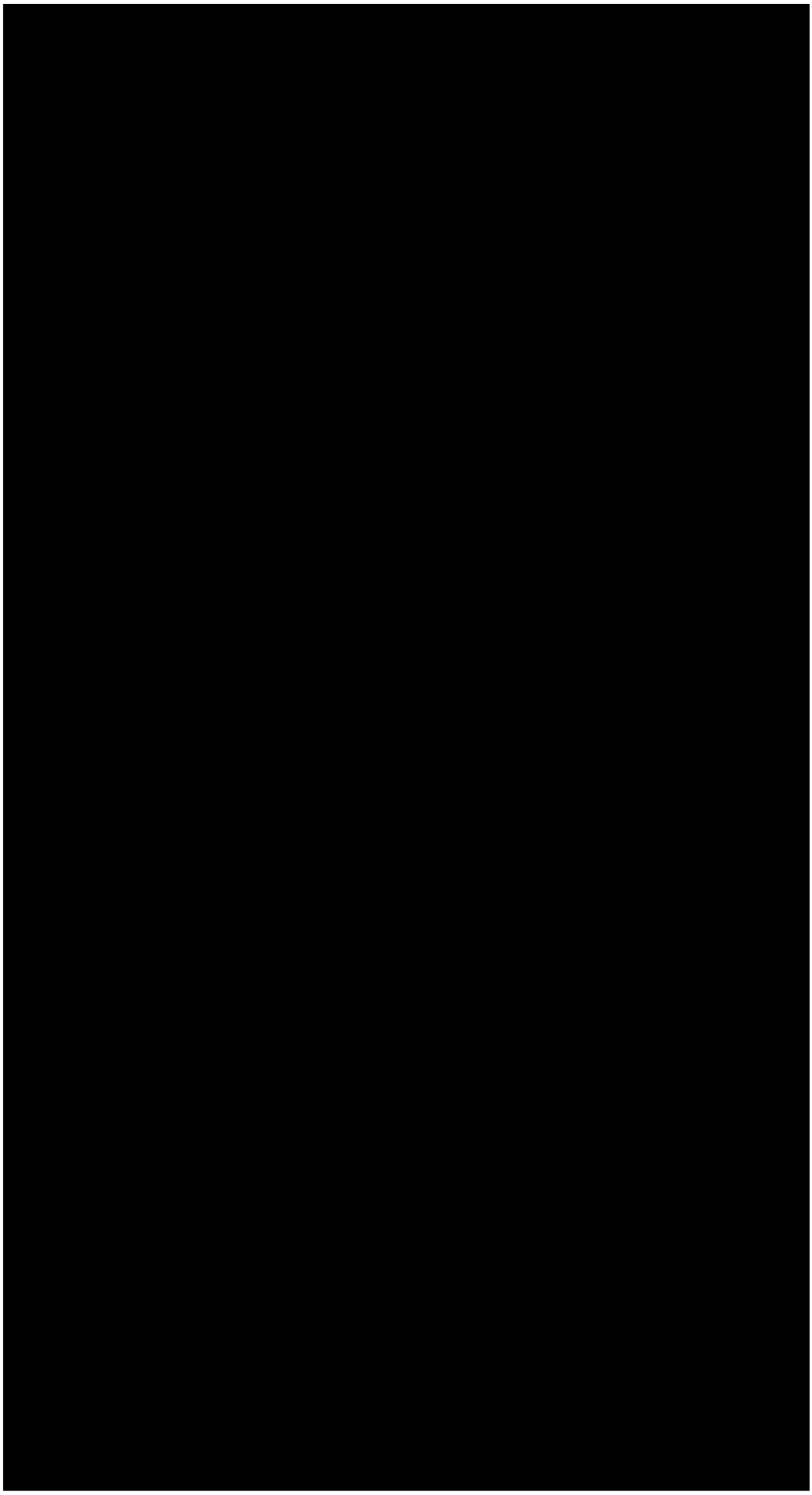

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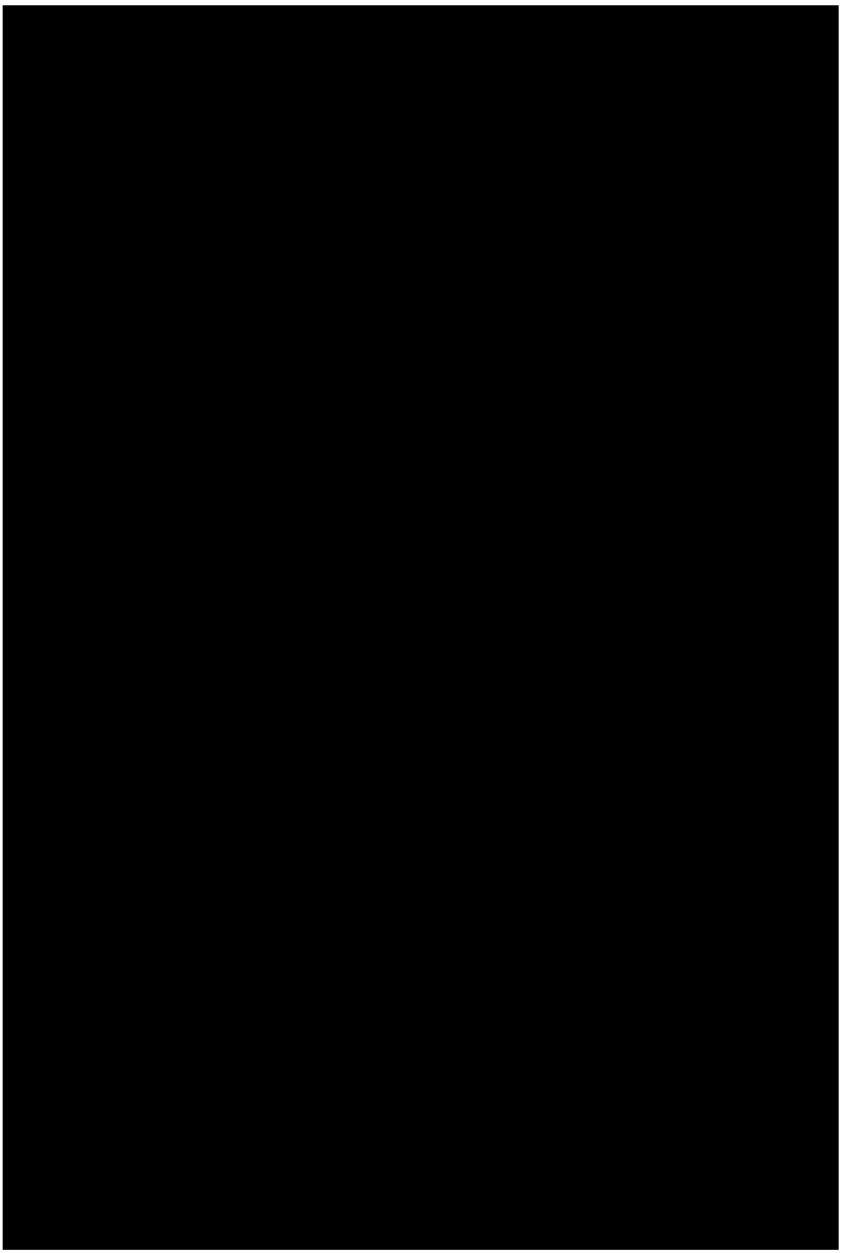

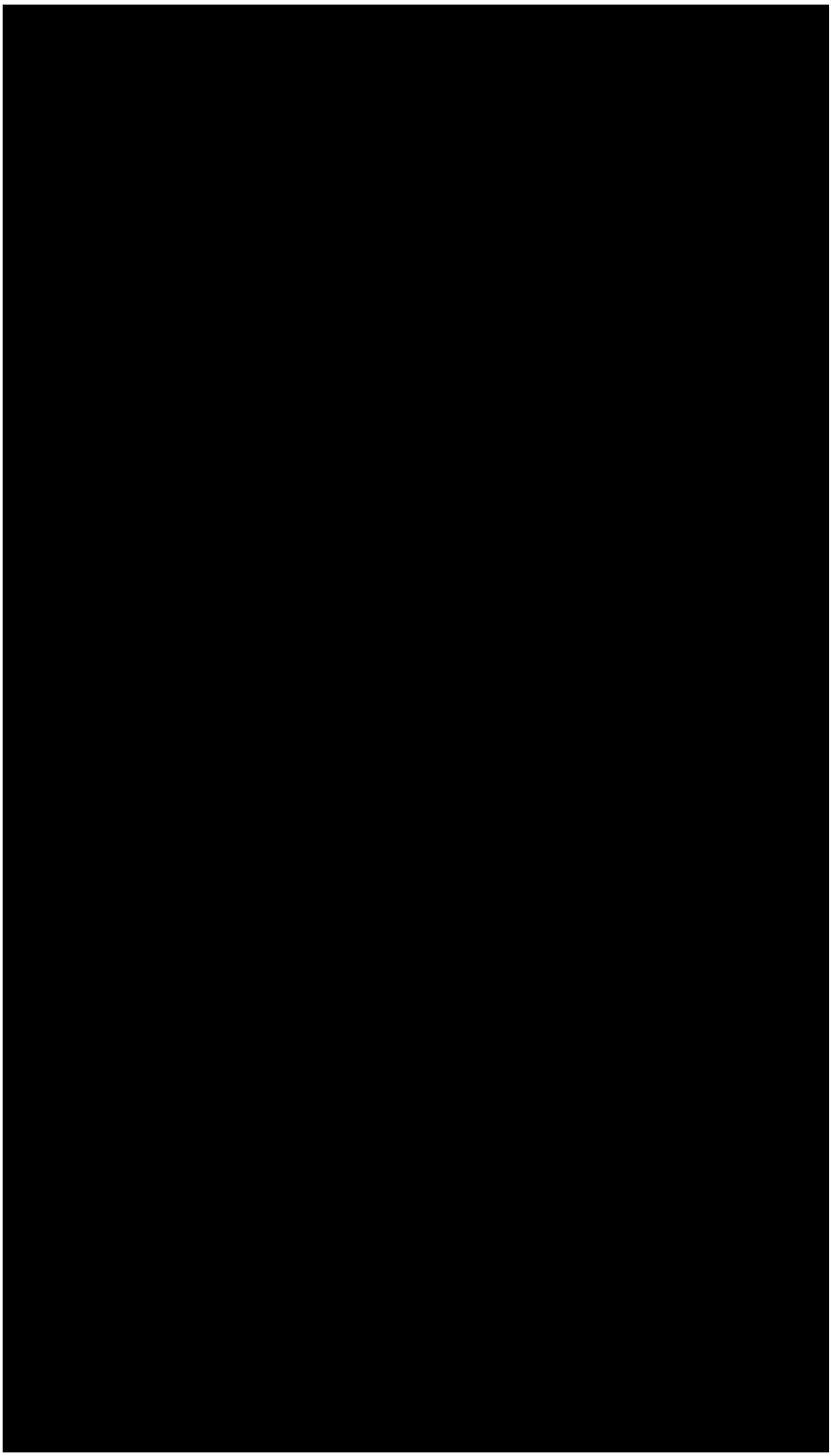

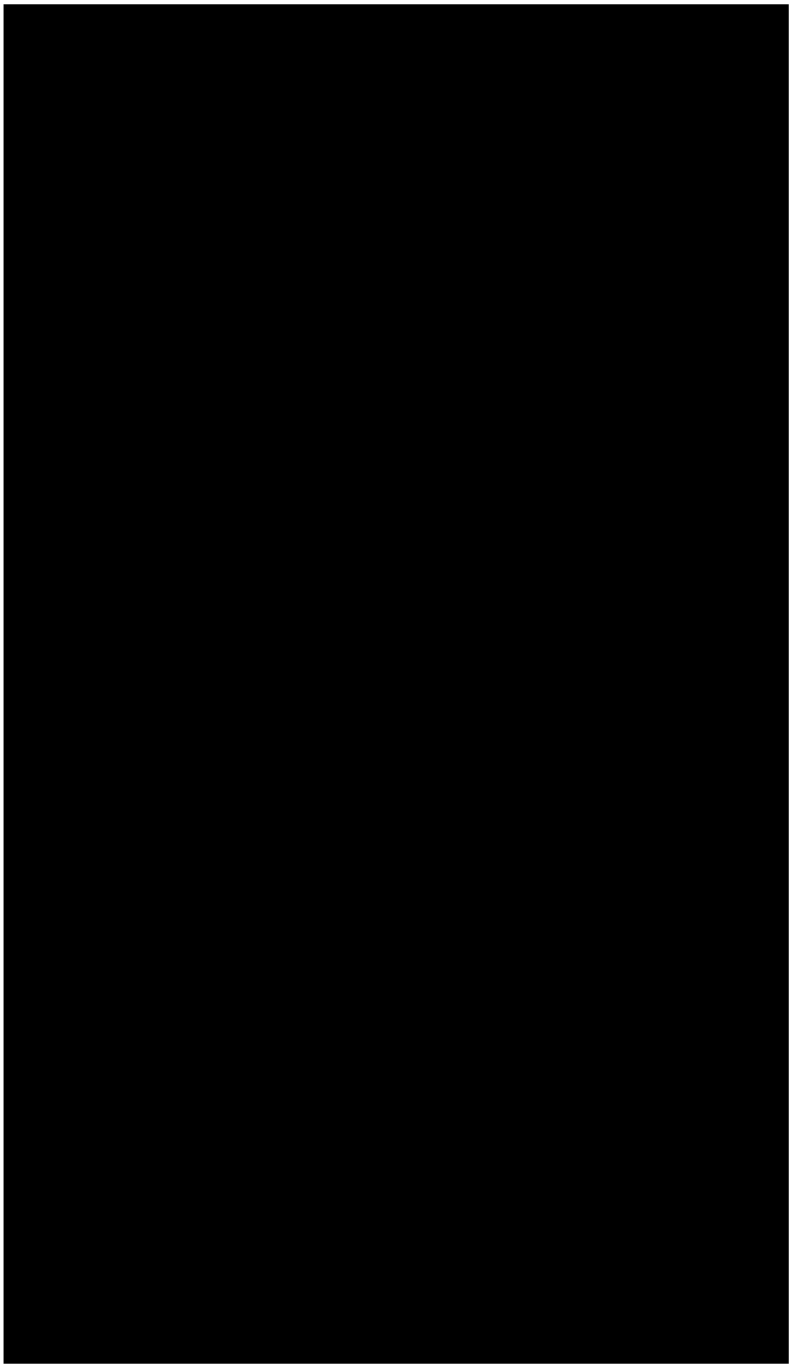

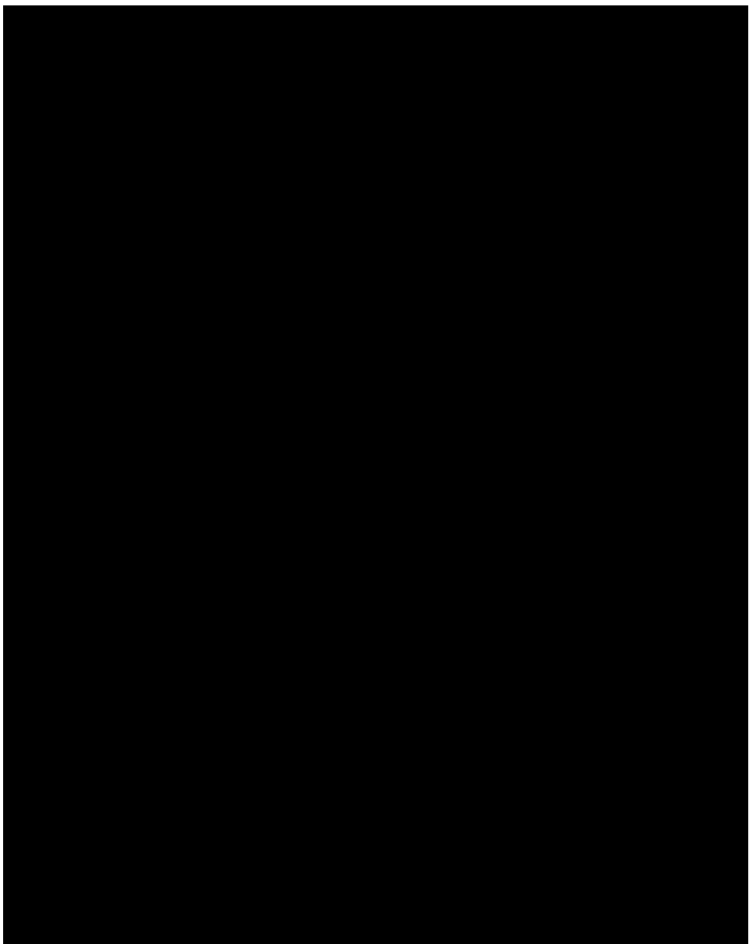

No. A-CV-30-81

Court of Appeals of the Navajo Nation

Navajo Engineering and Construction Authority, *Appellant,*

vs.

Harold Noble, *et. al., Appellee.*

Decided May 8, 1984

OPINION

Review of appeal by Nelson J. McCabe, Chief Justice.

[redacted]

Richard George, Esq., Tuba City, Navajo Nation (AZ), for the Appellant and Albert Hale, Esq., Window Rock, Navajo Nation (AZ), for the Appellee.

AFFIRMED WITH INSTRUCTIONS

The issue presented to the Court is an appeal from the Window Rock District Court, the Honorable Tom Tso, over a contract action between the Navajo Engineering and Construction Authority and the Steamboat Chapter and whether the individuals and officials of the Steamboat Chapter enjoy the protections of the Navajo Nation Sovereign Immunity Act. The matter was set for argument on November 4, 1983 with counsel presenting their points and authorities. For the reasons cited below, the Court herein affirms the order of the Window Rock District Court of June 15, 1981 with the only limitation being the modification of such district court order that had dismissed the action with prejudice to read dismissal without prejudice.

I.

Because this matter represents a contract dispute between the above captioned parties and additionally due to the Steamboat Chapter being a

"tribal entity" pursuant to Resolution CMY-42-80 of the Navajo Tribal Council, the Court would like to take this opportunity to specify the relevant facts in the instant case.

It appears from reviewing the record below that plaintiffs alleged to have entered into a contract for the improvement in and around the location of the Steamboat Springs Chapter House. While there appears no memoralized contract as to the exact terms and conditions of such performance of labor, petitioner claims as a matter of law that there was substantial performance as to the work conducted. The matter was heard on a Motion to Dismiss on January 21, 1981 in the Window Rock District Court with the Honorable Harry Brown denying the Motion to Dismiss.

On May 20, 1981 respondents renewed their Motion to Dismiss before the Honorable Tom Tso setting forth legal arguments as to why such a renewed motion should be heard. Counsel for appellant objected to the renewal of such motion but the record appears to be absent of sufficient reasons upon which such objection could have been sustained. Thus, on June 21, 1981, the Window Rock District Court entered a written Judgment and Order granting such Motion to Dismiss and appellant appeals from such order.

II.

In reviewing the record below and the pertinent orders entered therein, the Court wishes to examine the procedural elements that appellant raises as to the ability of one district court judge issuing a contrary decision to a prior order entered by another district court judge. Before the Court ventures too far astray from the controllable Rules of Court, Rule 23 of the Navajo Court Rules states as follows:

> "The Court shall have the power to order any relief required after the determination of the facts, and law, whether such relief be equitable or legal in nature. At anytime 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 judgments, reopen cases where new evidence required a new hearing or otherwise take another look at a judgment where justice and equity clearly requires it to do so. *Zion's First National Bank v. Joe,* 4 Nav. R. 92 (1983).

