJO NATION

September 30, 1983

Jasper MANYGOATS, Appellant,

vs.

GENERAL MOTORS ACCEPTANCE CORP.,
Phoenix, Arizona, Appellee.

[REDACTED]

Appeal argued October 8, 1982 before Nelson J. McCabe, Chief Justice and Associate Justices Marie F. Neswood and Homer Bluehouse. Opinion by the full court.

[REDACTED]

Irene Feigenoff Barrow, Esq., of Tuba City, Navajo Nation (Arizona) counsel for Appellant, and Robert Church, Esq., of Tuba City, Navajo Nation (Arizona) and Richard B. Wilks, Esq. of Phoenix, Arizona for the appellees.

THE CASE BEFORE THE COURT

This appeal involves the complexities of interpreting contracts for the sale of vehicles and the application of federal and state consumer protection laws. The facts of the case are quite simple, but the application of the law is not. The briefs and arguments of the counsel for the parties have been most helpful in guiding the decision of this court.

On August 28, 1979 Jasper Manygoats decided to buy a new 1979 Chevrolet eight-cylinder pickup truck from Hanosh Chevrolet Company in Grants, New Mexico. When the purchase was made, Manygoats and Hanosh signed a standard installment sale contract, which was a printed form in which the blank spaces were filled in with a typewriter. The form was commercially printed and it indicates that it was prepared for use in the State of New Mexico. The form specifically indicates that it was intended to disclose information required by the Consumer Credit Protection Act (which is a New Mexico act) and the terms contained on the face of the form are clearly meant to comply with the Federal Truth-in Lending Act.

Manygoats agreed to pay a total of \$7,100 for the pickup, including a downpayment of \$2,700 in the form of a trade-in and cash, and the balance of \$4,400 by means of 36 payments of \$171.54 per month.

The transaction was made at Grants, New Mexico by a Navajo citizen residing at Tuba City, Navajo Nation (Arizona), and it is clear from the document that it would be assigned to the General Motors Acceptance Corporation (GMAC) of Albuquerque, New Mexico.

Things went along in accordance with what the parties expected under the contract until May 27, 1980 when GMAC filed suit to repossess the truck (or obtain the balance due) because of a failure of the defendant Manygoats to make his payment for four months in 1980. Manygoats made an answer in which he denied the payments were due and in which he raised a counterclaim. The counterclaim was made under the Federal Truth-in Lending Act, and it claimed damages consisting of a statutory penalty of two times the finance charge under the contract or the limited statutory amount of \$1,000. The total contract balance claimed owing the GMAC at the time was \$5,489.28.

The counterclaim alleged that there were three violations of the Truth-in Lending Act: (1) That GMAC was attempting to take as a security not only the truck but "equipment, accessories, and other property in the vehicle," and that there was no disclosure in the agreement that such property would be taken; (2) That the agreement did not clearly tell Manygoats that "after acquired property" could be repossessed along with the truck; and (3) That the agreement did not tell the amount of means of calculating default, delinquency or other charges payable as late charges.

General Motors Acceptance Corporation denied that these matters were in violation of the Truth-in-Lending Act in a reply to the counterclaim, and it later amended its reply to allege that the counterclaim was barred by a Federal limitation that Truth-in-Lending actions must be brought within one year of the date of the agreement was signed.

On this point the parties set up very technical arguments of law and interpretations of a federal consumer act, and the arguments before this court have set up a philosophical debate over whether the arguments raised are "lawyers nuance" and "mental gymnastics" in interpreting a complex consumer act. Both sides claim the blessings of common sense in their interpretations. If only the process was so easy.

One factual matter which is not stated in any of the arguments on appeal and one which was not resolved by the trial court is whether or not there were actually any items of "equipment, accessories, and other property in the vehicle" which would be the subject of a repossession order and whether the dispute over what should or should not have been in the contract was academic or a real dispute. This is a fact which may have assisted the Court of Appeals in its interpretation.

After the suit was filed Mr. Manygoats became current in his payments by the end of January, 1981, and GMAC wanted to terminate the case by dismissing it. However Manygoats wished to proceed with his counterclaim for \$1,000 against GMAC and moved the court for a summary judgment upon the papers on file.

Extensive and very technical briefs were filed by the parties, and on May 26, 1981 the District Court took action in a judgment granting a summary judgment to GMAC, granting GMAC motion to dismiss its complaint and denying Manygoats' motion for summary judgment. Manygoats' appeal from that judgment is what is before this court.

ISSUES ON APPEAL

The issues before this court involve an interpretation of the Truth-in-Lending Act. They are:

1. Since 15 U.S.C. Sec. 1640(a) requires that an action be brought within one year from the date of the occurrence of a violation of the Truth-in-Lending Act (that is, the date of the agreement to buy the pickup in this case), could the counterclaim be brought after August 28, 1980 (one year after the date of the agreement)?

2. When the seller is given the right to take "any equipment or accessories" in a vehicle when it is repossessed, and that right is given in small print on the back of a written agreement, is the Truth-in-Lending Act violated?

3. When a seller can take "any other property in the..... vehicle at the time of repossession," and that right is stated in small print on the back side of an agreement, is there a violation of the Truth-in-Lending Act?

4. When state law limits the use of property used on or in a vehicle after it is bought as an item which can be repossessed, must that fact be stated in the agreement?

THE LAW APPLICABLE TO THIS CASE

At the outset it is very important for this court to indicate to the parties and to others what law applies in the Courts of the Navajo Nation in Truth-in-Lending cases. 7 N.T.C. Sec. 204(a) requires us to apply a sliding-scale of laws in civil actions. When a civil action comes before a Navajo court, it must first apply "any laws of the United States that may be applicable," then, if there are none, "any authorized regulations of the Interior Department," then "any ordinances or customs of the Tribe," and, if none of these laws is applicable, then the court must apply the "laws of the state in which the matter in dispute may lie." Id. Since this is an action under the Truth-in-Lending Act, which is an act of the United States, then the Navajo courts will apply that act and its regulations as "laws of the United States that may be applicable," and no other.

While this is a technical point, it is important. This is a situation in which the Navajo courts will make their own independent interpretation of an enactment of the Congress of the United States, guided by the general precedents of the Courts of the United States and States around the country, and we will not be bound by any decision of the State of Arizona, New Mexico or Utah (depending upon where the dispute arises) or a United States District Court for the federal judicial districts in those states. In other words, the Navajo courts have been given the specific authority to make an independent interpretation of federal law in this category of case, and because of that independent authority the Navajo courts are not bound by local federal or state interpretations of the Truth-in-Lending Act. This is an important distinction because this court notes that there are judicial disagreements as to the meaning and application of the Truth-in-Lending Act among the federal courts and the states, and this court is not required to be bound by a particular interpretation of a non-Navajo court in this region. Of course we will follow definitive rulings of the United States Supreme Court in interpreting the act, as well as definitive regulations and rulings of any federal administrative agency which is authorized to interpret and enforce the act (i.e. the Federal Trade Commission), and we will give the interpretations of courts in this region great weight. However this court has been given the power by the Navajo Tribal

Council to reserve to itself its own reasonable and guided interpretation of federal law, and we will exercise that power in an independent fashion.

THE STATUTES OF LIMITATIONS QUESTION

We first must address the question of whether there has already been a decision of this court which fixes the Navajo interpretation of the Truth-in-Lending Act as to the statute of limitations question. If there has been, we will of course apply the normal rule that the prior decision will be followed.

The only apparent decision of this court on the question is that of Smoak Chevrolet Company v. Barton, 1 Navajo R. 153 (1977). In that case, without any reference to the date of the agreement, the date of the filing of a repossession complaint or the date of the filing of a counterclaim, the Court of Appeals held that the counterclaim in that action was barred by the one year statute of limitations of the Truth-in-Lending Act. Id. at 160.

The other reported Navajo decision is that of A-1 Mobile Homes Inc. v. Becenti, a decision of the Crownpoint District Court. 2 Navajo R. 72 (D. Crownpoint, 1979). In that case the district court interpreted Smoak to be a declaration of the Court of Appeals to bar counterclaims after the one-year period of time. Id. at 77. That decision also held that no counter-claim, whether it is in the nature of a recoupment, setoff or other claim, can be made after the one-year period. Id.

It is not clear what the principle of law set down in Smoak is. It simply did not permit a particular counterclaim in that case and we do not know the complete circumstances under which it was asserted. As was noted in the A-1, there has been a great deal of disagreement among the various jurisdictions on the application of the limitations provision, and indeed a number of courts have permitted counterclaim in the nature of recoupment under the act. There is a difference between a counterclaim, which is made in opposition or deduction from a claim, recoupment, which is a discount from a demand, or setoff, which is an extrinsic or independent claim. See Black's Law Dictionary, pp. 420, 1439, 1538 (Rev. 4th Ed., 1968). We do not find Smoak to be dispositive here because it is not clear what this court held previously, and of course A-1 was a trial court decision which is not binding on this court.

In determining this issue it is proper to keep the history of the act and its interpretation in mind. On March 31, 1980 the United States Congress amended the limitations provision of the act and provided that consumers can assert claims "as a matter of defense by recoupment or setoff" in "an action to collect the debt which was brought more than one year from the date of occurrence of the violation." P.L. 96-221, Title VI, Sec. 615, 94 Stat. 180; 15 U.S.C. Sec. 1640(e). This statutory amendment was in accord with a number of decisions allowing such claims. See Am.Jur.2d, New Topic Ser., Consumer Protection Sec. 113.

This action originally was for repossession or the balance of the purchase price, and the defendant made a counterclaim which arose out of the same transaction and out of the obligations of the seller to the buyer. Therefore it was in the nature of a setoff or independent claim as regards repossession, or a recoupment (i.e. to lessen the obligation)

as regards any balance due. Clearly this would fall within the permissible defense allowed under the amendment to the statute.

The Smoak decision did not decide the question of when counter-claims can be brought given the filing of the original claim within the one year period. This is a question of pleading and it is not decided by reference to Arizona law.

In this case the court will rule that the correct interpretation of the Truth-in-Lending Act is that violations of the act may be asserted as a matter of defense. That is all the amendment to the limitations statute permits, and although the amendment did not come into effect until April 1, 1982, it is clearly a statute which is either declaratory of Congress' agreement with prior decisions or is a remedial provision which may be applied retroactively.

The position taken is that defense in the nature of recoupment or setoff are defenses only. 15 U.S.C. Sec. 1640(e) was clearly intended to limit affirmative claims after a one-year period of time, and after that time violations of the act may be asserted only as a matter of defense. In this case the plaintiff sought to withdraw its claim due to the subsequent compliance of the defendant with his agreement under the contract, and the defendant should not be permitted to have more rights than intended under the law.

Therefore we hold that violations of the Truth-in-Lending Act may be asserted after one-year as a matter of defense in actions to collect a debt, and that since the defendant in this case lost the need to defend by use of violations of the act that the dismissal of the action upon motion of the plaintiff operated to cause a dismissal of the defendant's counter-claim as well.

Since this matter has been determined on a question of procedural law the court will not address its views as to the merits of the defendant's claims that the act was violated, but notes that there is probable cause to believe it was.

Therefore the decision of the district court is affirmed for the reasons stated and the reasoning of the district court is overruled.

[REDACTED]

No. A-CV-43-81

COURT OF APPEALS OF THE NAVAJO NATION

September 30, 1983

ESTATE OF NAVAJO JOE

Appeal heard May 9, 1983 before Chief Justice Nelson J. McCabe and Associate Justices Harry D. Brown and Marie F. Neswood.

Kee Yazzie Mann, of Window Rock, Navajo Nation (Arizona) appearing for Joe Begay, Administrator of the Estate of Navajo Joe.

[REDACTED]

[REDACTED]

This is an appeal in a probate case, and the court's disposition is made considering the fact that the estate asset in dispute is a grazing permit for 50 sheep units. In Navajo common law a grazing permit is one of the most important items of property which a Navajo may own. A permit means that an individual may have the means of sustinence of a traditional Navajo sheep provide income, food, and clothing.

The procedural aspects of this case are unclear, but it appears that there is an underlying dispute between Joe Begay as the administrator of the estate and Hazel G. Dodson, a claimant against the estate. There are miltiple order in the file, raising questions of adequate notice to the parties and leaving a conflicting and confusing trail of paper.

This court is satisfied from the matter presented to it that there is attorney misconduct in this case in which an attorney failed on a number of occasions to appear at hearing or notify his client of the proceedings. While normally courts will not relieve parties of the consequences of failing to appear for hearing, the record of this case shows non-appearance by the administrator without fault a number of times. Finally, there are no findings in the record which support the claim of Hazel G. Dodson, who is not an heir-at-law, that she is entitled to the entire grazing permit which is the asset of the estate. There should be findings on this point if she is entitled in place of the heirs.

In sum, this matter will be returned to the Tuba City District Court for a final hearing at which all the heirs and claimants shall be notified, and at which all claims and matters relating to distribution shall be heard. Since Judge Whitehair is no longer a sitting judge and Judge Walters and Brown have disqualified themselves, the Honorable Tom Tso of the Window Rock District Court is assigned to hear the matter.

A hearing will be conducted within 30 days of this order, and a final decree of distribution will be entered within 30 days of the date of the hearings.

No. A-CV-30-80

COURT OF APPEALS OF THE NAVAJO NATION

September 30, 1983

FOUR CORNERS AUTO SALES, INC.,

and

BARCLAY'S AMERICAN FINANCIAL, Appellants,

vs.

DOO S. BEGAY, Respondent.

Appeal heard May 9, 1983 before Chief Justice Nelson J. McCabe and Associate Justices Robert B. Walters and Tom Tso.

F.D. Moeller, Esquire, of Farmington, New Mexico appearing for the appellants, and Donna C. Chavez, Esquire, Window Rock, Navajo Nation (Arizona) appearing for the respondent.

[REDACTED]

[REDACTED]

A-CV-33-81

WESTERN BANK, Appellant,

vs.

LESTER KING, Appellee.

Appeal heard May 9, 1983 before Chief Justice Nelson J. McCabe and Associate Justices Robert B. Walters and Tom Tso.

F. D. Moeller, Esquire, of Farmington, New Mexico appearing for the appellant, and Damon L. Weems, Esquire, of Farmington, New Mexico.

[REDACTED]

[REDACTED]

OPINION BY THE COURT

These two appeals have been consolidated for the purposes of a common opinion and joint disposition, since the legal issues raised in both appeals are identical.

THE PROCEDURAL QUESTION BEFORE THE COURT

The complaint in the Four Corners and Barclay's case was answered not with an answer but a counterclaim. On October 21, 1982 the District Court granted a judgment and recited as a ground for it the failure to file a reply to the counterclaim. On November 1, 1982 the court entered its default judgment against Barclay's for its failure to answer the counterclaim. Finally, on November 8, 1982 the court amended its final order to add the plaintiffs' failure to answer interrogatories as a ground for the granting of a default judgment.

In the Western Bank case the Shiprock District Court entered a judgment in favor of the defendant on July 10, 1981, and gave as its reason the failure to file a reply to the defendant's counterclaim. The appeal in that case not only attacks the entry of judgment for failure to reply to the counterclaim, but there is a claim that the damages were speculative.

REPLIES TO COUNTERCLAIMS

Both the Chinle and Shiprock courts committed error in granting default judgments for failure to file a reply to the counterclaims which were raised in these answers. The Crownpoint District Court has already held that there is "no requirement that an answer be filed to any counterclaims..." General Electric Credit Corporation v. Vandever, 1 Navajo R. 352 (Crownpoint District 1978). Therefore these judgments must be reversed because the general expectation of the bench and bar has been that no replies to counterclaims are necessary.

The question of whether or not there should be replies to counterclaims or other affirmative new matters raised in answers in a matter which this opinion should deal with. With respect to counterclaims the general rule is that "Ordinarily a reply must be made to a setoff or counterclaim....or the allegations thereof are taken as true. Under a statute providing that any new matter in the answer constituting a counterclaim must be demmed controverted by the opposite party, no reply to an answer containing a counterclaim is necessary." 20 Am.Jur. 2d, Counterclaim, Recoupment, Etc. Sec. 148. Given a question which is unanswered by our rules and which gives this court an opportunity to make pleading policy, there is a choice between requiring a written reply to a counterclaim or not requiring one, leaving the matter to be tried on an assumption it is denied.

The modern trend in court pleading is to keep the pleadings few and simple. However the philosophy of pleading which we adopt is that the purpose of pleadings is to give everyone notice of the claims upon which they rely and the basic facts supporting those claims so that the parties and the court will know exactly what is in dispute. This means that if there is a claim, it should be stated and the party making the claim should know the position of the opposite party upon it. This also means where there is a counterclaim, the claimant and the judge is entitled to know whether it is admitted, denied or a mix of those positions. Therefore there should normally be a complaint and an answer. If the answer raises a counterclaim or a special defense which raises new facts or matters which clearly call for a reply, then there should be a reply. (Not all special defenses should be replied to, and the courts are cautioned to not permit defaults for failure to reply to a

special defense unless there are new facts raised or the defense clearly calls for a reply).

We do not want to go to the Old English practice of having pleadings go on and on. We do not want to boast, as did Baron Parke (an early English judge) that of the twelve volumes of case reports on his court, nine volumes were of cases dismissed on the pleadings alone. We simply require that all the claims and defenses of the parties be fully developed through appropriate replies when new matters are raised.

The rule we announce in this opinion will be prospective only, and it will apply only to cases arising with this problem after the date of this opinion.

HEARING IN DAMAGES

Unless the damages in a case can be clearly established through simple documentary evidence supplied with a motion, a court should not enter judgment the purpose of pleadings is to give everyone notice of the claims upon which they rely and the basic facts supporting those claims so that the parties and the court will know exactly what is in dispute. This means that if there is a claim, it should be stated and the party making the claim should know the position of the opposite party upon it. This also means where there is a counterclaim, the claimant and the judge is entitled to know whether it is admitted, denied or a mix of those positions. Therefore there should normally be a complaint and an answer. If the answer raises a counterclaim or a special defense which raises new facts or matters which clearly call for a reply, then there should be a reply. (Not all special defenses should be replied to, and the courts are cautioned to not permit defaults for failure to reply to a special defense unless there are new facts raised or the defense clearly calls for a reply).

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The rule we announce in this opinion will be prospective only, and it will apply only to cases arising with this problem after the date of this opinion.

HEARING IN DAMAGES

Unless the damages in a case can be clearly established through simple documentary evidence supplied with a motion, a court should not enter judgment without a hearing in damages. This very simply is a hearing at which the party asking for relief proves his exact damages to the court. If damages can be computed by reference to an authenticated document, then no hearing is necessary. But if testimony is required to show the amount of damages, then there should be a hearing, and the judgment should recite the fact of a hearing and make findings on the nature and amount of damages.

A hearing in damages should be simple, and the procedure for proving damages is not difficult. See, Deal v. Blatchford, 3 Navajo R. 159 (Ct. App. 1983).

DEFAULT FOR FAILURE TO ANSWER INTERROGATORIES

Our discovery rule does not, as do the discovery rules of the Federal courts, have a specific provision for the entry of a judgment against the party who fails to comply with discovery procedures or orders. Our rule states that "Upon refusal of discovery by any counsel, the party seeking discovery may apply by motion to the court for an order compelling such discovery." R. 19, Rules of Civil Procedure.

The trial courts do have the authority to grant a judgment against a party for a failure to comply with discovery, and this is one of the inherent discretionary powers all courts have. However that is a remedy to be used infrequently to address flagrant abuses and gross negligence on the part of counsel, and normally the conduct of counsel should not effect decisions on the merits of the case. The better practice is for the court to first hear a motion to compel discovery and grant it, and then enter a judgment only if the party flagrantly refused to obey the order after notice of it.

DISPOSITION

The Four Corners case the judgment in it is hereby reversed and it is remanded to the Chinle District Court with the appellants to file an answer to the counterclaim within fifteen days of the date of this order. The appellants are also given fifteen days to answer the interrogatories on file. A pretrial conference will be conducted before the court within fifteen days of the date of this order.

The Western Bank case is remanded to the Shiprock District Court, and the judgment in that case reversed. The appellant will file a reply to the counterclaim within fifteen days of the date of this order, and a pre-trial conference will be held within fifteen days of the date of this order.

No. A-CV-26-83

COURT OF APPEALS OF THE NAVAJO NATION

October 14, 1983

Lewis H. BEGAY, et.al., Petitioners,

vs.

Harry WERO, et.al., Respondents.

[REDACTED]

[REDACTED]

Wilbert Tsosie, Esq., Shiprock, Navajo Nation (New Mexico) for Petitioners. Samuel Pete, Esq., Fort Defiance, Navajo Nation (Arizona) for Respondents.

This matter comes before this Court as an ex parte Petition for a Temporary Restraining Order to enjoin the above names respondents in the scheduled inauguration of newly elected chapter officials from the Chichiltah Chapter to be held on October 15, 1983. Because of the uniqueness and procedural error found in the election process held on September 6, 1983, and the subsequent election contest filed by the petitioners, the Court has accepted jurisdiction in this matter.

THE CASE BEFORE THE COURT

On September 6, 1983, elections were held for the positions of President, Vice-President, Secretary and Treasurer for the Chichiltah Chapter. It appears from both respondent's election contest and petitioner's filed petition that there are 935 registered voters for the Chichiltah Chapter. However, through an erroneous procedure and oversight by the respondents, only 399 ballots were presented on the day of election. Shortly after 5:00 p.m. on the day of the election, the ballots had run out and voters were required to wait for new ballots to arrive. Moreover, those new ballots that were proffered were absent of the picture of petitioner Lewis H. Begay resulting in a discrepancy of those ballots that were used earlier in the day.

On September 9, 1983, Raymond L. Lancer filed a Complaint for an Election Contest with the Navajo Board of Election Supervisors claiming: 1) shortage of election ballots on the day of the election; 2) that an overcount of ballots resulted in a re-count of those ballots that were cast; 3) that there exist large and significant discrepancies between those present and the number of ballots that were cast; and, 4) that a re-election be held to determine who is in fact the elected president of the chapter. The Court notes at the outset that Mr. Lancer and Mr. Begay were both contestants for the position of Chapter President and that Mr. Begay had been declared the winner for that elected office of the Chichiltah Chapter.

PROCEDURAL ERRORS

The Court takes notice of the Resolution of the Navajo Board of Election Supervisors of the Navajo Tribal Council "Adopting Rules and Regulations for Hearing and Deciding Disputes Arising in Connection with Local Chapters." Such resolution was implemented on May 25, 1979 with Mr. Raymond L. Lancer's signature indicating his position as Chairman of the Board of Election Supervisors.

Upon examining the Rules and Regulations for Dispute Arising on Local Chapter Elections, there are several pertinent sections that come into consideration:

II. Initiating an Election Contest

- A. The only parties entitled to initiate an election contest shall be:
 - (1) A person who was a candidate for the same office at the election who result he wishes to contest, with respect to the Chapter Elections; . . .
- C. A party wishing to contest an election must file with the Board of Election Supervisors, within ten (10) calendar days after the completion of the election canvass for the Chapter Election . . . a statement setting forth:
 1. The Name and residence of the party contesting the election.
 2. The name of the person whose right to the office is contested.
 3. The office the election to which is contested.
 4. The detailed facts supporting the contest.
 5. The statement shall be verified by the affidavit of the contestant that he believes the matter and things therein contained are true.

III. Initiating a Hearing

- A. The Board shall review the Statement of Contest to determine whether or not the Statement meets the requirements set forth above. The Board shall also determine whether or not the allegations contained in the statement are sufficient as a matter of law; that is, would the allegations, if true, cause a change in the apparent result of the election being contested.

It appears that the above requirements were met by the contestant Raymond Lancer in his Complaint filed with the Electin Supervisors. It is to the lack of the mandated procedural hearing as prescribed in the regulations of the Election Supervisors (III, A, B, C, D, E) that is involved in this case at bar which now requires this review by the Court. Because the Complaint and Contest to the Chichiltah Chapter elections was timely filed pursuant to the established regulations of the Election Supervisors and because there was no procedural hearing conducted by the Election Sueprvisors, petitioners are now forced to seek this judicial redress.

The regulations that are involved in this matter are quite explicit in the procedural components for the hearing process when a party challenges such chapter elections. Such matters as a transcript (Regulation, IV(A)), quorum of four members of the Board of Election Supervisors be present (Regulations, IV(D)), and the entire evidentiary procedure for conducting such hearing (Regulations, IV(E-P)), are found within the context of the Regulations. Such procedures were not followed as there appears to have been no hearing conducted by the Board of Election Supervisors in response to the Election Contest filed on September 9, 1983. Furthermore, the Court is cognizant of the newly revised election laws found in 11 N.T.C. Sec. 51(7) "Navajo Election Commission" (1982 edition) which enumerates the provisions for contesting elections by the chapters. (Petitioner's Exhibit A). Such provisions mirror those that are used by the Board of Election Supervisors and need not be recited herein.

Approximately one month later, on October 6, 1983, a letter was sent to Mr. Lewis Begay from Ms. Bessie Tsosie, Manager, Navajo Election Commission-(Petitioner's Exhibit C), which indicated that "On October 6, 1983, the Navajo Election Commission at a duly called meeting voted unanimously to have a re-election for the Chichiltah Chapter President position based on the "Statement of Grievance" filed by Raymond Lancer." In examining this procedure, the Court finds that the Navajo Election Commissin was in violation of their regulations which clearly indicate the type of examination to be utilized when receiving an Election Contest and the manner in which to review such complaint. (Regulations, III A-E). The regulations clearly spell out that there is more to reviewing such complaint than just discussing such matter at a "duly called meeting." This procedural error cannot be excused when such important issues as chapter elections and a subsequent challenge comes before the Commission. In the October 6, 1983 "decision" reached by the Commission, a special election was ordered for the position of Chapter President only, that the ballots to be used will be ones that contain the pictures of both candidates (Mr. Lancer and Mr. Begay), and that the poll will be open from 8:00 a.m. to 7:00 p.m. (11 hours). The conclusion reached as to why such re-election would be verified was "...(T)he prime factor that led to a decision for re-election was the shortage of ballots caused by the Navajo Election Commission." Such conclusion is at the very least accurate but fails to consider the procedural errors made by the Commission in their handling of the election contest. Such events, viewed cumulatively and in perspective to the procedural due process outlined in the Board of Election's Regulations, warrant this Court to find as a matter of law that petitioner's were denied their privilege of a hearing, final notice to such hearing, the opportunity to present evidence, and for a final decision based on such complaint.

