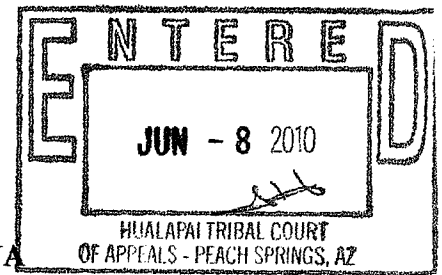


IN THE HUALAPAI COURT OF APPEALS
HUALAPAI RESERVATION, STATE OF ARIZONA



DEBORAH CLARK,
Appellant

v.

DUANE PARKER,
Appellee

Case No.: 2010-AP-001
Re: Case No. 2009-CV-009

OPINION AND ORDER

Before Justices Carole Goldberg, Pat Sekaquaptewa, and Wes Williams, Jr.

Opinion by Justice Goldberg, in which Justices Sekaquaptewa and Williams join.

OPINION AND ORDER

Appellant Deborah Clark appeals from a Minute Order entered on February 5, 2010, which maintained joint legal custody over two of their minor children, and reaffirmed existing child support orders. Appellant filed a Notice of Appeal on February 10, 2010, requesting that the Minute Order below be vacated or reheard for the following reasons: (1) the Tribal Judge erred in denying Appellant's request for "sole custody" over her two minor children, (2) the Tribal Court failed to increase the amount of child support owed by Appellee and order payments, and (3) Chief Judge Garcia should preside over this case due to her familiarity with the facts. The only error identified by this Court is the Tribal Court's failure to determine whether a wage assignment should be imposed on Appellee's new employer. This Court accordingly remands with respect to this issue, and affirms all others.

Statement of Relevant Facts and Procedural History

Since 2006, Appellant Deborah A. Clark ("Appellant") and Appellee Duane R. Parker ("Appellee") have been involved in an ongoing dispute over child support payments for their minor children. On February 9, 2006, Appellant filed a petition for child support for all three of their minor children under case number 2006-CV-026. On October 12, 2006, Tribal Court Judge Talayumptewa held a Child Support Hearing and ordered Appellee to pay \$100 per child per month, totaling \$300 per month in child support. On October 16, 2006, a wage assignment was issued to Appellee's employer to deduct the child support payments.

On February 25, 2009, Tribal Court Judge Honga held a Child Support Hearing and issued a Child Support Modification and Arrearages Order. The Tribal Court found that the eldest child had reached majority. The Tribal Court also determined that both parties can claim one remaining minor child as a dependent for state and federal income tax purposes and that Appellee owed \$3,150 in arrears. Appellee was ordered to pay \$100 per child per month and \$100 per month for arrears, totaling \$300 per month in child support. Judge Honga also issued a wage assignment order for \$150 to be deducted bi-weekly from Appellee's payroll.

During the fall of 2009, Appellant served jail time for a criminal conviction. Appellant consequently placed the two minor children with Kendra B. Welsh and Duran D. Parker, respectively, and sought to delegate parental rights through a power of attorney. While there is no record of the power of attorney, the Tribal Court recognized Ms. Welsh's authority to file a motion, requesting a child support hearing. In the August 26, 2009 motion, Ms. Welsh claimed that Appellee had been delinquent in making child support payments for one minor child for whom she was caring. Tribal Judge Garcia held a Status Hearing on October 28, 2009, and issued an Order on Status Hearing Regarding Child Support on October 29, 2009. The Tribal Court found that Appellee had made some payments to Ms. Welsh, but still owed \$3,150 in child support arrears. The Tribal Court also found that Appellee's wages had not been assigned due to an employee policy that Appellee's wages could not be garnished.