Normally, a judge should not consider modifying or vacating a judgment without very serious reasons for doing so and without a specific writ-

ten 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 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. *Id.*

In the instant case, appellee's Motion to Dismiss was originally denied and such action was entered in as an Order on January 21, 1981. The matter at hand, therefore, is whether in the subsequent argument made on renewing the same allegations in the Motion to Dismiss, Judge Tso had sufficient grounds which warranted the re-examination of the substantive and procedural grounds in which to rehear the sufficiency of the cause of action. Appellant points the Court to the language of Rule 63, Arizona Rules and Federal Rules of Civil Procedure. In examining such rule of procedure, the language is at best informative but not conclusive. The reality of the Courts of the Navajo Nation and the fluctuation of our sitting as circuit riding judges reveals that such procedural events may occur, where a subsequent judge may rehear a matter only if such re-hearing is warranted and the subsequent judge is not abusing a discretionary privilege. Such re-examination and subsequent motion re-hearings must be based on sufficient matters of law and facts as to warrant the parties and their counsel to reargue points and authorities before the Court. *Id.*

In examining the record below, Judge Tso's subsequent ruling does not indicate any abuse of discretion or action which would indicate an arbitrary and or capricious manner in the handling of the re-hearing issues. In examining the Order entered by the Window Rock District Court on June 15, 1981, this Court finds that Judge Tso entered findings pursuant to a district court judge demonstrating fairness and discretion in re-hearing the matter:

> "Two grounds for dismissal based on failure to state a claim and sovereign immunity were argued previously and the Honorable Harry D. Brown denied the motion based on an alleged insufficiency of evidence. The motions raised only legal points which did not require presentation of evidence and a denial of defendant's motion on this ground is clearly erroneous and in the interest of justice and fairness, the Court will uses its discretion to allow a rehearing of the motion."
> (Judgment and Order, Window Rock District Court, Paragraph 2, June 21, 1981)

Such finding as recited above indicates that there existed legal arguments that were to be made before the District Court in essentially a reconsideration of a prior motion that had been argued and denied. This procedure does not appear to be abuse of discretion by the trial judge and this Court will not disturb such ruling. Moreover, it was from such granting of the lat-

ter Motion to Dismiss that appellee filed this appeal. Judge Brown's denial of appellee's Motion to Dismiss was not discretionary but required a decision based on applicable laws. Judge Tso's findings indicate that the prior motion was not in fact based on applicable laws and properly had the motion reargued. Rule 23 of the Navajo Court Rules authorizes such judicial practice and Judge Tso was within the proper use of discretionary review in allowing such subsequent argument to be made on the Motion to Dismiss.

III.

Because the Court finds that the Order entered by the Window Rock District Court on June 21, 1981 is valid and shows no abuse of discretion in law or in fact, the Court will not set aside such order nor find that such order is void for want of jurisdiction. The additional point raised in this appeal is the matter of sovereign immunity as such action relates to the defendant's status as Steamboat Chapter officials. The District Court as a matter of law found that the Steamboat Chapter is a governmental unit of the Navajo Nation and as such entity enjoys the protection of CMY-42-80 Sovereign Immunity. In such dismissal, the district court entered its findings based on the immunity granted to Navajo government functions and found that there existed no cause of action or a claim upon which relief could be granted. In light of such finding and further due to the matters of pleading with sufficiency to establish a successful cause of action, the Court herein finds that the Order issued on June 21, 1981 is valid and affirms such order with the only modification striking the "dismissal with prejudice" to read "Dismissal without Prejudice." Such modification allows the appellant to review the facts and law in the instant case and prepare accordingly.

No. A-CV-37-83

Court of Appeals of the Navajo Nation

Navajo Housing Authority, *Petitioner,*

vs.

Helen Betsoi, Bessie Benally, Olson & Gucina Redhorse, Francis & Rita Wagner, & All other Mutual Help Participants, *Respondents.*

Decided July 24, 1984

OPINION

[redacted]

John H. Schuelke and Norman Cadman, Esquires, Window Rock, Navajo Nation (AZ) for the Petitioner and Peter Breen and Wesley Atakai, Esquires, Window Rock, Navajo Nation (AZ) for the Respondents.

Justice Tom Tso delivered the Opinion of the Court.

The above-entitled matter comes before the Court of Appeals of the Navajo Nation on the Navajo Housing Authority's petition for a declaratory judgment to determine rights under Mutual Help and Occupancy Agreement and certification of questions from the Honorable Homer Bluehouse and the Honorable Marie F. Neswood, District Judges for Chinle and Crownpoint Districts, respectively. The two judges have requested the Court of Appeals to review the certification of questions on the validity of applying 16 N.T.C., Sec. 1801 through 1810 in causes of action against citizens residing in the Navajo Housing Authority's Mutual Help Housing Program.

The two judges requested the certification of questions because of the multiplicity of similar actions in the two courts and on further information these types of cases are presently pending in the rest of the Navajo courts. The only issues this court will deal with at this time and by this opinion is whether the trial court should certify questions to the Court of Appeals and whether the certification of questions instantly before us is proper and permitted by the Rules of the Appellate Procedure.

The Navajo Rules of Appellate Procedures at Rule 16, *Mandamus and Other Special Proceedings*, states, "the Court of Appeals will take original jurisdiction in proceedings for a writ of mandamus or a writ of prohibition or in *any other special proceedings* only when it appears that no remedy is available from a district court" (emphasis added).

If a certification of question is a "special proceedings" pursuant to Rule 16, then the Navajo Court of Appeals will have original jurisdiction.

The term certification of a question is one of no fixed content. Such term is used to describe a practice based on the procedure developed in the federal courts, under which an entire case or more generally a specific question of law involved in the case may be sent from a lower to a higher court for decision.

Certification is provided for in some jurisdictions where the intermediate appellate court is of the opinion that a question of law is involved which is of such importance that the higher court ought to review the entire case. 5 Am. Jur. 2d, *U.S. Appeals and Error*, Sec. 1025.

It appears a certification of questions is part of the built-in remedies available from a trial judge when there is narrow and definite question(s) of law or statute(s) before him wherein she / he certifies to the appellate court for review and determination which is then returned to the trial court for the proper disposition.

From the discussion above it appears that a certification of questions from a lower court to a higher court is a special proceeding in the Navajo Nation Courts, therefore in the instant case the Navajo Court of Appeals has jurisdiction to review the questions certified to them by the Chinle and the Crownpoint District Courts.

Where the jurisdiction on appeal of the highest court is based on certified questions it is usually restricted to review of single or particular questions which present distinct questions or propositions of law usually arising in the case, and which are material, and will aid the lower court in determining the case before it. Different questions from those certified by the Court below cannot be substituted by the parties.

Certification by the trial court may be limited to particular types of questions which are important and doubtful. 5 Am. Jur. 2d, *Appeals and Error*, Sec. 1026.

The following elements must occur before a question can be certified from a lower court to a higher court, i.e.,

(a) the question must be one of legal doubt requiring a final determination of law;

(b) it must be a question of material importance or an issue of substantial public interest;

(c) it may so affect the merits of the controversy that it ought to be deter-

mined by the reviewing court before further proceedings in the trial court;

(d) all those elements must be so determined to exist by the court before which the cause is pending prior to the question(s) being certified for review. *State v. Karagavoorian*, 32 RI 477.

On certification of question as to the constitutionality of a statute, the duty of the appellate court is to test the constitutionality only in-so-far as the question relates to the disposition of the actual case presently before the court. *Agootian v. Providence Redevelopment Agency*, 80 RI 72, 91 A2d 21.

Certified questions should be carefully and precisely framed to present distinctly and clearly the question or proposition of law involved. The certificate should contain the proper statement of the ultimate facts upon which the question arises and should clearly show in what respect the instruction of decision of the appellate court is desired. 5 Am. Jur. 2d, *Appeals and Error*, Sec. 1028. Generally, the appellate court will consider only the question or questions certified, without regard to the record, although in some jurisdictions the appellate court instead of answering the questions certified may be authorized on its own motion to order up the entire record as though it had been brought up on appeal.

The opinion of the higher court on the question certified becomes the decision of the lower court on the question(s), but the opinion rendered by the intermediate appellate court remains undisturbed during the pendency of the case in the higher court on a certified question.

The matter at bar is a question of law regarding the legality of 16 N.T.C., *et. seq.* when utilized by the Navajo Housing Authority as to participants residing in the Mutual Help Housing throughout the Navajo Nation. The questions certified to this court appears that it would create potential conflicts when the lower trial judges are hearing essentially the same cases which could and will result in contrary findings.

On the questions certified in this matter it appears that the legality of the forcible entry and detainer law as found within 16 N.T.C. is being challenged which is basically a constitutional challenge to the procedure under Navajo law.

In considering the certification of questions before this court from the lower court, and upon examination of the certificate, it appears from the Chinle and Crownpoint District Court that each of the elements necessary for certifications are being essentially met.

Upon review of the instant facts, there are pending actions which involve an interpretation of tribal law and the request is a narrow ruling on the legality of such statute in light of events surrounding the eviction of mutual help participants. On such reading therefore, it appears that the case at bar is being conducted in accordance with the general trend of certification of questions. The question of jurisdiction of the Court of Appeals to hear such mat-

ters as the certification of questions can be framed as involving substantial issues of public interest which will affect the total outcome of both HUD Housing on the reservation as well as the several causes of action that are now before the courts. Thus, there are several policy decisions that are to be considered as part of this question. Although not the ultimate reason for such consideration, nevertheless, this case requires serious consideration by the Court of Appeals for the future housing growth within the Navajo Nation.

THEREFORE, the certification of questions from the Crownpoint and Chinle Courts are proper and this Court should consider the questions.

THEREFORE IT IS HEREBY ORDERED that the Navajo Nation Court of Appeals will accept the certificate of questions from the Chinle and Crownpoint District Courts and will consider the questions.

IT IS FURTHER ORDERED that the stay of proceedings in this matter will continue and any further proceedings within the lower court are stayed until the further outcome of this matter.

IT IS FURTHER ORDERED that the participants are directed to continue paying their agreed monthly payments to the Navajo Housing Authority.

No. A-CV-17-83

Court of Appeals of the Navajo Nation

Lorena Barber, *Appellant,*

vs.

Harold Barber, *Appellee.*

Decided July 27, 1984

OPINION

[redacted]

[redacted]

Albert A. Hale, Esquire, Window Rock, Navajo Nation (AZ) for the Appellant and Damon L. Weems, Esquire, Farmington, New Mexico for the Appellee.

Acting Chief Justice Tso delivered the Opinion of the Court.

REVERSED AND REMANDED

This is a child custody case in which the mother and the father are striving for the custody of their children.

A decree of divorce was entered in the above-captioned matter on June 25, 1980, wherein custody of the parties' minor children was granted to the Appellant. Since then Appellant had custody of the three minor children. On August 23, 1982, Appellee filed in the Shiprock District Court a motion for a change of custody. Subsequently, a hearing was set to hear the motion two times and the matter was continued both times. On October 28, 1982, Appellant submitted a response to the motion for a change of custody and argued that Appellee's motion was submitted contrary to Rules on Pleadings, Forms and Motion, specifically Rule 4 and the Court should summarily dismiss the motion without a hearing pursuant to the Rule. The Court rendered no decision on the Appellant's response to the motion for a change of custody.

A second motion, a Motion for a Home Study, was also submitted by

Appellee, to which Appellant submitted a Motion in Opposition again arguing the motion is not in compliance with Rule 4, *et. seq.*, Rules, on Pleadings, Forms and Motions, specifically arguing no brief was submitted with the motion. Subsequently, there was another continuance on the Appellee's motion.

On May 4, 1983, the matter came before the court for a hearing at which time only Appellee appeared with his attorney. Appellant and/or her attorney failed to appear. The Appellee, his attorney and their witnesses, met with the judge in chambers and it appears there were some informal discussions resulting in an order being issued accordingly on June 8, 1983.

I.

The issues before the Court are as follows:

1. Whether the District Court erred in granting a default judgment;
2. Whether the District Court's Order for change of custody is supported by evidence;
3. Whether the District Court failed to act as a *parens patriae* for the minor children;
4. Whether Appellant was denied her right to due process guaranteed by the 1968 Indian Civil Rights Act codified at 25 USC Sec. 1302(8);
5. Whether the Appeal was timely perfected.

II.

The Court of Appeals will first address the issue of whether the case before the court was timely appealed.

Rule 2(c), Filing of Appeals, Rules of Appellate Procedure, states ". . . the Notice of Appeal, briefs, the fee and the copy of the final judgment shall be filed with the Clerk within thirty (30) 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 (30) days period shall be allowed."

According to the record on appeal, Appellant perfected her appeal on July 8, 1983, and it was entered into the record of the Court below on May 12, 1983, as evidenced by the stamp of the Court and also the affidavit of the court clerk. Appellee further argues that the order was "rendered," by whatever definition it is used, certainly no later than May 12, 1983.

The affidavit of Mildred Mitchell, Chief Clerk of the Shiprock District Court, states she received the order in the mail on May 12, 1983, bearing the signature of Judge Whitehair whereupon she stamped the order "May 12, 1983" indicating the date when the order was received.

The records from the court below, specifically the file docket sheet, indicates the Honorable Judge Whitehair signed the order on June 8, 1983. As the Navajo Tribal Courts are courts of record, the record of the court as reflected in the docket sheet will be deemed conclusive. The order was signed and entered on June 8, 1983. Under the provisions of Rule II of the Rules of Civil Procedure, the appeal time began to run from that date. Hence, the appeal was timely filed.

III.

Appellent contended that the Court erroneously rendered a default judgment when in fact she responded to the appellee's motion and the matter was put at issue. The issue is whether a party is entitled to a default judgment when the adverse party had responded to a motion but failed to appear for trial.

It has been declared that once an answer on the merits is filed and the case is at issue, a default judgment may not be rendered against the defendant for failure to appear at the trial. It is reasoned in support of this rule that since the burden of proof is upon the plaintiff he must prove his case not withstanding the failure of the defendant or his counsel to appear at the trial. *Yazzie v. Yazzie*, TC-CV-205-82, (decided October 27, 1983).

In the instant case, appellee was not entitled to a default judgment since appellant responded to the motion and the matter was put at issue. The burden of proof was upon appellee to prove a change of custody is necessary and in the best interest of the children.

The District Court's Order of May 4, 1983, implying a default judgment is proper due to the appellant's failure to appear, is a reversible error.

IV.

The Court will now address the issue of whether the District Court's order for change of custody is supported by evidence. From previous findings the matter was set for a hearing on May 4, 1983. When the Appellant and her counsel failed to appear, Appellee, his attorneys and witnesses met with the judge in his chambers where certain informal discussion transpired and an order was entered accordingly.

The Order of the District Court dated May 4, 1983, states in relevant part

". . .due to a material change in circumstances since the entry of the final decree herein, the best interest of the children of the parties would be served by plaintiff having full care and custody of such minor parties subject to reasonable visitation rights of the defendant."

The Court of Appeals has dealt with an issue of this nature in the decision of *Lente v. Notah,* 3 Nav. R. 72 (1982). A substantial change of circumstances must be alleged and the pleadings should show why a change of custody is better for a child as well as facts demonstrating a substantial change of circumstances. *Id.* at 75.

The dominant principle is always the best interest of the child. *Id.* at 72, 76. The best interest test is based on facts and scientific findings. *Id.* at 72, 76.

There are no fixed standards as to what constitutes a substantial change of circumstances or what is in the "best interest of the child's" test. Only a complete review of the circumstances surrounding a child will give the Court guidance on how to rule. *Id.* at 72, 79.

There is obviously no evidence whatsoever to support the District Court's Order for a change of custody and the same must be reversed.

V.

The next issue is whether the trial court failed to act as *parens patriae* for the minor children.

The general rule is that the court must always act as the parent of the child and must act in the best interest of the children especially in cases where a change order of custody is requested.

The District Court failed to make findings of facts as to whether a change of custody is in the best interest of the children which is clearly a failure to act as a parent in the place of the parents for the minor children. Such failure to act is a reversible error and must be remanded for a proper disposition.

VI.

The last issue is whether plaintiff-appellant was denied her rights to due process as guaranteed by the 1968 Indian Civil Rights Act. The relevant part of the 1968 Indian Civil Rights Act states that ". . .no Indian tribe in exercising powers of self government shall deny to any person within its jurisdiction the equal protection of its law or deprive any person of liberty or property without process of law."

The Appellant is arguing that the order of the District Court entered June 8, 1983, ordered the Navajo Tribal Police Department to pick up her children

within five days. Such order was carried out by the Navajo Police Department. However, the children have subsequently been returned to the Appellant and therefore that issue is moot and the court will not address itself to that matter.

It is therefore ORDERED that the District Court's Order entered June 8, 1983, be and is hereby reversed.

It is further ORDERED that the above-entitled matter be and is hereby remanded to the Shiprock District Court for further disposition in accordance with the Court's opinion.

No. A-CV-13-84

Court of Appeals of the Navajo Nation

Marshall Tome, *Appellant,*

vs.

The Navajo Nation, *et. al., Appellee.*

Decided September 18, 1984

OPINION

[redacted]

Raymond Tso, Esquire, Crownpoint, Navajo Nation (NM) and Michael L. Danoff, Esquire, of Albuquerque, New Mexico for Appellant, Eric D. Eberhard, Esquire, and Irene Toledo, Esquire, Window Rock, Navajo Nation (AZ) for the Appellees.

On April 3, 1984, the Trial Court at Window Rock entered an Opinion and Order whereby the action in the Trial Court was dismissed with prejudice.

On May 1, 1984, appellant (plaintiff below) filed a Notice of Appeal. Along with the Notice, appellant filed a Designation of Record, a certified copy of the Trial Court's Order denying plaintiff's Motion for Reconsideration and a Brief on Appeal which contained an attachment marked as Exhibit "A."

On May 22, 1984, the Court of Appeals denied and dismissed the appeal on the basis that a certified copy of the Opinion and Order of the Trial Court entered on April 3, 1984, had not been filed as required by Rule 2 of the Rules of Appellate Procedure.

On May 25, 1984, appellant filed a Motion to Reconsider Dismissal of Appeal. On June 25, 1984, a hearing on the Motion for Reconsideration was had before a three judge panel pursuant to Rule 12 of the Rules of Appellate Procedure. The parties filed briefs and both sides were represented by counsel at the hearing.

Upon consideration of the briefs, the arguments, and the Court's file in

this matter, the Court finds that appellant has failed to show sufficient grounds for the appeal to be reinstated and the Court's original order denying and dismissing the appeal is affirmed.

Rule 2 of the Rules of Civil Procedure states that an appeal is originated or begun by the payment of the filing fee and the filing of certain documents, one of those being a certified copy of the judgment or order being appealed.

There are a number of cases from the Navajo Court of Appeals in which the appeal was denied for failure to file a certified copy of the order or judgment being appealed. These cases are contained in the Navajo Reporter and will not be cited here. The Court would like, however, to direct the attention of the parties to the case of *Navajo Nation v. Keeswood*, 2 Nav. R. 115 (1979), as particularly illustrative of the adherence that will be given to the Rules of Appellate Procedure. In that case appellant had failed to serve appellees by personal service or certified mail as required by Rule 6 of the Rules of Appellate Procedure. The appeal was dismissed for failure to properly serve appellees even though they had received a copy of the Notice of Appeal by regular mail and therefore had actual notice of the appeal.