JURISDICTION OF THE COURT

Section VII(A) "Appeal" of the Regulations indicates that "A party who wishes to appeal from the decision of the Board must file a Notice of Appeal with the Court of Appeals of the Navajo Nation within ten (10) days after the opinion is filed or the case dismissed. The Court hereby finds that the October 6, 1983 letter from the Manager of the Navajo Election Commission was the "decision" from which petitioner's

[REDACTED]

bring this Appeal. Petitioners filed this action within the specified ten day hiatus and grants this Court the jurisdiction as the proper tribunal to hear this matter.

ORDER

Because of the several inconsistencies in the procedural development of the election held on September 6, 1983 at the Chichiltah Chapter which was based on admittedly insufficient and incomplete ballots, and, further, because the Office of Navajo Election Commission failed to establish a hearing in response to the election contest filed with them on September 9, 1983, IT IS HEREBY ORDERED:

- 1) A temporary restraining order be issued enjoining the Navajo Election Commission from inducting those persons elected on September 6, 1983, scheduled to be held on Saturday, October 15, 1983.
- 2) The Election Contest that was presented to the Election Commission on September 9, 1983 be remanded back to the Commission to be settled consistent with this Order and with the regulations established by the Election Commission.

No. A-CV-23-79

COURT OF APPEALS OF THE NAVAJO NATION

October 17, 1983

Hattie JOHNSON, Appellant,

vs.

Delphine DIXON and Audrey DIXON, Appellees.

Appeal heard November 24, 1980 before Chief Justice Nelson J. McCabe and Associate Justices Homer Bluehouse and Harry Brown.

[REDACTED]

Tom Tso, Esquire, of Window Rock, Navajo Nation (Arizona) appearing for the appellant, John Westerman, Esquire, of Farmington, New Mexico, appearing for the appellees and Micheal Taylor-Shaut, Esquire, of Window Rock, Navajo Nation (Arizona) appearing for DNA-People's Legal Services, Inc., as a friend of the court.

[REDACTED]

THE CASE BEFORE THE COURT

This case involves simple statutory construction, but the court is required to interpret a statute of great importance to individuals who reside within the Navajo Nation.

On March 12, 1979 a law suit involving Delphine Dixon and Audrey Dixon (the respondents here) against Hattie Johnson (the appellant here) commenced before a jury of six persons. The trial was held at Shiprock. On March 15, 1979 at 1:45 a.m. the jury reached its verdict in the case, and it awarded defendant Hattie Johnson damages in the sum of \$15,000 for the infliction of emotional distress and punitive damages in the sum of \$25,000 against Delphine Dixon, one of the plaintiffs. The verdict also gave Hattie Johnson \$45,000 for alienation of affection and \$15,000 punitive damages as against Delphine Dixon. It then went on to give Audrey Dixon \$8,000 damages for assault and battery and \$16,000 punitive damages against Hattie Johnson. Delphine recovered nothing for assault and battery.

The case was appealed by the plaintiffs, but the appeal was dismissed because it was not filed within the time provided by law.

The foundations for this appeal began on April 23, 1979 when Hattie Johnson filed a claim of exemption of property from any taking under a writ of execution. She filed claims based both upon New Mexico statutory exemptions and the Navajo exemption statute, 7 N.T.C. Sec. 711. On August 31, 1979 Hattie Johnson filed an amended claim of exemption, relying upon a liberal change in the New Mexico exemption statutes to include a homestead.

The order of the Honorable Perry Garnenez which is the subject

of this appeal indicated that New Mexico law could not be applied in support of exemptions under 7 N.T.C. Sec. 204 (which outlines the choice of law in civil actions in the Navajo Courts) because of the fact 7 N.T.C. Sec. 711 (our exemption statute) "specifically covers property subject to execution and property exempt from execution." The court allowed the exemption of livestock up to 75 sheep units and personal property up to \$500 in value.

Hattie Johnson raises two issues on appeal:

"First, under 7 N.T.C. Sec. 711, should a Judgment Debtor be permitted to hold exempt from execution a homestead, a grazing permit, a land-use permit, a homesite lease, and the necessities for support of self and family";

"Second, if 7 N.T.C. Sec. 711 is deemed too imprecise to protect that property, should a Judgment Debtor be permitted to hold exempt from execution that property protected by the laws of her state of residency, in addition to that property specifically exempted by the Code."

We will address these issues in reverse order.

Prior to proceeding to the discussion of the issues, the Court will thank DNA-People's Legal Services, Inc. for appearing in this appeal as a friend of the court. The brief which DNA filed was excellent, and the articles which were appended to the brief were helpful. It is well-known that the library resources of the area are limited, and it is of great assistance to the Court to furnish it with articles which it otherwise would not have had access to. The excellent brief and the materials furnished have made DNA a friend of the court indeed.

THE USE OF STATE LAW

There has been a great deal of argument that should our exemption statute prove to be too vague that state exemption statutes should be used to remedy that problem, and against that argument the law that a tribal enactment preempts state law has been raised. It is true that when an Indian Nation enters a field of legislation where there may be concurrent jurisdiction by a state, state jurisdiction is ousted and preempted, leaving exclusive tribal jurisdiction. See Fisher v. District Court, 424 U.S. 382 (1976); Biggs, "Trial Preemption," 54 Washington L. Rev. 633, 640-643 (1979). However this is not a preemption of state jurisdiction question as such, it is a situation in which our statute is to be interpreted.

7 N.T.C. Sec. 204 gives a sliding scale of laws to be applied in the Navajo Courts in civil action. The statute is:

"(a) In all civil cases the Court of the Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the Tribe, not prohibited by such Federal laws.

(b) Where any doubt arises as to the customs or usages of the Tribe the court may request the advice of counsellors familiar with these customs and usages.

(c) Any matters that are not covered by the traditional customs and usages of the Tribe, or by applicable Federal laws and regulations, shall be decided by the Court of the Navajo Tribe according to the laws of the state in which the matter in dispute may lie."

In construing the statute we use the obvious rule of construction that you are to read the statute as a whole and read what it says on its face. Subsection (a) states a mandatory preference for the law to be applied, and state law is not listed within that preference. Sub-section (c) requires that only if there are any "matters that are not covered" by the laws listed in subsection (a) the application of state law will be mandatory.

7 N.T.C. Sec. 711 fits within the scheme of Chapter 5 of Title 7 outlining court procedure. It is placed with a number of statutes which deal with executing upon judgment, and it is clearly intended to "cover" the "matters" of property which is subject to execution and property which is exempt from execution. Therefore, since the Navajo Tribal Council has enacted a provision dealing with property in judgment executions, the District Court of the Shiprock District was correct in its ruling and it could not apply the state law the appellant urged upon it.

Given the fact that the Navajo Code has a provision for exemptions it would be highly unusual to use the state exemptions. It has long been recognized that federal courts need not, in diversity of citizenship cases, adhere to state procedural laws. Erie R. Co. v. Tompkins, 304 U.S. 64, 92 (1938). The Navajo judicial system, as is the federal judicial system, is an independent system for administering justice to those who come within its jurisdiction. That being the case, the Navajo Courts, as do federal court, follow Navajo policies as to how the Navajo Courts should be run. Byrd v. Blue Ridge Rural Electric Corporative, Inc., 356 U.S. 525 (1958). (We do not, as do the federal courts, consider the policy of providing substantially the same outcome as the state courts. Our policy is often to not provide the same outcome in order to protect Navajo interests and cultural values).

Our choice of law statute was enacted in 1959 at a time in which the Navajo Tribal Council was afraid of a state takeover. History shows that the Council chose a judicial system which mirrored state and federal court models in order to prevent a state assumption of jurisdiction. However the choice of law statute clearly expresses the intent that the Navajo Tribal Council wanted Navajo law to apply wherever possible. Otherwise why would the Navajo Courts have been created? The intent of the Council that we apply Navajo law, consisting of Navajo statutes, the common law (custom) and decisional law is plain, and in all cases the courts should carefully make certain that the matter is "not covered" by our law before considering or proceeding to the use of state law.

This is not to say that state law may not have its place. Our statutes are largely the product of Anglo-European legal thinking and drafting, and they are frequently based upon legislative models found in state and federal legislation. That being the case, state cases and similar statutes may be used in aid of interpretation of a Navajo statute. This is particularly the case where words of legal art are used in a statute. However that is a far different matter than actually applying state law.

LAND INTERESTS AS BEING EXEMPT FROM EXECUTION

That statute we are called upon to construe reads:

"(a) Except as provided in subsection (b) of this section, the following property only shall be subject to execution and all other property shall be exempt from executions:

(1) Livestock in excess of 75 sheep units, the debtor to have the right to select which animals not in excess of 75 sheep units he wishes to keep, and any other personal property of the debtor in excess of the value of \$500, the debtor to have the right to select which property not in excess of the value of \$500 he wishes to keep.

(2) Any chattel legal title to which is in the plaintiff or upon which the plaintiff holds a lawful lien, provided the writ of execution specifies the chattel.

(b) The property declared exempt by subsection (a) of this section is not exempt from execution or sale in an auction brought or judgment recovered for the purchase price of the property so long as the property remains in the possession of the original purchaser."

This statute is not vague but quite easy to construe on its face. The Navajo Police may seize all livestock in excess of 75 sheep units and all personal property in excess of the value of \$500. All other property (i.e. other than livestock or personal property) is exempt.

What about land?

A grazing permit has been held to be an interest in land, and certainly the same principle would apply to a land-use permit and a homesite lease. Estate of Lee, 1 Navajo R. 27, 32 (1971); Estate of Nelson, 1 Navajo R. 162, 165 (1977). In the case Estate of Peshlakai, the Window Rock District Court considered Navajo land policy in ruling upon whether there could be adverse possession within the Navajo Nation. Opinion and Order, No. WR-CV-304-82 (December 30, 1982). In that case the Honorable Tom Tso ruled:

"This court is bound by the intent of the Navajo Tribal Council as expressed in its enacted laws, and reading the provisions of Chapter 5 of Title 3 pertaining to grazing permits it is clear that the Navajo Tribal Council did not intend that anyone but a permittee authorized by the Grazing Committee and the Superintendent should have a legal right to the use of lands. Since the lands are given to a particular person for his or her particular use and they cannot be in any way transferred or given without official permission, it is impossible to obtain an interest in Navajo land without fully complying with the statute. Estate of Nelson, 1 Navajo Rep. 162, 165 (1977)."

Judge Tso was correct, and he was correct in his discussions on the nature of Navajo land tenure. As a general principle, the Navajo Nation either holds direct title to lands or they are held in trust for the Navajo Nation by the United States. Although individual Navajo families or clans may occupy lands within the Navajo Nation, where the Navajo Nation has a scheme for allocating lands for individual use, our regulatory land scheme assumes that the individuals may not change or jeopardize the interests of the Navajo Nation in the land. This was known at the time the execution exemption statute was enacted, and from a reading of the statute it is clear that land was meant to be exempt. The individual has a leasehold or a use interest in the land, and interference with that interest would be interference with the Navajo Nation itself. Since Indian property and tribal property (i.e. land) cannot be lost under the legal doctrines of adverse possession, laches or delay, interests in such property in the nature of a use or lease-hold interest cannot be lost under an execution unless the statute clearly provides for it.

NECESSITIES FOR SUPPORT OF SELF AND FAMILY

Wherever possible statutes should avoid stating fixed dollar amounts, because, as Montesquieu noted, "The value of money changes from a thousand causes, and the same denomination continues without the same thing." The Spirit of Laws, Bk. XXIX, Ch. 16.

Our statute does provide for "necessities for support of self and family," namely 75 sheep units and personal property of value of \$500. Under Navajo common law, sheep were the basic necessity for support of self and family, and the Council obviously had that in mind by choosing the figure of 75 sheep units and \$500 worth of personal (i.e. non-land) property. The difficulty is that outrageous inflation rates have existed since 1956, and 75 sheep units and \$500 do not have the value they did then. We must hold this way because that is what the statute says, and we cannot go beyond the statute.

In the practice of state legislatures exemption statutes are often amended. Indeed some Western state constitutions require the legislature to enact liberal exemption laws as a constitutional provision in order to assure that exemption statutes reflect the current economic situation.

While our ruling may appear to be harsh, we have no jurisdiction to enlarge the provisions of this statute. It is up to the Navajo Tribal Council to make more liberal exemption provisions if it so chooses.

DISPOSITION OF APPEAL

The order of the Shiprock District Court is affirmed and clarified in accordance with this opinion.

[REDACTED]

No. A-CV-19-83

COURT OF APPEALS OF THE NAVAJO NATION

October 19, 1983

Daniel DESCHINNEY, SR., Appellant,

vs.

THE NAVAJO NATION, et.al., Appellees.

[REDACTED]

[REDACTED]

Robert J. Wilson, Esq., Raton, New Mexico for Appellant. Claudine Bates Arthur, Department of Justice, Window Rock, Navajo Nation (Arizona) for Appellees.

[REDACTED]

This matter having come before the Court on the stipulation of the parties and the Court being fully advised, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this appeal is dismissed with prejudice.

[REDACTED]

No. A-CV-23-83

COURT OF APPEALS OF THE NAVAJO NATION

October 20, 1983

Harry MANUELITO, Appellant,

vs.

Louise MANUELITO, Appellee.

[REDACTED]

[REDACTED]

Herman Light, Esq., Shiprock, Navajo Nation (New Mexico) for Appellant.
Earl Mettler, Esq., Shiprock, Navajo Nation (New Mexico) for Appellee.

The appeal in the above entitled matter, filed the 23rd day of September, 1983 having been received and considered by the Chief Justice pursuant to 7 N.T.C. Sec. 801, the Court finds that service in this matter was not in accordance with Rule 6(a) of the Rules of Appellate Procedure and that the required filing fee was not filed in accordance with Rule 2(a) (b) of the Appellate Procedure in that the filing fee was late and not filed with the Notice of Appeal.

The above captioned matter is therefore, HEREBY DISMISSED.

[REDACTED]

No. A-CV-11-83

COURT OF APPEALS OF THE NAVAJO NATION

October 21, 1983

Leonard BEGAY, Appellant,

vs.

Betty DENNISON, Appellee.

[REDACTED]

Appeal heard before Nelson J. McCabe, Chief Justice and Associate Justices Robert B. Walters and Harry Brown.

[REDACTED]

Irene Toledo, Esq., Crownpoint, Navajo Nation (New Mexico) for Appellant.
Wilbert Tsosie, Esq., Shiprock, Navajo Nation (New Mexico) for Apellee.

Pursuant to 7 N.T.C. Sec. 801(b), the Chief Justice found that probable cause was present and granted this appeal in the above-captioned matter. Oral argument was presented to the Court on September 28, 1983, Wherein the Court has found that the matter be remanded to the District Court at Shiprock for further findings consistent with this Order.

I. BACKGROUND

The issue in front of the Court is the propriety of a summary judgment being issued in the paternity action filed with the Shiprock District Court. It appears from the filed and submitted petitions and related court documents that on December 13, 1982, the Honorable Henry Whitehair found through a "Judgment and Declaration of Paternity" that Leonard Begay was in fact the natural father of Gina Anna Dennison. In examining the procedural components of the case at bar, the Court takes note of the fact that a summary judgment was utilized by the district court in reaching the legal conclusion of the paternity issue. Moreover, the Motion for Summary Judgment entered and signed by the district court was absent of any supporting memoranda of points and authorities normally required for any motion to be actionable, Rule 7, Rules of Civil Procedure. While Rule 28 of the Rules of Civil Procedure does not mandate any supporting affidavits or memorandum of points and authorities, it is certainly a good practice to have any and all such summary judgment actions to be complete with such legal argument to warrant the court to grant such motions. In essence, therefore the district court while not requiring such supporting documents in allowing such motion to be entered, acted upon this motion without accompanying authority and necessary legal analysis. In addition, it further appears that due to several counsel withdrawing from represen-

ting the legal interests of the defendant, that the answer to the motion for summary judgment was without legal assistance, and that such action of stripping the defendant of filed answers and other such motions pertinent to the paternity action was of such magnitude, that the defendant/appellant was in essence found to be the natural father of the minor child without any conclusive proof or fact finding by the district court.

II. Utilization of Summary Judgment

The Court would like to take this opportunity to further spell out the requirements necessary for the Courts of the Navajo Nation to properly utilize the procedural tool of a summary judgment. Rule 28 of the Rules of Civil Procedure covers the role of a summary judgment as used in the Court of the Navajo Nation. In order to make effective and appropriate use of the civil device, a party" . . . shall file and serve upon opposing party or his counsel at least seven (7) days before the date set for trial. The adverse party shall serve opposing affidavits within two (2) days prior to that date of trial." In addition Rule 28 makes abundantly clear that the burden of proof shall be set forth as" . . . The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added).

It is hard to envision that an issue such as an action to establish paternity cannot have any "genuine issues as to any material fact" and the moving party in a summary judgment paternity action be entitled to such judgment as a matter of law. The whole concept of paternity is for the court to act as a true fact finder and make substantial conclusions as to the merits of the moving party and to weigh the responses and proffered evidence of the alleged father. It is also extremely clear that when the district court totally ignored the defendant's response and motion for blood tests as being "null and void"; that the court was circumventing its role as a source of fact finding in such an important matter.

Summary judgment is a procedural device designed to test whether a case should proceed to trial. It does not determine the sufficiency of the pleadings, nor does it determine the sufficiency of the evidence presented at trial. The true purpose of the summary judgment is to determine whether a party can demonstrate, by the use of the affidavits, depositions, or information learned in discovery, that there is a genuine issue of fact in controversy. If a genuine factual issue is found, the summary judgment motion will be denied. If no material issue of fact is shown to be in dispute there is no need for a trial and the court will enter judgment on behalf of the party who is entitled to win on the basis of the disputed facts.

While the Navajo Courts have adopted and implemented our own Rules of Civil Procedure, the corollary analogy to this procedural question is found in the Federal Rules of Civil Procedure, Rule 56. Such rule is consistent with that found in our rules and the analysis necessary for a court to decide such matter before the trial commences. A summary proceeding is not used to decide an issue of fact, but, rather to determine whether one exists. Pharmaseal Laboratories, Inc.

v. Goffe, 90 N.M. 753, 759 (1979). Such use of a summary judgment is in essence an extreme remedy that should not be employed unless there is not the slightest doubt as to the existence of an issue of material fact. Fischer v. Mascarenas, 93 N.M. 199, 200-201 (1979).

With such analysis in mind, the Court cannot reconcile that such summary judgment was granted when there is clearly such material facts as a paternity action that warrants a full and complete hearing to gather all the pertinent facts and evidence to reach a full and fair result. There were no stipulated agreements reached or similar result which, in the most unique and specific circumstances, would warrant the issuance of a summary judgment in an action to establish paternity of a minor child.

III.

Because of the foregoing discussion and for the need to establish legal facts and conclusions regarding the proper disposition of this matter, IT IS HEREBY ORDERED:

1. This paternity action be remanded to the district court for a full and complete hearing;
2. Counsel will attend a pre-trial conference within thirty (30) days of this Order to decide on the issues to be presented, and the evidence to be submitted. Such material will be written and submitted to the district court;
3. A hearing be held within ninety (90) days of this Order to allow the full presentation of witnesses, evidence and legal argument.

SO ORDERED.

No. A-CV-24-83

COURT OF APPEALS OF THE NAVAJO NATION

October 26, 1983

Harold BARBER, Appellant,

vs.

Lorene W. BARBER, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Damon L. Weems, Esq., Farmington, New Mexico for Appellant. Albert Hale, Esq., Window Rock, Navajo Nation (Arizona) for Appellee.

This petition for Writ of Habeas Corpus comes before this Court as appeal from the decision rendered by the Shiprock District Court on June 25, 1980. This subsequent appeal follows a filed motion for a change of Custody entered by the appellee herein and the entire disposition is scheduled for a full hearing by the Court of Appeals on November 4, 1983 to resolve the very nature of the petition which is the issue of child custody. Because the Court does not wish to interfere with the present status of the children until the Court has had full opportunity to hear the merits of the case, such request is not favorable as actionable remedy will be only granted in the most extraordinary cases.

This case having come before the Acting Chief Justice of the Navajo Nation pursuant to Title 7 Section 801 of the Navajo Tribal Code and pursuant to Rule 14(a) of the Rules of Appellate Procedure and the undersigned having reviewed the file and being fully advised in the premises, it is hereby ORDERED that the above-captioned petition is HEREBY DISMISSED due to the timeless of the Court of Appeals review of the matter in question.

[REDACTED]

No. A-CV-28-82

COURT OF APPEALS OF THE NAVAJO NATION

October 31, 1983

Oscar CHISCHILLY, SR., Appellant,

vs.

Elizabeth D. CHISCHILLY, Appellee.

[REDACTED]

[REDACTED]

[REDACTED]

Richard George, Esq., Tuba City, Navajo Nation (Arizona) for Appellant.
Larry Yazzie, Esq., Window Rock, Navajo Nation (Arizona) for Appellee.

The appeal in the above-captioned matter filed the 15th day of November, 1982, having been received and reviewed by the Chief Justice pursuant to 7 N.T.C. Sec. 801, finds:

That a review of the matters on file in the District Court and this Court determines that no probable cause exists for the granting of an appeal.

It is hereby ORDERED that the above-captioned matter be and it hereby is DISMISSED.

[REDACTED]

No. A-CV-26-83

COURT OF APPEALS OF THE NAVAJO NATION

October 31, 1983

Lewis H. BEGAY, et. al., Petitioners,

vs.

Harry WERO, et. al., Respondents.

[REDACTED]

[REDACTED]

The matter before the Court herein requests that an Order for Rehearing and Stay of Execution be issued in the injunction issued by this Court on October 14, 1983. While counsel for Intervenors and Respondents wish that they have the opportunity to quash the temporary restraining order issued, the issue now is moot considering the Amended Order issued by this Court on October 25, 1983, which outlines and clarifies those very issues that respondents and intervenors now wish to present for argument. By such Amended Order, the Court on its own clarified that those persons, to wit: Ben DuBoise Vice-President of the Chichiltah Chapter; Roselyn John as Secretary/Treasurer of the Chichiltah Chapter, who were duly elected and subsequently inaugurated for these positions hereby and remain in those positions that they were duly inducted. As such, the matter that intervenors/respondents present to the court is now settled and the only issue that awaits action is the hearing by the Board of Election Supervisors, and/or a stipulated agreement as to such hearing, and the final re-election for the position of President for the Chichiltah Chapter.

So ORDERED.

[REDACTED]

No. A-CV-32-82

COURT OF APPEALS OF THE NAVAJO NATION

November 15, 1983

Edgar MARTINE, Petitioner,

vs.

THE HONORABLE HENRY WHITEHAIR,
Judicial District of Ramah, New Mexico, Respondent.

[REDACTED]

[REDACTED]

The issue before the Court is for a Petition for a Writ of Mandamus requesting this Court to order the Honorable Henry Whitehair to reconsider a Motion for Reconsideration due to alleged error in finding the burden of proof and a prima facie case that failed to demonstrate the mens rea of a criminal offense. While in reviewing the related documents pertinent to this petition, the Court finds that such procedural directive to the Court is not within the scope of relief available in the instant case. Petitioner is familiar with such rules of procedure as adopted by this Court and can seek alternative remedies through an appellate procedure. This Court will not order a District Court judge to reconsider a motion in which the trial judge has already heard and ruled on. Only in the most extraordinary situations will the province of the Court of Appeals be brought into operation ordering a mandamus action against a trial judge. Such being the facts found herein and upon review by the Chief Justice pursuant to 7 N.T.C. Sec. 801, petitioners request for this Writ of Mandamus is hereby dismissed.

SO ORDERED.

No. A-CV-30-83

COURT OF APPEALS OF THE NAVAJO NATION

November 16, 1983

Gilbert BEGAY, Applicant,

vs.

THE HONORABLE TOM TSO, ex rel,
Alyce and Emery McCABE, Real Parties in Interest.

The matter before the Court is a request from a party presently in litigation within the Window Rock District praying for the Court of Appeals to grant a number of extraordinary writs, to wit: writ of mandamus, writ of prohibition, a habeas corpus request and notice of appeal. Plaintiff should be informed from the outset that such request and prayers for relief to the Navajo Court of Appeals are of the extraordinary nature and can only be granted in the most prevailing circumstances. The over-all tenor of plaintiff's request are more clearly considered as interlocutory appeals on the question of self-incrimination by the plaintiff in a civil action. Because of such request, the Court herein denies as discussed below each and every prayer for relief at this stage of the district court proceedings.

I.

The issue before the District Court is a civil action of a vehicular death that occurred within the exterior boundaries of the Navajo Nation. Since that event, defendant has plead guilty to the charge of vehicular manslaughter in Federal District Court (District of Arizona) on September 26, 1983, No. CR-83-84 PCT VAC, pursuant to the Assimilative Crimes Act, 18 U.S.C. Secs. 1153, 1112. Defendant moved the District Court for a Motion in Limine and of an additional request in a motion for a protective order to guarantee that defendant would not be forced to testify at a trial that could lead to self-incrimination. The Window Rock District Court, the Honorable Tom Tso, denied such requests for both the Motion in Limine and for a protective order. Defendant filed this appeal for such extraordinary relief.

The Court of Appeals has repeatedly held that the Courts of the Navajo Nation do not honor interlocutory appeals. Thompson v. General Electric Credit Corporation, 1 Nav. R. 234 (1977); Marilyn Todachine v. Navajo Tribe, et. al., 1 Nav.R. 245 (1977); Hugh Pelt v. Elaine Pelt, 1 Nav.R. 127 (1979); Hoskie Y. Mike and Dorothy Hoskie v. Harrison and Harriette Pete and James Hunt, Sr., 2 Nav.R. 129 (1979); and Tom and Lorraine Sellers v. Babbitt Ford, Inc., 2 Nav.R. 147 (1979). The special procedures of mandamus, prohibition, and special procedure are to aid the Court of Appeals jurisdiction, correct excesses in the trial court, and to compel action. Wilson v. Wilson, 3 Nav.R. 63 (1982).

7 N.T.C. Sec. 302 gives this court jurisdiction to hear appeals from final judgments and orders of the Trial Court. Aside from appeals, this court has jurisdiction to hear cases where 1) a special writ or order is necessary or proper to carry out its jurisdiction, or, 2) the Trial Court is acting beyond its jurisdiction, or, 3) the Trial Court fails or refuses to act within its jurisdiction. 7 N.T.C. Sec. 393. Rule 16 of the Rules of Appellate Procedure implements the last section by providing for the procedures of mandamus, prohibition and other special remedies.