Judge Garcia ordered that Appellee continue to pay \$300 a month in total child support, with \$150 going directly to Ms. Welsh. The Tribal Court also granted Appellee permission to claim one of the minor children as his dependent for his 2009 federal and state tax returns, while Ms. Welsh was granted permission to claim the other child, for whom she was caring, on her tax returns. The Court also ordered: "The respondent (Appellee) shall pay child support through the registry of the Hualapai Tribal Court at P.O. Box 275, Peach Springs Arizona. Or in the alternative, initiate a wage assignment through his employer who will deduct the appropriate amount of money from the wages of the respondent (Appellee)." It is unclear whether a wage assignment was ever issued.

Also, on October 28, 2009, Appellee filed an Ex-Parte Petition, requesting sole custody of his two minor children. Appellee did not specify whether he was requesting sole legal custody, sole physical custody, or both. On November 18, 2009, Appellant submitted a Notice of Response to CV Petition, rebutting Appellee's allegations and requesting a custody hearing. Appellant's 2006 child support petition and Appellee's 2009 child custody petition were later consolidated under the case number, 2009-CV-059.

On January 20, 2010, Chief Judge Garcia held an Initial Hearing and issued two orders. In the Minute Order, the Tribal Court ordered that Appellant shall have "care and custody of one of the minor children pending the final hearing," while Ms. Welsh "shall have custody of [the other] until further order of the Court." In the Order for Reconsideration of Judgment entered on October 28, 2009, the Tribal Court found that Appellee was now in child support arrears of \$6,000. The Court consequently reconsidered its October 28, 2009 Order on Status Hearing Regarding Child Support, and denied Appellee's request to claim one of the children as a dependent on his 2009 tax returns.

On February 5, 2010, Tribal Court Judge Wilber held a Custody and Child Support Hearing. In a Minute Order, Judge Wilber noted that Appellee withdrew his petition for sole custody after hearing Appellant's witness testimony, which confirmed a safe home environment. Judge Wilber also found that Appellee needs to be consistent with child support payments, but is experiencing financial hardship. Judge Wilber ordered that the parties maintain "joint custody" of the children, that the children should remain at the placements as determined in the January 20, 2010 Minute Order, and that prior child support orders be affirmed.

On February 10, 2010, Appellant timely filed her Notice of Appeal, requesting that the February 5, 2010 minute order be vacated or reheard. Appellant has not filed any briefs in this case, but identified three grounds for appeal in her Notice of Appeal: (1) the Tribal Court erred in denying Appellant "sole custody" over her two minor children, (2) the Tribal Court failed to increase the amount of child support owed by Appellee and order payments, and (3) Chief Judge Garcia should preside over this case due to her familiarity with the facts.

On April 2, 2010, this Court held an oral argument hearing in this case. Appellant appeared *pro se*, and Appellee did not appear.

Issues for Review

1. Did the Tribal Court err in denying Appellant's request for "sole custody" of her minor children?
2. Did the Tribal Court properly respond to Appellant's requests for increased child support payments and for the wage assignment of Appellee's earnings?
3. Did the Tribal Court Judge err in presiding over this case?

Jurisdiction

The Hualapai Court of Appeals is a court of limited jurisdiction that may only review final judgments or orders of the Tribal Court in civil matters. *See* Law and Order Code § 10.2. Additionally, a written Notice of Appeal must be timely filed within five days after the appealed final judgment or order is entered. *See* Law and Order Code § 10.4. The Notice of Appeal must also provide the Appellee and the Court with sufficient notice of the basis for the appeal. *See* Law and Order Code § 10.5.

In the present case, Appellant appeals from a Minute Order that established the custody of her two minor children, and affirmed existing child support obligations. This Minute Order ended any foreseeable litigation in the matter, and consequently, constitutes a "final order." *See Paya v. Tribe*, 2009-AP-008 (Hualapai Ct. App. 2010). Appellant timely filed her Notice of Appeal on February 10, 2010, which was within five days of the appealed Minute Order entered on February 5, 2010. Appellant also set forth her grounds for appeal, which are listed above. Accordingly, Appellant has properly invoked the jurisdiction of this Court.

