

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

BRANDON SIEWIYUMPTWEA,	)	Case No.: 2007-AP-001
Appellant	)	Re: Case No. 2006-CV-009
	)	
v.	)	
	)	
SHARMARIE TORRES,	)	OPINION AND ORDER
Appellee	)	
	)	

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**Before Justices Wes Williams, Jr., Robert N. Clinton, and Carole Goldberg.**

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

**OPINION AND ORDER**

Appellant Brandon Siewiyumptewa ("Appellant") appeals from a Custody Order entered on January 12, 2007 granting joint legal custody of the parties' daughter (the "Child") to both parties and primary physical custody to her mother Appellee Sharmarie Torres ("Appellee"). On January 18, 2007, Appellant filed his Notice of Appeal alleging eighteen legal and factual errors committed by the Tribal Court.

This matter comes before the Court of Appeals more than three years after Appellant filed his Notice of Appeal because the case file was misplaced within the Court building. This Court feels great regret over the lengthy delay, and apologizes to the parties for the difficulty that this delay has caused. These errors by the court are further compounded at this time due to an inadequate record from the trial court. Two files containing many of the records from the trial were misplaced at the time of the Appellate Court hearing, but were later discovered. However, those files are still not complete and a transcript of the trial still has not been found. Again, the court can only profusely apologize to the parties for these errors. The court's failure to properly manage its records is inexcusable considering the seriousness of the matters involved. Based on these events, the Court finds that it cannot adequately review Appellant's allegations at this time because it is impossible for this Court to determine whether the Tribal Court made reversible errors.

This Court accordingly vacates the Custody Order entered on January 12, 2007 and remands the matter to the Tribal Court for a new hearing. The last valid Custody Order entered on February 3, 2005 is hereby reinstated to the extent that Appellant regains and shall have primary physical custody over the Child during the pendency of the new hearing. Appellee shall have reasonable visitation rights during this time period.

## **Statement of Relevant Facts and Procedural History**

On August 18, 2004, Appellee Sharmarie Torres was charged with one count of Aggravated Battery (VIO) in violation of Section 6.89(A) of the Law and Order Code and one count of Child Abuse (VIO) in violation of Section 6.2000(1). At that time, Appellant Brandon Siewiyumptewa and Appellee had joint legal custody over the Child. Appellee had primary physical custody. On February 1, 2005, Appellant was granted “full custody” of the Child. On February 3, 2005, Appellant was again awarded “custody” of the Child. The Tribal Court did not specify whether it was awarding Appellant legal custody, physical custody, or both. However, the Child was moved into Appellant’s home, suggesting that Appellant had at least been granted primary physical custody. On June 7, 2005, Appellee was found guilty of the charged crimes and sentenced to six months in jail. This sentence was suspended to six months of supervised probation ending on December 7, 2005. The child abuse conviction did not involve the child addressed in this case, but rather a different child of Appellee with another father.

On January 12, 2006, Appellee filed for reinstatement of “custody” of the Child. Throughout 2006, Appellant and Appellee engaged in a protracted custody battle. Both parties were represented by counsel. On January 12, 2007, the Tribal Court concluded the custody hearings and issued its custody order. The Tribal Court found that Appellant did not live on the Hualapai Reservation, that Tribal custom dictates “the mother is the proper person to have care and custody of a child,” and that it would be in the best interest of the Child to learn Hualapai culture and language in Appellee’s home on the Hualapai Reservation. The Custody Order granted joint legal custody of the Child to both parties and primary physical custody to Appellee. The custody order also provided Appellant with visitation rights.

On January 18, 2007, Appellant filed his Notice of Appeal, alleging eighteen legal and factual errors committed by the Tribal Court during the custody hearings. These alleged errors included material evidentiary errors, judicial bias, constitutional violations, and improper determinations of Tribal custom.

## **Jurisdiction**

The Hualapai Court of Appeals is a court of limited jurisdiction that in civil matters may only review final judgments or orders of the Tribal Court. *See* Law and Order Code § 10.2. Additionally, a written Notice of Appeal must be timely filed within five days after the 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.

Appellant appeals from a Custody Order that established the custody of the Child. This order ends foreseeable litigation in this matter, and consequently, constitutes a final order. *See Paya v. Tribe*, 2009-AP-008 (Hualapai Ct. App. 2010). Appellant timely filed his Notice of Appeal on January 18, 2007, which is within five days of the appealed order. *See* Law and Order

Code §§ 10.4 & 3.3. Appellant also set forth numerous grounds for appeal in his Notice of Appeal. Accordingly, Appellant has properly invoked the jurisdiction of this Court.

## **Discussion**

Material portions of the Tribal Court record are missing in this case. Most significantly, this Court does not have a full audio recording of the trial. In *Jackson v. Tribe*, this Court held that where there was a gap in the audio recording of a Tribal Court traffic hearing, rendering it unclear whether Appellant had been allowed an opportunity to testify on her own behalf, the Court should remand the matter so that the Tribal Court can make a reviewable record. 2008-AP-001 (Hualapai Ct. App. 2008). The *Jackson* court reasoned that it was impossible to tell whether Appellant's due process right to testify on her own behalf had been violated. *Id.* However, the *Jackson* court also noted that "[u]nder some circumstances it may be possible to reconstruct an incomplete Tribal Court record for appellate review in a manner that ensures due process of law for an appellant." *Id.*

Here, this Court is unable to reconstruct an adequate record to review Appellant's allegations of legal and factual error committed by the Tribal Court. These allegations include material evidentiary errors, judicial bias, constitutional violations, and improper determinations of Tribal custom. At a bare minimum, such allegations require this Court to examine the testimony given at the custody hearings, which this Court is unable to do without a full audio recording of the custody proceedings.