The appeal that is presently before the Court is an appeal from an order of the District Court which is not a final order. Such requests have repeatedly been denied by the Court of Appeals as not ripe for review, In the Matter of Nez, 3 Nav.R. 15 (1980). The entire appeal that has been now presented to this Court is the matter of whether plaintiff can compel testimony from the defendant that may tend to incriminate him in collateral lawsuits. Because defendant has subsequently plead guilty to the federal charges, he is no longer able to utilize such claim as incrimination when such examination in our Navajo courts is to be entirely based on the facts concerning the crime of which he was convicted. See Federal Rules of Evidence, Rule 803 (22); and, Asato v. Furtado, 474 P.2d 288 (Hawaii, 1970) (prior criminal conviction was admissible as evidence of negligence in later civil suit arising from same transaction).

From the facts presented, it appears that the fact of the criminal prosecution is that which is directly part of the civil action. Such judgment in a criminal action is available as evidence in a subsequent civil action where the judgment is offered for the single purpose of proving its own existence, where such existence is a material fact, in which case the judgment is conclusive as to the fact of its rendition. Evidence, 30 Am.Jur.2d. Sec. 985. See McCormack on Evidence, 2d Ed., p. 739. In addition, such evidence has its own impeaching value when used in the district court. Id.

IT IS HEREBY ORDERED that defendant's application for a writ of mandamus, prohibition, certiorari, habeas corpus request for a stay, plus Notice of Appeal are hereby denied. The Court also wishes to point out to defendant's counsel to re-examine the variety and number of writs which were requested of the Court and to be sure that such future pleadings are consistent and of proper application.

IT IS FURTHER ORDERED that this matter be and is hereby DISMISSED.

November 16, 1983

ORDER OF DISQUALIFICATION

The Court on its own motion, hereby disqualifies the Chief Justice of the Navajo Nation, Nelson J. McCabe, from acting on the above-entitled matter in favor Robert B. Walters as the Acting Chief Justice.

ASSUMPTION OF JURISDICTION

I, Robert B. Walters, Trial Judge of the Navajo Nation, hereby assume jurisdiction over the above-captioned matter as the appointed Acting Chief Justice therein.

No. A-CV-12-83

COURT OF APPEALS OF THE NAVAJO NATION

November 17, 1983

Michael Thomas HEREDIA, Appellant,

vs.

Ruth Ann Tracey HEREDIA, Appellee.

Appeal heard August 24, 1983 before Chief Justice Nelson J. McCabe and Associate Justices Robert B. Walters and Harry D. Brown.

Benjamin Curley, Esq., of Window Rock, Navajo Nation (Arizona) for Appellant and Robert Ericson, Esq., of St. Michaels, Navajo Nation (Arizona) for Appellee.

BACKGROUND OF THE FACTS

The case at bar presents to the Court of Appeals for the Navajo Nation a situation that has grown from a divorce action with stipulated judgment to a question involving Navajo Nation jurisdiction and sovereignty over a domestic matter. The essential facts as observed by the Court is that the above-captioned parties had initially filed and cross-filed for a dissolution of marriage during June, 1982. Subsequent to this action, the parties through the signatures of their respective counsel, entered into a stipulated judgment which outlined the terms and conditions of their marital dissolution. Each and every one of these procedural actions was conducted within the Courts of the Navajo Nation and at no time were there any collateral actions brought in our sister courts. Defendant Heredia has employed several legal counsel in his attempt to both contest Navajo Nation jurisdiction and to have the legality of the stipulated judgment overturned because of alleged non-compliance between himself and his retained counsel. The Court of Appeals also takes notice of the several orders entered into by the Window Rock District Court regarding this matter and finds that such orders were proper and in compliance with Navajo law and Rules of Procedure. In addition, Mr. Heredia brought this matter to the Federal District Court (District of New Mexico) Civ. No. 83-0034 P, wherein the District Court dismissed the action for lack of personal and subject matter jurisdiction. Most recently, Mr. Heredia has filed an action within the 11th Judicial District Court, McKinley County, State of New Mexico, CV-83-308 requesting a temporary restraining order against the Pittsburgh and Midway Coal Mining Company from garnishing his employee wages. The District Court has entered such restraining order against the garnishee effective November 1, 1983 with an Order to Show Cause

at the court for November 23, 1983. Such state action presents a jurisdictional contradiction to a cause of action which is exclusively within the jurisdiction of the Navajo Nation because of the nature of this domestic matter and further due to the petitioner and minor child residing within the exterior boundaries of the Navajo Nation. Moreover, Mr. Heredia has long submitted to the jurisdiction of the Courts of the Navajo Nation by his filing of all necessary and pertinent documents growing out of this domestic controversy. Finally, the United States District Court upheld such analysis when dismissing defendant's attempt to seek federal jurisdiction over a Navajo Court matter.

The issue presented includes the propriety of the stipulated judgment as entered by Order of August 25, 1982, the question as to whether garnishment of the defendant's wages were proper in light of N.T.C. Sec. 255 and related Court of Appeals decisions, and if such garnishment should be continued in light of the possibility that such arrearages have been satisfied.

On November 9, 1982, the Window Rock District Court entered an order reflecting both an Order to Show Cause as to why defendant should or should not be held liable for child support and the stipulated alimony decree and to hear a pro se motion by defendant to modify and vacate the stipulated judgment entered on August 25, 1982. Defendant did not attend such hearing but instead filed a letter to the court which was interpreted by the Window Rock District Court as an answer to the show cause hearing. However, through his absence to defend and prosecute such modification motion, the court found that the defendant did not meet his burden of proof in the matter and found for the petitioner. On November 9, 1982, the district court issued a wage garnishment directing the Pittsburgh and Midway Coal Mining Company to garnish the defendant's wages in the amount of \$400.00 per pay period. On December 19, 1982, the defendant filed in the district court a motion to quash the garnishment pleadings to such motion and the matter was finally heard by the Window Rock District Court on April 18, 1983. An order was issued reciting the procedural facts and findings regarding the garnishment matter, the pro se filing by the defendant, and the powers of the Courts of the Navajo Nation to order garnishment for child support. On May 18, 1983 a Notice of Appeal was filed in this Court which is now the subject matter for this review. The Court of Appeals in examining the Order of the Wndow Rock District Court of April 18, 1983 hereby finds no irregularities and affirms such order as entered. On August 29, 1983 the Court of Appeals and the Window Rock District Court received a letter from petitioner's counsel which essentially stated that defendant may have in fact satisfied the garnishment order entered by the district court on November 9, 1982. Petitioner's letter indicated that Mr. Heredia has paid approximately \$7,200 since December 15, 1982 when the garnishment order went into effect. Moreover, petitioner's request for a hearing to determine whether the writ should be discharged is now before this Court and should be set for such determination accordingly. Moreover, the Court has been informed by the Navajo Department of Public Safety located in Window Rock that a certain half-ton pickup truck which was awarded to petitioner has been removed from such containment. Therefore, in light of such information before the Court and because of further information regarding the status of outstanding unliquidated community debts and respective properties, the Court as part of this Order remands to the

Window Rock District Court requiring a finding as to the financial and property interests of the parties.

II. WAGE GARNISHMENT AS A REMEDY FOR CHILD SUPPORT

The issue of wage garnishment for child support as a judicial remedy has been debated before the Court of Appeals and before the lower courts. Navajo Tribal Utility Authority v. Foster, 3 Navajo Law Journal 1099-1108, (September 30, 1983); Foster v. Lee, 3 Nav. R. 203 (1982) and In the Matter of Tsosie, 3 Nav.R. 182 (1981). The Court has determined that such remedy, while an integral part of such equitable relief available for such non-support in child support matters, is an acceptable remedy to combat situations where a sole parent and minor child are entitled to such financial assistance by the garnished parent. However, past Court of Appeals decisions have utilized the language of 7 N.T.C. Sec. 255 "all writs" statute coupled with 7 N.T.C. Sec. 701(a) "remedy to the injured party" in upholding the remedy of wage garnishment in child support matters. In examining such analysis, no mention has been brought forward to examine the very explicit and enabling language as found in 9 N.T.C. Sec. 1303. A clear and specific mention of enforcement for such debts as child support to be held by the employer for the indebted parent is found within the text of the 9 N.T.C. Sec. 1303:

"An order entered under 9 N.T.C. Sec. 1301 against the parent may be enforced by contempt proceedings, and shall also have the effect of a judgment at law. In addition to other remedies, the court may issue an order to any employer, trustee, financial agency, or other person within the territorial jurisdiction of the Tribe, indebted to the parent to withhold and to pay over to the clerk of court, moneys due or to become due.

No property of the parents or either of them, shall be exempt from execution to enforce collection of the amounts ordered to be paid by court under this section." (Emphasis added).

It is hard for the Court to find anything but the obvious in the above statutory scheme which allows such equitable relief as wage garnishment in the Courts of the Navajo Nation. Moreover, the second part of Sec. 1303 indicates that there are in fact no exemptions to the power of such equitable relief. Thus, in an action predicated upon a wage garnishment, it is stated in the plain language of the statute that neither parent can claim the normal statutory exemptions attributable to garnishment actions before the Navajo Courts on a child support action. Thus, we hold as a matter of law and statutory interpretation that the enabling language of 7 N.T.C. Sec. 255 and 9 N.T.C Sec. 1303 enable the District Courts of the Courts of the Navajo Nation to order wage garnishment to any employer, trustee, financial agency or other person within the territorial jurisdiction of the Tribe for child support. Such garnishment action must be first proven and substantiated at the Order to Show Cause hearing which is but one of many due process protections to be afforded all the necessary parties to such action. There is a very

urgent and serious need for the Navajo Judicial Conference to meet and develop further rules and format for such court and financial procedure and the Court hereby makes such recommendation for future implementation.

The Court would like to take this opportunity to review and modify in part the holding of Navajo Tribal Utility Authority v. Foster, 3 Navajo Law Journal, 1099-1108 (September 30, 1983). In this decision, the issue of wage garnishment for child support was upheld as an equitable remedy for enforcing child support orders. In our holding, we stated:

"As a matter of practical guidance to the trial courts, the procedures sanctioned by this Court today are:

1. The issuance of a writ of garnishment requiring a third party holding sums payable to the judgment debtor to appear in court to state whether and in what monies are owed to the debtor for the purposes of the entry of an order against the third party to pay the money over;

2. Applications to the Court to issue a writ of execution upon the wages of judgment debtor, which will be served by the Navajo Police by making an inquiry of the employer as to employment and wages owing, and receiving those sums permitted by Federal law." (Emphasis added).

In re-examining such language as "judgment debtor", the Court finds that such language is too broad and is now modified to only be actionable for a judgment debtor who is a party entitled to child support. The Courts of the Navajo Nation are not going to allow such equitable remedy as wage garnishment for other than child support enforcement. If such actions as execution on property, 7 N.T.C. Sec. 701 et. seq. is not sufficient for the civil judgment creditor to act on a debt due and owing, then subsequent executions may be the only alternative until the Navajo Tribal Council sees to enact the requisite legislation for such equitable relief as wage garnishment for judgment creditors. However, in the findings and ruling as recited herein, the Courts of the Navajo Nation are within their statutory authorization to enforce and honor such requests for wage garnishment growing out of an order for child support. Thus, this modification of the ruling of Navajo Tribal Utility Authority v. Foster is only to clarify who is in fact entitled to such relief and who has standing to bring such actions before the Courts of the Navajo Nation. In addition, in Navajo Tribal Utility Authority v. Foster this Court recognized the due process claims that were presented by Navajo Tribal Utility Authority regarding the procedural safeguards to be afforded the garnishee-employer. In that decision we stated,

"...In the case of wage executions, we hold that it is sufficient if there is an opportunity to be heard. In other words, if there is a writ of

execution which the employer cannot comply with or which would place the employer in jeopardy of running afoul of some regulatory scheme, then the employer will have the right to object or pay over clearly permissible amounts. It will be sufficient for the employer to advise the Navajo Police for the purposes of return to the court by the police or for the employer to file an objection with the court and have an opportunity to be heard in that fashion. Attempts to circumvent valid orders which can be paid legally will be dealt with severely as disobedience to a lawful court order." 3 Navajo Law Journal at 1107.

Therefore, in light of the above holding and further consistent with the findings herein, such due process considerations are mandated to all parties in a wage garnishment action and will be followed by the Courts of the Navajo Nation forthwith.

III.

In light of the holdings found within this decision, the Court now wishes to examine the wage garnishment procedures that transpired in the instant case. The District Court order that was entered on November 9, 1982 ordered garnishment of wages of the defendant for "...child support, alimony, certain debts and the petitioner's costs and attorneys fees." The Court has reviewed such order and finds that the Order entered was somewhat vague as to the exact wage schedule for the garnishment and for the specific particulars attributable to the "certain debts, alimony and attorneys fees." Even a liberal reading would find that such order could run for a period of indefinite perpetuity casting a cloud over the enforceable time limit. Because wage garnishment is of first impression for the Courts of the Navajo Nation, the Court finds that such order issued is in fact valid based on the existing obligation owed to the petitioner by the respondent in the form of child support. Moreover, the Court herein directs that all future garnishment orders issued by the District Courts of the Navajo Nation specify in reasonable certainty the schedule of wages to be garnished, the amount or sum certain and the duration of such equitable attachment. In addition, such due process procedures must be maintained in order to guarantee all the parties before the court the opportunity to have a hearing and contest the garnishment due to jurisdiction, termination of employment, satisfaction of debt, etc. With the implementation of such procedures created by the Judges of the Courts of the Navajo Nation, such procedural safeguards can be adopted to assist indebted parent(s) and for the garnishee-employer the protection to be afforded under the due process clauses of the Indian Civil Rights Act, 25 U.S.C. 1301 et. seq. and the Navajo Bill of Rights, 1 N.T.C. Sec. 1 et. seq.

The instant case presents the fact situation wherein defendant has apparently paid, through his garnished wages, the outstanding arrearage that was due and owing petitioner and minor child. Because of such

event and further due to the information presented to the Court by petitioner's attorney of the letter of August 29, 1983 the Court hereby finds that the Writ of Garnishment ordered by the Window Rock District Court on November 9, 1982 be hereby discharged and an immediate hearing be scheduled to settle any further outstanding claims that the parties may proffer. In such rehearing on these unliquidated claims, the Court hereby requests the following information be presented:

1. Any and all outstanding unliquidated debts that the parties have due and owing to the other party;
2. The status of any community property which was the basis of the Stipulated Judgment be finally disposed of, or, in the alternative, any property that has been disposed of prior to transfer between the parties be indicated as a source of traceable proceeds that one party may owe the other, to wit: the 1979 GMC pick-up truck;
3. Determine the status of the attorney fees as requested by petitioner in light of the Stipulated Judgment, Clause 14, wherein the parties agreed to bear their own costs and attorney fees;
4. Any and all other facts relevant to the debts and obligations of the parties.

IV.

Because of the procedural components encompassing this case and further due to the fact that a minor child is involved in the ultimate outcome of this action, the Court hereby enters the following orders:

1. IT IS HEREBY ORDERED that the Order of Wage Garnishment entered by the Window Rock District Court on November 9, 1982 be and hereby is DISCHARGED;
2. IT IS HEREBY ORDERED that the issues of unliquidated debts arising from this divorce action be remanded back to the Window Rock District Court for findings of fact consistent with the information required as stated in this Order;
3. IT IS FURTHER HEREBY ORDERED that the issue of attorney fees be heard and a findings be entered by the Window Rock District Court as to the costs attributable to the parties if so found;
4. IT IS RECOMMENDED most urgently to the Navajo Nation Judicial Conference to formulate Rules of Court and forms associated with such procedures regarding the uniform and consistent implementation of wage garnishment for child support within the Courts of the Navajo Nation.

SO ORDERED.

[REDACTED]

No. A-CV-13-83

IN THE COURT OF APPEALS OF THE NAVAJO NATION

November 18, 1983

THE NAVAJO NATION, Appellant,

vs.

JUDGE JAMES ATCITY, Respondent.

[REDACTED]

Appeal before Chief Justice Nelson J. McCabe and Associate Justices Robert B. Walters and Harry D. Brown.

[REDACTED]

Larry Kee Yazzie, Esquire, Chief Prosecutor, Office of the Prosecutor, The Navajo Nation, Window Rock, (Arizona), for Petitioner and Wilbert Tsosie, Esquire, of Shiprock, Navajo Nation (New Mexico) for the Defendant.

This subsequent order now comes before this Court in response to legal arguments made pursuant to an Order dated June 3, 1983, by the Chief Justice. Such review is proper and correct in light of the memorandum of law submitted by the Office of the Chief Prosecutor for the Navajo Nation. This order now is presented with the issues surrounding the petition for a writ of mandamus asking that the Honorable James Atcity be commanded to assume jurisdiction in the matter captioned Navajo Nation v. Darrell Curtis, No. SR-CR-1570-83, District Court of the Navajo Nation, District of Shiprock.

STATEMENT OF FACTS

On April 9, 1983, a criminal complaint was filed in the Shiprock District Court naming the above named defendant for violating 17 N.T.C. Sec. 443, Sexual Assault. The complaint was signed by Everett John in his official capacity as a Police Officer of the Navajo Nation. On May 10, 1983, the Shiprock District Court dismissed the complaint and reasoned that it "can be refiled by Davis Woody as complainant within ten (10) working days." Mr. Woody is the alleged victim of the sexual assault perpetrated by Darrell Curtis. The subsequent Motion for Reconsideration was filed and denied by the District Court. On May 10, 1983, the District Prosecutor for the Shiprock District refiled and signed the complaint as the complainant in his official capacity in the same cause of action. At the same time, a demand for a jury trial was filed with the court. The District Court failed to issue the requested criminal summons and the Office of the Prosecutor for the Navajo Nation filed a writ of mandamus with this Court seeking judicial review of the District Court's disposition of the matter.

This Court therein found that it has jurisdiction where a writ or order is necessary to (1) complete the exercise of its jurisdiction; (2) to prevent or remedy an act of the Trial Court which is beyond its jurisdiction; or, (3) cause the Trial Court to act where it unlawfully fails or refuses to act within its jurisdiction. 7 N.T.C. Sec. 303. Actions under this statute are original proceedings before the Court of Appeals are not appeals as they are special proceedings. Rule 16, Rules of Appellate Procedure.

This case raises the legal issues of (1) who must sign a criminal complaint; (2) the duty of the court to issue a summons or warrant of arrest upon the filing of a complaint; and, (3) the right of the Navajo Nation to a trial upon a criminal complaint filed by one of its prosecutors. These are all issues that go to the statutory provision which gives this Court the jurisdiction to order a judge to act where he or she unlawfully fails or refuses to act within his or her jurisdiction. Therefore, in light of the above need to settle this matter and further due to the enabling statutory provisions of the Navajo Tribal Code and this Court, the petition on file appears to be within the jurisdiction of this Court. It is further found that there exists probable cause pursuant to 7 N.T.C. Sec. 801(b) and it is within the realm and jurisdiction of the Court to decide the issues as now presented.

I. Who must be the Signatory to a Criminal Complaint for the Issuance of a Criminal Summons in the Courts of the Navajo Nation?

This issue is perhaps the most pressing and pertinent legal issue to be resolved. The enabling statute that the Court focuses on is found in Title 17 of the Navajo Tribal Code Section 1801 which states:

"No complaint filed in any court of the Navajo Nation shall be valid unless it shall bear the signature of the complainant or complaining witness, witness by a duly qualified Judge of the Courts of the Navajo Nation or by the Chairman of the Navajo Tribal Council, or his duly authorized representative."

The complaining witness in this matter was Officer Everett John, Navajo Division of Public Safety, Shiprock District. There is absolutely no doubt that Officer John has the capacity to sign as the complaining witness. Moreover, when examining the role of the Office of the Prosecutor found in 2 N.T.C. Sec. 985, the combined functions of the Navajo Division of Public Safety with the Office of the Prosecutor mandates that clearly the police officer¹ can sign the complaint and that the prosecutor file the criminal action.

In examining 2 N.T.C. Sec. 981 et. seq., the Navajo Tribal Council has succinctly outlined the duties and responsibilities of the

¹On January 26, 1983 a meeting was held between the Judges of the Navajo Nation and Office of the Prosecutor for the Navajo Nation wherein it was agreed that prosecutors and police officers will begin signing criminal complaint based on their information and belief that a crime has occurred.

Office of the Prosecutor and staff for the processing of criminal actions before the Courts of the Navajo Nation. Within such authority is the ability to institute proceedings before the judges of the Courts of the Navajo Nation when... "in the opinion of the Prosecutor, he has information that offenses have been committed, and to prosecute such persons to the full extent of the law." Thus, if the police officer has reasonable information regarding such violation of Titles 14 and/or 17 then, accordingly, he or she can be a signatory to a criminal complaint and file such action with the Office of the Prosecutor to await the decision as to whether prosecution will go forward. Because of the ability to "institute proceedings" rests within the powers granted to the Office of the Prosecutor, then such provisions clearly authorizes the Prosecutor to sign a complaint on behalf of the Navajo Nation.

A scenario finding a person who may have been badly battered and unable to actually sign or verify a complain may still be actionable by the Office of the Prosecutor on behalf of the victim. A contrary holding would create further victimization of persons who are either unable to sign as a complainant or complaining witness. Therefore, in making the requisite findings related to the processing of criminal complaints, the Courts herein finds that as long as an officer of the Navajo Division of Public Safety or the Office of the Prosecutor has reasonable information as to the authenticity of the complaint and the facts surrounding such offense, he or she may be a signatory to the criminal complaint. It is abundantly clear that an injured party has their remedy at law to either quash such complaint or have it dismissed.

II. Duty of the Court to Issue Summons or Warrant upon a filing of a Criminal Complaint.

Inherent within the province of the Courts of the Navajo Nation is the responsibility of issuing summons and warrants upon the proper filing of a criminal complaint by the Office of the Prosecutor.

It is clear that the prosecutor has the prosecuting function. 2 N.T.C. Sec. 1972 (as amended by Resolution CF-8-82) indicates that one of the purposes of the Office of the Prosecutor in the Department of Justice is "to prosecute to completion all cases involving alleged violations of the Navajo Tribal Code by Indian persons..." It is the mandatory duty of the prosecutor to "investigate, prosecute and dispose of all cases within his or her jurisdiction ..." 2 N.T.C. Sec. 1974(2). While these statutes give the prosecutor the authority to prosecute, 7 N.T.C. Sec. 253(1) enables the Courts of the Navajo Nation to issue such summons or warrants applicable to a criminal prosecution.

III. Right to Trial upon filing of a Criminal Complaint

7 N.T.C. Sec. 651(a) outlines the province for..." a trial and trial by jury by any party, upon demand, of any issue of fact." The Navajo Nation by and through its prosecutor is absolutely entitled to their "day in court." If any assemblance of due process is to be upheld by the Courts of the Navajo Nation, it is of critical importance that the same protections afforded an accused be granted to the prosecutor in the filing and prosecuting of a criminal complaint. To thwart such procedure would be to undermine the Navajo judicial process. Such due

[REDACTED]

process protections is an inherent element in the jurisprudence dynamic found in the federal and state courts and is equally found within the mandates and procedures of the Courts of the Navajo Nation.

IT IS HEREBY ORDERED that the matter of Navajo Nation v. Darrell Curtis No. SR-CR-1570-83 be remanded back to the Shiprock District Court with the instructions to the Honorable James D. Atcitty to grant the Office of the Prosecutor the opportunity to file such criminal complaint initially brought before the court and to further instruct the Shiprock District Court to issue the appropriate Criminal summons pertinent to this cause of action.

IT IS FURTHER ORDERED that the matter brought before the Shiprock District Court be allowed the opportunity to schedule a jury trial as mandated by 7 N.T.C. Sec. 651(a).

SO ORDERED.

[REDACTED]

No. A-CV-33-83

COURT OF APPEALS OF THE NAVAJO NATION

December 7, 1983

In Re Admission to Practice of
Margaret S. WILSON and Vance GILLETTE

[REDACTED]

[REDACTED]

Based upon the foregoing Motion for admission to practice for Margaret S. Wilson and Vance Gillette, duly licensed attorneys (state and federal courts) by the Chief Prosecutor, Larry Kee Yazzie, and being fully advised in the premises.

IT IS ORDERED

That Margaret S. Wilson and Vance Gillette are admitted to practice before the Courts of the Navajo Nation in association with the Office of the Prosecutor.

[REDACTED]

No. A-CV-34-83

COURT OF APPEALS OF THE NAVAJO NATION

December 7, 1983

In Re Appointment of:
Frank BROWN

[REDACTED]

[REDACTED]

The Office of the Prosecutor, Chief Prosecutor Larry Kee Yazzie hereby petitions the Court for appointment of Frank Brown as a process server.

O R D E R

Being fully advised in the premises:
IT IS ORDERED that Frank Brown is appointed as a process server.

No. A-CV-33-83

COURT OF APPEALS OF THE NAVAJO NATION

December 14, 1983

In Re the Admission to Practice of:
Vance GILLETTE

[REDACTED]

On December 7, 1983, the Chief Justice of the Navajo Nation issued an Order granting an association license to practice before the Courts of the Navajo Nation to Vance Gillette to practice in conjunction with the Office of the Prosecutor. Since that date of such Order, it has come to the attention of the Chief Justice of the Navajo Nation that Vance Gillette has forwarded documents to the Courts of Appeals that are not in accordance with the practice and procedure required by an attorney either licensed or in association with a licensed attorney to follow when conducting legal business before the Courts of the Navajo Nation must be absolutely knowledgeable of the laws of the Navajo Nation and the Rules of Procedure for the Courts of the Navajo Nation in their professional conduct and business conducted before the Courts. Advocates and counselors practicing before the Navajo Courts are held to the same high standards of conduct of the American Bar Association. In the Matter of Daniel Deschinny in Contempt of Court, 1 Nav.R. 66, 67 (1972).

In conjunction with the Office of the Prosecutor, Mr. Gillette has forwarded documents to the Office of the Chief Justice which demonstrates unfamiliarity with Navajo law and a general disregard for the proper research and conduct appropriate for such association license. It was upon a good faith showing and the Sworn Oath of Office in Support of Motion for Admission to Practice that the Courts of the Navajo Nation allowed Vance Gillette the ability to practice law in association with the Office of the Prosecutor. Such Oath as found in the Plan of Operation for the Office of the Prosecutor, ACS-157-83, states that each and every person working within the Office of the Prosecutors do "...solemnly swear... to protect and defend the... laws of the Navajo Nation..." Because of the transpired events conducted by Mr. Gillette, therefore, the Courts of the Navajo Nation hereby finds that such matter demonstrates a violation of the Oath of Office sworn to by Mr. Gillette and violates the spirit and conduct of an attorney associated to practice before the Courts of the Navajo Nation.

