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5 **IN THE HUALAPAI NATION COURT OF APPEALS**
6 **HUALAPAI RESERVATION, ARIZONA**

7 HUALAPAI TRIBE,

8 Appellant,

9 v.

10 HOWARD WHATONAME,

11 Appellee.

) App. Court Case No.: 2012-AP-011
) Tribal Court Case No.: 2012-JDN-007

) **ORDER GRANTING MOTION**
) **FOR STAY OF JUDGMENT**

12
13 **Before Justice Carole Goldberg**

14 This is a dependency case, brought under Hualapai Law and Order Code Chapter 13,
15 sections 13.3 (B)-(D), alleging that a minor child, T.W., is both dependent and neglected.
16 Following investigation by the Hualapai Tribal Police and Social Services, T.W. was taken into
17 tribal protective custody by order of the Tribal Court on May 3, 2012. In its dependency petition,
18 the Tribe alleged that Appellee Howard Whatoname ("Appellee") beat T.W. with a belt on his
19 face, and then kept T.W. home from school so that the injuries to T.W.'s face would not be
20 discovered. On June 18, 2012, the Tribal Court dismissed the Tribe's petition and ordered the
21 immediate return of T.W. to Appellee, his father and legal custodian.

22 Along with a Notice of Appeal, Appellant Hualapai Tribe ("Appellant" or "Tribe") has
23 moved to stay the judgment of the Tribal Court dismissing its dependency petition and ordering
24 the immediate return of T.W. to Appellee. In support of its motion to this Court for a stay, the
25 Tribe now argues that the Tribal Court acted arbitrarily and capriciously in finding that Appellee
26 had not beaten T.W. on the face with a belt. In light of the seriousness of the potential danger to
27 T.W. from returning him to Appellee's custody (should the Tribe's version of the facts prove
28 true), and the questions the Tribe has raised about the basis for the Tribal Court's findings, this
Court is staying the Tribal Court's judgment and ordering an expedited hearing on the appeal.

25 **I. FACTUAL AND PROCEDURAL BACKGROUND**

26 On Wednesday, April 25, 2012, T.W.'s teacher called Appellee to inform him that T.W.
27 had marked another student with a marker and that T.W. should be taken home. T.W., who is
28 ten years old, testified telephonically to the Tribal Court in the dependency hearing¹ that when

¹ T.W. testified via telephone in the courthouse because he said he did not want to confront his

1 they arrived home, Appellee was intoxicated and beat T.W. on the buttocks, face, and arms with
2 a belt, causing T.W.'s face to swell. According to T.W., this was not the first occasion on which
3 Appellee had beaten him with this same belt. T.W. further testified that Appellee did not allow
4 him to attend school the next day because Appellee did not want school officials to see the marks
5 on T.W.'s face resulting from the beating.

6 T.W. apparently stayed out of public view until Sunday morning, April 29, 2012, when
7 his mother observed him. T.W.'s mother testified at the dependency hearing that she became
8 concerned when she observed a mark across T.W.'s face. After listening to T.W.'s account of
9 the cause of the mark, she called the police. The police who responded to the call testified at the
10 dependency hearing and wrote in their police report that T.W. had an unusual mark on his face.
11 Furthermore, T.W.'s teacher testified at the dependency hearing that when T.W. returned to
12 school after the weekend, she also observed an unusual, discolored mark across T.W.'s face.

13 In their report of the investigation, the police indicate that Appellee denied having beaten
14 T.W.'s face with a belt, although Appellee did acknowledge having physically disciplined T.W.
15 with a spanking on T.W.'s buttocks. Further, according to the police report, Appellee stated that
16 any marks on T.W.'s face must have come from an injury while playing baseball. During the
17 dependency hearing, Appellee argued that he had used only reasonable discipline on T.W., and
18 that T.W. was not telling the truth about what had happened. He contended that poor relations
19 between Appellee and T.W.'s mother led her to promote a false story about Appellee having
20 beaten T.W. with a belt on the face. Appellee also placed great weight on a photograph of
21 T.W.'s face that the police had made at the time they responded to the call from T.W.'s mother.
22 Several witnesses who had testified that they had seen a mark on T.W.'s face could not see that
23 mark on the photo. Further, Appellee brought out evidence that Appellee is a very concerned
24 parent, and has made considerable efforts to find the appropriate educational program for T.W.,
25 who, according to his teacher, has difficulties keeping his behavior under control.

26 A great deal of the dependency hearing, which was held on May 30, 2012, was devoted to
27 challenging the credibility of witnesses and the correctness of the accounts put forward by each
28 side. Although Appellee did not testify, his statements in the police report were subjected to
intense scrutiny, especially his claim that the marks on T.W.'s face were attributable to a baseball
injury and his statement to the police that he held T.W. back from school because of his
misbehavior. Appellee, in turn, sought to establish that T.W. had a history of lying, that his
mother was motivated by ill will towards Appellee, that T.W. had responded affirmatively to a
question asking whether he had been "coached,"² and that the photograph contradicted the
testimony of eye witnesses.