Discussion

1. The Tribal Court Did Not Abuse Its Discretion in Denying Appellant Sole Custody of her two Minor Children.

In her Notice of Appeal and at oral argument, Appellant argues that the Tribal Court wrongfully denied her “sole custody” over the two minor children. Black’s Law Dictionary defines “custody” as “involv[ing] legal custody (decision-making authority) and physical custody (caregiving authority).” Appellant does not specify if she requested sole legal custody or physical custody of her children. Because neither Appellant nor the Tribal Court has drawn this distinction, this Court reviews whether the Tribal Judge erred in denying Appellant’s request for both sole legal custody and sole physical custody.

Pursuant to Section 12.31 of the Law and Order Code, custody determinations require the Tribal Judge to establish a legal and physical custody arrangement that suits the “best interests of the child.” Due to the discretionary nature of custody decisions, the appropriate standard of review is abuse of discretion. *See Walker v. Tribe*, 2005-AP-009 (Hualapai Ct. App. 2007); *see also In re Marriage of Diezsi*, 201 Ariz. 524, 526 (2002).

A. The Tribal Court Did Not Abuse Its Discretion in Denying Appellant Sole Legal Custody over Her Two Minor Children

Legal custody refers to the authority of a parent to make significant decisions on a child’s behalf, including decisions about medical care, religious upbringing, and education. *See Black’s Law Dictionary* (8th ed. 2004). Hualapai written law and common law do not provide a standard for determining when sole legal custody is in the “best interests of the child” in a child custody dispute. This Court consequently looks to other jurisdictions for guidance on this issue.¹

Most states in the United States have a preference for joint legal custody or have instituted a presumption that joint legal custody is in the “best interests of the child.” *See, e.g., Kay v. Ludwig*, 12 Neb. App. 868 (2004). Joint legal custody is customary in many jurisdictions because it provides both parents with the ability to make critical decisions on behalf of their children, such as being able to take one’s child to a hospital in the event of an accident. In fact, this preference is suggested in Section 13.32 of the Law and Order Code, which requires the Tribal Court to make a finding that a parent is unfit, has abandoned the child, or fails to provide proper parental care and protection before terminating parental custody in juvenile court. This Court accordingly finds it appropriate to employ a preference for joint legal custody here.

In the present matter, Appellant did not present any evidence to overcome a preference for joint legal custody. At the Custody and Child Support Hearing on February 5, 2010, Appellant did not offer any evidence indicating Appellee’s unfitness as a parent. In fact,

¹ Section 3.1(D) of the Law and Order Code provides: “As to any matters that are not covered by the Tribal Constitution, codes, ordinances or resolutions of the Tribe or by Tribal Common Law or by applicable federal law or regulation, the Tribal Court may be guided by common law as developed by the other Tribal, federal or state courts.”

Appellant did not even allege that Appellee was unfit as a parent. Because Appellant failed to present evidence indicating that joint legal custody was not in the “best interests” of her children, the Tribal Judge properly denied Appellant’s request for sole legal custody over the two minor children.

B. Appellant Has Primary Physical Custody over Her Two Minor Children

Physical custody refers to the right of a parent to have a child live with him or her. *See* Black’s Law Dictionary (8th ed. 2004). As Appellant mentioned at oral argument, in 2005, Tribal Court Judge Ray granted Appellant “primary custodial guardianship,” or in other words, primary physical custody over her children. Primary physical custody means the child physically resides with, and spends the great majority of time with one parent who is designated as the primary physical custodian. The other parent has visitation rights and privileges. For example: the non-custodial parent may have visitation at least every other weekend, one evening during the off week, alternate holidays and some block time for vacation periods. Non-custodial arrangements vary with each set of circumstances.

One parent having primary physical custody and the other having visitation rights is different from one parent having sole physical custody. Sole physical custody is very seldom granted by the court. Usually, the term is used when one parent is completely out of the child’s life, such as in prison, or in circumstances that contact with the non-custodial parent would expose the child to physical danger or abuse. Sole physical custody does not automatically mean that the non-custodial parent has no visitation rights. The court may grant one parent sole physical custody and grant the non-custodial parent specific visitation. The term sole physical custody is most often combined with sole legal custody which then grants one parent the complete control over making all the decisions for the child without any input by the non-custodial parent. However, sole physical custody may also be combined with joint legal custody. In that case, although one parent has the child solely in their physical custody, the important decisions for the child are made with input by the non-custodial parent.