It is HEREBY ORDERED that the Order granting Mr. Gillette the association to practice with the Office of the Prosecutor dated December 7th, 1983, is hereby REVOKED and that this Order shall expire only upon a showing that Mr. Gillette has demonstrated successful completion of the Navajo Nation Bar exam and admitted to practice before the Courts of the Navajo Nation.

[REDACTED]

No. A-CV-33-83

COURT OF APPEALS OF THE NAVAJO NATION

December 14, 1983

In re the Admission to Practice of:
Margaret S. WILSON

[REDACTED]

[REDACTED]

On December 7, 1983, the Chief Justice of the Navajo Nation issued an Order granting an association license to practice before the Courts of the Navajo Nation to Margaret S. Wilson in conjunction with the Office of the Prosecutor. Since that date of such Order, it has come to the attention of the Chief Justice of the Navajo Nation that Margaret S. Wilson has forwarded to the Office of the Chief Justice a sworn and deposed Affidavit attesting to an issue directly involving the Chief Justice which is both untrue in substance and in fact. Such practice will not be allowed or tolerated by the Courts of the Navajo Nation especially by a person who is a duly licensed attorney authorized to practice before state and federal courts. The whole spirit and meaning behind the purposes of an Affidavit is to set forth facts that are both true and accurate by the attesting affiant. Affidavits, 3 Am.Jur.2d Secs. 11, 20. No document that is proffered to the Courts of the Navajo Nation should contain language which is insulting, accusative, or improper. Wilson v. Wilson, 3 Nav.R. 63, 64-65 (1982).

Admission to practice law before the Courts of the Navajo Nation is indeed a privilege and not a right. In the Matter of Practice of Law in the Navajo Courts by Melody Dickerson, 3 Nav.R. 166 (1982). It was upon a good faith showing and the Sworn Oath of Office in Support of Motion for Admission to Practice that the Courts of the Navajo Nation allowed Margaret Wilson the ability to practice law in association with the Office of the Prosecutor. Because of the transpired events conducted by Ms. Wilson, therefore, the Courts of the Navajo Nation hereby finds that such matter demonstrates a violation of the Oath of Office sworn to by Ms. Wilson and violates the spirit and conduct of an attorney associated to practice before the Courts of the Navajo Nation.

It is ORDERED that the Order granting Ms. Wilson the association to practice with the Office of the Prosecutor dated December 7th, 1983, is hereby REVOKED and that this order shall expire only upon a showing that Ms. Wilson had demonstrated successful completion of the Navajo Nation Bar exam and admitted to practice before the Courts of the Navajo Nation.

WINDOW ROCK DISTRICT COURT

January 21, 1983

No. WR-CV-01-83

[REDACTED]

MONICA DAMON, EDITH YAZZIE, REBECCA MIKE,
and ELEANOR WAUNEKA, Plaintiff, v.

PETER MacDONALD, FRANK E. PAUL, ROY KEETO,
JOHN DOES 2, 3 and 4; ADVISORY COMMITTEE, NAVAJO
TRIBAL COUNCIL, NAVAJO TRIBAL COUNCIL; and
CONTROLLER OF THE NAVAJO TRIBE, Defendants.

Honorable Tom Tso, Judge presiding.

THE FACTS ON RECORD

This law suit comes to the court as a simple dispute between private individuals over who has the right to use lands owned by the Navajo Nation. It is brought to quiet title to lands which are the subject of separate and conflicting claims. However the suit is more complex because the parties, and one plaintiff who is a member of the Navajo Tribal Council, contend that certain legislative actions of the Advisory Committee were illegal.

The basic facts of the dispute are simple. The plaintiffs claim that in 1967 a gentleman by the name of George Damon established a customary use area in what is now the community of Window Rock, and that the customary use Mr. Damon had was a property interest which he could hold and which his wife and children could inherit. The plaintiffs in this action are the widow and daughters of George Damon, claiming rights to the land through him and the Damon family.

Things became complicated when a gentleman by the name of Nakai Nez put his thumb print to an agreement dated November 8, 1935. That agreement says Nakai Nez held for 20 years through "usage," and that Nez would give up "a strip of land lying between the Agency buildings and the Cap Rock of the mesa on the East, and the lands formerly held by Carl Mute, Navajo Indian, on the North, and Charlie Yazzie and John Keto, Navajo Indians, on the South...." In return for these 100 acres, Nez was to receive a farm wagon, a harness set and he could "haul ten cords of wood."

The Damon family says that Nakai Nez was only living with the Damon family, with the implication he had no right to relinquish the 100 acres. In any event the Damons say that there was never a consent on their part to give up their customary use area. That assertion is somewhat clouded by the inconsistent fact that the decedent and seven of his children have held grazing permits in the area, the children having theirs in the years following 1968.

There is some dispute, as yet unclear, as to exactly what the relevance is of the surrender of the 100 acres by Nakai Nez, including

his right to make a surrender and the precise location of the land. The land description contained in the 1935 agreement can by no stretch of the imagination be said to be legally precise.

Things began coming to life when the Acting Area Director of the Navajo Area Office (Bureau of Indian Affairs) notified the Chairman of the Navajo Tribal Council on December 16, 1982 that a certain "administrative reserve" of 100 acres, located in the Window Rock area, was restored to tribal trust land status. Very shortly thereafter defendant MacDonald accepted the return of the land on behalf of the Navajo Tribe.

On December 29, 1982 the Office of Navajo Land Development entered into a compromise of dispute agreement with five individuals regarding the disputed area, but that agreement did not include the plaintiffs.

Previously the Advisory Committee approved the withdrawal of the land in dispute (December 17, 1982), and on December 28, 1982 the day before the compromise agreement was signed - the expenditure of \$70,000 to settle the claims of Willie Keeto and others was approved by it.

Subsequently defendants MacDonald, Paul and Keeto received Advisory Committee approval for homesite leases in the area. It has appeared to the court that the Advisory Committee resolution with respect to defendant MacDonald's homesite has been approved by the Bureau of Indian Affairs, but that those of defendants Paul and Keeto have not, and the Bureau will withhold action until the rights of all the parties to this case are resolved. Defendant MacDonald has already been removed as a subject of temporary relief by Bureau action.

The plaintiffs ask for a temporary restraining order to stop construction on the land, prevent further decisions on the land until compensation is paid, to halt financial transactions connected with these events, to prevent the use of tribal employees, equipment and materials in developing the land, and to otherwise freeze action until the case is decided. Plaintiff Edith Yazzie asks this relief not only on her own behalf as a claimant, but on behalf of the Navajo public.

STANDARDS FOR TEMPORARY RESTRAINING ORDERS

Temporary restraining orders are meant to be short-lived, and they can be granted only until the court can hear the matter in more detail in a later hearing for relief while the suit is pending. Weintraub v. Hanrahan, 435 F.2d 461 (CA7, 1970). What a plaintiff asks for when requesting a temporary restraining order is something drastic and something the court usually will not grant, unless there is a very strong showing indeed that there will be an injury which cannot be later healed and that it is desirable for such action to be taken. Youngstown Sheet & Tube Co. v. Sawyer, 103 F. Supp. 978 (D.D.C. 1952). Before a court can grant a temporary restraining order, it must be satisfied that:

1. There is going to be immediate and irreparable injury;
2. There is a probability of success on the merits; and
3. There is harm to the moving party which outweighs any harm to the opposing party and to the public. National Prisoners Reform Asso. v. Sharkey, 347 F. Supp. 1234 (D.R.I. 1972).

THE LAW IN THIS CASE

These are very high standards, and this court has already turned down the plaintiffs' request for a temporary restraining order for their failure to present compelling facts showing they are entitled to relief.

A lengthy hearing was held on the plaintiffs' application, and the court had the opportunity to hear live testimony and receive documents in support of the application. The factual conclusion of this court is that there is something to the plaintiffs' claims but not enough to merit the entry of a temporary restraining order. Very serious questions of fact and law have been raised, but there is not enough at this point to justify drastic action by the court.

The Court is not convinced there will be immediate and irreparable injury because, while the plaintiffs point out that the grazing use of the land will be destroyed, there is no strong showing they actually use it to graze. Their claim for specific relief is also clouded by their claims for monetary payment, and the law for centuries has been that a court will not stop someone from doing something if a money payment to an injured party will resolve his problem. There is also the fact that on January 12, 1983 letters were sent to Frank E. Paul, Willie Keeto and Roy Keeto saying it will not act on resolutions affecting this matter "until all the rights of all the parties have been resolved by the Courts." Therefore there is in effect administrative hold which resolves some of the need. Further the defendants have already agreed, in their home-site lease application, that they will not build until all approvals are had.

There is not enough evidence before the court to show that the plaintiffs will probably succeed. The court needs clarification of the effect of the 1907 customary use claim, the impact of the 1935 agreement and the actions of the parties affecting their rights to the land. The court must also have a good deal more argument and law presented to it before deciding the validity or invalidity of actions by the Advisory Committee. This Court follows the presumption of validity that attaches to official acts, particularly those of the legislature, and it will not act hastily to invalidate an Advisory Committee resolution. This is not to say that the court will not invalidate an illegal act, but it must be clear that an act is illegal before the staying hand of the court is extended.

There has been no satisfactory showing of a harm to the plaintiffs which outweighs any harm to the opposing parties. If construction is halted, then the defendants could be in breach of building contract commitments, material purchase commitments and other obligations. This court notes that outgoing tribal officials will not have the advantage of tribal housing and that they will have to find other places to live. Defendant Paul has a sufficient risk of losing a great deal of money that the court does not find the weight of hurt to be light for him. Of course all this will depend upon Bureau of Indian Affairs action, and it has indicated it will withhold action until this matter is resolved.

The public concern is great in this case. Allegations of impropriety of public monies being spent and public lands being allocated without following proper procedures are serious, and the court has the public interest very much in mind. However, since the Bureau of Indian Affairs has not approved (and apparently will not approve) the expenditure of public monies, and land illegally vested can be legally

[REDACTED]

divested, the solution is to proceed to a full trial and resolve these questions. The court sees no irreparable injury to the public interest now, given the present state of things.

Since these points tell the court it should not issue a temporary restraining order, and since there has been evidence of restraint on the part of the Bureau of Indian Affairs, it is appropriate for the court to ask the Bureau, as the organ of one sovereign speaking to the organ of another, that it continue with its policy of withholding action on matters before it related to this case until the case here can be resolved. This is a matter falling under Navajo law and one within the jurisdiction of this court, and this court represents to the Bureau of Indian Affairs that this, and not the Bureau, is the more appropriate forum to resolve this dispute.

Since the Court is denying temporary relief, it is in the interests of justice that the plaintiffs have a rapid opportunity to present their final case. Therefore the Court will enter a separate order for an expedited trial, rapid discovery and appropriate pretrial proceedings. If the case is tried and decided quickly, then many of the problems of possible injury to the plaintiffs will be resolved. Needless to say, the defendants would like to know where they stand as soon as possible.

Based on these considerations, the application for a temporary restraining order is DENIED, with leave for reapplication should there be a change in circumstances meriting relief.

[REDACTED]

WINDOW ROCK DISTRICT COURT

February 1, 1983

No. CP-CV-74-80

[REDACTED]

VIRGINIA TOLEDO, Plaintiff, v.

CHEE B. BENALLY, Defendant.

Honorable Tom Tso, Judge presiding.

This opinion and order is based upon the motion of Chee B. Benally, defendant in the above-captioned matter. The motion for Change of Judge, dated January 14, 1983, moves the court for an order disqualifying the Honorable Tom Tso on the grounds "according to movant's and his attorney's belief that any further involvement by Judge Tso in the cause of action might unfavorably influence the outcome at the trial." The motion is supported by an affidavit executed by Chee B. Benally which simply states his belief that "he will be unable to obtain a fair and impartial trial at the case, since he believes that Judge Tso is prejudiced and biased towards him."

The defendant in his affidavit also states that his motion for disqualification, dated August 12, 1981 disqualified Judge Tso from presiding over the case. The court record reflect on September 16, 1981 defendant submitted an "affidavit of defendant" stating his fear that the Judge may decide in favor of the plaintiff without respect to the merits of the case before him by reason of bias and prejudice of the judge in that the judge has demonstrated such a position in respect to his counsel, William P. Battles. The court records further shows that the only document filed was "affidavit of defendant", no appropriate motion for disqualification was ever filed.

In other words, the motion and affidavit simply assert a lack of impartiality and a belief of impartiality as to Judge Tom Tso. The court takes notice that the venue of this action was previously changed from the Crownpoint District to Tuba City and finally to Window Rock District.

The procedural question arising from this motion is whether the motion is sufficient to give the court grounds upon which to act. Normally, in the absence of a statute or rule of court, judges are disqualified as a matter of public policy and in the interest of impartiality where there is an interest the judge has in a matter or where the judge has a degree of relationship to a party. 46 Am.Jur.2d, Judges Sec. 86. Where there is a statute or rule of court for the disqualification of a judge, there is the view that such a statute or rule should be liberally construed to accomplish the object of assuring justice free from bias or influence caused by a judge's interest or relations. Id. Sec. 88.

In this case there is a rule of court with respect to disqualification. The pertinent portion of Rule 7 of the Rules of Civil Procedure is:

"The judge may disqualify himself on motion of one of the parties or on his own motion. When a judge disqualifies himself, a copy of the order shall be sent to the Chief Justice who shall name a new judge to hear the case."

In other words, the rule simply provides that a judge may be disqualified by motion, but it does not provide the grounds for disqualification. The court notes that the word "may" in the rule gives the court the power to grant or deny the motion based upon the use of sound judicial discretion.

This particular motion and conclusory affidavit provides the court no basis upon which to exercise judicial discretion. There are many grounds to disqualify a judge and a general accusation of a lack of impartiality can include many reasons. See 46 Am.Jur.2d, Judges Secs. 94 through 197, discussing a myriad of grounds for disqualification.

The court concedes that in some jurisdictions the filing of a general and conclusory affidavit of disqualification without demonstrating facts showing prejudice is sufficient. Id. Sec. 210. However since our rule provides for a motion of disqualification which may be granted or not as a matter of discretion, the rule is that the facts upon which the disqualification motion is based must be set forth. Id. The correct rule for our courts would be:

"Sufficient factual matters must be stated to show bias and prejudice on the part of the judge to the extent that it may reasonably and substantially appear that his actions during the trial will be so influenced that a fair and impartial trial may not result. Thus, it has been stated that the test of the sufficiency of an affidavit disqualifying a judge is whether its content shows that the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the judge, and that allegations of facts that are merely frivolous or fanciful will not support a motion to disqualify on the ground of prejudice." Id.

Some states provide litigants with the opportunity to remove a judge from a case by either making a motion and showing no ground for removal or simply making a motion supported by a boilerplate affidavit of bias and prejudice. Others provide that detailed and specific grounds for disqualification must be shown. Our rule of court, which makes the question one of discretion pursuant to a motion, fits the latter description. (For a discussion of Federal disqualification practice, See Laird v. Tatum, 409 U.S. 824, 34 L.Ed.2d 50 (1972)).

Pursuant to the "affidavit of Defendant" dated August 12, 1981, the defendant fears that the judge will be prejudice due to an unspecified bias of the judge towards defendant's tribal court advocate, William P. Battles. The affidavit fails to show personal bias of the judge of such a degree as to adversely affect the defendant's interest. The Navajo Nation Court of Appeals has previously decided that bias (which is not shown in this case) is not sufficient to disqualify a judge:

"... there is ample case law which states that bias against a party's attorney is not sufficient to disqualify a judge.... In those cases in which the bias of a judge towards a party's attorney has been held sufficient grounds [for] disqualification of the Judge, the basis for disqualification have always been shown through affidavits of personal bias of such a degree as to adversely affect the client's interest." p. 216, Yazzie, et.al. v. Board of Education Supervisor, 1 Nav.R. 213 (1978).

Therefore, based upon the foregoing discussion, the Court enters the following orders:

1. The motion for disqualification of Chee B. Benally dated January 14, 1983 is hereby DENIED for factual and legal insufficiency, without prejudice to the renewal of the motion; and
2. Should the motion be renewed it must be made upon specific grounds and must be supported by sufficient affidavits of the party and his counsel in accordance with this opinion; and
3. Any such motion must be noticed and set for a hearing before the Court; and
4. Any such motion must be supported by a brief or memorandum setting forth the legal arguments in support of the motion with appropriate citations in support of such arguments.

SO ORDERED.

WINDOW ROCK DISTRICT COURT

February 7, 1983

No. WR-CV-565-82

[REDACTED]

IN THE MATTER OF THE ESTATE OF:

REED DESCHEENY, Deceased/

Honorable Tom Tso, Judge presiding.

This opinion is made upon the court's own motion because of an ex parte communication received from Edward McCabe, Jr., the Bureau of Indian Affairs Superintendent of the Shiprock Agency.

The letter follows the entry of a probate decree determining heirs and the making of a determination of the property to be allocated to heirs. The Bureau of Indian Affairs letter indicates that the order of this court "cannot be processed as written, and is being returned for correction." It goes on to make a legal determination that the decree is not valid because of our statute of limitations.

The membership list of the Navajo Nation Bar Association does not show that the Superintendent is a member of our bar, and this Court takes judicial notice of the facts that (1) the Superintendent is not a Judge of the Navajo Nation and (2) the Courts of the Navajo Nation are not under the control of the Bureau of Indian Affairs.

What is before the Court is the conduct of an official of the Bureau of Indian Affairs arrogating to himself the authority to make a determination of Navajo law contrary to a valid ruling by a Navajo court.

The letter is a poor exercise of the practice of law in this jurisdiction for two reasons: First of all, the letter ignores the fact that the parties failed to raise the question of the statute of limitations, and the law clearly is that the statute is not jurisdictional but a matter of affirmative defense, and it can be waived by not raising it. 51 Am.Jur. 2d, Limitation of Actions, Secs. 4, 428, 430. Therefore the limitation does not apply in this case. Secondly, the letter relied upon a memorandum of the former Judicial Branch General Counsel with regard to the statute of limitations in probate actions. Gudac, "Stale Probate Cases," (October 15, 1976). In the Navajo Nation it is the judges and not their attorneys who determine the law. 7 NTC Sec. 255. The Chief attorney for the Court (now called the Solicitor) has only the authority to give opinions - not legal rulings which override the determination of a judge. Therefore the BIA letter is bad law.

The Superintendent of the Shiprock Agency also overlooked the policies which bind him in his relations with the Navajo Nation. The Assistant Secretary of the Interior for Indian Affairs has ruled that "It has been a longstanding general principle on the part of the Department of the Interior that the Indian tribes are empowered to interpret their own governing documents." Appeal of Garmann, 5 Indian L. Rep. H-17,

H-18 (August 23, 1978). In that same opinion the Assistant Secretary indicated that only a tribal interpretation of law which is "so arbitrary or unreasonable that its application would constitute a violation of the right to due process or equal protection" would not be accepted. Id. The Assistant Secretary specifically refused to rule upon a number of tribal court interpretations in the Garmann appeal. Id., H-19 - 20. It is clear that the decision of this court in no way denies due process or equal protection. See 51 Am.Jur.2d, Limitation of Actions, Sec. 4.

In 1959 the Bureau of Indian Affairs lost any authority over the courts of the Navajo People. Once that authority was removed by the Navajo People, the Bureau of Indian Affairs lost review authority over our court cases. Benally v. Navajo Area Director, 9 IBIA 284, 292 (1982).

Therefore the letter was ill-advised and contrary to the policy of the Bureau of Indian Affairs, at least as is indicated by available authority.

Therefore the probate decree was, and is, valid and should be fully recognized, enforced and given full faith and credit by the Bureau of Indian Affairs.

The court regrets the necessity of issuing a sharp rebuke in this matter, but the time has long past since the Bureau of Indian Affairs should have ceased interference in the operations of Indian courts.

Therefore the Court enters the following ORDERS:

The Superintendent of the Shiprock Agency, Bureau of Indian Affairs, is hereby advised that the prior decree of this Court, dated December 10, 1982, is reaffirmed, valid and within the jurisdiction of this court, and he is hereby requested, as the representative of a fellow sovereign, to give it full faith and credit.

[REDACTED]

WINDOW ROCK DISTRICT COURT

April 12, 1983

No. WR-C-661-76

[REDACTED]

JOANN BECENTI, Plaintiff, v.

JOHNNY and SHIRLEY LAUGHLIN, Defendants.

and NAVAJO FOREST PRODUCTS INDUSTRIES.

Honorable Tom Tso, Judge presiding.

This is a case which involves the construction of a statute, and it appears that a number of interpretations can be made. In this case the plaintiff recovered a money judgment against the defendants in March of 1977. The plaintiff diligently tries to enforce her judgment, and in November of 1982 she made her application to this court for a writ of garnishment to reach the wages of one of the defendants, payable by the Navajo Forest Products Industries (Garnishee). The defendants have moved to quash an issued writ, citing a five-year limitation on executions in 7 NTC, Sec. 705. That statute provides:

"The party in whose favor a money judgment is given by the Courts of the Navajo Tribe may at any time within five years after entry thereof have a writ of execution issued for its enforcement. No execution, however, shall issue after the death of the judgment debtor. A judgment creditor may have as many writs of execution as are necessary to effect collection of the entire amount of the judgment."

What does this statute mean? There appear to be several readings of it:

1. There is an absolute bar to any execution after five years have passed;
2. As long as the judgment creditor obtains a writ of execution within five years the judgment can be enforced;
3. After five years, writs of execution cannot be used to collect, but other means can;
4. There can be waiver of the five year limit by the defendants' actions.

There is an obvious problem in interpreting the intent of the Navajo Tribal Council with respect to the five year limit, and since the reading of the entire resolution which created the statute does not resolve the problem, the court must use other reasonable means of interpretation.

In beginning an analysis of the statute, the court accepts the contention of the defendants that a writ of garnishment is the same sort of remedy as a writ of execution. Reisenfeld, Creditors' Remedies &

Debtors' Protection, pp. 2-7 (1967). This is in accordance with the opinion of the court in the case In the Matter of the Interest of Tsosie, (1982) Navajo L.J. 2015. Therefore, any limitation in the statute applies to the remedy sought here.

It is a matter of standard statutory law that statutes must be read on their face to reach a reasonable conclusion which follows from the obvious intent and purpose of the statute. In this case there is an obvious conflict in the intent of the statute when reading it on its face, with a five year limitation to, "have a writ of execution", and a provision that "a judgment creditor may have as many writs of execution as are necessary to effect collection of the entire amount of the judgment." It is important that the five year limitation is upon the issuance of a writ of execution, and Chapter 5 of Title 7 (Procedure) contains no time limitation on judgments.

As a general rule an execution or part payments on a judgment within the period of the statutory time limitation extends the time in which a judgment may be executed. In Lindsey v. Merrill, executions and payments during the statutory period formed new points for the running of the statute and permitted new executions. 36 Ark. 545 (1880). In Strong v. State, part payment of a judgment was held to postpone the running of the statute and revive a judgment for the purposes of an execution. 57 Ind. 428 (1877). In Neilands v. Wrights, the court interpreted a statute such as ours which did not indicate the effect of part payment, but held that part payment was an acknowledgement of the existence of the demand and a waiver of the statute of limitations. 134 Mich. 77, 95 NW 997 (1903).

Two other cases noted that there is a difference between the running of a limitations upon executions and that upon the judgment itself, and held that partial satisfaction extends the period of time in which one may execute upon a judgment. Hicks v. Brown, 38 Ark. 469 (1882); Kontz v. LaDow, 133 Ark. 523, 202 SW 686, (1918).

The obvious purpose of 7 N.T.C. Sec. 705 is to prevent stale judgments and to require judgment creditors to be diligent in seeking to collect on their judgments. If there is no such diligence, then the judgment debtor is assured peace after the five year period. However, since the judgment creditor is permitted as many writs of execution as he or she needs to collect a valid judgment, this court holds that partial satisfaction of the judgment and, as here, legitimate attempts to collect by execution or otherwise toll the statute.

THEREFORE the limitation of 7 N.T.C. Sec. 705 shall run from the date of the last execution attempt on the part of the plaintiff, and the motion to quash the writ of execution is hereby DENIED.

SO ORDERED.

[REDACTED]

WINDOW ROCK DISTRICT COURT

April 18, 1983

No. WR-CV-239-82

[REDACTED]

RUTH ANN TRACEY, Plaintiff, v.

MICHAEL THOMAS HEREDIA, Defendant.

Honorable Tom Tso, Judge presiding.

The above entitled matter having come before this Court on the respondent's Motion to Quash Writ of Garnishment and to vacate judgment and upon the petitioner's Motion in Opposition thereto; and counsel for each party having submitted brief in support of their motions with both agreeing the Court can enter a decision upon the brief without an oral argument; The Court in reviewing the case finds as follows:

1. On August 18, 1982, the Honorable Henry Whitehair issued a stipulated judgment regarding the divorce of the parties. Relevant provisions of the judgment state:

"This matter having come on before the Court upon the petitioner's petition for dissolution of marriage; and it appearing to the court that both parties were represented by legal counsel; and it further appearing that the parties and their legal counsel have reached a settlement agreeable to the parties and otherwise in conformity with laws;" (Emphasis Added).

"IT IS FURTHER ORDERED, ADJUDGED and DECREED that the respondent shall pay to the petitioner the sum of Two Hundred (\$200) Dollars per month for the support and maintenance of petitioner beginning the 5th day of September, 1982 and continuing on the 5th day of each consecutive calendar month until petitioner remarries, dies, or further order of this court."

"IT IS FURTHER ORDERED, ADJUDGED and DECREED that this court shall retain continuing jurisdiction over this proceeding and the parties hereto."

2. The stipulated judgment signed by the Honorable Henry Whitehair was approved as to form by Mr. Eric D. Eberhard, attorney for petitioner and James Jay Mason, attorney for respondent.

3. On August 27, 1982, the respondent sent a letter to Mr. Eric D. Eberhard, attorney for petitioner informing him that Mr. Mason no longer represented him in his divorce or any other related legal matter. He was also contemplating retaining another advocate or attorney.

A copy of the letter was received by this court on September 03, 1982. Within the same letter the defendant informed Mr. Eric D. Eberhard that he did not concur with the stipulated judgment and was unaware of what Mr. Mason, his former attorney agreed to.

4. On September 09, 1982, Mr. Mason filed a Motion to Withdraw as counsel of record for respondent on the grounds that the services for which he was retained had been completed, and at the request of respondent. The court granted the motion on same date.

5. On September 20, 1982, the petitioner filed a motion for an Order to Show Cause alleging that respondent failed to fulfill certain provisions of the stipulated judgment.

6. On September 22, 1982, the respondent, pro se, filed a handwritten response to the petitioner's Motion to Show Cause. Respondent prayed that the court not issue any order until the validity of the stipulated judgment is determined by the court.