Additionally, Appellant alleges serious errors in the Tribal Judge's determination and application of Tribal custom. Appellant alleges that the Tribal Judge erroneously granted primary physical custody of the Child to Appellee based on an inappropriate determination that Tribal custom requires the mother to retain primary physical custody unless deemed to be unfit. Appellant's allegation not only raises the difficult question of whether the Tribal Court made an appropriate Tribal custom determination, but also implicates a possible violation of the equal protection clause in Article IX(d) of the Hualapai Constitution. This Court's determinations on Tribal custom and constitutional law have a substantial impact on the Hualapai legal structure and community at-large. This Court consequently believes that it would be unwise to review such issues without a full record.

This belief is compounded by the Tribal Court's decision to grant primary physical custody to a parent convicted of child abuse. A court must focus any child custody decision on the best interests of the child. The child has lived with Appellee for three years since the custody order was entered, and no new accusation of child abuse during that time period has been brought to this court's attention. However granting custody to a parent convicted of child abuse could only occur if significant and substantial findings existed that led the court to believe that the other parent could not provide an adequate home for the child. Again evidence to support any such finding cannot be reviewed due to the loss of the trial record.

Appellant further alleges that the Tribal Court judge in this case recused herself from a related child custody proceeding involving the same mother. The court record lacks material records needed to determine how the judge could recuse herself in a related case, and not be

required to recuse herself in this case. Again, the court record is incomplete so that this Court cannot properly make a decision on the merits of the parties' arguments.

Due to the substantial loss of the Tribal Court record and the nature of the issues presented on appeal, this Court remands this case so that the Tribal Court can make a reviewable record on custody. This will foremost protect the interest of the child at issue, and assure that all parties receive a fair hearing and due process, including a valid opportunity for an appeal if needed.

### **Conclusion and Order**

This Court accordingly vacates the Custody Order entered January 12, 2007 and remands this matter to the Tribal Court for a new hearing. The last valid Custody Order entered February 3, 2005 is hereby reinstated, as modified herein, during the pendency of the new hearing. Although the February 3, 2005 Custody Order does not specify the type of "custody" awarded to Appellant, this Court interprets this order as giving Appellant primary physical custody of the Child. Both parties shall maintain joint legal custody through the pendency of the new hearing. The record indicates that the Tribal Court subsequently ordered visitation rights for Appellee; however, the Visitation Order is missing from the Tribal Court record. Therefore, if the parties cannot agree upon a reasonable visitation schedule, the Tribal Court shall determine the schedule. This Court accordingly orders the Tribal Court to hold an immediate hearing to determine Appellee's visitation rights if requested by either party.

Before embarking on another round of custody hearings, this Court hopes that the parties reevaluate their parenting objectives in light of their changed living circumstances. Such considerations may enable the parties to achieve compromise. This Court notes that both parties previously expressed a desire for quick and inexpensive resolution of this matter. If both Appellant and Appellee seek to avoid continued custody litigation in the Tribal Court, they might consider an alternative form of dispute resolution, such as mediation.<sup>1</sup> A neutral, third-party mediator might help both parties achieve compromise in light of their changed circumstances. For example, now that both parties live on the Hualapai Reservation, Appellant and Appellee might consider exploring joint physical custody arrangements. Joint physical custody refers to the right of both parents to have a child live with him or her. *See Black's Law Dictionary* (8th ed. 2004). The amount of time that the child lives with each parent will depend on the particular terms of the joint physical custody arrangement, but can be divided by days, weeks, months, or even years.<sup>2</sup> It is the sincere hope of this Court that Appellant and Appellee will explore the benefits of mediation and joint physical custody arrangements. Should the parties choose to mediate and arrive at a compromise, the Tribal Court can subsequently certify the agreement to give it a binding effect.


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<sup>1</sup> The Superior Court of Arizona in Coconino County has a list of available mediators through their Civil Mediation Program. For more information, contact ADR Coordinator Sidney Buckman at (928) 679-7508. A Hualapai Court of Appeals justice not involved in this case may also be available for such services. For more information, contact the Tribal Court clerk.

<sup>2</sup> For more information on joint physical custody arrangements, the Arizona Supreme Court published a guide, *Planning for Parenting Time: Arizona's Guide for Parents Living Apart*, which is available online at <http://www.supreme.state.az.us/dr/parenttime/PPWguidelines.pdf>.

Finally this court again apologizes to the parties for the failure of the court system to meet their needs in a timely and consistent manner. This court can only work in the future to create a system where such problems and errors are minimized, and to seek a more efficient process for all parties who are involved in the court process.

Dated: This 2<sup>nd</sup> day of June, 2010 on behalf of the entire panel.

  
Justice Wes Williams, Jr.  
Hualapai Court of Appeals