During the fall of 2009, Appellant placed one of the minor children with Kendra B. Welsh and placed the other with Duran D. Parker. Appellant made these respective placements so that her children would be cared for while Appellant served jail time for a criminal conviction. In making these placements, Appellant sought to temporarily delegate her parental powers to Ms. Welsh and Mr. Parker by giving them power of attorney over her children. It is not necessary for this Court to determine whether Appellant properly executed a power of attorney. Appellant’s personal delegation of parental powers to a third party does not and cannot alter the underlying legal and physical custody rights of the parents. Any modifications to existing physical custody rights require court intervention to ensure that these changes are in the “best interests of the child.” *See* Law and Order Code § 12.31. As a result, Appellant did not transfer her physical custody rights to Ms. Welsh and Mr. Parker when she sought to execute a power of attorney.

Additionally, Appellant’s physical custody rights may not be terminated without a finding that she is unfit, has abandoned her children, or fails to give her children proper parental care and protection. *See* Law and Order Code § 13.32. The Tribal Court has never made such a determination, and consequently has no authority to give a third party physical custody of her

minor child. To the extent that the January 20, 2010 and February 5, 2010 Minute Orders purport to confer physical custody of one of the minor children to Ms. Welsh, the Tribal Court acted improperly. However, at oral argument, Appellant stated that this child has been returned to her care, rendering inquiry into the propriety of the Tribal Court's actions moot.

This Court accordingly affirms the Tribal Court's decision to maintain joint legal custody over the minor children. This Court also finds that since Appellant was granted "primary custodial guardianship" in 2005, Appellant has had and continues to possess primary physical custody over her two minor children. No basis has been presented to grant Appellant's request for sole physical custody over her children.

2. The Tribal Court Made a Proper Child Support Determination, but Erred in Failing to Respond to Appellant's Request for a Wage Assignment Order

Appellant alleges that the Tribal Court failed to increase the amount of child support owed by Appellee and order payments. Appellant consequently requests that this Court mandate those actions. This Court may only compel Tribal Court action, where the Tribal Court has failed to perform or has improperly performed a mandatory duty. Tribal Courts are required to respond to the requests and motions brought before them. In the event that no response is made, this Court may order the Tribal Court to issue a response. The Tribal Court however retains its discretion to determine whether to grant or deny the request.

Here, Appellant claims that the Tribal Court did not respond to two of her requests: (1) to increase the child support payments owed by Appellee, and (2) to issue a wage assignment order on Appellee's employer. These two claims are addressed in turn.

A. The Tribal Court Made a Proper Child Support Determination

Reaffirming the prior child support orders is responsive to Appellant's request for increased child support payments. This determination merely constitutes a denial of Appellant's request for an increase in the amount of monthly child support.

Additionally, the Tribal Court's reaffirmation of the prior child support orders is within the discretion of the Tribal Court. Tribal Judges are afforded vast discretion to adjudicate child support disputes. *See* Law and Order Code § 12.21. Upon consideration of all relevant factors, the Tribal Judge may order a parent "to pay an amount reasonable and necessary" in child support. The Tribal Judge may consequently find, in her discretion, that the existing child support orders in this case already require Appellee to pay an appropriate amount of child support. This decision is particularly reasonable as Judge Garcia had recently made a child support determination on January 20, 2010, approximately two weeks prior. The pre-existing child support orders also clearly set forth the child support obligations of the parties:

The February 25, 2009 Child Support Modification and Arrearages Order requires Appellee to pay \$300 a month in child support (\$200 in child support for [the two minor children] and \$100 towards his arrearages) and allows each parent to claim one child as a dependent for federal and state income tax purposes.