7. On September 22, 1982, the respondent filed a Memorandum of Points - Motion to Reopen Divorce Proceedings. In that document, the respondent alleges that he was seriously misrepresented by Mr. Mason in that Mr. Mason made certain agreements without his knowledge, and as a result the respondent lodged a complaint about Mr. Mason's conduct to the Disciplinary Board of the State of New Mexico. The respondent prayed that the court reopen the divorce proceedings. In essence the respondent's Motion to Reopen Divorce Proceedings is a supplement to his response to the petitioner's Motion for Show Cause.

8. The petitioner's Motion for an Order to Show Cause and the respondent's answer thereto were scheduled to be heard on November 08, 1982 at 8:30 a.m.

9. The Order to Show Cause to the respondent was issued on September 28, 1982. The respondent was served with a copy of the Order to Show Cause through certified mail, and he acknowledged receipt on October 14, 1982.

10. Respondent failed to appear for the Order to Show Cause on November 08, 1982. Consequently the court issued an order based on the testimony and evidence presented by the petitioner. The answer submitted by respondent was not considered since he failed to appear to pursue his case. The order issued from the bench on November 08, 1982 was reduced to writing and signed on November 09, 1982.

11. On November 09, 1982, the court received a note from the respondent dated October 08, 1982. The court has problem understanding the contents of the note, however it seems to indicate that the respondent chose not to appear for the hearing on the Order to Show Cause. The relevant part of the note states:

"Being aware of related consequence of non-appearance in the Honorable Court of the Navajo Nation, my restraint is out of fear and guarantee of equal protection. Relinquishment from the court is not based on contempt but skepticism."

Based on the respondent's note he was aware, among other things that if he failed to appear from trial to pursue his case, the court cannot consider his allegation, which needs to be proven by him by the propondence of the evidence. Respondent chose not to pursue his case.

12. On November 09, 1982, the respondent through his new attorney again filed a Motion to Quash Writ of Garnishment and to vacate judgment. Approximately two months later (February 18, 1983), the respondent finally filed a brief in support of his motion.

14. On January 05, 1983, petitioner filed her motion and brief in opposition to respondent motion to quash writ of garnishment and vacate judgment.

15. Around the early part of March, 1983, the petitioner filed another brief in support of her motion through her new attorney.

16. On March 22, 1983, the respondent filed a response to petitioner's motion.

17. It appears to the court that the respondent's complaint on his former attorney's alleged misconduct was dismissed by the Disciplinary Board of the State of New Mexico for a lack of supporting evidence after investigation (see attached).

ISSUES

The issues which must be decided by the court are as follows:

1. DID THE DISTRICT COURT ERR WHEN IT ISSUED A WRIT OF GARNISHMENT?

2. DOES THIS COURT HAVE THIS AUTHORITY TO SET ASIDE AND VACATE THE STIPULATED JUDGMENT WHEN SUBSTANTIAL JUSTICE WILL BE SERVED?

OPINION

ISSUE ONE

The respondent's basic argument is that the writ of garnishment is an extraordinary writ which must be specially authorized by legislation enactment of the Navajo Tribal Council, and presently the Navajo Tribal Code and policy does not provide or allow garnishment.

The respondent in support of his argument cites Tom S. Joe v. Honorable Ray Marcum, et.al., United States Court of Appeals, Tenth Circuit, (1980) 621 Fd2, 358-363. The respondent argues that in that case, the Tribe represented to the court that the Navajo Tribe do not permit enforcement of judgment by garnishment of wages.

The respondent further argues that courts of general jurisdiction such as the District Courts of the Navajo Nation are without authority to proceed in garnishment and the power to do so rests upon express statutory authority.

The respondents concludes the Navajo Tribe Code does not specifically authorize the Navajo District Court to issue writ of garnishment, therefore this court erred in issuing such a writ.

The petitioner argues the District Court did not err and his authority to issue writ of garnishment pursuant to 7 NTC Sec. 255, Rule 23, Rules of Navajo Civil Procedure, Rule 13, Rules of Navajo Rules of Civil Procedures and further cites In the Matter of the Interest of Emerson Daniel Tsosie, et.al., No. CH-CV-205-81, (1982) Navajo Law Journal, 002015. (Chinle District Court).

The issue of whether or not the Navajo Tribal Code provides

explicit authorization for the District Court to issue a writ of garnishment in aid of the exercise of its jurisdiction has been raised both in the Chinle District Court and the Window Rock District Court. According to this court's knowledge there is no appellate decision on this issue.

The Chinle District Court in its Tsosie decision concluded that 7 NTC 705, and 7 NTC Sec. 255, coupled with Rule 13 and 23, Rules of the Navajo Civil Procedure gives the Navajo District Court the full authority to create a plastic remedy, appropriate to the enforcement of its judgment. The court further found that the law of the Navajo Nation is determined to permit garnishment or other orders to satisfy judgments from the wages owing to judgment debtors.

The Tsosie decision was based upon the court's rulings upon a petition for a writ of garnishment to obtain payroll deductions for child support from the wages of the father, who was employed by the Bureau of Indian Affairs. The order required a deduction of \$300.00 per month from the father's wages "until further order of the court."

The Window Rock District Court in rulings on a similar issue in the case of Foster v. Lee, WR-CV-558-81 (Window Rock District Court, March 08, 1982) adopted almost verbatim the Tsosie decision and rules that 7 NTC Sec. 705 and 7 NTC Sec. 255 coupled with 13 and 23, Rules of Navajo Civil Procedures gives the Navajo District Court full authority to create a plastic remedy, appropriate to the enforcement of its judgment.

The decision in Foster v. Lee derived from the court's ruling on a petition for a writ of garnishment to obtain payroll deduction for child support from wages earned by defendant Lee, an employee of Navajo Tribal Utility Authority. Said order required a deduction of Two Hundred Fifty (\$250.00) Dollars from each payroll check of defendant.

In the instant case the order directing wage garnishment requires deduction from the respondent's bi-weekly salary the sum of Four Hundred (\$400) Dollars for a total deduction of Eight Hundreds (\$800) Dollars per month. The garnished wage is applied first to the payment of One Hundred (\$100) Dollars arrearage in child support and a Six Hundred (\$600) Dollars arrearage in alimony; next to the regular payment of child support in the amount of Two Hundred (\$200) Dollars per month; next to the payment of all debts imposed upon the respondent by the stipulated judgment entered on August 18, 1982; and finally to the petitioner's cost and attorneys fees incurred in the approximate amount of One Thousand Five Hundred (1,500) Dollars.

The court in this case will adopt the analysis and rulings in the Tsosie case and Foster v. Lee, and again rule that pursuant to 7 NTC Sec. 705 and 7 NTC Sec. 255 coupled with Rule 23, Rules of Navajo Civil Procedure, garnishment is permitted. This court has the full authority to issue writ of garnishment, and its doing so is not an error.

Therefore, the order directing wage garnishment, dated November 09, 1982 is valid and regular on its face and it does conform with the laws of the Navajo Nation.

ISSUE TWO

The respondent argues that this court has the power to vacate a judgment when it appears that substantial justice requires that a judg-

ment be vacated. The respondent claims that he was denied justice when his attorney, without his knowledge or consent, signed a stipulated judgment which granted the petitioner's alimony which respondent contends is not supported by evidence.

Respondent in support of his agreement cites, 1 B Moore's Federal Practice, Sec. 0.405(3), at 632 (2d. Ed. 1982); and Rule 60, New Mexico Supreme Court Rules.

The petitioner contends that Rule 23, Navajo Rules of Civil Procedures, sets forth three grounds for reopening a case after a final order or judgment; (1) to correct error, (2) to consider nearly discovered evidence, (3) for any other reason consistent with justice.

Without having to go through a lengthly analysis on the issue, the Court agrees that it has power pursuant to Rule 23, Rules of Navajo Civil Procedure to order any relief required after the determination of the facts, and law, whether such relief be equitable or legal in nature.

The respondent's complaint to the court is not based on any error on the part of the court but solely on the alleged misconduct of his former attorney. The evidence received at the hearing on November 08, 1982 shows that respondent actively participated in the negotiation which led to the stipulated judgment. Negotiations were only entered into at the insistence of the respondent. Mr. Heredia voluntarily choose not to appear for that hearing and there was no way for the court to receive testimony or other evidence from him regarding his claim and for that reason it was not considered. In a civil action the burden of proof rests on the moving party to prove his claim by the proponedence of the evidence.

The respondent voluntarily choose his attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney." Smith v. Ayer, 101 U.S. 320, 236, 25 L.Ed. 955, 958.

The respondent being aware of the consequences of non-appearance in court decided not to appear and therefore waived his claim that the court should vacate the stipulated judgment based on the conduct of his attorney.

The respondent has array of remedies available to him before the bar which respondent showed he was aware of, by lodging a complaint with the Disciplinary Board of the State of New Mexico. The respondent has two primary complaints (1) attorney fees and (2) the matter of Mr. Mason persuading him to agree to certain matters. The two major complaints were clearly explained to the respondent and the matter before the Disciplinary Board was dropped as there was no evidence to support the charge.

If the respondent has not been afforded a fair hearing then it occurred solely at his own election. The court scheduled a hearing to hear his case on November 08, 1982 and as far as this court is concerned the respondent was afforded a fair hearing which respondent intentionally waived.

Therefore it is the ruling of this court that it has authority to set aside and vacate the stipulated judgment where substantial justice

will be served. However the findings and opinion of this court in the instant case is that the judgment is not one which should be reopened.

ORDER

Upon the foregoing opinion this court makes its orders as follows:

1. The Stipulated Judgment dated August 18, 1982 will remain in full force and effect;

2. The order directing garnishment dated November 09, 1982 will remain in full force and effect;

3. The Justice Department of the Navajo Nation is directed to initiate an extradition proceeding to extradite respondent from the City of Gallup, State of New Mexico to the Navajo Nation to start serving the sentence imposed upon him as a result of the contempt charges and caused a warrant of arrest to be issued; and

4. IT IS FURTHER ORDERED that the Justice Department of the Navajo Nation will initiate extradition and arrest proceedings immediately.

SO ORDERED.

[REDACTED]

WINDOW ROCK DISTRICT COURT

April 20, 1983

No. WR-CV-121-83

[REDACTED]

IN THE MATTER OF THE CUSTODY OF:

B.N.P., B.P., L.P. JR., Minor Children.

Honorable Tom Tso, Judge presiding.

This is a child custody dispute in which this court is called upon to make a decision on which of the two Indian governments should exercise the power and duty to protect children under their care. The foremost consideration for this court must be the best interests of the children who come before it, and after that considerations of governmental relations come into play.

since this is a conflicts of law case utilizing the tools of finding connections with governments and examining governmental interests for the purpose of comity, the facts of the case are all-important.

FACTS FOUND

The petitioners are the natural father of the three children who are before the court and the natural father's wife. The three children, boys, 7, 9, and 11 years of age are Navajo on their father's side and Mescalero Apache on their mother's side.

The parents separated in 1979, and in 1980 they obtained their decree of divorce from the Mescalero Apache Court, with custody being voluntarily given to the father. From the time of the divorce until September 1982 the children have physically been within the territorial confines of the Navajo Nation, and although the children have been placed in school in Gallup, their connections with the Navajo Nation are strong. In sum, the children have been with the natural father and his family members from 1979 until the present time.

The one break in residence in a Navajo environment was for the period of time from December 16, 1982 to the middle of March, 1983. It appears the children were taken from the father on the pretext of visitation, and the physical custody of the children on the Mescalero Apache Reservation was used as a pretext for a modification of custody order by its court. The children were apparently returned here under the same pretext.

THE CONFLICT IN CHILD CUSTODY JURISDICTION

The court is uncomfortable with the role it has in this case because of the fact both the parents of these children have seen fit to ignore the desires of their children by kidnapping them back and forth. This court recognizes the fact there is an outstanding Mescalero Apache Tribal Court decree with respect to these children and that the normal

course of action would be to automatically enforce that decree. However the law of the Navajo Nation as to given recognition to the decrees and judgments of other Indian courts is that where (1) the other court had jurisdiction, (2) the proceedings there were proper and (3) it is within the public policy of the Navajo Nation, those decrees and judgments will be honored and enforced. In the Matter of Chewiwi, 1 Navajo R. 120, 126 (1977).

While the court is invited to examine the jurisdiction of the other court (as we are permitted to do) and to find that the proceedings before the Mescalero Apache Tribal Court were irregular, this is a matter which, on the facts, can be decided by deciding this court's jurisdiction. This is done due to this consideration:

"One of the things that the child's welfare certainly demands is stability and regularity. If he is continually being transferred from one parent to the other by conflicting court decrees, he may be a great deal worse off than if left with one parent, even though as an original proposition some better provision could have been made for him." Clark, Law of Domestic Relations, p. 326 (1968).

This court is required by Navajo law to give children its protection for their care, guidance, control and welfare. 9 NTC Sec. 1001. To that end, this court has jurisdiction in child custody matters. 9 NTC Sec. 1053(3). It also has general domestic relations jurisdiction over all Indians. 9 NTC Sec. 253. This is an important duty for the court to exercise because

"If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a since qua non to preservation of its identity." Wisconsin Potowatomies v. Houston, 393 F. Supp. 719, 730 D. Mich. (1973).

This court considers the construction of its juvenile statutes for the purpose of this particular problem to be one of statutory construction and procedural law, and therefore it will utilize the persuasive precedents of the Restatement on the Conflict of Laws and the Uniform Child Custody Jurisdiction Act as guides for the permissible limits of the jurisdiction conferred.

Sec. 79 of the Restatement Second, Conflict of Laws (1979) provides:

"A state has power to exercise judicial jurisdiction to determine the custody. . . of the person of the child. . .

- (a) Who is domiciled in the state, or
- (b) Who is present in the state, or
- (c) Who is neither domiciled nor present in the state, if the controversy is between two or more persons who are personally subject to the jurisdiction of the

state."

Section Three of the Uniform Child Custody Jurisdiction Act has several grounds for jurisdiction to make or modify a child custody decree, including where:

(1) "This state (i) is the home state of the child at the time of the commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding and the child is absent from this State because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this State; or

(2) It is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) The child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or it is otherwise neglected (or dependent)."

(Other portions of the section omitted).

As to the domicile test of the Restatement, it is deemed satisfied by the rule that the child's domiciled is that of his father. Clark, supra, p. 151. For the reason that this court will exercise jurisdiction on many grounds, including section 3(1)(ii) of the Uniform Child Custody Jurisdiction Act, domicile with the father under the original Mescalero Apache Court order will be deemed to have been continuing.

These children are certainly present within Navajo Indian Country, so the Restatement is satisfied as to that ground as well.

Additionally, there is a sort of domicile-present in Indian country test which is satisfied by the kinship of the paternal family, the Navajo ties the children have and their Navajo orientation. These are sufficient to give the Navajo Nation an interest in them which will support jurisdiction. Wisconsin Potowatomies v. Houston, 393 F.Supp. 719, 733-734 (Mich. 1973).

Under the Uniform Child Custody Jurisdiction Act there are a number of considerations which support the exercise of jurisdiction here:

1. This jurisdiction is the home jurisdiction of the children. Since the children have always lived within Navajo Indian Country and the significant ties the children have are to the Navajo people and not the Mescalero Apache People (i.e. in terms of orientation), this is the "home state" for the children in the legal sense. See Howard v. Gish, 373 A.2d 1280 (Md., 1977); In re Marriage of Schwander, 79 Cal.App.3d

1013 (Cal. 1978); In re Lemond, 395 NE2d 1287 (Ind. 1979); Both v. Superior Court, 590 P.2d 920 (Ariz. 1979).

2. This was definitely the "home state" of the children within 6 months of the commencement of this action, and these children were definitely absent because of their removal by a person claiming custody. This is the one ground upon which this court could rely. This section is the parental kidnapping section of the code, and it is applied here particularly because of the mother's conduct in taking the children for the purpose of forum shopping.

3. It is in the best interests of the children that this court assume jurisdiction because due to schooling, family ties, a period of residence, acculturation, orientation and many other factors these children have a significant connection with the Navajo Nation. Further, this court has received evidence of the future care of the children and their case.

4. The children are physically present within Navajo Indian Country and sadly this court finds there is sufficient evidence that they need protection due to the familial situation they are in. We have two parents battling over the children, and until the situation can be stabilized, they will be in need of protection. The court has interviewed the children as to their custody preferences and has received the reports of professionals indicating that the children prefer to be with their father and that they fear their mother due to drinking.

At the beginning of this opinion the court indicated that it would use the Navajo public policy portion of the three part test in Chewiwi. The protection of children is within the public policy of the Navajo Nation, and the use of two reliable national legal standards for the exercise of jurisdiction has lead this court to the conclusion it should take jurisdiction in this matter.

THEREFORE IT IS HEREBY ORDERED AS FOLLOWS:

1. This court has jurisdiction over the persons of the petitioners and children of the action and over the subject matter of the action;

2. The permanent custody of B.N.P., B.P., and L.P., Jr. shall be in L.P., Sr.;

3. Counsel shall submit draft findings of fact and conclusions of law with respect to the evidence adduced at the hearing of this matter within ten (10) days which fully address the personal and subject matter jurisdiction of the court and the factors affecting the best interests of the children. Counsel are advised that the propriety vel non of the proceedings before the Mescalero Apache Tribal Court are not a matter for such findings, and the proceedings before the prior court will be deemed to have been regular for the purposes of this order;

4. Counsel for the petitioner shall cause service of certified copies of this order upon the Navajo police, the childrens' schools and upon their natural mother; and

5. Vernetta Platero, the natural mother of the children, shall have the right of reasonable visitation of the children and she shall be consulted as to the education and well being of the children. The petitioner father is advised that he should not attempt in any way to shut the mother off from interaction or contact with the children.

SO ORDERED.

[REDACTED]

WINDOW ROCK DISTRICT COURT

May 13, 1983

No. WR-CV-153-83

[REDACTED]

MARSHALL TOME, Plaintiff, v.

THE NAVAJO NATION, et.al., Defendants.

Honorable Tom Tso, Judge presiding.

This case is in reality a dispute between two Navajo government administrations over a valuable item of property, the Navajo Times newspaper and publishing business. The dispute revolves around arguments over the legality of the sale of the Times to Marshall Tome under the administration of the Honorable Peter MacDonald and the legality of the cancellation of that sale under the administration of the Honorable Peterson Zah. The Advisory Committee which served under Chairman MacDonald approved the sale of the Times to Marshall Tome, the former Director of Division of Community Development, and Chairman MacDonald signed a sales agreement to complete the transaction. Mr. Tome has now come before the court to ask its protection because of a subsequent enactment of the current Advisory Committee voiding the legislative action of its predecessor.

The basic legal question presented to the court is whether Mr. Tome has a valid and binding contract with the Navajo Nation. That basic question can be reached only through an examination of the legality of the legislative action approving the sale and perhaps an examination of the legality of later legislative action invalidating the prior approval of the contract.

The court does not decide these questions now, because the only question which has been presented to it is whether the court should block any action to sell the Times pending the resolution of these major questions. Mr. Tome asks for a temporary restraining order to keep the Times from being sold to anyone but himself, and this court is called upon to inventory and balance the comparative hardships, potential losses, injury and benefit to Tome and the Navajo Nation should an order be entered or denied.

The court is bothered by the political implications of the case before it. The political conduct of one governmental administration is being matched against the political conduct of a subsequent administration. The courts normally steer clear of such disputes, but this court will hear this one because of the facts that an individual is claiming injury to his property rights and an impairment of a contract, and the property of the Navajo People is the asset being sought by the parties. As will be detailed below, we are dealing with the property of the Navajo People, an asset which all Navajo governmental administrations must treat with the greatest respect and care, and this court has a duty imposed by Navajo common law to protect that property.

The facts essential to a ruling on an application for a temporary restraining order are fairly plain. On January 5, 1983 the Advisory Committee enacted Resolution No. ACJA-13-83 approving the sale of the Times to Marshall Tome and that resolution not only authorized but directed Chairman Peter MacDonald to sign an agreement of sale with Tome. The agreement was reviewed and approved by the committee. It provides for the sale of the Times, including its equipment, fixtures, inventory, name, subscriptions and other business aspects. The sales price was \$28,000.00, payable in 60 days. An appraisal was to be made by a qualified appraiser hired by the Commercial Industrial Development and Management Department of the Division of Economic Development, and if that appraisal showed a value of over \$28,000.00, Tome would have been required to pay the difference between the appraised value and the purchase price within the 70 day period. The agreement provided that the sale was to be effective upon its approval by the Advisory Committee.

The agreement was signed on January 7, 1983, two days after the Advisory Committee resolution.

There is an annotation at the top of Resolution ACJA-13-83 that it is a "Class "B" Resolution, Area Approval Required." There was some testimony as to the effect of resolutions which carry the "Class A" designation (approval by the Commissioner of Indian Affairs or the Secretary of the Interior - the court assumes the Assistant Secretary now assumes this function), the "Class B" label (approval by the Navajo Area Director, Bureau of Indian Affairs) or the "Class C" mark (no approval of the United States Government needed). The court is not satisfied at this point as about the legal and policy foundations for these classifications and leaves them for more complete argument and discussion later. If the argument is that Bureau of Indian Affairs approval at the area office level was required to validate this sale, then the court must know the legal foundation for it and the legal interests to be served by such a requirement. It may well be that the Navajo government would be bound by its own classification of the sales resolution and by its own legislation action, but the determination of whether the plaintiff has vested property rights may hinge on that legal determination. The court finds that the Navajo Area Director, BIA, has not given approval to the resolution or the sale.

THE NAVAJO COMMON LAW

This court has jurisdiction over this matter. It has jurisdiction over the defendants due to its general jurisdiction, and that jurisdiction is not stayed by the Navajo Nation Sovereign Immunity Act because conduct which may have exceeded the scope of the authority of officers and legislative bodies is in question. The insurance coverage jurisdictional question cannot be decided at this point. While it is true that the liability of the Navajo Nation does hinge upon insurance coverage, (1) that is a question of damages and not the kind of relief requested here; (2) it may be possible for a plaintiff to obtain a judgment which is executory and which may later be satisfied by legislative appropriation or otherwise; and (3) there is not enough factual evidence before the court on that question to provide a basis for ruling on the point.

Navajo Common Law is a body of law which is fully binding on

this court and on the parties. 7 NTC Sec. 204. It consists of the customs, traditions and usages of the Navajo People. The court can "find" the Navajo common law through its own knowledge of it, since it is a matter of common knowledge, or through proof of it. The court takes judicial notice of the following legal principles:

There are valuable and tangible assets which produce wealth. They provide food, income and the support of the Navajo People. The most valuable tangible asset of the Navajo Nation is its land, without which the Navajo Nation would exist and without which the Navajo People would be caused to disperse like the Jewish People following the fall of Jerusalem. Land is basic to the survival of the Navajo People.

While it is said that land belongs to the clans, more accurately it may be said that the land belongs to those who live on it and depend upon it for their survival. When we speak of the Navajo Nation as a whole, its lands and assets belong to those who use it and who depend upon it for survival - the Navajo People. Therefore, as a matter of Navajo common law, this court finds that the assets in question are the property of the Navajo People and not particular individuals or government administrations. Since it is the property of the Navajo People, this court is required to assume the jurisdiction of a guardian or custodian over it to determine whether it is being managed in the best interests of the Navajo People. The courts derive their authority from the inherent sovereignty of the Navajo People, and they are affirmatively required to exercise that authority to further that sovereignty by protecting its land and property base.

Under Navajo tradition this is the time of year that the Navajo People would dissolve their bodies of men at war and return to productive and peaceful activities. This court is required to act as a peace leader to bring this land to undisputed and peaceful use.

Therefore the court has jurisdiction in this case and the authority to enter all appropriate orders to protect the property of the Navajo People.

THE STANDARD OF REVIEW IN THIS CASE

This court has already declared the law of temporary restraining orders in a situation very much like the one before it now. In Damon v. MacDonald this court noted that the temporary restraining order is a drastic remedy which will not usually be granted without a very strong showing there will be an injury which cannot later be healed. No. WR-CV-01-83, p. 4 (Ruling on Application for a Temporary Restraining Order, Jan. 21, 1983). Any party asking for a temporary restraining order must show the court;

1. There will be immediate and irreparable injury if an Order is not granted;

2. There is a probability the applicant will be successful on the merits of the suit (i.e. he or she will win in the end); and

3. There is a harm to the applicant which outweighs any harm to the opposing side and to the public. Id. As was noted earlier in this opinion, this court is required to review all the possible injuries and evil affects which the granting or denial of an order will cause and then require or stop action as the facts mandate.

IMMEDIATE AND IRREPARABLE INJURY

The balance of injury shows that the public would be injured most heavily if an order is granted. The documents leading up to the contract and the agreement itself show a minimum purchase price of \$28,000 and the court notes that the upper limit of that price is \$40,000. In evidence is a memorandum from the Director of the Navajo Property Control & Stores Department showing an acquisition value of the equipment of the times to be \$129,901. (Note: That is only the equipment value and there are other items which were included in the agreement). The court notes Mr. Tome's allegation that should the agreement not be followed he will be injured in the sum of \$4,872.000. The court does not know the period of time such damages would accrue, but certainly the question is weighed as to how much the Times is really worth. On the basis of the appraisal of equipment alone, the Navajo People would lose \$101,901. The purchase agreement itself calls for the payment of the difference between the agreed purchase price and appraised value, and the court finds that there is a sufficient potential of significant harm to the Navajo People that the doubt should be resolved in their favor.

The court is not satisfied that the injury is immediate, given the need under the subsequent Advisory Committee resolution to take certain steps prior to a sale, and the court is not satisfied that the injury is irreparable. It is true that the Times is a unique asset which could be the subject of a court order for the specific performance of a valid contract for sale, and the court will protect that option in this order. However the plaintiff does also have the possibility of a damage judgment which the court may or may not find to be viable. These things need to be developed.

SUCCESS ON THE MERITS

At this point there is no assurance that either side will be successful on the merits. As was noted above, this is a case with political overtones to it and one which will most likely require the court to use fiduciary standards to evaluate. There are many legal questions to be resolved and the merits of this case are by no means apparent at this point. Some of them may be:

1. Whether the new administration is bound by the actions of the prior administration by some sort of succession doctrine;
2. Whether the plaintiff has acquired a vested property interest in fact which is protected by principles of due process and prohibitions against the impairment of contract;
3. Whether the conduct of the prior Advisory Committee was in full compliance with Navajo law or was ultra vires;
4. Whether Bureau of Indian Affairs sanction of the transaction is required or was had;
5. Whether there are or were any problems with conflicts of interest or fiduciary standards;
6. Whether the contract was unconscionable;
7. Whether the subsequent Advisory Committee action can be upheld under the doctrine that a legislature can repeal a prior enactment at any time;

8. Whether the plaintiff has an adequate remedy at law;
and

9. Whether the contract was valid and proper or it should be declared void as being violative of public policy and the Navajo common law described above.