In the instant case the appeal was never properly begun because the appellant failed to comply with the requirements for originating an appeal.

Appellant contends that because the Clerk of the Court of Appeals accepted the filing fee and the documents presented that any defects were somehow waived. Appellant also alleges that the clerk told him in a subsequent conversation that everything was in order. The Court hopes the following remarks will dispose of the necessity of having to address these or similar contentions in the future.

The acceptance by a court of papers for filing is a clerical act. It provides a uniform and systematic method for parties to present pleadings to the court. It does not confer jurisdiction, remedy defects in pleadings, or waive any legal or procedural requirements.

Further, the clerk of any court will not be held to a higher standard of legal knowledge or skill than those admitted to practice before the courts. It is the duty of those who undertake to represent a party to make certain that pleadings are properly filed. In this case the Clerk was presented with a certified copy of an order. She had no duty to inquire whether it was the correct order. Even had no order at all been presented, the acceptance of the Notice of Appeal would not have waived the requirement that a certified copy of the order or judgment being appealed be attached. Rule 2(b) of the Rules of Appellate Procedure states:

> The Clerk shall not accept any appeal for filing and no appeal shall be considered filed until the fee has been paid and a copy of the final judgment has been attached.

This provision gives the Clerk the authority to reject documents unless certain provisions are met. It neither gives the Clerk the authority to waive any requirements nor requires the Clerk to have the legal knowledge or expertise to make determinations regarding documents beyond determining that the format is proper. Further, Rule 2(b) states that an appeal will not be considered filed until the copy of the final judgment has been attached. The determination is for the Court, not the Clerk.

The acceptance of a document for filing confers no right beyond notation of the filing date and presentation of the papers to the Court. It is the responsibility of the parties and their representatives to comply with proper procedural and legal requirements. It is the responsibility of the Court to determine the nature and sufficiency of that compliance.

Therefore, it is ORDERED that the Order of denial and dismissal of the Court of Appeals be and hereby is AFFIRMED.

No. A-CV-27-83

Court of Appeals of the Navajo Nation

Rozan Pavenyouma, *Appellant,*

vs.

Loren A. Goldtooth, *Appellee.*

Decided November 13, 1984

OPINION

Review of Appeal by Chief Justice Nelson J. McCabe.

Michael V. Stuhff, Esq., for Appellant, Flagstaff, Arizona and Genevieve K. Chato, Esq., for Appellee, Fort Defiance, Navajo Nation (AZ).

Appellant and appellee were divorced on December 7, 1981. The issue of custody of the five minor children of the marriage was reserved. Appellant had been given temporary custody of the children on November 23, 1981, and custody was continued with her pending a permanent order. On February 8, 1982, the trial court amended its custody order to give joint temporary custody to both parties with primary custody in the mother. On April 21, 1982, the trial court awarded the parties permanent joint custody of the minor children and directed the parties to prepare a joint custody plan. The parties were unable to agree upon a plan for implementation of joint custody and each party submitted a separate proposal to the trial court. By order dated September 16, 1983, the trial court without further proceedings or hearings on the matter, made a split custody award of the minor children. Appellant was given custody of LaVerne and Lynette and appellee was given custody of Loretta, Loren and Lorayne. Neither party was ordered to pay child support but the appellee was ordered to provide medical and dental coverage for the children and to pay one-half the extraordinary expenses of LaVerne and Lynette.

The oldest child of the parties was born October 29, 1973, and the youngest was born October 11, 1980. The father is Navajo and the mother is Hopi. All the children are enrolled or are eligible to be enrolled in the Navajo Tribe. The father resides in Phoenix but maintains close family ties with his relatives in Tuba City. The mother resides in Moencopi, Arizona.

Throughout the custody proceedings the trial court made extensive efforts to inform itself by way of social service investigations, financial statements and medical reports. The trial court found that both parents were fit and proper persons to have custody and that both parents maintained good relationships with the children.

This case came before the Court of Appeals on the question of whether the trial court abused its discretion in the award of split custody and whether there was an abuse of discretion on the award of child support.

Child Custody

The Court finds that the joint custody award by Order dated April 21, 1982, was a permanent and not a temporary order.

Although the joint custody order of April 21, 1982, left open for future determination by the parties particulars as to the implementation of the joint custody and although the trial court specifically reserved the right to approve or disapprove the parties' plan of implementation, there is no indication that the issue of the type of custody was open for further debate. The Order read in its entirety is quite clear that the parties were awarded joint custody and that the manner in which physical custody would be determined was the only issue reserved for future consideration. This is much the same situation as granting the divorce but reserving certain issues such as custody and child support.

The Court further finds that the subsequent order of September 16, 1983, providing for split custody was improper. The split custody award was in effect a modification of the prior joint custody award. This court has previously set forth the procedure which must be followed when a modification of a custody order is sought. This procedure requires that a motion for a modification be filed with proper service upon the opposing party; that the motion set forth facts showing a change of circumstances and state reasons why a modification of custody is in the best interests of the child; that a hearing be had; that the moving party show a substantial change in circumstances since the last custody order; and that the court find that the change in custody is in the best interests of the child. *Lente v. Notah*, 3 Nav. R. 72 (1982).

The trial court was apparently of the opinion that joint custody could only be ordered in those situations where the parties can reach agreement on the details of a shared custody arrangement. Parental assistance and cooperation in the implementation of joint custody is certainly the preferred atmosphere but we cannot hold that the courts are always precluded from making a joint custody order in the absence of complete parental cooperation. In this particular case the trial court had extensive contact with and information about the parties and in its discretion determined that the situation was conducive

to joint custody. It would have been proper for the trial court to have proceeded to make an order establishing the details of such custody arrangements. Joint or shared custody is a relatively new legal concept not only in the Navajo Courts but in the country as a whole. Until such time as divorcing parents become aware of the flexibility of such concept and of how they can participate in determining vital issues concerning their children, the courts may have to provide a great amount of guidance. Such guidance is not contrary to the principles of joint custody:

> Much of the research described and summarized in this book supports the conclusion that the best interest of the child is served by the continued involvement of both parents in the post-divorce life of the child. Put another way, it appears that divorces having the least detrimental effect on the normal development of children are those in which the parents are able to cooperate in their continuing parental roles. Parental cooperation cannot be easily ordered or legislated, but it can be professionally, judicially, and statutorily encouraged and enclosed. "Winner take all" sole custody resolutions tend to exacerbate parental differences and cause predictable post-divorce disputes as parents try to strike back and get the last word. Joint or shared parenting following divorce is an appealing alternative. Jay Folberg, *Joint Custody and Shared Parenting* 9 (1984).

Although the propriety of joint or shared custody per se is not at issue before this Court, the Court has read and been informed by the Opinion and Order of the trial court of April 21, 1982, wherein Judge Tso, the trial court judge, has presented a brilliant analysis of the relationship between the principles of joint custody and traditional Indian family modes. In that opinion, which is reported at 3 Nav. R. 223, 226 (1982), Judge Tso states:

> . . .you cannot separate native peoples from their culture and tradition. This court takes judicial notice of the fact that in Navajo culture and tradition children are not just the children of the parents but they are children of the clan. In particular children are considered members of the mother's clan. While that fact could be used as an element of preference in a child custody case, the court wants to point out that the primary consideration is the child's strong relationship to members of an extended family. Because of those strong ties, children frequently live with various members of the family without injury. This is the condition throughout Indian Country (as Indian reservations as a whole are called). Therefore the court looks to that tradition and holds that it must consider the entire extended family in order to make a judgment based upon Navajo traditional law.
>
> This approach is in harmony with modern trends in child psychology as well. It is interesting to note that the Anglo-European society is increasingly discovering ways which we have known for centuries.

Having found that the order of April 21, 1982, was a permanent order and that the proper procedures for modifying that order were not followed, the

Court is now in the position of the trial court on April 21, 1982; that is, there is a joint custody award with no guidelines to the parties as to how the joint custody is to be implemented.

The Court may either remand the issue for further proceedings or may in the interests of justice and disposing of the matter, modify the order so as to do justice to the parties. Considering the length of time the matter has been pending, the Court finds that it is in the best interests of the parties and the minor children that litigation in this matter come to an end.

The Court therefore makes the following orders regarding custody of the minor children of the parties:

1. Appellant and appellee are awarded joint custody.
2. The minor children shall reside with appellant during the school year.
3. The minor children shall reside with appellee during the summer vacation from school.
4. Each parent shall have liberal access to and visitation with the children during the periods of time the children are not residing with that parent. All visitation is to be by prior arrangement between the parties.
5. The parent with whom the children are residing or currently with shall be responsible for daily care and shall make necessary decisions regarding emergency medical or dental care.
6. All major decisions regarding the children's education, religious training, cultural and artistic training, non-emergency health treatment, and general welfare shall be made by both parents together.
7. Each parent shall encourage the minor children to love and respect the other parent and shall encourage close ties with both maternal and paternal relatives.
8. Neither parent shall change the Arizona residence of the minor children without notification to the other parent.
9. Neither parent shall change the residence of the minor children to a location outside the state of Arizona without prior written consent of the other parent.

Child Support

Under the split custody decision of the trial court, there was no abuse of discretion in the failure to award child support to either party. Under the provisions of joint custody as set forth above, however, the Court finds that some provision should be made to help defray the costs to appellant of having the children residing with her the greater portion of the year and of providing for the children during the winter months when heavier clothing is needed. The Court makes the following orders regarding child support:

1. Appellee shall pay to the appellant as and for child support the sum of $100.00 per month per child for the nine months of September through May.

2. Appellant shall provide medical and dental coverage for the minor children.

3. The parties shall bear equally the costs of any medical or dental bills for the minor children not covered by insurance.

4. So long as the parties comply with this order, the appellant shall claim two children as dependents for Federal Income Tax purposes and the appellee shall claim three children as dependents.

It is further ORDERED that the above custody and support provisions shall become effective immediately.

No. A-CV-15-84

Court of Appeals of the Navajo Nation

Rena C. Williams, *Appellant,*

vs.

The Navajo Election Commission
and Board of Election Supervisors, *Appellees.*

Decided January 22, 1985

OPINION

Before McCabe, Chief Justice, Brown and Hilt, Associate Justices.

Leonard Watchman, Esq., Window Rock, Navajo Nation (AZ) for Appellant; Donna C. Bradley, Esq., Window Rock, Navajo Nation (AZ) for Appellees; and Lawrence A. Ruzow, Esq., Window Rock, Navajo Nation (AZ) for Jimmie Bitsuie.

This matter came before the Court for hearing on October 17, 1984, on the issue of whether the Appellant's statement of election contest as contained in her original Statement of Grievance and the amended Statement of Grievance was sufficient on its face so as to require a hearing.

On November 2, 1982, an election was had in Fort Defiance for the purpose of electing two Navajo Tribal Council delegates. The two positions subsequently became vacant and two special elections were held on February 14, 1984, and April 17, 1984.

On the day of the April 17, 1984, election the *Navajo Times* contacted the chapter house regarding the time for the polls to be open. The paper was told that the polls closed at 5:00 p.m. rather than 7:00 p.m. as mandated by 11 N.T.C.§19.

Appellant Rena Willliams was a candidate in the April 17, 1984, election. She lost to the only other candidate, Jimmie Bitsuie, by 15 votes.

On April 26, 1984, appellant filed a Statement of Grievance with the Navajo Board of Election Commission (hereinafter referred to as Commission). The Statement of Grievance contained the following allegations:

1. A professional and impartial attitude was not demonstrated by the election representative as required by 11 N.T.C. Chapter 13 §245.

2. The election representative's failure to insure that the proper time for the polls to close was released to the *Navajo Times* was a violation of 11 N.T.C. Chapter 13; and

3. An unspecified percentage of the registered voters did not vote and this failure to vote was a direct result of the publication of the wrong time for the polls to close.

On May 10, 1984, appellant submitted an amended Statement of Grievance. The amended Statement of Grievance contained what were labeled as "First Cause of Action" and "Second Cause of Action". The "First Cause of Action" sets forth the publication of wrongful conduct of the election representative. The "Second Cause of Action" states that Jimmie Bitsuie and other unnamed persons slandered appellant prior to the election. The amended Statement of Grievance was accompanied by certain documents including an affidavit from a chapter employee that she had been acting as receptionist on April 17, 1984, and that she had released the wrong time for the polls to the *Navajo Times*. There was also a Petition signed by twenty-one registered voters of the Fort Defiance Community stating that they felt the publication of the wrong time caused some voters not to vote and caused appellant to lose the election.

On May 10, 1984, the Commission reviewed the original Statement of Grievance. It is not clear to the Court whether the amended Statement of Grievance was reviewed. The Court is of the opinion, however, that the First Cause of Action of the amended Statement of Grievance did not enlarge upon the allegations of the original Statement of Grievance and that the allegations of the Second Cause of Action were outside the scope of the authority and review of the Navajo Board of Election.

On May 21, 1984, appellant filed a Notice of Appeal. On June 29, 1984, the Court of Appeals entered an Order allowing an appeal on the issue of whether the statement of election contest as contained in the Statement of Grievance and the amended Statement of Grievance was sufficient on its face so as to require a hearing.

The Navajo election laws for electing the Chairman, Vice Chairman, and members of the Navajo Tribal Council are contained in 11 N.T.C. Chapters 1-13. Chapter 13 is entitled "Penal Provisions." The provisions of that chapter deal with bribery of electors, coercion of electors, intimidation of an elector by his employer, interference with an election officer, violation of duty by election officers, and illegal registration for voting. The chapter further sets forth penalties for violation of the provisions which are enforced through the courts or the Advisory Committee.

Section 245 of Chapter 13 provides that a member of the Election Com-

mission shall not "knowingly and willfully fail or neglect to perform any duty under any part of this chapter." A Statement of Grievance alleging a violation of 11 N.T.C. Chapter 13, § 245 raises the question of whether such an alleged violation is within the scope of review by the Commission. The Court will not at this time decide whether violations of Chapter 13 are the exclusive jurisdiction of the courts and the Advisory Committee but will review appellant's Statements of Grievance for whether, on their face, they sufficiently allege an election unfairness or fraud under 11 N.T.C. Chapter 1-13 as a whole and under the guidelines for election review set out in *Johnson v. June*, 4 Nav. R. 79 (1983), (hereinafter cited as *Johnson.*)

Johnson sets forth standards for the court to apply when reviewing the actions of the Board in matters of election dispute. These standards follow the theories that election results are presumed to be regular and proper and that the contestant must overcome that presumption by showing that the alleged misconduct or irregularity was of such a nature that the outcome of the election was changed or a fair election was prevented.

Nowhere in the Statements of Grievance filed by the appellant is there any connection made between the publication of the wrong time for the polls to close and failure of any registered voter to vote for appellant. Even more telling, there is not a showing that a single registered voter failed to vote for either candidate because of a belief that the polls closed at 5:00 p.m. rather than 7:00 p.m. Appellant has not overcome the presumption that the election results were regular and proper. As this Court stated in *Johnson* "Speculation on the conduct of an election is not enough to overturn it. . . ." Appellant's Statements of Grievance presented only speculation that the election was unfair or improper and that the outcome of the election was changed as a result of that unfairness or impropriety.

The same analysis applies to appellant's allegations that a professional and impartial attitude was not demonstrated by the election representative as required by 11 N.T.C. Chapter 13, § 245. A person's attitude is one of subjective interpretation and for an attitude to ever rise to the level of being judicially reviewable, there must be specific instances of conduct demonstrating the alleged "attitude." Appellant's Statements of Grievance do not contain those specific instances and do not show that even one voter failed to cast a ballot because of an election official's improper attitude, much less that the result of the election was changed. Further, as the court pointed out above, Chapter 13 deals with specific prohibited conduct and alleged violations of Chapter 13 must set forth conduct prohibited by that Chapter.

The allegation that an unspecified percentage of the registered voters did not vote as a direct result of the publication of the wrong time for the polls to close suffers from the same failure to show that any voter failed to vote because of that publication. Appellant has not even demonstrated that a smaller percentage of people voted in the April 17, 1984, election than in other special elections.

Even though the court directed appellant to specify precisely which election law was violated, the appellant chose to rely upon her original assertions that 11 N.T.C. Chapter 13, §245 was violated by the release of the wrong information to the *Navajo Times*. As the court pointed out above, Chapter 13 deals with specific wrongful acts in connection with elections. Section 245 makes it unlawful for the Chairman of the Election Commission, a member of the Election Commission, any registrar, poll judge, poll clerk, or Special Election Supervisor to "*knowingly* and *willfully* fail to neglect to perform any duty under any part of this chapter" (emphasis added). Appellant neither sets forth the section violated nor claims that any election official knowingly and willfully violated that section. The affidavit supplied by an Angela Davidson regarding the incorrect voting time states that she is usually employed as a cook at the chapter house but on the day of the special election she was acting as a receptionist. She states that she gave the wrong information to the *Navajo Times* but there is no assertion that she released the incorrect poll closing time at the direction of an election official.

The court does not hold that "knowingly and willfully" is the standard by which all alleged violations of the election code will be reviewed. It is the standard established for alleged violation by election officials of 11 N.T.C. Chapter 13.

Although the burden of showing a violation of the election code is on the one contesting the election, the Court has reviewed 11 N.T.C. Chapters 1-13 together with the Statements of Grievance for any possible construction of a violation of the election laws and can find none.

Finally, the Court comes to the issue of whether the Commission acted properly in dismissing the grievance without a hearing.

11 N.T.C. § 51 sets forth the procedures for election contests. 11 N.T.C. § 51 (17) (a) states:

> Within ten days of the incident complained of or the election, the complaining person must file with the Commission a statement setting forth the reasons why he believes the election law has not been complied with.
>
> If, on its face, the statement of election contest is insufficient under the election law, the statement shall be dismissed by the Navajo Election Commission.

The Commision determines whether the Statement of Grievance sufficiently states a violation of the election law. This means that the grievance must specify what election law was violated. It must also contain sufficient facts that if proven to be true would indeed constitute a violation of the law. Further, under *Johnson* these facts must tend to rebut the presumption that the election was fair and show that but for the violation of the election law the result would have been different.

The function of this Court in reviewing the actions of the Commission is

to determine whether the Commission abused its discretion or failed to follow its procedures. The Court cannot find that the Commission abused its discretion to determine the sufficiency of the Statements of Grievance or failed to follow its procedures.

The decision of the Commission is affirmed.

No. **A-CV-02-84**

Court of Appeals of the Navajo Nation

Validating the Marriage of
Rose M. Garcia and Alfred Garcia
Decided February 20, 1985

OPINION

Appeal reviewed by Chief Justice Nelson J. McCabe.

[redacted]

Wesley W. Atakai, Window Rock, Arizona, for the Appellant.

On December 1, 1983, Rose M. Garcia filed a Petition for Validation of her marriage to Alfred Garcia, deceased. The petition set forth that Rose M. Garcia is an enrolled member of the Navajo Tribe of Indians and that decedent, Alfred Garcia, was a Mexican-American. The petition alleged that petitioner and decedent cohabitated and were recognized as husband and wife in the community. The petition also alleged a Navajo Traditional Wedding Ceremony on April 3, 1959, and recited four children born of the union.

On December 8, 1983, the trial court entered an Order denying the petition on the basis of 9 N.T.C. § 2. That section states:

> Marriage between Navajos and non-Navajos *may be validly contracted only* by the parties' complying with applicable state or foreign law (emphasis supplied).