On June 18, 2012, the Tribal Court ordered the dismissal with prejudice of the Tribe's
dependency petition and the immediate return of T.W. to Appellee, his legal custodian. The Tribe
filed a motion for a stay with the Tribal Court on June 21, 2012, and the Tribal Court denied that
motion in an order dated June 22, 2012. Immediately following the denial of that motion, the
Tribe filed the present motion to stay the Tribal Court's orders. On June 27, 2012, this Court
scheduled an expedited hearing on the stay motion, which was held telephonically on June 28,

father. T.W. did testify, however, that he loves his father.

² T.W. later stated in his testimony that the Tribal Prosecutor had not told him what to say.

1 2012. During that hearing, it became evident that despite the Tribal Court's order, T.W. was still
2 not in Appellee's custody. The Tribe had previously filed a criminal complaint against Appellee
3 for the same acts presented in the dependency petition, and one of the conditions of Appellee's
4 release was that he have no contact with T.W. Accordingly, T.W. is currently residing with a
5 paternal relative. Counsel for Appellee indicated in the hearing that if this Court denies a stay,
Appellee will move in the criminal case to have the no-contact restriction removed, and therefore
to have T.W. returned to his home.

6 Under Rule 15(b)(iii) of the Hualapai Rules of Appellate Procedure, a single Justice of
7 this Court may order a stay of the Tribal Court's judgment "if the appellant (1) has previously
8 made the same motion to the Tribal Court and (2) files a written statement of the facts and issues
9 relevant to granting the suspension ... within ten (10) business days after the appellant has been
10 notified of the unsuccessful motion to the Tribal Court." The Tribe's stay motion was filed
within the requisite ten days of its unsuccessful motion to the Tribal Court. Furthermore, the
Tribe supplied a statement of facts and issues relevant to the granting of a stay. Thus, the Tribe's
motion is properly before this Court.

11 12 II. DISCUSSION

13 In *Hualapai Tribe v. Walema*, 2008-AP-012, this Court set forth the criteria it would
14 apply in deciding whether to grant a stay in a criminal case. Those criteria are: (1) that – based
15 on clear and convincing evidence – a person is not likely to flee or pose a danger to the safety of
16 any other person or the community; (2) that the appeal is not for the purpose of delay; and (3)
17 that the appeal raises issues that will likely result in a reversal, an order for a new trial, a sentence
18 that does not include imprisonment, or a reduced sentence less than the time already served.
These criteria are not entirely appropriate in determining whether to grant a stay in a civil case,
specifically a civil dependency case, and must be modified to suit the circumstances of civil
litigation. For a civil case, the more appropriate criteria are:

- 19 (1) the likelihood of the appellant prevailing on appeal;
20 (2) whether the appeal is taken in good faith and not for the purpose of delay;
21 (3) the nature of the harm to the appellant, to other parties, to other persons, and to the
public that will likely result from the grant or denial of a stay.

22 Looking first at criterion (2), this Court has no doubt that the Tribe has taken its appeal in
23 good faith. The fact that the Tribe has initiated a criminal proceeding against Appellee for the
24 same acts alleged in the dependency petition is evidence that the Tribe believes there is good
support for its allegations of mistreatment of T.W.

25 Criterion (3) requires this Court to examine the likely harms that will follow from the
26 grant or denial of a stay. Because of the contested nature of the facts in this case, this Court must
27 separately assess the nature of the harm depending on which understanding of the facts is
ultimately upheld. If the stay is granted and the Tribal Court's ruling is eventually affirmed,
Appellee will have been deprived of the custody of T.W. for an additional four to five weeks, the
likely time span from the date of this order to the final resolution of the appeal, given the
28 expedited scheduling. If the stay is denied, the criminal court removes the no-contact order, and

1 the Tribal Court's ruling is eventually reversed, T.W. will be returned to the custody of a parent
2 who has subjected him to physical abuse. Later, he will have to be removed from that same
3 custody. This potential danger to T.W., combined with the disruption to his living arrangements,
4 is substantial, and considerably greater than Appellee's loss of an additional four to five weeks of
5 custody of his child.