RULING ON THIS APPLICATION

A temporary restraining order will be denied. The equities weight in favor of the Navajo People and a full hearing on the issues raised and more will be required before this court is in a position to identify who has proper interests to be protected.

However, the rights of the plaintiff must not be ignored. He is a businessman of standing with years of business experience. Businessmen enter into agreements with the expectations of profit, and they invest money, time and effort in order to obtain an agreement. What Mr. Tome is asking for is the benefit of his bargain. If it is an enforceable bargain, he should have it. He says that if the agreement is not enforced quickly he will lose the benefit of his bargain and be injured in a substantial way. The court agrees with the urgency of the matter and also finds that the public needs a quick determination of this case.

Therefore, it is hereby ORDERED that:

1. The plaintiff's application for a temporary restraining order is denied;

2. Within five (5) days of the date of this order, counsel for the parties shall make their reports to the court on (a) any discovery that needs to be done and how quickly it can be completed, (b) what pretrial proceedings will be necessary to prepare this case for an immediate trial, and (c) the date on which they can go forward with a full trial on the merits. The trial must take place no later than 60 days of the date of this order, and the court prefers to go forward no later than 30 days of the date of this order.

3. The plaintiff may, if necessary, make a further application for extraordinary relief in accordance with the standards of this opinion and order.

WINDOW ROCK DISTRICT COURT

May 23, 1983

No. WR-CV-240-82

VICTORIA LYDIA PESHLAKAI, Petitioner, v.

ALBERT GUNN REDD, JR., Respondent.

Honorable Tom Tso, Judge presiding.

This is a paternity action involving two minor children. The issues in this case have been joined by a petition for paternity, an answer and counterclaim and a reply to the counterclaim. A pretrial conference was conducted before the court on May 18, 1983, ad upon the pleadings of the parties and the contentions made at the pretrial conference, the court makes the following determination of the issues of fact and law to be resolved:

THE CASE

There are two minor children involved in this case. Their names will not be disclosed here because of the policy of keeping such matters confidential. The first child, a boy, was born on August 2, 1980, and he will be three years of age this year. The second, a girl, was born on January 1, 1982, and she is almost $1\frac{1}{2}$ years of age.

The paternity of the boy was admitted by the response, and the respondent pleas that he has insufficient knowledge with respect to the paternity of the girl.

The pleadings put at issue the fitness of the mother for child custody, and the father asks for custody of the boy and also custody of the girl, if she is determined to be his child.

It appears that the boy was enrolled as a member of the Southern Ute Indian Tribe by action of its Tribal Council on December 30, 1980. The Council Resolution, N. 80-121, recites that the child has a $\frac{1}{4}$ degree of Ute blood and that the enrollment was based upon the child's authenticated birth certificate. The child is also shown as enrolled on the Navajo Indian Census Roll and having a $\frac{1}{2}$ degree of Navajo Indian blood.

Therefore the paternity of the father with respect to the boy is not at issue and the court will so find.

MATTERS AT ISSUE

The court finds these matters to be at issue:

1. Whether the respondent is the father of the girl;
2. Who should have custody of the children;
3. Whether the custody of the children should be with one person or should be split (depending upon the paternity issue);

4. Which enrollment is valid;
5. Child support.

QUESTIONS OF LAW TO BE BRIEFED

The court will, upon its own motion, determine whether a summary judgment should be entered on the issues before it. The issue of enrollment appears to be one of law, and a summary judgment should be possible to resolve it. The paternity and custody questions are ones of fact, and they would normally be resolved at trial. However these questions should be approached with a view of narrowing the issues of fact to be tried or entering a possible summary judgment. Therefore the court enters the following ORDERS with respect to the questions of law and fact:

QUESTIONS OF LAW

The parties are hereby ORDERED to submit simultaneous on the following questions within 20 days of the date of this order:

1. The legal standards of proof necessary to make a summary finding of paternity under the facts of this case and those standards, if any, which must be resolved at trial;
2. Whether, as a matter of law, the custody of the minor children should be split given the probable maternity of the mother with respect to both of them;
3. The custom law aspects, both Navajo and Ute, of child custody under the facts of this case;
4. The law to be applied to this case, both as to statutory law and custom law, as among the law of the Navajo Nation, the law of the Southern Ute Tribe or the State of New Mexico;
5. What application the presumption of regularity of official records has with respect to the Southern Ute enrollment resolution and the Navajo enrollment record (i.e. fraud, compliance with applicable enrollment procedures, et.);
6. To what extent, if any, this court must give either full faith and credit or comity to the Southern Ute enrollment resolution, considering matters of jurisdiction, public policy, custom law, points of contact, governmental interests and like matters.

The parties shall provide the court with verified or certified copies of the applicable Southern Ute tribal code provisions or enrollment policies applicable to this case in order to assure that the court has a correct statement of the Southern Ute law applicable to the enrollment and jurisdiction questions.

QUESTIONS OF FACT

The court has the authority to make its own motion for summary judgment, but it can do so only if it finds that there are no issues of material fact with respect to the issues before it. In an attempt to simplify the factual issues before the court for a possible trial, and in order to determine whether the court should make its own motion for summary judgment, the parties are ORDERED to file affidavits of fact from the appropriate persons having knowledge of the facts within 30

[REDACTED]

days of the date of this order. The relevant facts the court wishes to have before it are:

1. As to residence:
 - a. The dates and places of residents of the parties at the time of their cohabitation;
 - b. The dates, places of physical residence and the names of the persons caring for the children since the date of their birth;
 - c. The dates and places of current residence of the parties;
2. As to affiliation with the Southern Ute and Navajo Tribe:
 - a. The contacts the parties have with their extended families, if any, including the nature of the interaction, the persons in the life of the children, and the nature of the interaction.
3. Those factual matters which the parties contend show that the child should, as a matter of policy, be enrolled in his or her tribe;
4. Those factual matters which the parties contend show their fitness for custody (see prior Navajo decisional law on this point);
5. Those factual matters which go to the issue of paternity;
6. Such other factual matters as fairly arise from the pleadings.

CONCLUSION

The court considers the enrollment question to be one of first impression and one which is of significant importance, and it should be approached carefully and thoroughly. The question of the childrens' paternity and custody is no less important, and the court wishes to either resolve these questions without trial or upon a careful presentation of the facts. If it appears from the affidavits of the parties that there are material issues of fact to be resolved at trial, the affidavits will be treated as admissions and contentions of fact, as appropriate.

SO ORDERED.

[REDACTED]

WINDOW ROCK DISTRICT COURT

June 20, 1983

No. WR-CV-300-83

[REDACTED]

IN THE MATTER OF THE ADOPTION:

OF S.C.M., A Kwakiutl Indian.

Honorable Tom Tso, Judge presiding.

This is an adoption case which seeks to stretch the limits of Navajo jurisdiction to their outermost extent. The Clerk of the District Court has brought the petition for adoption on file to the immediate attention of the court because of its unusual circumstances, and the court exercises its inherent authority to rule upon jurisdiction on its own motion.

THE FACTS UNDERLYING A RULING ON JURISDICTION

Facts are the foundation of jurisdiction, and the situation in this adoption matter is that:

The female child was born in December of 1982 in British Columbia, Canada. Her parents are Canadian citizens and residents of British Columbia. The natural mother of the child is a "status" Indian of Canada, that is, a person entitled to be registered or who is registered in the Indian Register of the Department of Indian Affairs and Northern Development of Canada. Sec. 2(1), Indian Act, R.S., c. 149 s.1 (Canada). The child is eligible for registry as a status Indian in Canada. Id., Sec. 11(e). The status of the child's father is not shown by the file.

The prospective adoptive father of the child is a member of the Navajo Tribe, and he resides in Provo, Utah. He is originally from Toh-la-kai in the New Mexico portion of the Navajo Nation. He is the child's uncle, and his deceased wife was the sister of the natural mother of the child.

The child was given into the care and control of her petitioner uncle when she was released from her British Columbia hospital birthplace.

Sixteen days after the child's birth, her natural parents executed consents for her adoption. They were not witnessed by a notary public or other officer empowered to administer oaths, but those consents were attached to affidavits that they had been freely signed after being explained by a barrister and solicitor (a Canadian attorney). The consents name the petitioner as the prospective adoptive parent, they were executed in British Columbia, and they have "In the Supreme Court of British Columbia" at the top.

One of the documents on file in this case is a letter from the petitioner's Canadian solicitors addressed to the Superintendent of Family and Child Services in Victoria, British Columbia. That letter

[REDACTED]

gives a history of the child and her parents, along with the petitioner's history, and it asks that the letter be accepted as a report under the British Columbia Adoption Act. The court assumes the "report" would be an investigative report each as that required in our adoption code. 9 NTC Sec. 609(a).

In sum, a Navajo uncle who resides outside the Navajo Nation seeks to adopt a Canadian status Indian child, whose parents reside in British Columbia, on the basis of consents executed in British Columbia and made with the intitial intention of use in an adoption in a British Columbia court.

On the basis of these facts, which are shown in the adoption petition and the exhibits attached to it, the petitioner asks this court to waive an investigation and immediately enter an adoption decree.

THE JURISDICTION PROBLEM

There are a number of approaches to adoption jurisdiction. One is that since an adoption affects the status of a child, and the status of a person is governed by the law of his domicile, the status of the adopted child may only be changed at the place of domicile. Clark, The Law of Domestic Relations in the United States, p. - 609 (1968). ("Domicile" is discussed below). Some courts take the approach that jurisdiction is an *in rem* action, giving a court jurisdiction over the child's status at the place of the child's domicile. Id., p. 608. Both of these approaches are difficult because of conflicts in deciding whether the "domicile" is that of the adoptive parents or the natural parents. Some courts say that the child's domicile is what supports jurisdiction, while others say that the adoptive parents' domicile will do so. Id.

The Restatement, Second, on Conflicts of Laws, at Section 142 states:

"A state has judicial jurisdiction to grant an adoption if (a) it is the state of domicile of either the adopted child or the adoptive parent, and (b) it has personal jurisdiction over the adoptive parent and either the adopted child or the person having legal custody of the child."

Taking the concept of domicile as our first jurisdictional consideration (there are other problems considered later), we then examine whether:

- (1) The Navajo Nation is the "domicile" of the petitioner or the child; and
- (2) The Navajo Nation has personal jurisdiction over the petitioner and either the child or the person having legal custody of the child.

The domicile problem

The law of domicile in the subject of conflicts of law is, to say the least, a very slippery problem. The Court of Appeals of the Navajo Nation made its own determination of the law of domicile as applied to the Navajo in the case of Halona v. MacDonald, 1 Navajo R. 189 (1978). That was a suit to enjoin the expenditure of funds from the Navajo Nation treasury to pay for legal expenses of the former Chairman of the

Navajo Tribal Council, Peter MacDonald. A dispute arose as to the proper venue of the case, and the Court of Appeals ruled upon the Navajo law of domicile to find that venue. The court noted that the chairman actually lived in Window Rock, Navajo Nation (Arizona) but was registered to vote in Teec Nos Pos, in the Shiprock Judicial District. Id. 194-195. The court noted the residence in Window Rock, and said, "But for Navajos, domicile is not as clear or fixed as it might be for non-Indians, if Indian brothers." Id. at 195. The court decided the question of legal domicile on the basis of Navajo customary law, which is applicable in civil actions under 7 NTC Sec. 204(a).

The Court of Appeals ruled that:

"By custom, Navajo consider themselves to be from the same area their mothers are from. Thus wherever they may be, they return home frequently for religious ceremonies and family functions, as well as to vote. By custom, Navajo are allowed to register and vote in the area where they are from, rather than where they live. Even the Navajo Tribal Code's election law is silent on this point. Perhaps this custom may have to be breached in the future, but for the present, Navajos may be considered to be domiciled where they maintain their traditional and legal ties, regardless of where they actually live." Id.

The Navajo rule of custom domicile is comparable to the law of some nations which assign a national domicile to all individuals born in their territory, even where they become citizens of other nations, or the situation in Mayer v. Department of Public Welfare where individuals who were an adoptive parent and child living in Japan were considered domiciled in New Mexico. 402 P.2d 942 (1965). (In that case, an adoption was denied under New Mexico law because its adoption statute required the child to be "living" in New Mexico. Although the petitioner is considered to be domiciled within the New Mexico portion of the Navajo Nation, this court does not apply the law of New Mexico because the Navajo adoption statute has preempted that law. 7 NTC Sec. 204.

Therefore the court finds the petitioner's domicile to be that of the Navajo Nation, and the test of Section 142(a) of the Restatement on Conflicts of Laws is satisfied.

The personal jurisdiction problem.

The test of section 142(b) is not reached as easily. This court has personal jurisdiction over the adoptive parent because he has submitted himself to the jurisdiction of this court, he is a member of the Navajo Tribe and he has a legal domicile within the Navajo Nation. This court does not have personal jurisdiction over the adoptive child because the child has neither domicile nor residence within the Navajo Nation. The general rule is that the domicile of the child in a situation where the child is born out of wedlock is that of the mother. Matter of Appeal in Pima County, 635 P.2d 187, 191 (Arizona App. 1981). Therefore the domicile of the child is in British Columbia. We do not know what

the domicile of the person having legal custody of the child is, because this court does not know the law of British Columbia which is applicable to this case. The custody rights of the petitioner are fixed by the law of British Columbia, since that is the place of the child's and her parents' residence. It may be that the physical surrender of the child into the physical custody of the petitioner, coupled with the execution of adoption consents in his favor, are a transfer of legal custody to him but the court does not know this, and that point of law is one of foreign law which has not been proven.

Therefore it would appear that this court could exercise jurisdiction over this adoption if it had personal jurisdiction over the child or the person having legal custody of the child. In the absence of proof of the contrary, the child's mother would be the legal custodian of the child.

The statutory problems here.

Aside from the tricky domicile questions which have been presented to the court, there is the matter of this court's statutory jurisdiction. Adoption is not a common law child; It is a child of legislation. Our adoption code, Chapter 7 of Title 9 of the Navajo Tribal Code, is silent on the question of this court's jurisdiction. However, our general jurisdiction statute, 7 NTC Sec. 253, does contain a provision regarding adoption jurisdiction:

"(3) Domestic Relations. All cases involving the domestic relations of Indians, such as divorce and adoption matters. Residence requirements in such cases shall remain in heretofore provided in regard to the Navajo Tribal Courts of Indian Offenses."

This court has subject matter jurisdiction over the adoption since the petitioner is a Navajo Indian and the child is Indian. (This court accepts the Indian-ness of the child not only because she is entitled to registration as a Canadian status Indian, but because the Indian nations of Canada have the natural right to determine on their own who are Indians).

7 NTC Sec. 253(3) was adopted on October 16, 1958 under our Tribal Council Resolution CO-69-58. The Navajo Tribal Court of Indian Offenses, which was a court controlled by the Bureau of Indian Affairs prior to April 1, 1959, used the provisions of 25 C.F.R. Sec. 11.22, which were promulgated on December 24, 1957. 22 FR 10515. The pertinent part of that regulation provided:

"The Court of Indian Offenses shall have jurisdiction over all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members and nonmembers which are brought before the courts by stipulation of both parties."

There is no provision for residence in an adoption case under Part II of 25 C.F.R., with the exception of custom adoptions between members,

which had to take place "upon the reservation." 25 C.F.R. Sec. 11.29. Therefore there is no residence requirement under our law.

While the current status of our jurisdictional law does not require the consent of a nonmember of suit where the nonmember is a resident of the Navajo Nation or the action arose within the Navajo Nation (Resolution CF-19-80), because the child and her natural parents are not residents of the Navajo Nation and this case does not arise within the Navajo Nation (being held to not so arise because of the requirements outlined in the Restatement section discussed above), then, for all practical purposes, this court will need the consent of the nonmember parents by means of their submission to the jurisdiction of the court, since that is the only means personal jurisdiction maybe obtained over them.

Therefore, this court does have subject matter jurisdiction over this case and it does have jurisdiction insofar as the domicile of the adoptive parent is concerned. It does not have jurisdiction insofar as personal jurisdiction over the child or her legal custodian is concerned. At least that has not been demonstrated to the court at this point.

THE PROBLEM OF CONSENT

This court should apply the standard of its adoption code to the consents which have been executed by the natural parents. Those consents are valid if they were signed in the presence of the judge of clerk of court or acknowledged before a notary public. 9 NTC Sec. 603(b). They were not signed before the judge of this judicial district or its clerk, and they were signed before a Commissioner for taking Affidavits in British Columbia. That satisfies the statute.

There is the problem, however, that the copies of the consents on file are photocopies, and the court will require further proof of their authenticity, in accordance with the Navajo Rules of Evidence. Rule 30 provides that "All evidence must be authenticated or identified to the satisfaction of the judge that the evidence is what it is claimed to be before it may be admitted." Such proof of authenticity will be required here.

THE ABSTENTION PROBLEM

While the petitioner may provide further information or the natural parents of the child may submit to the jurisdiction of this court, one further question is whether this court should exercise jurisdiction. First of all there is the problem that if this court happens to not have jurisdiction based upon any rational interpretation of adoption jurisdiction theory, then the adoption decree will not be recognized. This was the situation when the Arizona Supreme Court refused to recognize a decree of its own courts. Hughes v. Industrial Commission, 211 P.2d 463 (1949).

There is the more important question of policy. The court notes that the petitioner originally intended to pursue the adoption in the courts of British Columbia, but obviously he has not done so. Is this because of a valid interest which British Columbia has in the child which was used as a ground for denying an adoption? Is it due to the need of the petitioner to return to his home in Utah immediately after receiving

his niece from his sister-in-law? Was it because of restrictive Canadian adoption policies which ignore the wishes of Indian childrens' bands or tribes and the value of placing Indian children with their extended families? The court needs to know these things.

This court notes that Canada is experiencing many of the same difficulties of non-Indian ignorance of Indian ways we have seen, particularly those of placement of a child within the extended Indian family in accordance with custom and the wishes of the child's tribe. See, Tom v. Children's Aid Society, (1982) 1 C.N.L.R. (Canadian Native L. Rep.) 160, 170, 132 D.L.R. (3d) 187, (1982) 2 W.W.R. 212 (Manitoba Prov. Ct., aff'd Man. CA) Re Eliza, (1982) 2 C.N.L.R. 53 (Sask, Prov.). These are the problems which lead to the adoption of the Indian Child Welfare Act in the United States. The Indian Child Welfare Act was also adopted to avoid the abuses of nonsanction private placements of children, and the court does not wish to simply give its blessing to an unsanctioned private placement, although it is made within the child's extended family.

Therefore the court wishes to know the complete history of this case and exactly why an adoption was not pursued in the courts of British Columbia. The court will make its policy decision based upon Navajo policies and it will lean in favor and the extension of jurisdiction should good cause be shown for not pursuing an adoption in British Columbia.

Indian law is the law of those legitimate policies adopted by Indian peoples for the benefit of Indian peoples. The policy applicable in this case is the Navajo common law policy that were children are given up by their natural parents, for good cause or bad, they are usually given up to clan members or relatives. The specific Navajo custom law applicable to this case is that where a man places his saddle outside the hogan of a woman, he pledges to serve her family and clan members. Here a Navajo man placed his saddle before the hogan of a Kwakiutl woman and has pledged to serve her clan and protect his neice. (The court is unaware of the proper metaphor for the Kwakiutl version of a hogan and apologizes for ignorance of that fact). Therefore the policy would appear to be in his favor if these other questions can be answered so the court can be satisfied he is not simply forum-shopping to avoid a proper application of proper policies of British Columbia.

THE INVESTIGATION

The petitioner may not have an investigation waived. 9 NTC Sec. 609(a) requires an investigation in all adoption cases. That statute refers to the Agency Branch of Welfare of the Bureau of Indian Affairs, but since its functions have been assumed by our Division of Social Welfare under the Indian Self-Determination Act, it will be responsible for making the required report.

The court notes that the Indians of Canada have many fine Social Welfare organizations, and the Union of British Columbia Indian Chiefs is noted for its fine services to its people. Certainly it will assist the Division of Social Welfare in this case.

THE CHILD'S BIRTH RIGHTS

This child is eligible for registration as a status Indian under the Canadian Indian Act, with all the rights and benefits which accrue to Canadian Indians. This child has a Canadian birthright, and since she will not be eligible for membership in the Navajo Tribe, it is important that her Canadian rights are preserved. This court wants a full report on the child's status and benefits in Canada, with assurance that as an Indian she will not become stateless or without proper Indian status under the laws of Canada or the United States. Therefore the court will require that the petitioner have his Canadian barristers and solicitors make a full report to the court on this point and that Division of Social Welfare investigative report address this point.

TEMPORARY CUSTODY

The final matter to be taken care of in connection with the adoption petition which has been filed is the temporary custody of the child.

The petitioner filed a proposed adoption decree with his petition, and in addition he filed a proposed order which would grant him the immediate temporary custody of the child pending the final decree or a further order of the court.

This order cannot be granted because the court, at this point, lacks jurisdiction over the child, as has been discussed.

In addition the court cannot grant immediate custody of the child because that matter is not properly before the court.

It is a matter of law which is elementary that the court cannot and will not grant relief without a proper application for relief. Our law clearly provides that no judgment can be granted in a suit unless the defendant has actually received notice of the suit and an opportunity to appear. 7 NTC Sec. 604. This is normally done by means of a complaint, which outlines the plaintiff's claims, and a summons, which is used to notify the defendant of the suit. Rules 2, 3. Rules of Civil Procedures.

It is not unusual for a party to file suit to enforce a legal claim and to ask for immediate relief, such as a temporary restraining order to temporary custody of a child. This too is done by a formal request that the court act, showing the legal right to immediate relief and the emergency nature of the request. Normally this is done by means of a motion for temporary and immediate relief or a petition for such relief.

In short, law suits are begun with written documents which give adequate notice of the facts and the grounds for relief and procedural relief during the course of the action is obtained by means of a written application, which is normally the motion.

There was no motion, application or petition for temporary custody. Such an application would show the facts, the legal basis for temporary child custody and it would give strong and sound reasons for granting that sort of relief. Courts are very reluctant to grant temporary custody of a child unless it is in the child's best interests, and custody cannot be granted on the basis of only the filing of a petition for an adoption and a proposed order granting temporary custody.

Therefore the order will be denied.

THE SIGNING OF THE PETITION

The court also notes that the petition for adoption is not signed by the petitioner. It is signed by the counsel for the petitioner.

The adoption petition statute, 9 NTC Sec. 606, does not require the prospective adoptive parents to sign the petition, but that section does require that the petition be substantially that of 9 NTC Sec. 607. The form contained in that section ends with the sentence. "The undersigned hereby declare that all facts represented in the above petition are true." This sentence refers to signers in the plural, and it is obviously intended to refer to adoptive parents signing the petition. Therefore, since the clear meaning of the statute regulating the form of the adoption petition is that the petitioner(s) must actually sign it. The petition is ordered to resubmit a petition which he has signed.

ORDERS

Based upon these concerns the court makes the following orders:

1. - The Division of Social Welfare is required to immediately commence its investigation as required by this order and 9 NTC Sec. 609(a), with the assistance of appropriate British Columbia and Utah social agencies, and to file the same with this court within 75 days of the date of this order;

2. The petitioner shall immediately report the addresses of the natural parents of the child to the Clerk of Court for the purpose of the issuance of a citation containing a consent to the jurisdiction of this court;

3. The petitioner shall request that his Canadian barristers and solicitors advise the court on the history of this case to date and the legal rights of the child under Canadian law;

4. The proposed order for temporary custody of the child is denied for the reason stated;

5. The petitioner is ordered to refile his adoption petition by signing it himself and certifying that the facts stated in the petition are true;

6. A hearing on jurisdiction and the merits of this case, should the court find it has and should exercise jurisdiction, shall be held before the court at Window Rock, Navajo Nation (Arizona) on the 14th day of September, 1983 at the hour of 8:30 a.m.

[REDACTED]

WINDOW ROCK DISTRICT COURT

September 21, 1983

No. CP-CR-2581-83
CP-CR-2583-83

[REDACTED]

THE NAVAJO NATION, Plaintiff, v.

DONALD RICO, Defendant.

Honorable Tom Tso, Judge presiding.

THE CASE

This is a ruling upon a motion for a continuance in a criminal case. The court has chosen to render a written opinion on the motion because of the legal issues raised, but more importantly in order to give guidance to counsel on standards for receiving continuance.

The facts of the case are taken from well-prepared pleadings.

The Navajo Nation, through the Crownpoint District Prosecutor, has moved that the trial set for September 28, 1983 be vacated and continued to another date, and in support of that motion the prosecutor says that the "only witness that has the knowledge of the real evidence of the charge against the defendant," Lt. Walter Begay, must attend a training session at the Indian Police Academy in Brigham City, Utah from September 19th through October 7, 1983. The motion recites that the witness' attendance at the program is mandatory under a contract with the Bureau of Indian Affairs under the Indian Self-Determination Act, and the motion is supported by a letter from the Indian Police Academy and a copy of police regulations contained in 25 C.F.R. Part II.

The defendant opposes the motion with a well-written memorandum of points and authorities. The motion is opposed because (1) the Hon. Marie F. Neswood previously denied a motion for a continuance based upon the same ground, (2) the supporting documentation to the motion does not show that the training program is mandatory, and (3) that since the prosecution did not advise the court of the previous denial of an identical motion, the motion is not brought in good faith and should be denied.

GOOD FAITH IN PLEADINGS AND MOTIONS

The good faith issue is adequately addressed by the Rules on Pleadings Forms and Motions adopted on April 23, 1982. Rule 3(a) provides:

"The signature of a member of the Navajo Nation Bar, any attorney permitted to appear before the courts or any person representing himself, containing in a pleading or other document submitted to the Court, is a certificate that the pleading or document is submitted in good faith and that the

matters of fact or law contained in such papers are made in good faith, are believed to be true and accurate and are based upon an adequate investigation of or research of those asserted statements of the fact or law."

Under this rule, we begin with the assumption that since the Crownpoint District Prosecutor's signature appears on a motion stating that Lt. Begay is the only material witness and that he must attend the training session, those facts are made in good faith and are believed to be true and accurate. The prosecutor's signature is also a certificate that he made an adequate investigation of the facts.