This section was passed by the Tribal Council on October 29, 1956. This was more than two years prior to the traditional ceremony alleged in the petition for validation.

The case came to the Court of Appeals on the sole issue of whether a marriage between a Navajo and a non-Navajo may be validated.

The Court was impressed by the arguments of counsel for the petitioner which recounted a history of non-Navajos adopting a Navajo way of life and becoming a part of their community. One particular example was Jesus Arviso, a man of Mexican origin who became a Navajo leader. The Court recognizes the contribution and importance of many non-Navajos

but finds that the provisions of the Navajo Tribal Code require it to affirm the decision of the trial court.

1 N.T.C. § 501 provides that a person who is at least one-fourth degree Navajo blood may become a member of the Navajo Tribe. 1 N.T.C. § 502 states that no one can become a Navajo except by birth. Consideration of these statutes along with 9 N.T.C. § 2 as set forth above compels this Court to hold that a Navajo and non-Navajo may have a valid marriage under the laws of the Navajo Nation only if they comply with applicable state or foreign law.

The Court recognizes that the Garcias had a long relationship and by this opinion does not intend to detract from the fact that they regarded themselves as married.

The Court by this decision does not decide the issue of whether the Garcias may have had a valid marriage under the laws of the state of their residence.

It is therefore Ordered that the decisions of the trial court be and hereby are affirmed.

No. A-CV-36-83

Court of Appeals of the Navajo Nation

Melvin T. Chavez, *Appellant,*

vs.

Carole Thomas, *Appellee.*

Decided March 21, 1985

OPINION

Before McCabe, Chief Justice, Neswood and Bradley, Associate Justices.

[redacted]

James Jay Mason, Esquire, Gallup, New Mexico for Appellant; and Nona Lou Etsitty, Esquire, Window Rock, Navajo Nation (AZ) for Appellee.

This matter came before the Court for oral argument on November 16, 1984. It arose originally in the trial court upon a Petition for Paternity and Child Support.

On November 29, 1983, the trial court entered a judgment finding appellant to be the biological father of appellee's minor child. A Notice of Appeal was filed from that judgment. Thereafter a Motion for New Trial on the basis of newly discovered evidence was filed with the trial court. That motion was denied and a Notice of Appeal was filed from that denial. The two Court of Appeals cases were consolidated and an appeal was allowed.

The Petition for Paternity and Child Support was filed on October 6, 1982. On February 24, 1983, the parties and the minor child submitted themselves to an HLA Blood Test. The results of that test gave the probability of appellant being the father at 76.2 percent. On June 22, 1983, the parties and the minor child submitted to a Red Blood Cell Test. The report of that test indicates six matching systems were used. Under five of these systems the probability of paternity was 68.9 percent. The sixth, the Kidd system, showed an apparent exclusion. Under the Kidd system, appellant was positive for JK^b and negative for JK^a. Under the presumption that such a result makes both of appellant's genes identical for JK^b, all offspring of

such a person are expected to inherit the JK^b marker. In some cases a rare gene at the Kidd locus has been found in Amerindians in Brazil. The presence of this rare gene in the appellant could change the expectation of finding the JK^b in the minor child.

The JK^b marker was not found in the minor child. The report of the Red Blood Cell Test stated that this result can be taken as evidence that appellant is not the father of the minor child or that both have a rare gene which would suggest paternity.

On June 28, 1983, counsel for both parties placed a call to Arizona Blood Services regarding the report from the lab. At that time counsel were informed that the only manner of determination whether appellant had such a rare gene would be to do a blood test upon appellant's parents.

Appellant's parents refused to have the tests. The case went to trial on November 3, 1983. On November 30, 1983, the trial court entered judgment in which appellant was found to be the father. The trial court ruled that only tests establishing non-paternity should be admitted in paternity cases. Accordingly, the trial court refused to give any weight to the results of either test.

After the trial, appellant's parents agreed to submit to the tests. These were done on December 13, 1983. An affidavit signed by Robert C. Williams, Director of the Histocompatibility Unit of Arizona Blood Services stated that as a result of the December 13, 1983, testing of appellant's parents, appellant could be excluded as father of the minor child.

On December 28, 1983, appellant filed a Motion for Reconsideration and New Trial on the basis of the affidavit of Robert Williams.

The Motion for New Trial was denied and appellant filed his Notice of Appeal.

The appeal was allowed on two questions of law:

1. Whether the trial court erred in the weight given to the results of the two blood tests of the parties and the minor child;
2. Whether the trial court erred in denying the Motion for New Trial.

Phillips v. *Farley*, 1 Nav. R. 69, 70 (1972), (hereafter referred to as *Phillips*), establishes the requirements for granting a Motion for New Trial on the grounds of newly discovered evidence. Those requirements are that the evidence:

1. Must be such as would probably change the result on a new trial;
2. Must have been discovered since the trial;
3. Must be of such a nature that it could not have been discovered before trial by due diligence;

4. Must be material; and
5. Must not be merely cumulative or impeaching.

At oral argument of this case there was some discussion of whether all the requirements of *Phillips* have to be met or whether the existence of one element is sufficient to grant a motion for new trial on the basis of newly discovered evidence. This Court holds that all five requirements set forth in *Phillips* must be present. The Court further holds that all five requirements were present in this matter.

Evidence which would exclude appellant as father of the minor child would probably change the result on a new trial. The evidence was discovered after trial as it was only after trial that appellant's parents consented to the blood tests and the results of those tests were made known. The evidence could not have been discovered prior to trial. Appellant had no power to compel his parents to submit to the tests and therefore the evidence was not in his control. The failure of appellant's parents to consent to the blood test cannot, in this case, be ascribed to a lack of diligence on the part of the appellant. The evidence is certainly material to the issue of paternity and is not cumulative or impeaching as there was no evidence presented at trial as to the blood composition of the appellant's parents.

The granting of a motion for new trial on the basis of newly discovered evidence does not in itself constitute a ruling in advance on the admission of such evidence or the weight to be given to such evidence. Proponent must still present the evidence in a proper and admissible fashion and the trier of fact must still determine the weight to be given to the evidence presented to the court at new trial.

At new trial the trial shall be only upon the evidence of the blood tests performed upon the parties, the minor child, and appellant's parents by Arizona Blood Testing Services unless the trial court finds that fairness and justice to all the parties requires that there be a complete rehearing as to all evidence.

As the new trial may dispose of all questions regarding the weight to be given to blood tests, the Court at this time makes no decision upon that issue. Upon final judgment at new trial, the parties will have the right to raise on appeal the issues of sufficiency of the evidence and the weight to be given to the evidence.

It is therefore Ordered that this case be and hereby is remanded to the trial court for new trial consistent with this order.

No. A-CV-01-84

Court of Appeals of the Navajo Nation

Vernold Livingston, ***Appellant,***

vs.

Annie Livingston, ***Appellee.***

Decided March 29, 1985

OPINION

Before McCabe, Chief Justice, Neswood and Hilt, Associate Justices.

[redacted]

Genevieve K. Chato, Esquire, Fort Defiance, Arizona for Appellant and Lawrence Ruzow, Esquire, Window Rock, Arizona for Appellee.

On December 5, 1983, the trial court entered a decree of divorce. The trial court order provided for custody and support of the two minor children and a division of the marital property. The appellee was awarded the parties' two bedroom hogan at Iyanbito. The trial court found that the parties had stipulated the value of the hogan to be $18.50 per square foot. There was no finding as to the number of square feet. The rest of the community property was awarded to the party in possession on the day of hearing.

The appellant filed a Notice of Appeal challenging the trial court's award of the Iyanbito hogan to the appellee. Appellant asked for a determination of the fair market value of the hogan and for a one-half interest in that market value.

An appeal was allowed on the issue of whether the trial court abused its discretion in awarding the hogan to the appellee. The parties were ordered to submit to the Court a written stipulation as to the square footage. The parties stipulated that by external measurements the square footage is 732 square feet and by internal measurements it is 576.13 square feet. Using the value of $18.50 per square foot stipulated by the parties, the value of the hogan ranges from $10,656.00 to $13,542.00.

9 N.T.C. §404 requires that "each divorce decree shall provide for a fair and just settlement of property rights between the parties. . . ." In *Shorty v. Shorty,* 3 Nav. R. 151 (1982), [hereafter cited as *Shorty*], the Court set

forth guidelines to assist the trial courts in determining what is fair and just. Eleven factors were listed in *Shorty.* These factors include the financial circumstances of the parties and the circumstances of the minor children. The District Courts were directed to consider all the circumstances of the parties when making a division of marital property.

The Court considered the relevant facts of this case. Appellant was awarded custody of the two minor children. Appellant's gross salary at the time of hearing was approximately two-thirds of appellee's. The parties received an approximately equal division of household goods and automobiles. The parties were awarded their separate property, the value of appellee's appearing in excess of appellant's. Appellee was ordered to pay approximately $2,000.00 more of the community debts but these debts were generally on his share of the community household goods and his vehicle.

A consideration of the factors in *Shorty* in light of the facts set forth above leads this Court to conclude that it was an abuse of discretion to award the entire hogan to the appellee.

The Court agrees that an equal division of marital property is not mandated. This does not mean, however, that there is not to be a balancing of all the circumstances of the parties. In fact, this balancing of circumstances is precisely why an equal division of property is not required in most jurisdictions. Under the flexibility thus allowed a court may, for example, offset one party's lower earning capacity by a larger share of the property. The desired end result is for the parties to start divorced life on some sort of equitable basis.

A balancing of the circumstances of the parties in this case requires at the very least that the marital property be divided equally.

It is therefore Ordered that appellee pay to the appellant as and for her interest in the parties' hogan the sum of six thousand dollars ($6,000.00) on or before May 1, 1986.

No. A-CV-05-85

Court of Appeals of the Navajo Nation

In the Matter of Contempt of:
Arnold Sells
Decided May 3, 1985

OPINION

Before McCabe, Chief Justice, Bradley and Tso, Associate Justices.

On March 7, 1985, at 4:20 p.m. Arnold Sells, Fiscal Director of the Judicial Branch, was served with an order to appear on March 8, 1985, at 9:00 a.m. in Tuba City District Court and Show Cause as to why he should not be held in contempt for failure to process travel authorizations for two Tuba City Court employees.

On March 8, 1985, the Chief Justice issued a Writ of Prohibition restraining Robert B. Walters, Judge of the Tuba City District Court, from any further proceedings against Arnold Sells in regard to the travel authorizations pending a hearing on the Writ. Judge Walters was ordered to submit a brief by April 15, 1985, on why the Writ should not be made permanent. Oral argument was set for April 29, 1985.

Judge Walters neither submitted a brief nor appeared for oral argument. The Court feels that the issues involved are of sufficient significance to warrant an Opinion as well as an Order.

The Court views this case as containing two major issues:

1. The jurisidiction of the trial court to issue the Order to Show Cause; and
2. The authority of the Court of Appeals to issue a Writ of Prohibition.

7 N.T.C. §253 establishes the subject matter jurisdiction of the trial courts of the Navajo Nation and 7 N.T.C. §255 provides that "the trial court shall have power to issue any writs or orders necessary and proper to the complete exercise of its jurisdiction."

This Court affirms the principle that the Navajo Tribal Courts have inherent power to enforce their orders and uphold the dignity of the court through contempt powers. This Court further affirms the holding in the case of *In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2

Nav. R. 85 (1979), [hereafter *Tuchawena*], that the trial judge has a great deal of discretion in determining what constitutes contempt and that "Absent a clear abuse of discretion or conduct on the part of the judge which is so unreasonable as to be classified as capricious and arbitrary, this Court will not disagree with a trial judge's determination." *Tuchawena,* p. 89. The holding in *Tuchawena* does not, however, clothe a judge with authority to use the contempt powers of the court to punish actions which displease him personally or are outside the jurisdiction of the court. The use of the word "discretion" as applied to judges or courts means discretion to act within certain boundaries. For judicial discretion those boundaries are the rules and principles of law as applied to the facts of a particular case. *Black's Law Dictionary,* 5th ed.

Contempt of court is generally defined as willful disobedience of a court's orders or action which bring the authority of the court into disrespect or disregard, interferes with parties or witnesses during litigation, or otherwise obstructs the court in the administration of justice. See *Black's Law Dictionary,* 5th ed. and 17 Am. Jur. 2d Contempt §3.

In the instant case, Arnold Sells was ordered by Judge Robert B. Walters to show cause why he should not be held in ". . .Contempt of Court for your interfering with the operation of this Court and Court staff by refusing to issue travel authorization for staff's travel to Window Rock for Navajo Nation Childrens' Code orientation on March 6 and 7, 1985."

The travel of staff of the Judicial Branch is an administrative, not a judicial matter. The Chief Justice is the administrative as well as the judicial head of the Judicial Branch. See 7 N.T.C. §371; Tribal Council Resolution CO-69-58 Preamble (1) and (2) as contained in note to 7 N.T.C. § 201; Minutes of Tribal Council Discussion, October 17, 1958; Personnel Policies and Procedures of the Judicial Branch § VIII.

The minutes of the Tribal Council Discussion at the time Title 7 was being discussed contain some indication of how the Tribal Council understood the administrative duties of the Chief Justice. Laurence Davis who was the attorney advising the Tribal Council gave the following explanation of the administrative duties of the Chief Justice. What is now Title 7 of the Navajo Tribal Code was enacted with Mr. Davis' explanation unchanged.

Administrative duties of Chief Justice, Section 7. Now this section provides that the Chief Justice besides presiding over all Appeal Courts will have the work of supervising the work of all the judges. He will advise the Chairman as to whether any probationary judge should be offered a permanent appointment and as to whether any judge is falling down on the job and should be removed from office. Gentlemen, the question has frequently arisen, "To whom are the judges responsible" and it was never possible to answer that question. They were responsible to the voters

and they were responsible to the Council because the Council fixed their salaries, but there was no clear line of authority. Nobody could tell a judge, "Look here Judge so and so, you are supposed to go to work at eight o'clock in the morning instead of ten o'clock." Under this resolution the Chief Justice would definitely have the responsibility of seeing to it that the judges got to work on time and did their jobs. *Record of the Navajo Tribal Council,* October 17, 1958.

The administrative authority of the Chief Justice is a recognized principle of court administration:

Effective and consistent direction of effort and application of policy in a court system require that administrative authority within the system be clearly established. Every court unit within the system should manage its internal business in a way consistent with the general rules and policy of the system as a whole. The work of every unit should be coordinated with that of other units that stand in vertical or parallel relationship to it. The system as a whole should maintain effective external relationships with other agencies of government, with the bar, and with various segments of the public. These tasks must be performed by someone in particular. Establishing administrative responsibility consists of specifying that person and his duties and authority.

In assigning administrative responsibility in court systems, the general principle of administration should be observed that such responsibility should be vested in individuals, not groups. Effective administration requires taking risks, assuming burdens, conferring approval, imposing rebuke, and answering to others for failures. The pains and penalties inherent in asserting administrative authority are immediate and apparent, while the rewards for doing so usually come only in time and then often only in the form of private satisfaction. These characteristics of the administrative task make the group or committee an unwieldy and unreliable instrument in which to repose ultimate administrative responsiblity. American Bar Association, *Standards Relating to Court Organizations,* 1974, pp. 15-16.

The Court recognizes that American Bar Association standards in regard to court organization are not binding upon the Navajo Nation. The Court finds, however, that the adoption of the ABA Code of Judicial Conduct and the ABA Code of Professional Responsiblity is a recognition by members of the Navajo Nation Judiciary and the Navajo Nation Bar Association of the excellence of American Bar Association standards.

Pursuant to the administrative authority of the Chief Justice, as contained in the above authorities, the Chief Justice has issued certain administrative orders. One such order issued July 12, 1984, and titled "Authorization for Travel" requires that all requests for travel outside the local judicial district by Judicial Branch staff be submitted to and approved by the Chief Justice. In addition, the tribal Office of Financial Services requires the signature of either the Chief Justice or the Court Administrator before travel claims are processed and paid.

Mr. Sells is an employee of the Judicial Branch and works in the Office of the Chief Justice. His position as Fiscal Director is part of the administrative staff of the Office of the Chief Justice of the Judicial Branch. The Fiscal Director works under the direction of the Chief Justice and not the judges collectively or individually. Thus, the Order to Show Cause issued to Arnold Sells was an attempt by the trial court to hold Mr. Sells in contempt for an action not properly within the jurisdiction of the trial court or the administrative authority of the trial judge. Further, it was an attempt to hold Mr. Sells in contempt for failure to act in a situation where he is not empowered to act.

The Court holds that the Order to Show Cause in this matter exceeds both the judicial and administrative authority of the trial judge.

The Court further holds that insofar as this Opinion conflicts with that portion of *Gudac v. Marianito, et. al.*, 1 Nav. R. 385 (1978), [hereafter *Gudac*], which holds that the judges collectively control the personnel policies of the Judicial Branch; that portion of *Gudac* is overruled. That holding in *Gudac* is not in keeping with Title 7 of the Navajo Tribal Code, with the legislative history of Title 7 of the Tribal Code, or with principles of sound court administration. Further, that particular holding of *Gudac* is not in keeping with the "universally written" principles of appealability which were announced in *Gudac* for the reason that the issue of who sets the personnel policies of the Judicial Branch never appeared in the case prior to the Opinion. In addition, the *Gudac* Court's construction of Title 7 N.T.C. Subchapter 9 cannot be accepted under any principles of statutory interpretation and construction.

The next issue which the Court addresses is that of the authority of the Court of Appeals to issue the Writ of Prohibition.

Subchapter 5 of Title 7 of the Navajo Tribal Code deals with the Court of Appeals. 7 N.T.C. § 302 states:

> The Court of Appeals shall have jurisdiction to hear appeals from final judgments and other final orders of the Trial Court. . . .

§ 303 of 7 N.T.C. states:

> The Court of Appeals shall have the power to issue any writs or orders necessary and proper to the complete exercise of its jurisdiction, or to prevent or remedy any act of the Trial Court beyond such court's jurisdiction, or to cause the Trial Court to act where the Trial Court unlawfully fails or refuses to act within its jurisdiction.

Thus, under the statutory authority of the Navajo Tribal Code, the Court of Appeals has both appellate jurisdiction and supervisory jurisdiction. Its appellate jurisdiction is contained in 7 N.T.C. § 302 which grants the Court of Appeals the authority to hear appeals from final judgements and orders of the trial court. Its supervisory jurisdiction is contained in §

303 of N.T.C. which grants the Court of Appeals the power to issue writs.

Supervisory jurisdiction is an established concept of court organization:

> Supervisory jurisdiction, or the power of superintending control, over courts of lower rank in the same jurisdiction is a kind of original jurisdiction frequently conferred upon appellate courts, especially the highest court of the jurisdiction. 20 Am. Jur. 2d, Courts, § 111.
>
> Supervisory jurisdiction may be exercised to compel action by an inferior court or to keep an inferior court within its jurisdiction, as by the issuance of a Writ of Mandamus, or a Writ of Prohibition. 20 Am. Jur. 2d Courts, § 115.
>
> The highest appellate court should also have authority to entertain original proceedings, such as those for writ of mandamus or prohibition, in aid of performing its responsibilities as a court of review. This authority is generally and properly held to be an inherent aspect of the highest court's status as such. American Bar Association, *Standards Relating to Court Organization,* p. 34.