6 Finally, criterion (1) directs this Court to determine the likelihood of the Tribe prevailing
7 on appeal. In order to prevail, the Tribe will have to shoulder a heavy burden. As this Court has
8 noted on several occasions, mostly in criminal cases, "the Court of Appeals presumes that a
9 Tribal Court's factual findings are without reversible error, and will review those findings only if
10 arbitrary and capricious." *Hualapai Tribe v. Santistevan*, 2011-AP-023 (2012); *see also*
11 Hualapai Constitution, Article VI, section 12; Hualapai Law and Order Code § 10.7; Hualapai
12 Rules of Appellate Procedure 2(a)(iii). The Tribal Court is normally in the best position to assess
13 credibility, although that position is not as strong in situations such as this one, where some of
14 the key testimony has been obtained via telephone rather than in person.³

15 The Tribe believes it can satisfy the demanding "arbitrary and capricious" standard by
16 demonstrating the implausibility of Appellee's version of the facts and the absence of any
17 effective challenge to the testimony of its supporting witnesses. This Court is not prepared to
18 conclude one way or the other at this point in the appeal. While the prospects for the Tribe
19 prevailing on appeal are substantially diminished by the demanding standard of review, the
20 possibility of prevailing does remain.

21 III. Conclusion

22 Taking all three criteria into account, this Court finds that a stay is warranted. The appeal
23 has been brought in good faith based on genuine objections to the ruling below, and not for mere
24 purposes of delay (criterion 2). Although the standard of review makes it difficult for the Tribe
25 to prevail on appeal, the Tribe has raised significant questions about the Tribal Court's findings
26 (criterion 1). Most important, the prospect of danger to T.W., should the Tribe's position be
27 sustained, requires that this Court take protective action, especially since a stay will only extend
28 Appellee's loss of custody for four to five additional weeks, given the expedited schedule for
resolving the appeal (criterion 3).

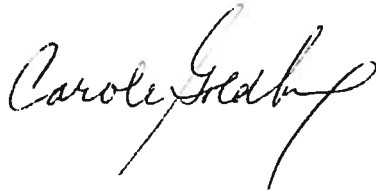
Accordingly, the judgment and orders of the Tribal Court in this case, dated June 18,
2012, are hereby suspended and stayed pending resolution of the appeal. The minor, T.W., shall
be returned to the custody of the Hualapai Department of Social Services, which can determine
whether T.W. should remain where he is currently living or placed elsewhere. The hearing on
the appeal will take place on Tuesday, July 24, 2012, at 9:00 A.M. For the appeal hearing,
Appellant's brief must be filed with this Court no later than 5:00 P.M. on Monday, July 9, 2012.
Appellee's brief must be filed with this Court no later than 5:00 P.M. on Friday, July 20, 2012.
Each party shall serve by personal delivery or by mail a copy of each brief upon the other party
on the date the brief is filed with the Court.

³ At the dependency hearing, not only was T.W.'s testimony taken by telephone, but so was the
testimony of the police officer who first responded to the call from T.W.'s mother and who took
the lead in conducting the police investigation.

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IT IS SO ORDERED

Dated: July 2, 2012

A handwritten signature in cursive script, appearing to read "Carole Goldberg".

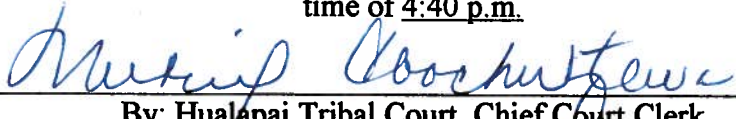
CAROLE GOLDBERG
JUSTICE OF THE HUALAPAI COURT OF APPEALS

HUALAPAI TRIBAL APPELLATE COURT
HUALAPAI RESERVATION OF ARIZONA

APP. DIV. CASE NO.: 2012-AP-011
TRIAL COURT CASE NO.: 2012-JDN-007

Hualapai Tribe, Appellant –vs- Howard Whatoname, Appellee

I, Muriel Coochwytewa hereby certify that I have provided a copy of an Order Granting Stay to: Chief Prosecutor, Marie James via in box log this 2nd day of July, 2012 at the time of 4:40 p.m.

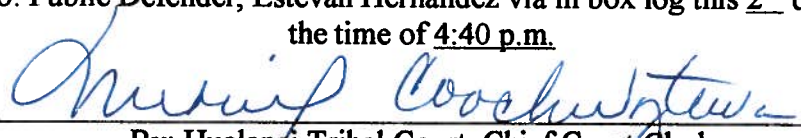

By: Hualapai Tribal Court, Chief Court Clerk

HUALAPAI TRIBAL APPELLATE COURT
HUALAPAI RESERVATION OF ARIZONA

APP. DIV. CASE NO.: 2012-AP-005
TRIAL COURT CASE NO.: 2011-CR-432

Hualapai Tribe, Appellant –vs- Howard Whatoname, Appellee

I, Muriel Coochwytewa hereby certify that I have provided a copy of an Order Granting Stay to: Public Defender, Estevan Hernandez via in box log this 2nd day of July, 2012 at the time of 4:40 p.m.


By: Hualapai Tribal Court, Chief Court Clerk