Rule 3(d) of the Rules of Pleading Form and Motions indicates that "A lack of good faith maybe found where a party or attorney omits material facts or omits points of law which that person knows or should know are relevant to the matters before the court." On September 8, 1983 the District Prosecutor made a prior application on the same ground to the Hon. Marie F. Neswood, and that motion was denied. It is very disturbing to the court that the fact of the denial of the motion, which is a "material fact" under the rule, was not disclosed in the motion. The court could deny the motion or take one of the other sanctions contained in Rule 3(d), and this court notes that it is the practice in some jurisdictions to reprimand counsel severely for the failure to disclose the previous denial of a motion or requested order.

However in this case the court will not make a finding of a lack of good faith and it will find that there was a error of judgment in failing to disclose the denial of the previous motion. The District Prosecutor is not known to the court to make knowing misrepresentations to the court or to withhold material information, and this will stand as a warning that any application to a court which has been dealt with or denied previously must disclose that fact.

The court accepts the facts recited in the motion for the purposes of a motion for a continuance.

STANDARDS FOR A CONTINUANCE

The Navajo Court of Appeals discussed the law of continuances on April 28, 1983 in its opinion in the case of Battles v. General Electric Credit Corp. (1983) Navajo L.J. ____; 4 Navajo Rep. ____ (Ct. App. 1983). The Court of Appeals has declared the Navajo law to be that continuances are within the sound discretion of the trial court - a discretion that must not be arbitrary or capricious. The Court of Appeals instructed the Navajo District Courts to "consider many surrounding circumstances, such as the practical consequences of the party having to go to trial and the opposing party having to suffer a delay." The court also indicated that motions for continuances call upon counsel to "clearly and precisely give the court good reasons for a continuance, to show that prejudice will result if the continuance is not granted and to state specific, concrete reasons to the court." Finally, the opinion dwells on the point that a showing of prejudice to the party asking for a continuance is most important.

Criminal cases are special, and the court must always keep in mind the right of a defendant to a speedy trial and possible prejudice to the defendant.

The heart of the matter is that the court must engage in a

balancing of interests between the prosecution and the defense in order to exercise sound discretion.

This case presents a situation where the prosecution has made a good presentation of facts which show good cause for a continuance. A material witness has been assigned to attend a training session at the Indian Police Academy. The court notes that the officer is a Lieutenant of Police, which is a command position. The court is aware that the bureaucratic requirements of the Bureau of Indian Affairs regarding training may not be highly important, but the court is also aware that the reputation and efficiency of the Navajo Police are partly based upon training records for its command officers. The prosecution has indicated that the lieutenant is a material witness - in fact the only material witness. Therefore there has been a showing of good cause and prejudice should the officer be required to attend the trial. The court notes that the Navajo Nation as a party is entitled to the same considerations for the pressing business of its witnesses as private litigants.

If there was a showing of the denial of a material right of the defendant which would cause him prejudice, the court might deny the motion for a continuance. In criminal cases the prosecution has the option of proceeding with its case or having it dismissed in situations where there is a showing that the granting of a continuance would cause a very real denial of a defendant's rights which would clearly cause him or her prejudice. Had there been such a showing the court would have explored those options. However, since the defendant only opposed what was contained in the motion for a continuance and raised no matters of prejudice to the defendant, the court will grant the continuance.

EFFECT OF THE DENIAL OF THE PRIOR MOTION

The judge making the ruling upon this motion is extremely reluctant to enter an order different than that entered by the Hon. Marie F. Neswood. Normally judges should respect the prior rulings of a judge on procedural stages of a case unless there is good cause to do otherwise. This judge feels that there is such good cause.

As a general rule the doctrines of res judicata or estoppel do not apply in motion practice the same way as in judgments. 56 Am.Jur. 2d, Motions, Rules, and Orders Sec. 30. Normally an order which involves a question of practice or the discretion of the court is not one which prevents a later motion or application on the same ground. *Id.* There is a distinction made between orders which involve procedural matters in a case and final orders which fix substantial rights and which are appealable. *Id.* Orders which fix rights and which may be appealed are binding, particularly where there has been a full hearing on disputed facts. *Id.*

Therefore I hold that there may be a subsequent application or motion on the same ground as a previous application or motion and that a subsequent judge does have the authority to reconsider an order which has been denied previously. A court should not permit reargument of a matter which has been decided without good cause, and it should not make a different ruling without good cause, but there is the authority to do so.

ORDER

The Navajo Nation's motion for a continuance is granted.

[REDACTED]

WINDOW ROCK DISTRICT COURT

October 11, 1983

No. WR-CV-197-82

[REDACTED]

IN THE MATTER OF THE ESTATE OF:

BOYD APACHEE, Deceased.

Honorable Tom Tso, Judge presiding.

THE CASE BEFORE THE COURT

This case involves a dispute over the distribution of the property of Boyd Apachee, who was killed in an automobile accident between Window Rock and Ganado on November 7, 1981. He was 27 years of age at the time of his death.

On October 2, 1981, 36 days before his death, a default decree of divorce was entered against Mr. Apachee. Custody of the decedent's minor child Lloyd Apachee, (who is now five years of age), was given to the child's mother, Rebecca Jane Apachee (who appears in this probate as Rebecca Jim, the guardian ad litem for the child). The Crownpoint District Court's decree required the decedent to pay \$200.00 per month to Mrs. Jim for the support of Lloyd. The first monthly payment was to commence in November, of 1981.

At the time of the decedent's death he was living at the camp of his mother, Faye Apachee. The other individuals living at the same camp, which is at Wide Ruins, were the decedent's father, Sjma Apachee, and the decedent's sisters, Maxine Apachee, Harriet Apachee and Geneva Apachee.

Shortly after the commencement of this probate a dispute arose over who is entitled to \$40,000.00 in insurance proceeds from the decedent's group life insurance policy. While the former Mrs. Apachee was the named beneficiary of the policy, this court ruled that she had lost all right, title, and interest to the proceeds due to the divorce. The Court's opinion is reported at 3 Navajo Rep. 250. (D. Window Rock, 1982).

The administratrix of the estate, Judy Glanzer (the decedent's sister, has previously filed her final accounting and a proposed distribution. The assets of the estate are \$45,045.40 in cash, a motorcycle, a stero, some miscellaneous books, pictures and some papers. Some property was buried with the decedent, and his clothing was burned. This is in accordance with Navajo traditional practices.

There is an objection to some of the expenditures of the administratrix, and a demand that she be required to bear the cost of them. The objected expenditures are attorney's fees to Lawrence Ruzow, Esq., filing fees for an adoption action brought by the administratrix affecting the decedent's son, private investigator fees and trips made to Window Rock insofar as there is not a more precise statement of the nature of the trips.

The proposed distribution is that "the assets be divided pursuant to Navajo custom to all heirs, meaning immediate family," and the "immediate family" listed includes the decedent's surviving child, the decedent's parents, five sisters and three brothers. The distribution plan does not indicate whether the property is to be divided equally, but assuming that is the prayer, there would be eleven heirs and the division of the gross cash estate would be \$4,095.03 each. (Of course, estate debts would have to be deducted from the gross figure first).

At trial, the decedent's mother, Faye Apachee, claimed that the Navajo customary law is that she is to receive all the property of the estate for the purpose of making a distribution to the brothers, sisters and the son. Lloyd Apachee's mother, claimed, on his behalf, that Lloyd is the only heir and entitled to all the estate. At the hearing she claimed 10% of the estate, but didn't know how much that would be. There is also a claim that she is entitled to accrued child support as a lien against the estate.

ISSUES TO BE DECIDED BY THE COURT:

1. Is the accounting of the estate assets accurate?
2. What expenses will be allowed or disallowed?
3. What is the Navajo common law of intestate distribution of money and personal property where the decedent was divorced and living with his parents and the decedent's child was living with the former wife?
4. Of what effect is the claim for child support?
5. What should be the final distribution of the estate assets?

THE LAW TO BE APPLIED IN THIS CASE:

The Navajo Tribal Council has given the Court guidance on what laws are to apply in probate cases. 8 NTC Sec. 2 provides:

"In the determination of heirs the court shall apply the custom of the Tribe as to inheritance if such custom is proved. Otherwise the court shall apply state law in deciding what relatives of the decedent are entitled to be his heirs."

In this case the court has heard testimonies of the parties regarding Navajo customary principles of inheritance, and in deciding the law from that testimony the court will weigh it as it weighs evidence of fact. Another method of proving custom in this case will be the court taking judicial notice of matters of Navajo common law which are commonly known or easily found in acceptable works on Navajo common law. Yet another method of proof of custom is the prior decisions of the Navajo Courts.

The statute unfortunately would appear to require the court to make an immediate jump from Navajo custom to state law provisions which may not fit Navajo needs and expectations. However, this court will adopt the ancient precedent that the Navajo common law is as the English common law:

"The lex non scripta, or unwritten law, includes not only general customs, or the common law properly so

called; but also the particular customs of certain parts of the kingdom; and likewise those particular laws, that are by custom observed only in certain courts and jurisdictions." Blackstone, I commentaries on the Law of England 62 (Emphasis in the original).

The Navajo common law is making a transition into a written form, but the recorded decisions of the Navajo judges are still common law.

"When I call these parts of our law leges non Scriptae, I would not be understood as if all those laws were at present merely oral, or communicated from the former ages to the present solely by word of mouth... But, with us at present, the monuments and evidences of our legal customs are contained in the records of the several courts of justice in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law leges non scriptae, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and their universal reception throughout the kingdom."

Id, 64-64 (Emphasis in the original).

This court takes judicial notice of the fact that state probate procedures and rules of inheritance are ultimately founded upon the customs of medieval England and the needs of its society. Navajo probate procedures and rules of inheritance should reflect the needs of the Navajo Society and the Navajo way of doing things. Therefore, this court announces as a rule of interpretation of 8 NTC Sec. 2, that the word "custom" for the purposes of the statute not only includes customs which may be testified to, judicially noticed, proved by expert testimony or otherwise shown by evidence, but it includes recorded opinions and decisions of the Navajo Courts (not dealing with statutory interpretation or the application of principles of state or general Anglo-European law), and some learned treatises on Navajo ways. The Navajo Tribal Council will be deemed to have intended this result because of the general principle that a legislature is presumed to have had the common law in mind when it enacts a statute. (Since the Navajo Tribal Council has generally enacted statutes which mirror Anglo-European law, it will be deemed to have had the basic definition of common law as custom law and (Sir William Blackstone's views in mind). Only some learned treatises on Navajo Ways will be deemed to reflect Navajo common law because this Court's experience with the works of anthropologists, ethnologists and other commentators on the Navajos is that often these works are incomplete, inaccurate or do not reflect the current state of the Navajo common law, which is a living spirit of the Navajo People. The court notes that the more reliable works for use in finding Navajo common law are those authored by wise and experienced Navajo authors. The Dine' are the most accurate commentators on themselves.

The court also pronounces its preference for the term "Navajo Common Law" rather than "custom" for the reason that it is not widely understood that the customs and traditions of the Navajo People are law, and the English term is used because it more accurately reflects our customs as law.

Therefore, the court will use these methods of finding the Navajo common law which is given preference in 8 NTC Sec. 2.

There is one final point to discuss in the question of what law applies. Rebecca Jim argues that there is no establishing Navajo custom regarding the distribution of money, and that because the Judges of the Navajo Nation have adopted rules of court for the distribution of estates, those rules should apply. As will be demonstrated, there are indeed Navajo common rules on the distribution of money after death, and even if the rules could be interpreted as indicated by Mrs. Jim, such an interpretation could not override the clear direction of the Navajo Tribal Council.

IS THE ACCOUNTING OF THE ESTATE ASSETS ACCURATE?

The court finds that the accounting as to assets is accurate and acceptable, particularly since it was prepared by a trustworthy accountant. The property of the estate consists of \$45,045.40 in cash, a motorcycle, a stero, some books, pictures and some papers.

WHAT EXPENSES WILL BE ALLOWED OR DISALLOWED?

The courts finds that the hiring of a private investigator to "search" for Lloyd Apachee and prepare evidence for an adoption action, and the payment on filing fees in the Crownpoint District Court for that action are unrelated to any proper debt of the decedent or any relevant expense of the administratrix, but the court disallows the private investigator fees and the filing fees and allows the administratrix's expenses in the sum of \$1,521.40.

WHAT IS THE NAVAJO COMMON LAW OF INTESTATE DISTRIBUTION OF MONEY AND PERSONAL PROPERTY WHERE THE DECEDED WAS DIVORCED AND LIVING WITH HIS PARENTS AND THE DECEDED'S CHILD WAS LIVING WITH THE FORMER WIFE?

The court classifies property as follows: A man is standing in an imaginary circle, and he has all his possessions - everything he calls life. They are (1) his wife and children, (2) his religion (including its paraphenalia, mountain dust, bundles, etc.) (3) his land, (4) his livestock and (5) his jewelry, including money. This agrees in essence with the anthropological material cited in the Estate of Peshlakai which named (1) "Hard goods" (nit-tlis), including coin, silver ornaments, white and yellow shell, coral and cannel coal, (2) "Soft and flexible goods" (yudi), including cloth, baskets, hides, skins and clothing, (3) "Ceremonial values" (jish), including chants, herb medicines, good luck formulae, sacred names, medicine bags, paraphenalia, etc., (4) Agricultural or range land (Kay-yah), and "Game goods" (Dinneh-chil-ah-tas-aye), consisting of domesticated and wild animals. Opinion and Order, No. WR-CV-304-82 (December 30, 1982).

In this particular case we are dealing with "money". In order to understand the principles of the Navajo common law of probate there are some basic facts about the Navajo economy which must be understood. The Navajo economy has traditionally been based upon grazing sheep for food, clothing and marketing. This ties the Navajo to the land. It must also be understood that the Navajo clan system is very important, with a child being of the mother's clan and "born for" the father's clan. The clan is important, and the family as an economic unit is vital. The Navajo live together in family groups which can include parents, children, grandparents, brothers and sisters, and all the members of the family group have important duties to each other. These duties are based on the need to survive and upon very important religious values which command each to support each other and the group. Some call these family and clan members living together a "residence group," and some call them a "camp." Shepardson and Hammond, "Navajo Inheritance Patterns: Randon or Regular?," V. Ethnology 87, 90 (No. 1, Jan. 1966); Barsh, Navajo Property law and Probate, 1940-1972, p. 13. (Unpublished manuscript. This document was prepared as an experimental outline of Navajo probate law in cooperation with the Navajo court of appeals and former Chief Justice Virgil L. Kirk). The meaning of these terms is actually that groups of Navajo who are related by blood or clan will live together for mutual protection and the common good, and the important point is that there is a difference in the distribution of property, depending upon whether it is an essential piece of property for the maintenance of the camp.

There is a division of property into productive goods and nonproductive goods. Productive goods, such as sheep and land (including land permits), are held for the benefit of the individual and the camp, and upon death such property is held for the benefit of those living in the camp. Nonproductive goods (jewelry, tools and equipment, non-subsistence livestock such as horses) belong to the individual. Cash can present a special problem because it can be treated either as productive property or nonproductive property. Treated as productive property, cash would be held in the camp for its economic security as a unit. Seen as nonproductive, cash would be distributed among family members.

Nonproductive goods are distributed by the camp where the decedent resided at the time of his death. A gathering is held, supervised by an agreed representative, and there is a discussion of how the property should be divided. This process may be assisted by a nataani or some other community leader. (The peacemaker of the Navajo Peacemaker Court could also be used). The property is then distributed with a preference to the immediate family members of the decedent, and the comparative need of claimants is also considered. The principle things considered in the distribution are residence in the camp and need, although other relatives not living in the camp may participate.

Under the old ways children did not necessarily have any preference in inheritance because of the fact they usually had a share in the family herd and because of the fact that Navajo children are always cared for by their family. The father's family would recognize that his children were "born for" their clan and would help if it was needed.

Therefore the court finds that the claim of Faye Apachee that the property should be given to her for distribution is essentially

correct. However, in order to be more correctly in accordance with the common law by granting preference to the immediate family and granting the prayer that the distribution be to the "heirs, meaning immediate family," that term requires discussion.

The Navajo Court of Appeals has struggled with the term "immediate family" in connection with who must be present for a valid oral will. Estate of Ray Lee, 1 Navajo Rep. 27 (1971) and Estate of Chisney Benally, 1 Navajo Rep. 219 (1978). In the Benally case the wife and children of the decedent's second marriage (who lived with him) were present, and the wife and children of the first marriage (who did not live with the decedent) were not. It was held that the first wife and children were not members of the decedent's "immediate family."

From the previous discussion we can see that the object of Navajo common law probate is to benefit the camp or residence group as a unit in the case of productive property and to benefit those living together and those in need in the case of nonproductive property. Since the court has received no evidence or claim that the cash should go to the residential family unit of the decedent, the money will be treated as "nonproductive" property.

The logic of finding a definition of "immediate family" in this case is simple. The decedent lived with his mother, his father and his sisters, Maxine, Harriet and Geneva. They would logically belong to the "immediate family" because of the close ties of blood, but more importantly, because of the mutual assistance and support they gave to each other. Lloyd Apache is also a logical member of the "immediate family" because he was "born for" his father's clan and is in need of assistance.

This means that there are six heirs to the property, and the court must now dispose of the net estate among them. The alternatives are to either make an equal distribution or to grant Faye Apachee's request that the property be given to her for distribution or to make distribution based on preference to the immediate family members of the decedent considering comparative needs of the claimant.

Having identified the immediate family and the common law method of distribution, the Court finds that the proper means of dealing with this situation would be to make distribution based on needs. The court does not have evidence of "need," as used in the Navajo common law, and another hearing involving the "immediate family" as discussed in this opinion would be proper disposition.

In passing the court will note that the burning of the decedent's clothing and placing some property with him at the time of burial are in accord with the Navajo common law. Some things are always left with the deceased because "the things were his or hers. More was added out of love for (the) dead one." Barsh, supra, p. 13.

OF WHAT EFFECT IS THE CLAIM FOR CHILD SUPPORT?

First of all, the claim will be denied because a proper written claim was not submitted. The court does not acknowledge the state law offered to support a claim that child support is a lien on the estate and a continuing obligation because there was no "right" of a child to inherit under Navajo common law due to the family structure and the care for children.

The court does recognize that times are changing and that the Navajo Courts have consistently given children preference in probate proceedings. See Barsh, *supra*, at pp. 34, 35, 38, 41 and 54. However, it has been the children who have resided with the decedent who have been given preference.

The court will not rule upon the question of the effect of a child support order on an estate in this case, particularly since the court does not have a formal claim before it. The child will be provided for here and have an opportunity to present his need. However, in situations where the court finds children not provided for in accordance with common law practices, it will reserve the right as the legal protector of children to make special provisions for them.

WHAT SHOULD BE THE FINAL DISTRIBUTION OF THE ESTATE ASSETS?

The net estate shall be distributed to the heirs.

ORDER

1. The heirs of this estate are determined to be Lloyd Apachee, Faye Apachee, Sjma Apachee, Harriet Apachee, Geneva Apachee, and Maxine Apachee.

2. The net estate will be distributed to the heirs by the Court on the basis of need.

3. The court will hear evidence on needs of each heir on the 15th day of December, 1983, at 8:30 o'clock a.m. All members of the immediate family of the decedent shall be present. The administratrix shall also be present for this hearing;

4. The accounting of; the administratrix shall be approved with the exception of fees for a private investigator and court filing fees, which shall be borne by the administratrix;

5. Upon completion of the hearing of "needs" of the heirs, the court will enter an order releasing the estate assets to those to whom they were distributed;

6. Those assets distributed to Lloyd Apachee shall be managed by Rebecca Jim as the guardian of the property of her child, invested in an interest-bearing account or security, and no money shall be withdrawn and spent by her without the prior leave of the court, which may be granted informally.

SO ORDERED

[REDACTED]

WINDOW ROCK DISTRICT COURT

October 18, 1983

No. WR-CR-1682-81

[REDACTED]

THE NAVAJO NATION, Plaintiff, v.

BENSON LEE, Defendant.

Honorable Tom Tso, Judge presiding.

The foregoing opinion is late by (2) two years because the case was inadvertently misplaced within the office and was recently found. The Court apologizes for the delay.

STATEMENT OF THE CASE

This is a criminal case in which the defendant is charged with the offense of threatening in violation of 17 N.T.C. Sec. 310. The complaint correctly cites the applicable code section and goes on to indicate the offense was committed one mile south on Navajo Routh 12, Navajo, New Mexico and that the facts of the offense were as follows:

"He threatened by word and conduct to cause physical injury to the person of another namely, Mailman, Adrian Police Officer, Navajo Division of Public Safety, Window Rock, Arizona." (Sic.)

(The signature on the complaint makes it clear the assault was not on a mailman but upon Officer Adrian Mailman).

The applicable portions of the statute which fit the factual allegations of the complaint would be:

"A person commits threatening if he or she threatens by word or conduct to cause physical injury to the person of another..."

(1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person;" 17 N.T.C. Sec. 310.

The defendant complains that the complaint was so ambiguous as to not give the defendant fair notice of the charge against him. The prosecution responds by asserting the complaint sufficiently describes the offense.

The legal issue is joined on the question of the adequacy of the complaint.

THE CONSTITUTIONAL STANDARD

Since the Constitution of the United States is not applicable to

[REDACTED]

Indian Nations, the source of the "constitutional" right of defendant to "be informed of the nature and cause of the accusation" is the Navajo Bill of Rights 1 N.T.C. Sec. 6, and the 1968 Indian Civil Rights Act, 25 U.S.C. Sec. 1302(6). The standard contained in those statutes is the same as that of the Sixth Amendment to the Constitution of the United States. Therefore we may look to prior Federal court interpretations of that article for guidance as to the application of the Navajo Bill of Rights and the Indian Bill of Rights.

The first United States Supreme Court discussion of this particular part of the Sixth Amendment is contained in an 1833 decision, where the court stated "the offense must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime with which he stands charged." United States vs. Mills, 7 Pet. 138, 8 L.Ed. 636 (1833). Later, in 1896, the Court stated:

"A defendant is informed of the nature and cause of the accusation against him if the indictment contains such description of the offense charged as will enable him to make his defense and to plead the judgment in bar of any further prosecution for the same crime." Rosen v. United States, 161 U.S. 29, 40 L.E. 606 (1996).

There are two legal standards developed by these cases. The first is geared to giving the defendant a fair opportunity to prepare for trial and assist in his defense, and the second is designed to give the defense of double jeopardy meaning. If the complaint is specific as to the offense, time, place and facts, an acquittal on the offense charged can be used to prevent a future prosecution.

The constitutional right we are speaking of came from a time where there was no discovery in criminal cases and no "open file" practice by prosecutors as there is today in many jurisdictions. The purpose of the constitutional standard was to give criminal defendants enough information for a defense and to prevent surprises at trial. Therefore the constitutional standard calls upon prosecutors to prepare complaints which allege the basic parts of the statute creating the crime and sufficient facts fitting within the statute to enable the defendant and his defense attorney to prepare their case. A complaint which does not allege all the basic parts of the statute creating the crime is inadequate on its fact and therefore defective and subject to a dismissal as is the case in this matter.

O R D E R

Therefore, it is HEREBY ORDERED that the complaint against the Defendant be and is hereby dismissed on being defective.

It is FURTHER ORDERED that the cash bond of \$100.00 posted by the Defendant be returned to him immediately.

SO ORDERED.

[REDACTED]

WINDOW ROCK DISTRICT COURT

October 26, 1983

No. WR-CV-72-83

[REDACTED]

ANDERSON PETROLEUM SERVICES, INC.
An Oklahoma Corporation, Plaintiff, v.

CHUSKA ENERGY AND PETROLEUM COMPANY,
A New Mexico Corporation, Defendant.

Honorable Tom Tso, Judge presiding.

STATEMENT OF THE CASE

This is a case where the plaintiff received in their favor a Journal Entry of Judgment from the District Court in and for Payne County, State of Oklahoma on February 4, 1983. Plaintiff is now asking this Court to declare the Oklahoma court order a valid judgment and to enforce the judgment through full faith and credit or comity. The Plaintiff is also asking, in addition to the total amount of the Oklahoma judgment, reasonable attorney fees and cost earned or incurred in the Payne County District Court action.

The Defendants argue that this Court should reject the Oklahoma court order and not declare it a valid judgment and that full faith and credit for the judgment should be denied.

The questions this court must deal with are:

(1) Whether this court should give full faith and credit to judgment of other states courts? (2) Can and should this court enforce the Oklahoma state order utilizing the doctrine of comity?

THE ISSUE OF FULL FAITH AND CREDIT

Assuming that a state had proper personal jurisdiction over the parties, the subject matter involved, and all due notices have been met and a judgment was properly issued. Under the circumstances, therefore, can this court give that judgment the same faith, credit, conclusive effect and obligatory force as it had by law or usage in the state from which it was granted? To answer this question we must first decide where this statutory clause regarding such authority derived from.

Full faith and credit is a clause of the Constitution of the United States at Article IV, Section 1, which requires that a foreign judgment be given such full faith and credit as it had by law or usage of the state of its origin.

Basically, this provision of the United States Constitution requires that one state shall give full faith and credit to the judgment of its sister state. The ultimate question presented now is, can the Navajo Courts give full faith and credit to the judgment of another state.

The Navajo Court of Appeals dealt with this same issue in the case of, In the Matter of the Guardianship of Katherine Denise Chewiwi, 1 Navajo Reporter 120, (1977). In particular, the court in the Chewiwi case dealt with the issue of whether the concept of full faith and credit is applicable to the relationship between courts of different Indian Tribes.

In the Chewiwi case the Court in discussing the concept of full faith and credit concluded the Navajo Nation and the Isleta Pueblo stand beyond the bounds of this rule of law, since it presently exists and governs the constitutional relationship of the States of the United States. Id. at 124. The Court went on to say the Indian Nations and Tribes were not signatories to the U.S. Constitution and were not intended to be included with the scope of the mandate of Article V, Section 1. Nor does Title 28, U.S. Code, Section 1738, which was written to effectuate the mandate of Article 4, Section 1, provide a clear guidance to the relationships between Indian Courts. Id. at 125.

Fortunately, the courts of appeals in the Chewiwi case also discussed the case of Jim v. CIT, 533 P. 2nd, 751, decided by the Supreme Court of New Mexico and also the effects of 28 USC, Section 1738 on Indian Courts. Basically, that is the same argument raised by the Plaintiff in this instant case. In answering the presented issues, the court stated in their opinion a careful reading of the Jim v. CIT decision will show that the real issue presented by the facts of that case related to the conflicts of law doctrine. The New Mexico Supreme Court determined that, pursuant to New Mexico's uniform commercial code, parties to a contract may determine which law, given the applicability of more than one, shall govern. Id. at 125.