Additionally the concept of the supervisory jurisdiction of the Navajo Court of Appeals is sanctioned not only by Title 7 of the Tribal Code but by the legislative history of Title 7:

> Section 6 speaks of the jurisdiction of the Court of Appeals. Now you know the present appeal procedure is for two judges, other than the judge who heard the case, to hear the case that is appealed. Under this new procedure there would be one judge permanently assigned to appeals, that is the Chief Justice. Now, also this would provide that the Court of Appeals would have the power to issue orders to the Lower Courts requiring the Tribal Court to refrain from exceeding its jurisdiction or to act if it failed to act. In other words, if the judge in the Tribal Court refused to do anything about a case under the present system, there is nothing you can do, but under the new system which is provided here, the Court of Appeals could issue an order and tell him to get busy. That is all in accordance with one of the principal purposes of this resolution which is to set up supervision over the judges we think we don't have at the present time, and to set up proper supervision with supervision from the judicial branch rather than interference from any other branch of the Government. *Record of the Navajo Tribal Council,* October 17, 1958. (The above is an explanation by Laurence Davis of the then proposed Court of Appeals. The Tribal Courts were established with this explanation unchanged.)

Further, the Court calls attention to Tribal Council Resolution CO-69-58, Preamble (2). This part of the Preamble to the Tribal Council Resolution, which established the Navajo Tribal Courts, states that an appellate court is needed to supervise the work of the trial courts and the trial judges.

The Court therefore holds that a Writ of Prohibition or Writ of Superintending Control is a proper exercise of the supervisory jurisdiction of the Court of Appeals. The Court further holds that the Writ of Prohibition issued in the instant matter was proper and within the authority of the Court of Appeals.

It is therefore Ordered that the Writ of Prohibition be and hereby is made permanent.

No. **A-CV-07-85**

Court of Appeals of the Navajo Nation

McCabe, Nelson J., Chief Justice, *Petitioner*

vs.

The Honorable Robert B. Walters, *Respondent*

Decided May 28, 1985

OPINION

Before Wilson, Special Presiding Justice, Kirk and Yellowhair, Special Associate Justices.

There are two issues that must be addressed by the Court in this prohibition proceeding. The first is whether the appointment of a retired judge as Acting Chief Justice or Special Presiding Judge is authorized under Navajo Tribal law. The second issue is whether Respondent, the Honorable Robert B. Walters, should be permanently prohibited from further participation in the criminal proceedings below involving the Petitioner.

The following is the summary of facts in this matter:

1) On March 8, 1985, criminal charges alleging three offenses of making or permitting a false tribal voucher, theft, and fraud in violation of the Navajo criminal code, were filed with the Tuba City District Court against the Petitioner, Nelson J. McCabe. The Petitioner is the Chief Justice of the Navajo Nation, the chief judicial officer of the Judicial Branch. A criminal summons was issued that same day, directing the Petitioner to appear for arraignment on March 11, 1985.

2) On March 11, 1985, the Petitioner appeared before the Honorable Robert B. Walters for arraignment, entered a plea of not guilty to the criminal charges, and was released on his own recognizance.

3) On March 14, 1985, the Honorable Judge Walters apparently on his own motion, modified the terms of Petitioner's release order and as a condition of his personal recognizance release, ordered the Petitioner relieved from performing his judicial duties and / or exercising judicial functions of his position as Chief Justice of the Navajo Court of Appeals. There was no written motion filed with the Court, nor was notice provided to Petitioner.

4) On March 18, 1985, the Petitioner filed an Application for Writ of Prohibition with the Court of Appeals, requesting that the Respondent be restrained from taking any further action in Petitioner's criminal cases and

all other related criminal proceedings involving Judicial branch personnel, on the grounds that the Respondent exceeded the court's jurisdiction and that the Respondent was biased. That same day the Petitioner, as Chief Justice, issued the Writ of Prohibition granting the relief requested in the Application, and also restrained the Director of the Division of Public Safety from executing any orders of the Tuba City District Court in the criminal cases cited.

5) On March 20, 1985, the Petitioner, as Chief Justice, appointed a retired judge, Honorable Dean Wilson, as special presiding justice of the Court of Appeals for all the criminal proceedings pending in the Tuba City District Court, involving judicial staff personnel, including the Petitioner. The Chief Justice appointed a retired judge due to the apparent conflict of interest that existed for all district judges in being called as witnesses in the criminal cases.

6) On Friday, March 22, 1985, at 5:00 p.m., the Respondent issued a bench warrant for Petitioner's arrest, for violation of the Order modifying the conditions of his release, in that Petitioner continued to perform his official duties as the Chief Justice of the Navajo Nation. The warrant was unsuccessfully executed by tribal police officers on Sunday afternoon, March 24, 1985, at Petitioner's mother's residence.

7) On March 25, 1985, Petitioner filed with the Court of Appeals, a Motion for an Order Affirming the Writ of Prohibition, and a Petition for An Order to Show Cause against the tribal police officers who attempted to execute the arrest warrant.

8) On March 27, 1985, the Honorable Dean Wilson vacated the Writ of Prohibition, dated March 18, 1985, and issued an Alternative Writ of Prohibition restraining the Honorable Robert Walters from, in any way, restricting the Chief Justice from performing the duties of his office.

9) On April 3, 1985, Respondent filed a Motion to Convene a Three-Judge Panel of the Court of Appeals and to Rescind the Appointment of Judge Wilson.

10) On April 12, 1985, the Petitioner filed with the Tuba City District Court a Motion to Disqualify Respondent.

11) On April 12, 1985, twenty-two criminal defendants filed with the Court of Appeals an Application for Leave of Court to Include Similarly Situated Navajo Defendants in the Writ of Prohibition requesting that the Respondent be restrained from taking any action in their criminal proceedings, pending in the Tuba City District Court.

12) On April 23, 1985, the Honorable Dean Wilson, issued an Order dismissing the prohibition proceeding and vacating the hearing set for April 29, 1985, to become effective upon the Honorable Robert Walters' approval of an order disqualifying himself from Petitioner's criminal cases. To date, no such disqualification order has been approved by Respondent.

13) On April 29, 1985, a three-judge panel of the Court of Appeals, composed of three retired judges, held a hearing on the Petitioner's Application for Writ of Prohibition and Motion to Affirm the Writ of Prohibition.

Addressing the first issue, Respondent claims that the Navajo Tribal Code requires that an Acting Chief Justice or Special Presiding Justice must be appointed from among the district judges and that the appointment of Honorable Dean Wilson, a retired judge, as Special Presiding Justice of the Court of Appeals in the prohibition proceeding is improper. Respondent relies on 7 N.T.C. § 372 (1977 Edition) which provides in pertinent part:

"The Chief Justice of the Navajo Tribe shall designate one judge of the Tribal Court to act as Chief Justice whenever the Chief Justice is absent from the territorial jurisdiction of the Trial Court, is on vacation, ill or otherwise unable to perform the duties of his office, or whenever the office of the Chief Justice is vacant. . . ."

This Court does not dispute Respondent's interpretation of the mandate of 7 N.T.C. § 372. However, the instant case presents a situation not contemplated when that section was adopted. That is, when all district judges are listed as witnesses in the trial court proceedings, who then, pursuant to 7 N.T.C. § 372, is qualified for appointment as Acting Chief Justice of the Court of Appeals to hear matters arising before the appellate court. Section 372 does not address this situation. Absent a specific statutory provision, the Court shall consider the tribal code sections dealing with the judiciary branch as a whole, to determine the legislative intent for guidance in this matter. It is clear that the Navajo Tribal Council, by enacting 7 N.T.C. § 372, intended that an Acting Chief Justice be appointed first from among the district judges. Yet, to rely solely upon Section 372 in the instant case would mean that no Acting Justice could be appointed, given the conflict of interest that exists for all the district judges in being called as witnesses in the trial below. Such a result could not have been intended by the Council. Where a strict construction of tribal law would lead to an absurd result, the Court must balance the effects of a literal interpretation against the legislative intent and a reasonable means to accomplish it. In reviewing the provisions of Title 7, the Council established a secondary pool of judges from which an appointment can be made. Although not specifically authorizing appointment as Acting Chief Justice, 7 N.T.C. § 353 (i) allows for appointment of retired judges by the Chief Justice, as follows:

"Retired judges shall be ineligible to hear any case in any court of the Navajo Tribe, unless the Chief Justice shall, with the consent of the retired judge involved, call him back for temporary duty to help relieve congestion in the docket of the Navajo courts."

It is within the province of the judiciary to construe and interpret legislation and the terms used therein. It is the Court's determination that congestion exists in the Court of Appeals when no appointment to the Court of Appeals can be made pursuant to 7 N.T.C. § 372, thereby authorizing appointment from the pool of retired judges pursuant to 7 N.T.C. § 353 (i). In considering the provisions of Title 7 as a whole, the Court holds that the appointment of Honorable Dean Wilson, a retired judge, as Acting Chief Justice or Special Presiding Justice in this procceding is authorized by Navajo Tribal law and is therefore proper.

With respect to the two remaining appointments of retired judges to this three-panel Court of Appeals panel, 7 N.T.C. § 301 establishes a Navajo Tribal Court of Appeals to consist of a Chief Justice and two Associate Justices. Appointment of Associate Justices are to be by the Chairman of the Navajo Tribal Council with the consent of the Navajo Tribal Council from among those recommended by the Judiciary Committee. This particular section became effective in 1978, but to date the Chairman has never exercised his authority under this provision and thus, there have been no appointments of Associate Justices of the Court of Appeals pursuant to this section. Were this Court to adopt a strict and literal interpretation of Section 301, then a logical extension of that analysis can only result in no properly constituted Court of Appeals since May 4, 1978.

It is clear that the Navajo Tribal Council intended to create a three-judge Court of Appeals, with a Chief Justice as its presiding judge. It is also clear that the three Justices of the Court of Appeals were to be permanent appointments, separate and distinct from the judges of the district courts. The pre-1978 provision dealing with the Court of Appeals established only the position of the Chief Justice as a permanent Court of Appeals position and provided that the two Associate Justices be selected from among the district judges. 7 N.T.C. § 301, prior law.

In the situation at hand, where the Executive branch has failed to act, does it necessarily follow that there can be no Court of Appeals appointments authorized under tribal law. This Court thinks not. Absent executive action authorized under tribal law, the Chief Justice in administering the Court of Appeals and as the chief judicial officer can properly look to prior law as guidance for appointments of associate justices to the Court of Appeals. In fact, the Chief Justice has since 1978 utilized 7 N.T.C. § 301, enacted prior to 1978, as the basis for appointing tribal judges as justices to the Court of Appeals. To have done otherwise would have resulted in appellate cases pending before the Court of Appeals for six years without any final decision.

It can reasonably be inferred that the Navajo Tribal Council ratified this interpretation, else it would have appropriated the necessary funds to allow for appointment of Justices by the Chairman pursuant to the 1978

amended provisions. Application of the pre-1978 Section 301 is a reasonable means of accomplishing the Tribal Council's purpose that there be established a 3-judge Court of Appeals.

However, application of Section 301, whether under post-1978 or pre-1978 law, does not dispose of the issue altogether. In the instant case, authority for appointment of retired judges to the Court of Appeals rests on 7 N.T.C. § 353 (i) and its application is identical to that discussed above relating to Judge Wilson's appointment. Thus, the appointment of retired judges to the Court of Appeals in this proceeding is authorized under tribal law and is proper.

In now considering the second issue presented to the Court—whether the Respondent should be permanently prohibited from further participation in Petitioner's criminal proceeding now pending before the Tuba City District Court, the Court feels it necessary to establish the parameters of this prohibition proceeding.

To begin, Petitioner is the only party who has filed Application for Writ of Prohibition *and* has standing to request this remedy; therefore, the Court can only consider the issues raised by Petitioner and Respondent. The Court will not consider the propriety of permanently prohibiting Respondent's action in the criminal proceedings involving judicial personnel other than Petitioner, presently pending before the Tuba City District Court, for the reason that none of those individuals have requested relief from this Court.

The Court will also not consider the alleged violations by Petitioner of the Navajo Code of Judicial Conduct due to the recent Navajo Tribal Council action ordering the suspension of the Petitioner as Chief Justice, thereby making this issue moot. See Resolution of the Navajo Tribal Council, No. CMY-46-85, May 9, 1985.

In addition, the Application for Leave of Court to Include Similarly Situated Navajo Defendants in the Writ of Prohibition, filed by the twenty-two criminal defendants, charged with various criminal violations in the Tuba City District Court, is denied for failure to establish grounds entitling them to the relief requested and they have an adequate remedy at law by means of an appeal.

A Writ of Prohibition is a discretionary writ and is appropriately issued where the trial court is proceeding without or in excess of its jurisdiction, or has abused its discretion in exercising its function over matters within its authority to decide and Petitioner has no plain, speedy, and adequate remedy at law. 63A Am. Jur. 2d, Prohibition § 133. This Court's authority to issue a writ of prohibition is established at 7 N.T.C. § 302, which grants to the Court original jurisdiction to hear cases where a special writ or order is necessary or proper to carry out its jurisdiction, and supervisory jurisdiction over a trial court acting beyond its jurisdiction. *Begay v.*

Honorable Tom Tso, 4 Nav. R. 122 (1983). This proceeding does not involve a trial court acting without jurisdiction, rather the dispute between the parties centers on a trial court's action in excess of its jurisdiction and its abuse of discretion. There has been no objection by Petitioner to the trial court's jurisdiction over the subject matter and the parties in the criminal proceeding below. Petitioner claims that Respondent exceeded the district court's criminal jurisdiction by ordering Petitioner to temporarily step down from his position as Chief Justice of the Navajo Nation as a condition of release on his personal recognizance.

It is Respondent's position that the release terms are authorized under 17 N.T.C. § 1813, which gives discretion to the district judge in setting the conditions of bail. Section 1813 provides:

> "The judges of the Trial Court of the Navajo Tribe are hereby authorized to impose conditions of a date of appearance and such other conditions upon bail as are necessary or proper."

A review of the tribal code sections addressing bail, reveals that bail was intended to include release from custody by either payment of a cash bond or personal recognizance release, and that the purpose of bail is to insure that the criminal defendant appear at any subsequent hearing. The discretion given to the district judge under Section 1813 authorizes the imposition of condition on release that bear a reasonable relationship to insuring defendant's appearance. These may include conditions such as requiring the defendant not leave the court's jurisdiction, or not to violate any tribal laws, or refrain from consumption of alcohol or other similar requirements. This Court fails to see any nexus between the district court's requirement, that Petitioner be relieved of his duties as Chief Justice, as a condition of release from custody, and how this condition in any way insures Petitioner's appearance at a subsequent hearing. Generally, the fact that a criminal defendant is employed is a factor justifying release on personal recognizance, and thus, it was an abuse of discretion to require a criminal defendant to leave his employment as a condition of release, as the Respondent has done in Petitioner's case.

Moreover, the district court exceeded its jurisdiction by ordering the Chief Justice of the Navajo Nation, a judge of a higher court, relieved from performing his judicial duties or exercising the judicial functions of his position during the pendency of the criminal proceeding as a condition of bail. In essence, the district court ordered, without authority, the suspension of the Chief Justice during the pendency of his criminal proceeding. No case decision nor any other legal authority can be found to justify removal or suspension of a superior court judge by a lower court. It is well settled that it is the superior court who possesses the authority to remove or suspend a lower court judge under the supervisory powers of an appel-

late court, and not the reverse as Respondent claims. 20 Am. Jur. 2d, Courts 111-117; 53 A.L.R. 3rd 882. In the Navajo judicial system, 7 N.T.C. § 303, clearly establishes the supervisory jurisdiction over the district courts in the Court of Appeals of the Navajo Nation, and the power to remove or suspend the Chief Justice rests solely with the Navajo Tribal Council, not with a district court judge. 7 N.T.C. § 352 specifically grants removal authority of the Chief Justice to the Navajo Tribal Council upon the recommendation of the Advisory Committee of the Navajo Tribal Council. It was the intent of the Council that it alone retains the power to remove the Chief Justice, and where the statute is specific, no other entity possesses that removal authority under its discretionary powers. Where the district court has exceeded its jurisdiction without legal authority to so act, the legal remedy of appeal is inadequate as a matter of law and issuance of a writ of prohibition to prevent further actions in excess of jurisdiction is proper. For these reasons, the Alternative Writ of Prohibition issued on March 27, 1985, restraining the Respondent from, in any way, restricting the Petitioner, as Chief Justice of the Navajo Nation, from performing the duties of his office is hereby made permanent.

Petitioner in his Application for the Writ of Prohibition has also requested that Respondent be disqualified from further participation in his criminal proceeding based upon Respondent's bias and prejudice preventing him from acting impartially. 7 N.T.C. § 303 grants the Court of Appeals supervisory jurisdiction or superintending control as the basis for interfering with an inferior court in the exercise of its jurisdiction where the lower court has departed from proper judicial activity or become dictatorial or oppressive in their conduct, thereby denying a party an impartial tribunal. A review of the proceedings below raises questions concerning the impartiality of the Respondent.

To begin, it appears that the Respondent failed to comply with the Rules of the Court regarding motions. New Rules of Pleading and Motion were adopted by the district judges on April 23, 1982. Rule 4 (d) of the rules requires that motions be made in writing and that copies of all motions filed with the court be served on the opposing party. The opposing party is then given five days from the date of receipt to file a response. The underlying purpose of these rules is to insure that notice is given to the parties prior to the Court's action on a motion, in conformity with basic notions of due process guaranteed under the Indian Civil Rights Act and the Navajo Bill of Rights. It is unclear from the district court's record who made the Motion for Modification of Personal Recognizance Release that was granted by Respondent on March 14, 1985, ordering Petitioner relieved from performing his judicial duties as Chief Justice of the Navajo Nation. No written notice was filed with the District Court, nor did the Respondent state in its Order of March 14, 1985, who made the Motion.

Given the requirements of Rule 4 (d), together with the due process protections guaranteed by the Indian Civil Rights Act, and the Navajo Bill of Rights, the Court at the very least should have provided notice to the Petitioner of the relief requested in the Motion, prior to granting it. Especially in view of the fact that the Motion requested change in the conditions of Petitioner's release, violations of which could result in his incarceration, and as stated earlier conditions beyond the lower court's authority to impose. In a case decided by this Court interpreting prior rules of motion that did not specifically require service of the motion on the opposing party, the Court nevertheless held that due process, at the very least, requires that a party receive a copy of a Motion and have an opportunity to respond before the matter could be decided by the district court. *Sweetwater Chapter v. Teec Nos Pos Chapter,* 2 Nav. R. 13, 14 (1979). Notably, Respondent participated in that decision as an Associate Justice of the Court of Appeals panel.

Procedural error alone is insufficient to warrant disqualification of a judge. However, in this case, Respondent's enforcement actions against Petitioner for violations of an order beyond the court's jurisdiction combine to prejudice the Petitioner and to raise a fair presumption that the Respondent is incapable of according the Petitioner a fair trial. To compound its already improper actions, and obviously in retaliation against Petitioner for issuing the Writ of Prohibition restraining the Respondent from further action in the criminal proceedings involving judicial personnel, Respondent nonetheless proceeded to enforce the modified release order by issuing an arrest warrant against the Petitioner. Respondent obviously wanted to insure Petitioner's incarceration during the weekend since the arrest warrant was not issued until 5:00 p.m. on Friday, March 22, 1985, but was unsuccessfully executed by tribal police officers on Sunday afternoon, March 24, at Petitioner's mother's residence.