The January 20, 2010 Order for Reconsideration of Judgment entered on October 28, 2009 determined that Appellee owes \$6,000 in arrears, and prohibits Appellee from claiming a child as a dependent for the 2009 tax year.

Accordingly, the Tribal Court's decision to reaffirm these prior child support obligations is responsive to Appellant's request for a child support determination. The Tribal Court's decision also reflects a proper exercise of discretion.

B. The Tribal Court Failed to Respond to Appellant's Request for a Wage Assignment Order.

According to the record, the Tribal Court has not responded to Appellant's request for the issuance of a wage assignment order against Appellee's employer. At oral argument, Appellant stated that Judge Wilber said that she would discuss the matter with Judge Garcia and issue a response. The February 5, 2010 Minute Order, however, does not include a decision on whether a wage assignment would be ordered. Because Judge Wilber is legally required to respond to Appellant's request, this Court remands with respect to this issue and orders the Tribal Court to make a determination on whether to issue a wage assignment order directed to Appellee's employer.

This Court also notes that wage assignment orders are governed by Section 12.25 of the Law and Order Code. The record indicates that past wage assignment orders in this case have not always complied with the requirements of Section 12.25, which provides in relevant part:

In the event a person obligated to pay child support is behind in payments for at least two months, the Court may order the person obligated to pay child support to make an assignment of a part of his periodic earnings or any trust income to the person entitled to receive the payments. . . . The assignment is binding on the employer, trustee, or other payor of the funds two weeks after service upon such person of notice that the assignment has been made. The payor shall withhold the earnings or trust income payable to the person obligated to support the amount specified in the assignment and shall transmit the payments to the Clerk of the court.

Law and Order Code § 12.25 (emphasis added). This Court reminds the Tribal Court of this statutory language, noting in particular that the Tribal Court must serve the wage assignment order on the employer, trustee, or other payor of funds.

3. The Trial Judge Did Not Err in Presiding over This Matter

In her Notice of Appeal, Appellant makes a request for "Judge Garcia to preside over this case for the facts (sic) that she has been with the case since it originated and is familiar with the issues which were not addressed on the above date." Appellant has never asked Judge Wilber to recuse herself from this case, but instead, raises this issue for the first time on appeal. In *Selena v. Hualapai Tribe*, 2008-AP-005 (Hualapai Ct. App. 2008), this Court found that a motion to

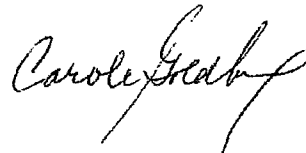
recuse, when not timely made, would not be reviewable unless the recusal charge was so substantial that it amounted to “plain error.” Plain error is a mistake by the Tribal Court that seriously prejudices substantial rights. A plain error must be corrected in order to prevent a miscarriage of justice and to preserve the integrity and the reputation of the judicial process.

Here, Judge Wilber’s decision to preside over this matter does not constitute plain error. Section 2.10 of the Law and Order Code only mandates recusal in two situations, “wherein the judge has any direct interest or wherein any relative by marriage or blood in the first degree is a party.” There is nothing in the record to indicate that Judge Wilber is a first-degree relative of either party, nor is there evidence in the record that she has a “direct interest” in the matter. Additionally, Appellant does not raise such allegations against Judge Wilber. Instead, Appellant requests that Judge Garcia preside over this case due to her familiarity with the issues. While judicial efficiency is a prized value of the court, this is not a ground that requires mandatory recusal. Judge Wilber is not required to recuse herself for this purpose, and accordingly, her decision to preside over this case does not constitute plain error.

Conclusion and Order

Upon review of the record, the only error identified by this Court is the Tribal Court’s failure to respond to Appellant’s request for the issuance of a new wage assignment order. This Court accordingly remands with respect to this issue, and affirms all others.

Dated: June 4, 2010 for the entire panel.



Justice Carole Goldberg
Hualapai Court of Appeals