Finally, the Court of Appeals concluded that 28 U.S.C. Section 1738, does not purport to govern the relationship between Indian courts. The constitutional provision upon which it is based did not envision Indian courts being in existence nor did the act itself. The status of the decision of Indian Courts is generally determined not in relations to "full faith and credit" but to the concept of the exclusive jurisdiction of each Indian court over certain matters, statutory federal law and U.S. Supreme Court decisions. Id. at 126. On September 22, 1983, the district court for the District of New Mexico in Platero, et. al. v. Platero, Navajo Tribe, et. al., CIV No. 83-0952 stated that... "Indian Tribes are not" states,... territories or possessions" within the meaning of Section 1738A, therefore, the Navajo Courts are not required to give full faith and credit to the Mescalero Tribal Order." Brown v. Babbit Ford, Inc., 117 Ariz. 192, 571 P. 2d 689 (1976); Contra, Mackey v. Coxe, 59 U.S. (18 How.) 100 (1855); Raymond v. Raymond, 83 F. 721 (8th Cir. 1897); Jim v. CIT Financial Services Corp., 87 N.M. 362, 533 P. 2d 751 (1975); F. Cohen, Handbook of Federal Indian Law, 145, 172 (1942); Ragsdale, Problems in the Application of Full Faith and Credit for Indian Tribes, 7 N.M. L. Rev. 133 (1977)." Such question as presented to the federal court on the issue of full faith and credit therefore was left unanswered.

Therefore, this court cannot give full faith and credit to the Oklahoma court order based on the "full faith and credit" clause of the U.S. Constitution Article IV, Section 1.

THE ISSUE OF COMITY

The court having discussed the issue of full faith and credit now comes to the second question which is whether or not this court can or should give enforcement to the Oklahoma court order based on the doctrine of comity?

Comity is a willingness to grant a privilege, not as a matter of right, but one of deference and good will.

In the Chewiwi decision the Navajo Court of Appeals ruled that when decisions of any state or Indian Courts is presented to the Courts of the Navajo Nation for enforcement the applicable disposition is one of comity.

Finally, the court stated that Navajo Courts will honor and enforce foreign judgments upon consideration of the rights of the foreign court to issue the judgment, of the propriety of the proceedings and of any relevant public policy of the Navajo Nation.

Essentially, the Court of Appeals gave a check list to the Navajo Courts to utilize in deciding whether it should enforce a foreign judgment. In the instant case the court will utilize the check list by first making some findings pursuant to the testimony and evidence adduced at the hearing on October 6, 1983, as follows:

1. Plaintiff Anderson Petroleum Services, Inc. is a corporation duly authorized under the laws of the State of Oklahoma with their principal offices at Stillwater, Oklahoma.
2. Defendant, Chuska Energy and Petroleum, Co. Inc., is a corporation duly authorized under the laws of the State of New Mexico, its registered office at Tohatchi, within the Navajo Nation and a suboffice in Albuquerque, New Mexico.
3. The parties entered into an agreement whereby they agreed that the Plaintiff would do an environmental impact study over one hundred and sixtyseven (167) acres of land on the Navajo Reservation and Defendant would pay Plaintiff One dollar and Fifty cents (\$1.50) per acre.
4. The agreement was signed by the Plaintiff in Houston, Texas, on the 28th day of July, 1982. The agreement was subsequently signed by the Defendant in Denver, Colorado.
5. The agreement provides that in the event of any disputes arising out of the agreement that the law of the State of Oklahoma will be controlling and any dispute will be interpreted in light of the laws of the State of Oklahoma.
6. On the 8th day of November, 1982, Plaintiff filed a breach of contract action against the Defendant in the District Court at Payne County, State of Oklahoma.
7. Due to the distance involved, Plaintiff attempted to perfect service of process on the defendant through registered mail. The registered mail was received by the sister of the president of defendant. The sister who signed for the registered mail had no connection whatsoever with defendant's company.
8. On December 8, 1982, Defendant filed a special appearance through their Oklahoma counsel and also filed a Motion to Quash the service of process and a Motion to Dismiss for

[REDACTED]

lack of jurisdiction. In said action defendant alleged that the State of Oklahoma had no personal jurisdiction over the corporation.

9. On January 6, 1983, Plaintiff Anderson filed a reply to defendant's motion.

10. On January 14, 1983, Plaintiff Anderson filed a Motion for Summary Judgment based upon the pleadings and an affidavit of Kenneth E. Anderson, President of Anderson Petroleum Services, Inc., along with a brief in support of their motion.

11. On January 25, 1983, Defendant filed its answers to the petition as well as its objection to the Motion for Summary Judgment.

12. On February 4, 1983, the matter came before the Payne County District Court. The Honorable Ray L. Wall, heard arguments of counsel and testimony of witnesses and granted a Summary Judgment in Plaintiff's favor.

13. On February 10, 1983, an affidavit from the Defendant was filed together with a Motion to Vacate Summary Judgment.

14. On March 24, 1983, the Plaintiff filed a notice of its intent to take a disposition of Lawrence R. Manuelito on April 1, 1983, which apparently was not done due to Mr. Manuelito's failure to appear for the disposition.

15. On March 29, 1983, the court entered an Ex Parte Order vacating the Summary Judgment dated February 4, 1983.

16. On April 8, 1983, another hearing was set in the Payne County District Court, wherein the court vacated its order dated March 29, 1983, and reinstated the judgment of February 4, 1983. The Court specifically provided for in its order that it would reconsider defendant's Motion to Vacate Judgment at such time as Chuska's president, Lawrence R. Manuelito would appear for trial.

17. It has been brought to the attention of the court that Mr. Manuelito failed to appear for the hearing on advise of counsel.

18. When Mr. Manuelito never appeared for deposition Plaintiff moved on June 23, 1983, to have a final judgment entered by the Payne County District Court.

19. On July 8, 1983, pursuant to notice, the Payne County District Court held another hearing at which time the parties appeared through counsel. Following this hearing and over the objections of the Defendant, a Journal Entry of Judgment was entered confirming the February 4, 1983, judgment as the final judgment.

20. Defendant took no further action on this matter nor did it appeal to any subsequent superior court in the State of Oklahoma.

The court in considering the right of the foreign court to issue a judgment must first of all consider whether the State of Oklahoma obtained personal jurisdiction over the defendant.

The testimonies presented at the hearing before this court showed

that the alleged service of process on Mr. Manuelito on November 15, 1982, was received by another person having no connection with the company and in essence was not obtained by Mr. Manuelito himself. This presents a problem as to whether or not service was proper.

The Court in considering the propriety of the proceedings that took place in the foreign court must consider whether the proceedings were proper. The record shows that the defendant filed a special appearance, and a Motion to Quash for lack of jurisdiction. Their motions apparently were not considered by the foreign court and their pleadings were ignored for some reason. This court feels that since that motion raised an objection on personal jurisdiction, at the least it should have been given some consideration towards the pleadings rather than ignoring it. Therefore, the Court finds some impropriety as to the proceedings within the foreign court.

Lastly, the court has to take a look at the relevant public policy of the Navajo Nation. Certainly the Navajo Nation's policy is not to encourage people to breach oral contracts or written contracts. It is against the Navajo policy for people to literally breach their contracts. Thus, the Plaintiff may have a case for breach of contract which has to be proven at trial.

Therefore, based on the foregoing, this court declines to enforce the Oklahoma judgment by the doctrine of comity.

O R D E R

IT IS THEREFORE ORDERED that the court hereby denies to give full faith and credit to the Oklahoma judgment in this case.

IT IS FURTHER ORDERED that the court will decline to enforce the Oklahoma judgment based on the doctrine of comity.

IT IS FURTHER ORDERED that the matter pending before this court be and is hereby dismissed.

IT IS FURTHER ORDERED that the writ of garnishment issued by this Court on the 2nd day of February, 1983, be and is hereby quashed and dismissed.

SO ORDERED.

WINDOW ROCK DISTRICT COURT

November 4, 1983

No. WR-CV-21-83

THE NAVAJO NATION, ex rel.
DIVISION OF SOCIAL WELFARE,

IN THE MATTER OF THE INTEREST OF:
J.J.S., A Minor.

Honorable Tom Tso, Judge presiding.

STATEMENT OF THE CASE

This is a case involving a minor child who is seriously neglected by his mother. The father of the child is unknown. As a result of the mother's severe neglect of the child her parental rights have been terminated pursuant to law. Upon termination of parental rights the natural mother expressed her desire that her child be adopted by Mr. and Mrs. Dan and Helen Chee.

A petition for adoption is also pending before this court on the above named minor child filed by Mr. and Mrs. Johnny and Patricia Stephens. Mr. and Mrs. Stephens are not members of the Navajo Tribe.

The social workers submitted an excellent home investigation report and recommendation. They have determined that both families are fit to raise the minor child. Mrs. Chee is a cousin to the child's natural mother and therefore a member of the extended family of the natural mother and resides in Pine Dale, New Mexico within the jurisdiction of the Navajo Nation.

The Court is confronted with the issue as to who should be appointed adoptive parents of this minor child since the two couples petitioning to adopt the child are both fit.

APPLICABLE LAW

The first thing this court must do is find which law applies in this case.

The trial court of the Navajo Nation has original jurisdiction over all cases involving the domestic relation of Indians, such as divorces, or adoption matters. 9 NTC Section 1001, et. seq.

The Navajo Tribal Code gives the Court a choice of law to use in a given case.

7 NTC Section 204, Law Applicable In Civil Actions,

- a. In all civil cases the Courts of the Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or custom of the Tribe not prohibited by such federal laws.

The law is very clear if there is an applicable custom of the Tribe not prohibited by federal laws then the court can apply those customs including any ordinances of the Navajo Tribe.

NAVAJO COMMON LAW DEFINED

This Court in its decision in the case of the Estate of Apache, WR-CV-197-82, 1983, Window Rock District Court. Pronounced its preference for the term "Navajo Common Law" rather than "custom" for the reason that it is not widely understood that the customs and tradition of the Navajo people are law, and the English term is used because it more accurately reflects our custom as law. The word "custom" for the purpose of the statute not only includes customs which may be testified to, noticed, proved by expert testimony or otherwise shown by evidence, but it includes recorded opinions and decisions of the Navajo Courts (not dealing with statutory interpretation or the application of principles of state or general Anglo-European Law), and some learned treatises on Navajo ways, Id.

AMERICAN LAW ON ADOPTION

There are laws of the United States which this court can use in ruling on this case including the Indian Child Welfare Act, (1978). This court can apply those federal laws in absence of a Navajo Custom which is not prohibited by federal law. Fortunately, there is a Navajo custom that this court is aware of and can apply in deciding the issue in this case.

Adoption is a legal process by which the law makes a substitution of parents for a child and terminates the parent and child bond with the natural parents, at least legally speaking. The adoption process requires the termination of the legal bond with the natural parents because of the idea that there can only be one parent and child relationship at any one time. Clark, The Law of Domestic Relations in United States, Section 18.1, P. 602, (1968).

An important point about Anglo-European adoption law is that it is a law which is created only by statute, and it did not come to the United States Courts through the English common or customary law. Id. at P. 603. As a result, the current American Law of Adoption is recent and a product of modern American attitudes. There has also been a history of hostility towards the law of adoption in American Courts, possibly due to the fact that it was not created over a long period of time by the courts to fit the needs of those who have come before them. Id.

NAVAJO COMMON LAW ON ADOPTION

The American Law of Adoption thinks in terms of duties. Natural parents have duties towards their children, and when those duties are breached, then the law will take the children away from the natural parents and give them to other parents. Navajo concepts are different and the following description has been made of Navajo legal attitudes towards family relationship.

"Navajos believe that each person has a right to speak for oneself and to act as one pleases. The mutual rights and duties of kinsmen normally discussed under the concept of the jural relations are best described as mutual expectations, rather than obligations. This distinction is a matter of emphasis and decreeing, but it is very real and worth nothing. Desirable actions on the part of others are hoped for and even expected, but they are not required or demanded. Coercion is always deplored." Witherspoon Navajo Kinship and Marriage, pages 94-95, (1975).

Therefore, the Navajo view of the relationship of children to parents is not one of a simple parent and child relationship, but an entire pattern of expectation and desirable action surrounding children. Opinion of Court Solicitor, 83-10 (1983).

A central concept of child rearing in Navajo society should be grasped before there is any discussion of the Navajo Common Law of Adoption. One description of that concept is:

"The Navajo people identify themselves as 'Dine', which means the people. The term is simply an expression of native pride or a message that conveys many things which are central in native feelings. One of the most important societal values included in this natural native feeling is the attitude towards children, they are highly valued and wanted. The basis for the Navajo life ethics was that the original parents of the first human infant pronounced a death penalty on any creator or being who mistreated the first child. This act or behavior would devalue or humiliate the supernaturals with whom the first human baby was identified. Therefore, in the Navajo religious context inhumane cruelty to children was prohibited." Navajo Child Rearing Concept, Child Abuse and Neglect - A Navajo Prospective, Navajo Children's Legal Services, Draft Section Of A Manual For Use In Child Welfare Services, (1983).

The Navajo Common Law principles of the expectation that children are to be taken care of and that obligation is not simply one of the child's parents. The Navajos have very strong family ties and clan ties.

The term adoption is used by Navajo commentators on Navajo Common Law but it is used in a different sense than that used in Anglo-European adoption statutes:

"Orphans of Navajo families or children of large families or broken homes are adopted by other family members or a family member of the same clan as the child." Carl N. Gorman, The Navajo Nation Is Made Up Of Many Conference, (1980); Published in Dine' Center For Human Development For Generations To Come, (1982).

Many Navajo adoptions have a different focus than Anglo-European law. As such, it is not principally concerned with the exchange of legal parents.

"Navajo adoption is based on need, mutual love and help. Children may or may not change the surname. Either way the family is a unit with strong, supportive, extended family and clan ties. It has worked for hundreds of years without adoption agencies and courts of law." Id.

Another distinctive aspect of Navajo adoption is that it is not necessarily permanent.

"Adoption is merely a case of taking the children into the home for a limited time, or permanently, by extending family or parental agreement, depending on the circumstances. The child is raised and treated as ones own. Grandparents are sometimes the ones to take in and raise the young children belonging by birth to their own deceased or unwed children or other related family members. Id. In Navajo Common Law a child is said to be born for his father's clan and a member of his mother's clan. This means that the child is an integeral part of a functioning self-reinforcing and protecting group. Anglo-European law is primarily concerned with immediate parent and child relationship while Navajo Law is concerned with the relationship of a child to a group which shares the expectation that its members will take care of each other's children." Court Solicitor's Opinion, 83-10, (1983).

The correct statement of the Navajo Common Law of adoption is that there is an obligation in family members, usually aunts or grandparents or a family member, who are best suited to assist the child to support and assist children in need by taking care of them for such periods of time as are necessary under the circumstances, or permanently in the case of a permanent tragedy effecting the parents. The Navajo Common Law is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because those concepts are irrelevant in a system which has obligation to children that extends beyond the parents. Therefore, upon the inability of the parents to assist a child or following the occurence of a family tragedy, children are adopted by family members for care which maybe temporary or permanent, depending upon the circumstances. The mechanism is informal and practical and based upon community expectation founded in religious and cultural belief. Opinion of the Solicitor to the Courts of the Navajo Nation, No. 83-10, September 9, 1983.

NAVAJO STATUTES ON ADOPTION

The Navajo Tribal Council is presumed to have had the common law as discussed above in mind when it enacted the following statutes recited in the Opinion and Order of this Court, In the Matter of the Estate of Boyd Apache, Cause No. WR-CV-197-83, October 11, 1983, (Citation omitted.):

1. 9 NTC Section 1256, states that after terminating the rights of parents, the court may place the child for adoption under applicable laws and regulations. (Emphasis added).

2. 9 NTC Section 1192, states: "In placing the child under the guardianship or legal custody of an individual or of a private agency or institution, the court shall give primary consideration to the welfare of the child but, whenever practical, may take into consideration the religious preferences of the child and of his parent."

3. 9 NTC Section 1001 states that family ties should be preserved and strengthened whenever possible.

4. 9 NTC Section 1197 states that the court may make any other reasonable orders which are for the best interests of the child or are required for the protection of the public.

5. 9 NTC Section 615 expresses the policy of the Navajo Tribe in regards to the adoption of Navajo children, to wit:

(a) The Navajo Tribal Council favors the formal adoption of Navajo children in accordance with the provisions of this chapter in all cases where the parents of such children are dead, or where such children are regularly and continuously neglected by their parents, or where the parents have abandoned such children. The Tribal Council looks with disfavor upon informal arrangements for the custody of such children except for temporary periods pending their formal adoption. (b) In the case referred to in subsection (a) of this section the Navajo Tribe neither favors nor disfavors adoption of Navajo children by parents who are not members of the Navajo Tribe but states as its policy that each case shall be considered individually or on its own merits by the Tribal Court of the Navajo Tribe.

CONCLUSION

In conclusion, the court rules that an extended family member of the child and the natural mother has stepped forth and recognized and assumed her responsibility and obligation to care for a child who is severely neglected by the natural mother. The Social Services report as well as testimonies at trial also reveal that the home is a fit and appropriate place for the child to be raised and that it is in accordance with the Navajo Common Law and therefore it should grant adoption to that member of the extended family. A Findings of Fact and an Order to this effect will follow forthwith, which is incorporated into this Opinion by reference.

SO ORDERED.

[REDACTED]

WINDOW ROCK DISTRICT COURT

December 8, 1983

NO. WR-CV-602-83

[REDACTED]

IN THE MATTER OF VALIDATING THE
MARRIAGE OF:

ROSE M. GARCIA, and ALFRED GARCIA,
(Deceased)

Honorable Tom Tso, Judge presiding.

The above entitled matter having come before this court on the petition for validation of marriage; the question presented by the petition is whether the court can validate a marriage between a member of the Navajo Tribe and a non-member of the Navajo Tribe, who is also now deceased; apparently the parties were married on April 3, 1959, through a Navajo Traditional Wedding Ceremony and as a result of this union four (4) children were born; Petitioner and decedent were recognized as husband and wife in their community of Tsayatoh Chapter on the Navajo Reservation.

Marriages between Navajos and non-Navajos may be validly contracted only by the parties' complying with applicable state or foreign law. 9 NTC Section 2, Mixed Marriage, (emphasis added).

All purported marriages of members of the Navajo Tribe not contracted by church, state or Tribal custom ceremony as defined by the resolution of the Tribal Council, wherein such members were or are recognized as man and wife in their community, are validated and recognized as valid Tribal custom marriages from the date of their inception. 9 NTC Section 61, Validation of Marriage, (emphasis added).

The language in 9 NTC Section 2 and 9 NTC Section 61 is very clear that this court is without authority to validate marriage between a member of the Tribe and a non-member of the Tribe.

THEREFORE, IT IS HEREBY ORDERED that the petition to validate marriage filed in this cause be and is hereby denied.

SO ORDERED.

WINDOW ROCK DISTRICT COURT

December 9, 1983

NO. WR-CV-300-82

IN THE MATTER OF THE ESTATE OF:
BEN TSOSIE, Deceased.

Honorable Tom Tso, Judge presiding.

This is a probate action in which an issue is raised as to whether a life insurance policy is community property; whether the appointment of decedent's brother as the beneficiary of the entire life insurance was proper and legal; and whether the silence of the surviving spouse and children when decedent announced to the family that he had appointed his brother beneficiary of the entire life insurance policy was a waiver of all rights that the surviving spouse and his children has to said life insurance proceeds.

1. Decedent, Ben Tsosie died intestate on March 1, 1982, at the University of New Mexico Hospital, Albuquerque, New Mexico.

2. Decedent upon his passing left a widow, two (2) sons and three (3) daughters.

3. Prior to the death of Ben Tsosie, he was or had been employed by the Navajo Tribe and carried a life insurance policy with a face cash value of \$30,000.00. The life insurance was obtained during the decedent's marriage to Tullie Chee Tsosie, C#67,543.

4. On or about September 25, 1981, decedent appointed his brother, Ben Joe Tsosie, as the named-beneficiary of his life insurance policy.

5. The premium paid on the decedent's life insurance policy was paid with income received by decedent during his marriage to Tully Chee Tsosie.

6. On December 25, 1981, Mr. Ben Tsosie came home and informed his family, i.e.: Tullie C. Tsosie, Wilson Tsosie, Susie Larson, Steven Tsosie; Isabel Tsosie, that he had appointed his brother, Ben Joe Tsosie, the named-beneficiary of his life insurance policy. Mr. Tsosie also talked about his death. The family did not respond in any way to his remark because according to the Navajo custom, death is not a pleasant thing to discuss.

7. Upon the death of the decedent, the National Republic Life Insurance Company paid out \$30,000.00 to Ben Joe Tsosie, the named-beneficiary.

8. Ben Joe Tsosie has spent the full \$30,000.00 for his personal uses and there is none left.

ISSUE #1

WHETHER OR NOT A LIFE INSURANCE POLICY OBTAINED DURING THE MARRIAGE AND THE PREMIUM PAID WITH INCOME RECEIVED BY HUSBAND DURING MARRIAGE IS A COMMUNITY PROPERTY.

In all civil cases the Courts of the Navajo Tribe shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the Tribe, not prohibited by such federal laws. 7 NTC Section 204(a), LAW APPLICABLE IN CIVIL ACTION.

Any matters that are not covered by the traditional customs and usage of the Tribe, or by applicable federal laws and regulations, shall be decided by the Courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie. 7 NTC Section 204(c), LAW APPLICABLE IN CIVIL ACTION.

According to the Navajo Laws all property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children while she lives separate and apart from her husband, is the community property of the husband and wife. 9 NTC Section 205, COMMUNITY PROPERTY - DEFINITION.

All goods, money, livestock, grazing permits and other real and personal property acquired by the husband and wife during their marriage are community property. On the death of a husband or wife, one-half of the community property goes to the survivor. The one-half is not a part of the probate estate, and cannot be willed away by the decedent. Rule 5, COMMUNITY PROPERTY, RULES OF NAVAJO PROBATE PROCEDURE. (Emphasis added).

When we deal with life insurance policy we are dealing with "money". Estate of Apachee, Opinion and Order, No. WR-CV-197-82 October 11, 1983 ... Citation omitted; Estate of Peshlakai, Opinion and Order No. WR-CV-304-82 (December 30, 1982), ... Citation Omitted.

A policy of life insurance whose premiums are paid out of the community property and which insures the life of the husband has been characterized as community property. 15A Am.Jur.2d, Community Property, Section 48 at 671-72.

Since the life insurance policy was obtained by the decedent during his marriage to Tullie Chee Tsosie and the premium on the life insurance policy was paid for with money earned during their marriage, the life insurance policy at issue before this court is a community property of Tullie Chee Tsosie and Ben Tsosie, decedent.

ISSUE #2

WHETHER THE SILENCE OF TULLIE CHEE TSOSIE TO DECEDENT'S ANNOUNCEMENT THAT HE HAD APPOINTED HIS BROTHER, BEN JOE TSOSIE, AS THE NAMED-BENEFICIARY ON HIS LIFE INSURANCE POLICY, CAN BE CONSTRUED AS A WAIVER TO HER RIGHTS TO THE COMMUNITY PROPERTY OF HERSELF AND HER LATE HUSBAND.

On December 24, 1981, approximately three months before his death, decedent came home and in the presence of his wife, two sons, (Wilson and Steven Tsosie) and two daughters, (Susie and Isabel Tsosie) talked about his death and that he has made his brother, Ben Joe Tsosie, named-beneficiary of his life insurance policy.

There was no response to the statement made by the decedent and no discussion took place between Mr. and Mrs. Tsosie regarding their community property rights at any length.

Mrs. Tsosie did not and never consented to her husband's appointment of his brother as beneficiary of the life insurance policy. When decedent made the statement on 12-24-81, he apparently had already made his brother the named-beneficiary.

On December 24, 1981, Mr. Tsosie was discussing what would happen upon his death. According to the Navajo custom death is not a proper and lively item to discuss. The testimony of the family member was that their sense of tradition prevented them from responding to Mr. Tsosie.

The law of waiver involves people giving up their rights. A waiver is "the voluntary and intentional relinquishment of a known right, claim or privilege." It is also "the intentional surrender of a known right or privilege, such surrender modifying other existing rights or privileges, or varying the terms of a contract." A very important element of the law of waiver is that it means someone giving something up they have a right to, and it is "a voluntary act and implies election by a person to dispense with something of value or forego some right or advantage which he might at his option have demanded and insisted upon." A waiver is not simply someone signing off on document or making an easy agreement to give something up. It requires (1) a distinct waiver of a right; (2) full knowledge of the right which is given up; (3) the fact the person giving the thing up knows his rights; (4) a plain appearance that the person intends to give up the rights; and (5) a voluntary and intentional surrender of rights. Wyaco v. Wyaco, Opinion and Order No. WR-CV-134-82, Window Rock District Court, (March 23, 1983) ... (Citation Omitted).

A waiver must be knowing and intentional. It requires one giving up a right and another having the benefit of that surrender, and there must be a showing of the giving up of a right in an unequivocal manner with an intention which is understood by the parties. Finally there must be consideration or estoppel to support the waiver. One usually does not surrender a valuable right unless there is something received for it. Wyaco v. Wyaco, Opinion and Order No. WR-CV-134-82 (March 23, 1983) ... (Citation Omitted).

This court cannot stretch at any length to construe Mrs. Tsosie's silence to mean she waived her interest and right in her community interests.

According to Navajo law, Mrs. Tsosie has absolute right to one-half of the life insurance policy and the same is not even subject to probate. Therefore, \$15,000.00 of the life insurance policy rightfully belongs to Mrs. Tsosie.

ISSUE #3

WHETHER THE DECEDENT'S APPOINTMENT OF HIS BROTHER AS THE NAMED-BENEFICIARY OF THE WHOLE PROCEEDS OF THE LIFE INSURANCE WAS PROPER AND LEGAL.

The Court's discussion under Issue #1 and #2 has already implied that it is improper and illegal for decedent to dispose of his surviving spouse's portion of the community property. To that extent it is improper and not lawful for the decedent to appoint his brother the beneficiary of the whole life insurance policy.

[REDACTED]

The decedent's half of the life insurance policy, i.e. (\$15,000) is his and he can will it away or otherwise dispose of it at his will and to that end his appointment of his brother as beneficiary of life insurance policy may be proper.

ORDER

THEREFORE IT IS HEREBY ORDERED that judgment in the amount of \$15,000.00 is entered against Ben Joe Tsosie and in favor of Tullie Chee Tsosie.

IT IS FURTHER ORDERED that this Court will hear the claims of Na Glee Begay and Alexander Tso on the ____ day of _____, 1983, at ____ o'clock ____ .m.

SO ORDERED.