Impartiality of the trial judge is a basic right of a criminal defendant. In the situation at hand, the actions of the Respondent in disregarding court rules of procedure designed to protect the due process rights of litigants, and then use of its enforcement power by means of an arrest warrant intended to result in Petitioner's incarceration over the weekend can only be characterized as oppressive and appear to be directed at Petitioner, for the sole reason that he is the Chief Justice and Respondent's superior. Were Petitioner any other individual, beside being the Chief Justice of the Navajo Nation, the personal recognizance release would have been sufficient to assure the Court that he would appear at any subsequent hearing, and thus, the Court's unauthorized modification of the release order and the enforcement tactics utilized leads this Court to conclude that Respondent is prejudiced against the Petitioner in the proceeding below.

Further, the legal remedy of appeal is inadequate in Petitioner's case.

Respondent has failed to rule on Petitioner's Motion to Disqualify despite this Court's modification of the Writ of Prohibition that narrowly restrained Respondent's actions, and gave Respondent ample opportunity to decide the disqualification issue. To remand this matter back to the district court for ruling on the Motion to Disqualify unnecessarily delays prosecution of the case and imposes additional time and expense on the parties, where Respondent's lack of impartiality is apparent from the records and where the result must be that of Respondent's disqualification. Should this case be remanded below and Respondent deny the Motion, then this issue will again be before this Court.

It is therefore ordered that Respondent is hereby disqualified from further participation in the criminal proceeding pending in the Tuba City District Court involving the Petitioner, and the Alternative Writ of prohibition is hereby modified to include this provision and is hereby made permanent.

No. A-CV-12-82

Court of Appeals of the Navajo Nation

Michael Nelson and Associates, Inc.
dba Navajo Westerners, *Appellant,*
vs.
DCI Shopping Center, Inc., *Appellee*
Decided August 15, 1985

OPINION

Before McCabe, Chief Justice, Tso and Walters, Associate Justices.

Lawrence Ruzow, Esquire, Window Rock, Arizona for Appellant and C. Benson Hufford, Esquire, Flagstaff, Arizona for Appellee.

Notice of Appeal was filed in this matter on May 25, 1982, appealing an Order and Judgment of the trial court entered on April 27, 1982.

On or about June 19, 1979, Michael Nelson and Associates, Inc. (hereafter MNA) and DCI Shopping Center, Inc. (hereafter DCISCI) entered into a sublease agreement. The lease was for commercial space in the Tseyi' Shopping Center in Chinle, Arizona. DCISCI had a lease with the Navajo Nation for the shopping center and in turn subleased space in the shopping center to individual businesses. MNA does business as "Navajo Westerners" and intended to operate a western clothing store in the shopping center.

At the time of the lease agreement the shopping center was still under construction. The lease agreement called for the provisions to become effective thirty days after DCISCI substantially completed construction of the premises or the date that MNA opened for business, whichever happened first. The lease also contained a provision that prohibited DCISCI from leasing commercial space to an establishment engaged in the sale of western clothing and related items. This restriction applied to the initial construction phase of the shopping center, Bashas' Market, Inc. was specifically exempted.

During the construction period in the fall of 1980, DCISCI approached

MNA regarding a waiver of this provision. DCISCI was negotiating a lease with Yellow Front Stores and sought the waiver from MNA in connection with those negotiations.

Although MNA never executed the waiver, it became concerned about the manner in which the shopping center was developing. During the fall of 1980, on one or more occasions, MNA verbally infomed DCISCI that MNA was terminating its lease. DCISCI accepted the verbal termination and asked MNA to confirm the verbal termination in writing.

On December 26, 1980, MNA sent DCISCI a letter stating that the lease should be considered terminated upon receipt of the letter. By letter dated January 12, 1981, DCISCI notified MNA that it accepted MNA's offer to terminate the lease agreement. By letter dated January 8, 1981, MNA advised DCISCI that it wished to continue with the lease agreement. This letter was received by DCISCI on January 12, 1981, after it had mailed its written acceptance of the termination.

On February 17, 1981, MNA filed a complaint against DCISCI for repudiation of the lease agreement. The complaint also alleged that MNA was a third-party beneficiary of the lease agreement between the Navajo Nation and DCISCI which contained Navajo preference provisions. Plaintiff alleged violations of those provisions by DCISCI and damage to MNA as a result.

The matter was tried on April 5 and 6, 1982. On April 27, 1982, the trial court entered an Order and Judgment against MNA and for DCISCI.

MNA appealed from this Order. On June 3, 1983, a Statement of Facts and Issues signed by counsel for both parties was submitted to the Court of Appeals. The Court of Appeals has relied upon the facts stipulated by the parties in reaching its decision in this matter. The parties agreed upon a statement of six issues. The Court is of the opinion that several of the issues may be resolved by examining the status of the lease agreement during the period between the fall of 1980 and January 12, 1981.

At the onset of this period there was a valid agreement between MNA and DCISCI. Thereafter DCISCI and MNA had discussions regarding a modification of the lease. No agreement was ever reached on the modification. Subsequently the parties orally agreed to terminate the lease and this agreement was reduced to writing. As of January 12, 1981, there was no lease agreement between the parties.

Parties to a contract may agree to a subsequent modification, termination, or recission of the contract or agreement. The parties to the original contract may make a new agreement which modifies or replaces the original. In this case the parties made a new and binding contract or agreement. Under the new agreement the rights and duties of both parties under the lease were terminated. The requirements for a contract were met in the agreement to terminate the lease. There was consideration in that both

parties gave up rights under the lease. The parties clearly meant to terminate the lease. Any requirements of a writing are satisfied by the exchange of letters between the parties.

Two issues in addition to the status of the parties were raised on appeal. These issues are whether MNA was a third-party beneficiary of the lease between the Navajo Nation and DCISCI which required Navajo preference and whether MNA was given adequate Navajo preference.

The provision of the Navajo Nation-DCISCI lease regarding Navajo preference reads as follows:

> The above notwithstanding, Lessee, in an subleasing of any right to or interest in this lease or any of the improvements on the leased premises, shall give preference to businesses owned and operated by members of the Navajo Tribe to the extent permitted by law. However, such preference shall be conditional upon Lessee's determination that such businesses *(i)* are economically feasible and *(ii)* will promote the social and business objectives of the shopping center.

Without determining whether MNA was a third-party beneficiary of the Navajo Nation-DCISCI lease, the Court finds that MNA did not meet the burden of showing that MNA was not given adequate preference. The section cited above requires Navajo preference in the subleasing of any portion of the master lease. Based upon the stipulated facts of the parties, MNA was given a sublease, the rental rate was better for the first year than the rate given to any other lessee of similar sized space, and MNA was given first choice of space in the shopping center. Further, the stipulated facts show that although DCISCI asked MNA to modify the original lease, DCISCI never indicated to MNA that DCISCI would not abide by the terms of the lease signed on July 19, 1979. Further, it does not appear to the Court that the space originally leased to MNA was subsequently leased to a non-Navajo.

By this decision the Court does not intend to establish any guidelines for Navajo preference. Rather the Court finds that the evidence submitted to the trial court was not sufficient to establish that "Navajo preference" as used in the Navajo Nation-DCISCI lease carried with it certain guidelines, meanings, or standards not elaborated in the lease itself. The Court further finds that MNA did not present sufficient evidence to show that MNA was not given "Navajo preference" as such term could reasonably be interpreted in the context of the lease provision cited above.

The decision of the trial court is affirmed.

No. A-CV-37-83

Court of Appeals of the Navajo Nation

Navajo Housing Authority, *Petitioner/Appellant,*

vs.

Helen Betsoi, *et. al., II, Respondents/Appellees*

Decided September 13, 1985

OPINION

Before Tso, Acting Chief Justice, Bradley and Hilt, Associate Justices.

This case comes before the Court upon certified questions from two District Courts. These questions arose during Forcible Entry and Detainer actions against Mutual Help Housing participants. The Court is asked to resolve two basic issues:

1. Whether Mutual Help Housing participants are tenants or equity owners;
2. If it is determined Mutual Help Housing participants are equity owners, whether Forcible Entry and Detainer may be used against them.

Mutual Help Housing is a program developed by the Department of Housing and Urban Development to assist members of Indian Tribes to become home owners. Under the program Indian Housing Authorities are authorized to borrow money to cover the costs of constructing housing in Mutual Help Housing projects. The Indian Housing Authorities are also authorized to enter into agreements with the Bureau of Indian Affairs and departments within the Department of Housing and Urban Development (HUD) for the provision of funds and services. The Indian Housing Authority (in the Navajo Nation, the Navajo Housing Authority) enters into agreements with individual participants with the goal being for the participant to become the owner of the home. The participants under the Mutual Help and Occupancy Agreement with the Navajo Housing Authority agrees to:

A. Maintain his house and grounds to the satisfaction of the Authority and pay for all utility charges.
B. Pay a monthly administration charge to the Authority for expenses and insurance.

C. Make additional payments toward home ownership based on his income and assets. These payments, called "equity payments," will shorten the period of time before he becomes the owner of his house.

The monthly payments are used to establish an operating reserve and to reduce the loan balance attributed to a particular participant's house. In addition, "annual contributions" from HUD are applied to reduce the loan balance. Initially, the participant may also be required to contribute labor and/or a lump sum payment. When the loan, which the Navajo Housing Authority incurred to construct the dwelling has been paid off, the participant is given title to the property.

It has been the practice of the Navajo Housing Authority to institute Forcible Entry and Detainer Actions (Eviction Proceedings) against Mutual Help Housing participants who become delinquent in their monthly payments. It is from such Forcible Entry and Detainer Actions in the trial courts that the issues have been raised in this Court. Specifically, the Mutual Help Housing participants assert that the use of Forcible Entry and Detainer against Mutual Help Housing participants deprives them of their property without due process of law as guaranteed under the Indian Civil Rights Act.

In determining the status of the Mutual Help Housing participants, the Court has considered the "Mutual Help and Occupancy Agreement" between the Navajo Housing Authority and the participant, the "Annual Contributions Contract" between the Navajo Housing Authority and HUD, and 44 Fed. Reg. No. 216, November 6, 1979. "Indian Housing; Final Rule." All of these documents contain a number of ambiguities, referring at various time to "participants", "homebuyers", "tenant", "rent", "equity payments", "homebuyer payments", "lessee", "lease-purchase contract", etc.

The rights and duties set out in these documents, however, are more revealing. Mutual Help Housing participants may be required to furnish land, materials or equipment, labor and/or money as a down payment; they may make structural changes or additions to the house with the consent of the Navajo Housing Authority; in the event of destruction of the house, the proceeds from the insurance carried by the Navajo Housing Authority may be used to rebuild the house or to pay off the indebtedness on the house with the remainder to the participant; and in the event of abandonment by the participant or termination of the agreement, the participant must receive the balance in the voluntary equity payments account and his Mutual Help contribution after certain expenses are deducted.[1]

1. The Court notes that the Federal Register provides for Indian Housing Authority Homeownership financing under which the Homebuyer is required to execute and deliver a Promissory Note and Mortgage. The Court, however, is unable to determine whether this procedure is utilized by the Navajo Housing Authority.

From the forgoing it is clear that the Mutual Help Housing participant has a status different from that of an ordinary tenant. The participant enters the agreement with the expectation of becoming a home owner; he usually contributes something in the nature of a "down payment"; he has use and control of the property in that he may assign his rights in the property and he may make structural changes or additions; and he has an interest in and a right to certain portions of insurance proceeds and Mutual Help contributions. The Court must conclude that a Mutual Help Housing participant has a property interest.

The Court has considered comparing that interest to those property interests commonly recognzied in other jurisdictions in the United States. The Court has decided, however, not to label the interest for two reasons. One, the trust relationship between Indian Tribes and the Federal Government creates property interests on reservations that are unique to tribes. Two, the involvement of the federal government in Mutual Help Housing creates rights and obligations that are not analogous to those involved in most property ownership situations.

The Court holds that Mutual Help Housing participants have a property interest entitled to the due process guarantees of the Indian Civil Rights Act.[2]

Next, the Court turns to the question of what is the due process to which Mutual help Housing participants are entitled.

The Court has reviewed the Rules and Regulations from 44 Fed. Reg. No. 216 which pertain to Mutual Help Housing. §805.424 provides procedures for termination of a Mutual Help Housing agreement. §805.424 (b) reads as follows:

(b) Notice of Termination of MHO Agreement by the IHA; Right of Homebuyer to Respond. Termination of the MHO Agreement by the IHA for any reason shall be by written Notice of Termination. Such notice shall state (1) the reason for termination; (2) that the Homebuyer may respond to the IHA in writing or in person of time regarding the reason for termination; (3) that in such response he may be represented or accompanied by a person of his choice, including a representative of the tribal government; (4) that the IHA will advise the tribal government concerning the termination; (5) that if, within 30 days after the date of receipt of the Notice of Termination, the Homebuyer presents to the IHA evidence or assurances satisfactory to the IHA that he will cure the breach and continue to carry out his MHO obligations, the IHA may rescind or extend the Notice of Termination; and (6) that unless there is such decision or extension the lease term and MHO Agreement shall terminate on the 30th day after the date of receipt of the Notice of Termination. The IHA may, with HUD approval, modify the provisions of the Notice of Termination relation to procedures for presentation and consideration of the

2. The contracts between HUD and the Indian Housing Authorities required that the Mutual Help Housing projects be subject to the Indian Civil Rights Act.

Homebuyer's response. In all cases the IHA's procedures for the termination of an MHO Agreement shall afford a fair and reasonable opportunity to have the Homebuyer's response heard and considered by the IHA. Such procedures shall comply with the Indian Civil Rights Act and shall incorporate all the steps and provisions needed to achieve compliance with state, local or tribal law with the least possible delay.

It is in the procedures set forth above that a Mutual Help Housing participant's property interest must be protected. The Navajo Housing Authority has the flexibility under these provisions to establish guidelines and procedures to comply with due process requirements. There is opportunity for the Navajo Housing Authority to provide adequate notice of termination and time for the participant to either covert the default or work out a plan with the Housing Authority for correcting the default. The procedures outlined in §805.424 set forth above appear to the Court to be minimum requirements and there is no impediment to the Housing Authority in amplifying and expanding these procedures.

Although the Court does not intend to establish such guidelines and procedures for the Navajo Housing Authority, if a due process question comes before it in regard to Mutual Help Housing, the Court will examine the procedures carefully. Notice, opportunity to be heard, adherence to guideline and procedures, and the fairness of such guidelines and procedures, and any other requirements of due process and fairness will be considered by the Court.

Due to the flexibility which the Rules and Regulations in the above cited section given to the Indian Housing Authorities, to establish procedures to insure due process in terminations, and due to the provision for refund of the Mutual Help Housing contributions, the Court does not at this time hold the Forcible Entry and Detainer actions against Mutual Help Housing participants violate due process requirements.

In each such action the trial court has the duty to scrutinize the termination proceedings which were had prior to a Forcible Entry and Detainer action being filed. Further, if any issues regarding the termination guidelines and procedures are raised in the trial court in a Forcible Entry and Detainer action, such issues may also be raised on appeal. At that time this Court will consider whether a Mutual Help Housing Participant's property interest has received the due process protections and guarantees to which it is entitled.

It is therefore Ordered that the proceedings in the trial courts, which are the subject of this case, proceed in accordance with this Opinion and Order.

No. A-CV-05-84

Court of Appeals of the Navajo Nation

The Navajo Election Commission and the Navajo Board of Election Supervisors, The Navajo Nation, *Appellees,*

vs.

Raymond L. Lancer, *Appellant*

Decided September 17, 1985

OPINION

Before McCabe, Chief Justice, Tso and Walters, Associate Justices.

[redacted]

Samuel Pete, Esq., Window Rock, Arizona for Appellant; Donna Bradley, Esq., Window Rock, Arizona for Appellees.

The appeal in this matter is from a decision of the Navajo Election Commission / Board of Election Supervisors (hereafter Board) on February 1, 1984.

Chichiltah Chapter elected chapter officers on September 6, 1983. Lewis Begay and Raymond Lancer were on the ballot as candidates for chapter president. Mr. Begay was elected by a vote of 262 to 246.

On September 8 or 9, 1983, Mr. Lancer filed an election contest.

The statement of the appellant contesting the election set forth the following irregularities:

1. Misconduct of candidate
2. Misconduct of poll officials
3. Shortage of ballots
4. Voting irregularities
5. Coercion of voters
6. Counting irregularities
7. Certain voters denied right to vote

On October 5, 1983, the Navajo Election Commission voted to have a re-election for chapter president. The decision was based upon the short-

age of ballots at the September election. On October 14, 1983, the Court of Appeals restrained the Chichiltah Chapter from inducting a president and ordered the Board to hold a formal hearing on the election contest petition as provided in the Board's Rules and Regulations.

On November 14, 1983, the formal hearing was conducted. On January 28, 1984, the Board found the September 6, 1983, chapter election to be fair and voted to certify Lewis H. Begay as Chichiltah Chapter President. The decision was put in writing on February 1, 1984. On February 3, 1984, Raymond Lancer filed his Notice of Appeal.

At the hearing appellant withdrew the allegation of coercion of voters. Appellant also admitted in his Brief on Appeal that he was not able to present adequate evidence on the allegations of voting irregularities and counting irregularities. The shortage of ballots was stipulated to by both parties. As to the other allegations the Board found that the appellant had not presented sufficient evidence to show either that irregularities or misconduct occurred or that any alleged irregularities or misconduct affected the result of the election or affected the fairness of the election.

Under *Nakai v. MacDonald,* 1 Nav. R. 107 (1975), and under the Board's Rules and Regulations for Disputes Arising on Local Chapter Elections, the Court of Appeals may review a decision of the Board to determine whether the decision is:

1. In violation of applicable provisions of the Constitution and laws of the United States of America;
2. In violation of the Navajo Tribal Code; or
3. Unsupported by the evidence contained in the transcript submitted on appeal.

The Court of Appeals finds that the issues of violations of the U.S. Constitution and the Tribal Code were not raised by the appellant. Therefore, the Court will consider only whether the decision of the Board was supported by the evidence.

The Court finds that based upon the briefs of the parties, the transcript of the hearing, and the decision of the Board, only one allegation was established by sufficient evidence. That is the allegation of a shortage of ballots. This lack of ballots resulted in there being a period of time when no one could vote.

Once an allegation has been proven or established, however, the one contesting the election must then show by sufficient evidence that the misconduct or irregularity actually changed the result of the election or prevented a fair election. *Williams v. Navajo Election Commission,* 5 Nav. R. 25 (1985), *Johnson v. June,* 4 Nav. R. 79 (1983).

In the present case the Board found that appellant did not show that the result of the election was changed or that the election was substantially unfair. The Board stated in its opinion that "There was no evidence presented by petitioner which specifically identified the names or numbers of registered voters that were turned away and, in fact, did not stay or come back to vote when the new ballots arrived. No evidence was presented that the poll officials did *not* inform voters that the absence of ballots was only temporary and that they should stay or return at 6:30 p.m., the estimated time of arrival for the new ballots. We can only assume that the trained poll officials did the correct thing by relaying the approximate time of arrival of new ballots to the voters and by allowing all those that were in line at the time the polls closed temporarily to cast their ballots." Upon a review of the record, the Court must agree with the Board that appellant did not establish that the shortage of ballots affected the outcome of the election.

When the appeal was filed in this matter the Court granted a Stay of Execution. Upon a motion by the Board and further consideration by the Court, the Stay was dissolved, the Court stating that the proper writ would have been a restraining order to prohibit the Board from certifying the election until a final disposition of the matter.

The decision of the Board of Election Supervisors in the within matter is hereby affirmed.

No. A-CV-14-83

Supreme Court of the Navajo Nation

Wilbert Morgan, *Appellant,*

vs.

Teresita Morgan, *Appellee*

Decided December 23, 1985

OPINION

Before McCabe, Chief Justice, Brown and Walters, Associate Justices.

[redacted]

John A. Chapela, Esq., Window Rock, Arizona for the Appellant and Robert C. Ericson, Esq., St. Michaels, Arizona for the Appellee

The parties were divorced by decree entered on May 16, 1983. Appellee was awarded $150.00 per month from March 1, 1982, until such time as she remarries or becomes gainfully employed. She was also awarded one-half of her attorney's fees in the amount of $75.00.

Appellant filed his appeal raising issues of whether the Navajo Courts could award spousal maintenance and attorney's fees.

The Order allowing the appeal found that under *Johnson v. Johnson,* 3 Nav. R. 9 (1980), the Navajo Courts have the power to award alimony. The appeal was allowed on the issues of whether the trial court abused its discretion in this particular award of alimony and whether the award of attorney's fees was proper in this case.

The Court has been presented with nothing that shows that the alimony award was excessive or improper. The small amount of the monthly award clearly indicates that it was intended as assistance to the appellee until she can support herself. It is not an amount which tends to encourage the appellee to rely solely upon it for support. Further, the amount is a reasonable fraction of appellant's income. The trial court did not abuse its discretion in the award of alimony.

Under *Hall v. Arthur,* 3 Nav. R. 35 (1980), the trial courts have the authority to award attorney's fees in special circumstances. 7 N.T.C. §725 permits the courts to assess costs in a case or "any further incidental

expenses connected with the proceeding. . . ." 7 N.T.C. §204(c) permits the tribal courts to apply the laws of the state in which the dispute lies if the matter is not covered by tribal laws or federal laws and regulations. In the chapter on domestic relations Arizona Statutes 25-324 states:

> The court from time to time, after considering the financial resources of both parties, may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under this chapter. For the purpose of this section costs and expenses may include attorney's fees, deposition costs and such other reasonable expenses as the court finds necessary to the full and proper presentation of the action, including any appeal. The court may order all such amounts paid directly to the attorney who may enforce the order in his name with the same force and effect, and in the same manner, as if the order had been made on behalf of any party to the action.

This Court holds that actions for dissolution of marriage are special circumstances in which the judge may order one party to pay a reasonable amount toward the attorney fees of the other party. It is within the discretion of the judge to determine what is a reasonable amount. The trial court record in this case does not show an abuse of discretion in the award of attorney's fees.

Therefore it is Ordered that the judgment of the trial court is affirmed.

No. A-CV-28-84

Supreme Court of the Navajo Nation

Sunny Jean Yazzie, *Appellant,*

vs.

Larry Kee Yazzie, *Appellee*

Decided December 23, 1985

OPINION

Before Tso, Acting Chief Justice, Bradley and Neswood, Associate Justices.

[redacted]

Opinion delivered by Tso, Acting Chief Justice.

This matter comes before the Supreme Court on two issues:

1. Whether the trial court had jurisdiction of the subject matter and jurisdiction over the Respondent;
2. If the trial court had jurisdiction, did it abuse its discretion in its Orders regarding divorce, division of property, and custody and support of the minor children.

There have been many motions filed by both parties at all stages of this proceeding. The Court will set forth only what it considers necessary for an understanding of this case.

Appellant and appellee were married in 1975 in Des Moines, Iowa. Later that year a Navajo wedding ceremony was performed. Appellant is an enrolled member of the Comanche Tribe. Appellee is an enrolled member of the Navajo Tribe. Four children were born of this marriage. The four children are enrolled members of the Comanche Tribe.

On June 6, 1984, appellee filed a petition for Dissolution of Marriage in the Tuba City District Court. On June 22, 1984, the Tuba City District Court granted a Motion for Appointment of Process Server to serve appellant in Lawton, Oklahoma. Appellant received a copy of the Petition for

Dissolution of Marriage through the process server and also by certified mail delivered June 12, 1984.

On or about July 7, 1984, appellant filed in the Distict Court a Special Appearance Contesting Jurisdiction. In that pleading appellant stated that she did not reside on the Navajo Reservation and that prior to moving to Oklahoma, appellant and the minor children were residents of Heber City, Utah, where they had moved on January 1, 1984. Appellant made no further appearances in the trial court.

At this stage of the proceedings both parties were representing themselves. Appellant continued to represent herself throughout this case. Appellee was represented by counsel for a short period of time after the appeal was filed but for the majority of the case appellee also appeared *pro se.*

On July 24, 1984, the trial court entered a judgment granting appellee a divorce by default. The trial court found that appellee had resided on the Navajo Reservation for at least 90 days prior to the commencing of the action. The divorce judgment awarded the appellee custody of the minor children, awarded appellant alimony, and divided up the personal property. Appellee was also awarded a house in Gallup, New Mexico.

Thereafter appellant filed an appeal. On November 19, 1984, the Court allowed the appeal on the two issues set forth at the beginning of this Opinion. The Court also stayed any execution of the divorce judgment and referred the case back to the trial court for findings of fact and conclusions of law on the issue of jurisdiction.

On February 19, 1985, the Tuba City District Court had an in camera hearing and on March 27, 1985, the trial court issued Findings of Fact, Conclusions of Law, and Modified Judgment.

According to an affidavit of appellee dated February 8, 1985, he and appellant resided on the Navajo Reservation in Window Rock from June, 1983, until April, 1984. Appellee's affidavit indicates at that time appellant moved to Gallup and appellee moved to Tuba City. Other pleadings filed by appellee indicate that appellant thereafter removed herself and the minor children to Lawton, Oklahoma. The Special Appearance Contesting Jurisdiction filed in the trial court by appellant in July, 1984, states that she and the children moved to Heber, Utah, on January 1, 1984, and then to Lawton, Oklahoma.

Regardless of the date appellant left the reservation, it is clear that both parties agree that appellant and the minor children were not residing on the reservation at the time the divorce was filed on June 6, 1984, and that they had not been residents of the reservation for some time prior to the filing of the petition for Dissolution of Marriage on June 6, 1984.

7 N.T.C §253 sets forth the jurisdiction of the Navajo Tribal Courts. At the time the divorce was filed §253 (2), which dealt with jurisdiction in

civil causes of action, stated that the Navajo Tribal Courts shall have original jurisdiction over "All civil actions in which the defendant is an Indian and is found within its territorial jurisdiction. All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur in Navajo Indian Country." This is a 1980 amendment to the jurisdiction statute which deleted a separate subsection on domestic relations which had provided for trial court jurisdiction of all cases involving the domestic relations of Indians.

Under the statute as amended the Navajo Tribal Courts had subject matter jurisdiction of all civil matters within the territorial jurisdiction of the Navajo Nation.

This subject matter jurisdiction of all civil actions was contingent upon personal jurisdiction of the defendants. This would appear to foreclose jurisdiction in the instant case as appellant did not fall within any of the requirements of 7 N.T.C. §253 (2).

Divorce, however, presents a situation that is somewhat dissimilar to other civil causes of action. Matters of family relationships, including marriage and divorce are areas of concern to a sovereign government. It is universally recognized that sovereign nations have the right and authority to regulate marriage and divorce among those who reside within the territorial boundaries of the sovereign.

In the United States, the federal government has recognized the rights and interests of the states in regulating marriage and divorce within state borders. These rights and interests are limited among the states by the requirements of due process and the full faith and credit clause. In order to balance the rights of the state in granting a divorce to one of its citizens with the due process rights of an out-of-state spouse, the federal and state governments have developed the theory of marriage as a status and that that status accompanies each party to the marriage.

Separation of the marital parties often results in one moving to another state. Due process questions are inherent in the attempt of either state to determine the marital status and dispose of all the incidents thereto when there is no personal jurisdiction over the out-of-state defendant. Lack of jurisdiction leaves the decree subject to being declared invalid or void. The state courts, with the blessing of the U.S. Supreme Court, follow the principle that the status of marriage which has been brought within a state's borders by one of the spouses may be terminated by the courts of that state, even though there is no jurisdiction to determine the incidents of marriage such as care and custody of the children, division of property, spousal support, etc. In these situations, domicile of the plaintiff or petitioner within the territorial boundaries is necessary to give the court jurisdiction of the status when there is no personal jurisdiction over the defendant/respondent.

In 1942, in *Williams v. North Carolina,* 317 U.S. 287, 87 L. Ed. 279, 63 S. Ct. 207 (1942), the U.S. Supreme Court upheld the power of state courts to determine marital status (grant a divorce) when one of the spouses is not domiciled within the state.

> The existence of the power of a state to alter the marital status of its domiciliaries as distinguished from the wisdom of its exercise, is not dependent on the underlying causes of the domestic rift. As we have said, it is dependent on the relationship which domicile creates and the pervasive control which a state has over marriage and divorce within its own borders. 87 L. Ed. at 287.

> Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state by virtue of its command over its domiciliaries and its large interest in the institutions of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of substituted service. . . meet the requirements of due process. 87 L. Ed. at 286.

Thus it is recognized that the power to regulate marriage and divorce within its borders provides a sovereign with the power to determine the marital status of one spouse even though the other spouse is without the territorial borders.

The Court must therefore look to the Navajo Tribal Code to determine the power of the Navajo Tribal Courts to grant divorces when one spouse is not domiciled in the Navajo Nation.

Prior to its amendment in 1980 the general jurisdiction statute contained the following statement of Tribal Court jurisdiction:

> (2) *Civil Causes of Action.* All civil actions in which the defendant is an Indian and is found within its territorial jurisdiction.
> (3) *Domestic Relations.* All cases involving the domestic relations of Indians, such as divorce or adoption matters. Residence requirements in such cases shall remain as heretofore provided in regard to the Navajo Tribal Courts of Indian Offenses.

Section 253 of Title 7 was amended February 13, 1980, by Tribal Council Resolution CF-19-90. The two above subsections were combined into one which read:

> (2) *Civil Causes of Action.* All civil actions in which the defendant is an Indian and is found within its territorial jurisdiction. All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur in Navajo Indian Country.

On December 4, 1985, this section was further amended to delete the first sentence. The civil jurisdiction grant now reads "All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation."

The Tribal Council Resolution CF-19-80 which amended the civil jurisdiction in 1980 is clear that the purpose of the amendment was to extend the civil jurisdiction to include non-Indians within the Navajo Nation. In intent or in actuality, there was no limitation upon the current jurisdiction of the Tribal Courts. In No. 2 of the Whereas Clauses of Tribal Council Resolution CF-19-80, the Navajo Tribal Council specifically recognized the jurisdiction of the Navajo Tribal Courts over domestic matters. Clearly the intent is to give the Tribal Courts authority to hear *all* civil matters that either arise within the territorial boundaries of the Navajo Nation or involve residents of the Navajo Nation.

Title 9 of the Navajo Tribal Code provides the Navajo Tribal regulation regarding Domestic Relations. 9 N.T.C. §401 states "The Courts of the Navajo Tribe are authorized to dissolve all marriages,. . ." §402 of Title 9 requires that the complaining party to a dissolution of marriage must have resided within the territorial jurisdiction of the Navajo Nation for 90 days prior to filing a complaint for dissolution of marriage.

§204 of Title 7 as amended on December 4, 1985, states that the Navajo Tribal Courts may use the laws of the state in which the dispute lies for "Any matters not covered by the traditional customs and usages or laws or regulations of the Navajo Nation or by applicable Federal laws and regulations. . . ." Prior to the amendment it was mandatory in these situations that the Tribal Courts apply the laws of the state in which the matter in dispute lies.

Arizona recognizes that the dissolution of a marriage is an action *in rem* over the marriage status and that personal jurisdiction over both spouses is not required. *Schilz v. Superior Court of the State of Arizona, In and for the Country of Maricopa,* 695 P. 2d 1103, 144 Ariz. 65 (1985); Arizona Statutes 25-311 and 25-312.

7 N.T.C §701 (a) provides that a judgment may consist of a "declaration of rights of the moving party."

Under the foregoing the Court holds that dissolution of marriage is an action affecting the status of marriage and that the Navajo Tribal Courts have jurisdiction to grant a dissolution of marriage when one of the spouses is domiciled within the territorial jurisdiction of the Navajo Nation if the complaining party has met the residency requirements even though the other spouse is domiciled outside the Navajo Nation.

This Court follows the principle that once the appellate court has assumed jurisdiction, the trial court may take no further action except at the direction of the appellate court. The trial court had no authority to

make any further orders in this matter after the appeal was filed.

The trial court had no jurisdiction to determine any matters in this case other than granting the dissolution and making a disposition of the property found within its territorial jurisdiction.

Therefore it is Ordered that that portion of the decree entered on July 24, 1984, which grants the divorce is affirmed. That portion of the decree which awards the appellee the household furniture in his possession and the 1977 Chevrolet pickup and camper is affirmed. All other Orders of the trial court are vacated and set aside.

No. A-CV-22-84

Supreme Court of the Navajo Nation

Nesbah C. Yazzie, *et. al., Appellants,*

vs.

Ruth Ellen Jumbo, *et. al., Appellees*

Decided January 26, 1986

OPINION

Before Bluehouse, Acting Chief Justice, Austin and Walters, Associate Justices.

[redacted]

James Jay Mason, Esq., Gallup, New Mexico for the Appellants, Samuel Pete, Esq., Window Rock, Arizona for the Appellees.

Opinion delivered by Austin, Associate Justice.

The Red Lake Irrigation Project, located near Navajo, New Mexico is one of the six major irrigation projects which was constructed and funded by the federal government. Pursuant to an Act of Congress dated July 12, 1960, P.L. 86-636, 74 Stat. 470, "all right, title and interest of the United States" to the Red Lake project was transferred to the Navajo Nation.

The irrigation ditch, which is the subject of this appeal, was constructed in 1959 as a subsidiary of the Red Lake project. The ditch crosses the properties of the appellants and appellees.

In 1950, appellee's father Paul Jumbo, acquired a land use permit for a 35 acre tract of land known as plot #1. The irrigation ditch supplies water to plot #1 for agricultural purposes. In 1973, Mr. Jumbo transferred 33 acres from his permit by gift to his daughter Ruth Ellen Jumbo, the appellee.

Appellant Nesbah Yazzie acquired a land use permit for two of the 35 acres, known as plot #2, in 1962. Plot #2 is adjacent to and east of plot #1. In 1967, Ms. Yazzie applied for a one acre homesite lease on plot #2. The homesite lease was finally approved on August 11, 1972. Although the irrigation ditch crosses plot #2, plot #2 has never been utilized for farming.

Appellant Peggy L. McClanahan also applied for a one acre homesite lease on plot #2 in 1967. Her homesite lease was finally approved in 1974. Under Navajo Tribal law, land cannot be withdrawn for two simultaneous purposes, so the District Court ruled that the Appellants' homesite leases superceded Ms. Yazzie's land use permit.

For over 28 years Ruth Jumbo and her family made economical and beneficial use of the water flowing through the irrigation ditch. In the process Ms. Jumbo and her family cleaned and maintained the ditch to insure proper flow consistent with the requirements of her land use permit.

A supplemental provision to Appellants' homesite leases provide that the homesite lease "will in no way be used to control other lands outside of the leased area." On July 7, 1983, the appellants blocked the flow of water through the irrigation ditch in retaliation for two incidents of overflow onto appellants' leased areas. Appellants' action disrupted and prevented production on plot #1. The Jumbo family alleged and the District Court agreed that the appellees sustained $3,984.68 in damages.

On July 12, 1983, the Red Lake Land Board convened to discuss the overflow problems and to propose a solution. The Board recommended that the small culvert responsible for the flowage be replaced with a larger culvert. When the case was heard on appeal the larger culvert was in place.

The appellants first argue that the District Court erred in denying their motion to dismiss for failure to exhaust administrative remedies. The appellants also claim that they were denied a fair opportunity to be heard because they were not properly served with the appellees' complaint prior to the Board meeting. On this claim we believe the appellants are relying upon the due process provision of the Indian Civil Rights Act, 25 U.S.C.A. §1302 (8) (1968).

Procedural due process relates to the requisite characteristics of proceedings which seek to effect a deprivation of life, liberty, or property. Annot., 98 L. ed. 855; See *Shaughnessy v. United States,* 345 U.S. 420 (1953), (Jackson, J., dissenting opinion). Procedural due process requires adherence to the fundamental principles of justice and fair play. *Hannah v. Larche,* 363 U.S. 420 (1960). It encompasses the requirements of notice, an opportunity to be heard, and to defend before a tribunal with jurisdiction to hear the case. *Anderson National Bank v. Luckett,* 321 U.S. 233 (1943). It necessarily follows that due process is not required where there is no interference with life, liberty or a vested property right.

The Appellants have failed to show that the Board proceeding deprived them of a vested property right. Neither have the Appellants demonstrated that the issues discussed by the Board resulted in a decision which deprived them of property.

It is obvious the board did not engage in quasi-judicial fact finding. The recommendation to replace the existing culvert did not affect the property

interest of either party. We refuse to require compliance with procedural due process for agency discussions that do not seek to deprive a person of a property right.

The Land Board possesses the authority to settle boundary disputes, water disputes, right of way disputes etc. 3 N.T.C. §84. These types of disputes naturally involve adverse parties asserting possessory rights to the property.

We are not persuaded that blockage of the ditch is a possessory dispute that requires preliminary resort to the Land Board. The appellees are not asserting an interest in either the ditch or the water. In fact, the appellees have never used the water for any beneficial purpose. The District Court did not err in denying the motion to dismiss.

The appellants next argue that the District Court erred in finding that the appellees had acquired an easement in the irrigation ditch by prescription, necessity and implication. In support, the appellants have cited sections from Felix Cohen's Handbook of Federal Indian Law and a section from the Federal Indian Nonintercourse Act, 25 U.S.C. §177. We believe the authorities cited by appellants properly deal with restraints on alienation of tribal lands absent strict compliance with applicable statutory requirements. Appellants' authorities are not necessarily controlling in this case because here we are not concerned with parties attempting to assert title against the Navajo Nation.

The facts are clear that all right, title, and interest in the entire Red Lake Irrigation Project has vested in the Navajo Nation pursuant to Congressional action. P.L. 86-636. The Navajo Nation has issued revocable permits to the community to utilize the irrigation system for agricultural purposes. 3 N.T.C. § 81 *et seq.* It cannot be said then that any of the parties to this action has title or can acquire title to the irrigation ditch.

It is apparent the appellees have shown the requisite elements for prescription including continuous, actual, adverse, open and notorious use. *Hester v. Sawyers,* 41 N.M. 497, 71 P. 2d 646 (1937); *Gibson v. Buice,* 394 So. 2d 451 (1981). However, we hold that no prescriptive right can be acquired in property belonging to the Navajo Nation or dedicated to a community use. To allow prescription is similar to authorizing only a few individuals to utilize public property to the exclusion of others. This process would disrupt the beneficial use of that property and result in numerous disputes.

For the same reasons we hold that the appellees did not acquire an easement in the irrigation ditch by necessity and implication. This does not mean that the appellees can forego their duty to clean and maintain the irrigation ditch. That duty is required of the appellees as a condition to their holding of a land use permit: "The acceptance of this assignment requires that you do your full share of the work required to keep the ditches

clean, maintain the principal water distribution system, and control waste water." Land Use Permit, Section B1.

The facts are uncontroverted that the appellees have made economical and beneficial use of the water from the irrigation ditch for over 28 years. Their right to use the water is also apparent on their land use permit. We hold that the appellees have acquired an interest in the water and any intentional obstruction upstream is compensable to the appellees.

This case will be remanded to the District Court to determine the nature and extent of the appellees' interest in the water. In addition, the appellees will recover, upon proper proof, damages for all injuries which are the direct, natural and proximate result of the appellants' conduct. The appellants can introduce evidence to minimize damages.

No. A-CV-26-84

Supreme Court of the Navajo Nation

In the Matter of the Estate of:
Charley Nez Wauneka Sr.
Decided March 7, 1986

OPINION

Before Neswood, Acting Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Lawrence A. Ruzow, Esq., Window Rock, Arizona for the Appellant and Samuel Pete, Esq., Window Rock, Arizona for the Appellee.

Opinion delivered by Austin, Associate Justice.

Ben Wauneka Sr., administrator of the estate, appeals the denial of his claim against Dennis Williams for unauthorized use of estate farmland. Ben Wauneka Sr., as an heir, also appeals the judgment which distributed the farmland to the heirs in equal parcels.

Charley Nez Wauneka Sr., died intestate on January 10, 1979. There is no surviving spouse. In his Final Report and Proposed Distribution, Ben Wauneka Sr., the eldest son, proposed that the entire farmland consisting of 10.8 acres be awarded to him. Objections to the proposed distribution of the farmland were filed by the opposing heirs (Eunice Wauneka, Lucille W. Hunt, Charley Wauneka Jr.) and by Dennis Williams. Dennis Williams is not an heir. Opposing heirs are all children of the decedent.

Both objections alleged that Dennis Williams had purchased the farmland from the decedent. In an earlier *de novo* decision the Court of Appeals had rejected the purchase argument and ruled that the farmland was estate property. *Wauneka Sr. v. Williams,* A-CV-26-81. Opposing heirs subsequently amended their objection to request equal distribution of the farmland.

In *Wauneka Sr.* the court entered the following judgments:

6. Dennis Williams shall be entitled to cut the alfalfa growing on the Land in question as of the date of the trial do [sic] novo and to bale and take such hay from the Land.
7. Other than cutting and taking the alfalfa growing on the Land in September, 1983, Dennis Williams shall make no other or further use of the Land in question.

The District Court interpreted these judgments as recognizing Dennis Williams's use and occupancy of the farmland and denied the administrator's claim for unauthorized use. WR-CV-553-83. Order entered September 24, 1984.

We now reverse the denial of the administrator's claim. The administrator is the proper representative of the estate and where the estate's interest is involved he may sue and be sued. *In re Balke's Estate,* 68 Ariz. 373, 206 P. 2d 732 (1949); *Estate of McCabe,* 11 Ariz. App. 555, 466 P. 2d 774 (1970); *Estate of Balcomb,* 114 Ariz. 519, 562 P. 2d 399 (1977). The administrator's primary duty is marshalling the assets of the estate. See *Estate of Tamer,* 20 Ariz. 228, 197 P. 643 (1919); *Estate of Engbrock*, 90 N.M. 492, 565 P. 2d 662 (1977).

Ben Wauneka Sr.'s duty as administrator requires that he maintain all necessary actions to recover property of the estate. See *Bodine v. Stinson,* 85 Nev. 657, 461 P. 2d 868 (1969). This includes suits against unauthorized users of the estate property. In *Wauneka Sr.* it has been determined that Dennis Williams was without proper authority to use and occupy the farmland except for the 1983 season.

The District Court erroneously concluded that judgments 6 and 7, in *Wauneka Sr.,* precluded all of the administrator's claim. We now clarify *Wauneka Sr.* to hold that Dennis Williams's use and occupancy of the farmland was legitimate for only the 1983 alfalfa season. Dennis Williams's other uses were not recognized in *Wauneka Sr.* and they are properly included in the administrator's claim.

It is obvious the Court in *Wauneka Sr.* justified its ruling by its desire to prevent crop waste for the 1983 season. That court, sitting *de novo,* possessed the evidence to justify its ruling so we will not disturb its wisdom, absent clear abuse of discretion.

We are without the benefit of Dennis Williams's brief and arguments opposing the administrator's claim. Dennis Williams failed to oppose the appeal despite notice to his counsel. Opposing heirs touched on points of Dennis Williams's case but we believe opposing heirs lack standing to assert Dennis Williams's defenses. See generally *Halona v. MacDonald,* 1 Nav. R. 189, 197, 198 (1978), (quoting *Flast v. Cohen*, 392 U.S. 83 [1968]). We presume Dennis Williams does not oppose the administrator's contentions on appeal. Cf. *Estate of Goldtooth,* 3 Nav. R. 48 (1981), (intervenor did not appear in person or through counsel on appeal and court grants opposing party relief).

Ben Wauneka Sr., as an heir, first contends that the District Court erred in distributing 10.8 acres of farmland to the heirs in equal parcels. Ben Wauneka Sr. argues that he should be awarded the entire farmland under the doctrine of equitable distribution. Alternatively, Ben Wauneka Sr. contends that the farmland as distributed by the District Court is unequal on its face. He argues that the parcel awarded to him is undeveloped, contains the roughest area, and it does not have the grazing capacity nor the production potential as the other parcels. We hold for equitable distribution therefore we do not reach the merits on the second claim.

In *Wauneka Sr. v. Williams,* A-CV-26-81, the Court of Appeals sitting *de novo* found that none of the parties, including the decedent, had a valid permit granting them the right to use and occupy the farmland. However, the Court found that the decedent held the use rights to the land through a lifetime of continuous and exclusive use.

The land is substantially improved. It is fenced and at least 7.6 acres has been continuously used for growing alfalfa since 1969. The other 3.2 acres, denoted "not in use," is used primarily for pasturing cattle. A small creek, which we presume is used for irrigation, crosses the land lengthwise. The land was surveyed and plotted on a map by the Bureau of Indian Affairs in 1979. It is unclear why a permit was not issued.

The Courts of the Navajo Nation have the authority to probate the unrestricted property of a decedent. 7 N.T.C. § 253 (c). The question arises as to whether the property in this case falls into the category of unrestricted property. Restricted property, we believe, includes reservation land for which the Navajo Nation holds title for the common use and equal benefit of all tribal members. See *United States v. Jim,* 409 U.S. 80 (1972); *Mashpee Tribe v. Watt,* 542 F. Supp. 797 (D. Mass. 1982), aff'd, 707 F. 2d 23 (1st Cir. 1983), cert., denied, 104 S. Ct. 555 (1983). Unrestricted property includes property owned by individuals, and for which the Navajo Nation does not hold title for all tribal members.

Land use on the Navajo Reservation is unique and unlike private ownership of land off the reservation. While individual tribal members do not own land similar to off reservation, there exists a possessory use interest in land which we recognize as customary usage. An individual normally confines his use and occupancy of land to an area traditionally inhabited by his ancestors. This is the customary use area concept.

The Navajo Tribal Council has recognized that customary usage is a property right for which compensation is available if diminished by the sovereign. 16 N.T.C. § 1402, CJA-18-60. In *Dennison v. Tucson Gas and Electric Company,* 1 Nav. R. 95 (1974), the Court recognized customary usage as a property right protected by the Navajo Bill of Rights and the Indian Civil Rights Act, 25 U.S.C. §1301 *et seq.* (1968). Customary usage is therefore viewed as a property interest by the Navajo Nation.

Wauneka Sr. v. Williams, A-CV-26-81, found that the decedent exercised continuous and exclusive possessory use of the land during his lifetime. The decedent's use was never disputed by either the sovereign, the Bureau of Indian Affairs, or other land users from the immediate area. It is clear then that the decedent possessed a recognized property interest in the farmland. The farmland is fenced and readily ascertainable. We hold that this customary use area and the improvements incident can pass as property under our laws of succession.

Under our rules Navajo custom, if proven, controls the distribution of intestate property. Custom takes priority even if it conflicts with our rules of probate. Navajo Rules of Probate Procedure, Rule 10; See *Johnson v. Johnson,* 3 Nav. R. 9 (1980); *Apache v. Republic National Life Insurance,* 3 Nav. R. 250 (W.R.D.C. 1982).

Ben Wauneka Sr. argues that he proved custom in the Blue Canyon area at the trial *de novo* through the undisputed testimony of a well known medicineman. In his brief, Ben Wauneka Sr. states: "It is the custom in this area of the Navajo Nation for the eldest son to inherit land." Brief for Appellant at 6. However, a brief statement without further elaboration is not overly persuasive. We consider this custom as only one factor in our decision.

Customary law has been frequently used by our courts to determine allocation of property. The customary trust is an excellent device to use in property distribution cases involving permits and land. The customary trust is a unique Navajo innovation which requires the appointment of a trustee to hold the productive property for the benefit of the family unit. See *Matter of the Trust of Benally,* 1 Nav. R. 10 (1969); *Johnson v. Johnson,* 3 Nav. R. 9 (1980).

The customary trust is most efficient if there is cooperation and participation by all concerned. Those elements are unfortunately lacking in this case. The dissension among the heirs is counter-productive to any concept of a customary trust. The best interests of the heirs will not be served by a trust which would only be an impetus for further family discord.

The Navajo Nation has long disapproved of fragmenting agricultural and grazing lands. While our statutes specifically address permitted lands, we believe the policy is equally applicable here. At 3 N.T.C. §217 we are reminded that:

> (a) Upon the death of an assignee his land use permit shall be transferred to his most logical heir as determined by the Tribal Court. The Court shall make every effort to assign the land as one unit or combine it with another. The Court should make every effort to keep the land assignment in one tract and not subdivide it.

The statutes governing inheritance of land associated with major irrigation projects and small irrigation projects contain the same language. 3 N.T.C. § 87; 3 N.T.C. § 154.

We adhere to the land policy of the Navajo Nation. We disfavor dividing up small parcels of land. The practical effect of progressive fragmentation of land results in possession of even smaller parcels by an astronomical number of heirs. The probation of allotments is a prime example of problems with fragmentation we can do without on the Navajo Reservation. (For an excellent discussion of the allotment problem, see Williams, *Too Little land, Too Many Heirs—The Indian Heirship Problem,* 46 Wash. L. Rev. 709 [1971].)

Splitting 10.8 acres of customary use land in this case results in each heir possessing a little over two and one half acres. Inevitably, progressive fragmentation decreases the usefulness of the land and the benefits derived from the land diminishes. An increase of squabbles over land use is apparent as customary users attempt to expand their use beyond their few acres. Our compliance with the Navajo land policy is made with the knowledge that opposing heirs have been awarded other equitable portions of the estate. Perhaps in the future, there will be situations which mandate contrary decisions, but we will not dwell on that here.

Every acre of land on the reservation not reserved for a special purpose is a part of someone's customary use area. Navajo history teaches us that land and livestock nourished our development as a nation. Today there are Navajo people who have devoted their entire lives to etching a living from the land. If left undisturbed these independent individuals will continue to sustain themselves from the land despite other people's need for a wage income.

It is undisputed that of all the heirs Ben Wauneka Sr. holds the best position to make proper and beneficial use of the land. Ben Wauneka Sr. is unemployed, does not have use rights to any other land, and he makes his living solely from the land in question. Ben Wauneka Sr. possesses the necessary implements to operate and maintain the farmland. Ben Wauneka Sr. has lived near the farmland all his life and he has worked the land in the past. Ben Wauneka Sr. needs the land to sustain his livelihood. We cannot say the same for the other heirs.

The opposing heirs have all expressed their intent to dispose of their parcels if awarded. Obviously the opposing heirs have no interest in farming the land. Each of the opposing heirs has been generously awarded other property of the estate. The opposing heirs are also either employed, live away from the land, or they do not possess the equipment to operate and maintain the land. The opposing heirs cannot complain that they were not well provided for.

Our decision to award Ben Wauneka Sr. this portion of the estate property is not inconsistent with our laws on property distribution. *Joe v. Joe,* 1 Nav. R. 320 (1978), dealt with the division of religious paraphernalia in a divorce action. There the Court allowed both parties to be awarded sufficient paraphernalia to perform ceremonies. Both parties had the capability

to put the items to proper use. See also *Johnson v. Johnson,* 3 Nav. R. 9 (1980); Compare *Shorty v. Shorty,* 3 Nav. R. 151 (1982). We believe Ben Wauneka Sr. is the most suitable heir who can put the land to proper and beneficial use, therefore he is awarded the farmland.

The case will be remanded to the District Court for a trial on the administrator's claim against Dennis Williams.

No. A-CV-15-86

Supreme Court of the Navajo Nation

Yellowhorse, Inc., Jane Yellowhorse Jones
and Dennis Jones, *Petitioners,*
vs.
The Window Rock District Court,
The Honorable Robert Yazzie, Judge, *Respondent*
Decided July 11, 1986

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

Robert J. Wilson, Esq., Gallup, New Mexico for the Petitioners.

Per Curiam.

An original petition was originated in this Court by petitioners, Yellowhorse, Inc., Jane Yellowhorse Jones and Dennis Jones (collectively Yellowhorse), seeking writs of prohibition and mandamus to be directed against respondent, Honorable Robert Yazzie, Window Rock District Court Judge. On June 6, 1986, we entered an order denying the writs.

The gist of the Yellowhorse petition contends that (1) a writ of prohibition must be issued to prohibit Judge Yazzie from conducting further proceedings in the case of *The Navajo Nation v. Yellowhorse, Inc., et. al.,* WR-CV-178-84, until after Judge Yazzie renders a written decision, upon Yellowhorse's motion to dismiss, submitted at the end of the Navajo Nation's case; (2) a writ of prohibition must be issued prohibiting further proceedings until sufficient time has elapsed for Judge Yazzie to consider disqualifying himself, upon his own motion, for bias and prejudice flowing from his and his family's relationship to Chairman Peterson Zah; (3) a writ of mandamus must be issued ordering Judge Yazzie to dismiss all counts of the Navajo Nation's second amended complaint in *The Navajo Nation v. Yellowhorse, Inc., et al.,* supra, which fail to state a claim upon which relief can be granted and over which the Window Rock District Court has no jurisdiction; and (4) the writ of mandamus should also order Judge Yazzie, to file a formal decision consisting of specific findings of fact and conclusions of law, setting forth the basis for denying Yellowhorse's

motion to dismiss, as to any or all counts of the Navajo Nation's second amended complaint.

This Court has authority to issue writs pursuant to 7 N.T.C. §303, the Judicial Reform Act of 1985. Specifically, this Court's power to issue writs of prohibition, mandamus, and superintending control against a lower court is based upon its supervisory authority over inferior courts. *In the Matter of Contempt of: Arnold Sells,* 5 Nav. R. 37 (1985). These writs are often referred to as extraordinary writs. In its broader application, a writ of prohibition is used by a superior court to prevent inferior courts, tribunals, governmental officers or persons from usurping or exercising jurisdiction with which they have not been vested by law. See *Van Dyke et al. v. Superior Court of Gila Country et al.,* No. 2086, 211 P. 576 (1922). In essence, a writ of prohibition works to keep inferior tribunals within their lawful jurisdictional bounds. *In the Matter of Contempt of: Arnold Sells,* 5 Nav. R. 37 (1985).

An application for an extraordinary writ pursuant to 7 N.T.C. §303 is an original proceeding in this Court. This means that the application for the writ must be presented to this Court in the first instance. The Court will review the application and it will either deny the application or grant an alternative writ. If an alternative writ is granted, then further proceedings are necessary to determine whether the writ should be made permanent.

A writ of prohibition is an extraordinary remedy which we will grant only in rare cases showing absolute necessity. At a minimum we prefer that the application show that (1) the lower court is about to exercise judicial power; (2) the exercise of such power by the lower court is not authorized by law; and (3) the exercise of such power will result in injury, loss or damage for which there is no plain, speedy and adequate remedy at law.

In a preceding case, *Nelson J. McCabe, Chief Justice v. The Honorable Robert B. Walters,* 5 Nav. R. 43 (1985), the initial rule governing writs of prohibition in this jurisdiction was pronounced:

> A writ of prohibition is a discretionary writ and is appropriately issued where the trial court is proceeding without or in excess of its jurisdiction, or has abused its discretion in exercising its function over matters within its authority to decide, and petitioner has no plain, speedy and adequate remedy at law. (Citation omitted).

Each application for a writ of prohibition requires a thorough consideration of the nature and circumstances of each case. For example, there may be a case where the lower court is proceeding without or in excess of its jurisdiction, but the petitioner has another plain, speedy and adequate remedy at law. It is possible in such a case to obtain a writ of prohibition but it will be based upon the sound discretion of the Court. In cases where it is unclear that the lower court is without jurisdiction or that it is exceed-

ing its jurisdiction, we are inclined to deny the application and have the petitioner pursue other remedies.

We do not purport that every petition for a writ of prohibition is granted or denied solely on the Court's discretion. This Court will grant a writ of prohibition as a matter of right if the lower court clearly has no jurisdiction of the action originally and the petitioner has no other remedy available. It will be the petitioner's burden to prove that he is entitled to the writ as a matter of right.

In a proceeding for a writ of prohibition, the primary concern is whether the lower court is proceeding without, or in excess of its jurisdiction. The focus is on jurisdiction. Both of Yellowhorse's contentions for a writ of prohibition are not of jurisdictional significance and Yellowhorse has not pointed out how they involved issues of jurisdiction. The first contention requests that Judge Yazzie be prohibited from conducting further proceedings until he enters a formal written decision. This request is a matter of the district judge's discretion wholly unrelated to jurisdictional questions. The second contention alleges bias by Judge Yazzie. Again the nexus between the alleged bias of Judge Yazzie and of the lower court's jurisdiction is lacking. Neither contention has addressed the issue of whether the district court is proceeding without or in excess of its jurisdiction. The application for a writ of prohibition is denied.

Yellowhorse's petition also asks for a writ of mandamus. Like a writ of prohibition, a writ of mandamus is an extraordinary remedy which will be granted in rare cases showing absolute necessity. A writ of mandamus will be issued to compel a district judge to perform a judicial duty required by law, only if there is no plain, speedy and adequate remedy at law. See *State Board of Technical Registration v. Bauer,* 84 Ariz. 237, 326 P. 2d 358 (1958).

A writ of mandamus, pursuant to 7 N.T.C. §303, is used to compel a lower court to perform existing duties within its jurisdiction. It is imperative that the petition initially show that (1) the petitioner has a legal right to have the particular act performed; (2) the respondent judge has a legal duty to perform that act; and (3) the respondent judge failed or neglected to perform the act. A writ of mandamus will not be used to create new duties for district court judges. Where the duty sought involves judicial discretion and inactivity is shown, a writ of mandamus will be issued to compel the exercise of that discretion, but the writ will not lie to command what the action shall be.

We believe that Yellowhorse is improperly requesting a writ of mandamus. Yellowhorse's arguments in support of the petition pertains to trial proceedings involving judicial discretion. In its first contention, Yellowhorse is attempting to bypass the district court by asking us to render a favorable judgment on the second amended complaint. This Court will

not order a district judge to dismiss a complaint before the lower court has had an opportunity to review the facts and applicable law and render a decision. Out of respect for the lower courts, and to maintain the public trust in the Navajo Nation judicial system, this Court's interference in lower court proceedings must be kept to an absolute minimum. Our supervisory powers will be exercised only in situations proving absolute necessity. If the district court decision is in error, Yellowhorse has a plain, speedy and adequate remedy by appeal.

Yellowhorse's second contention is also an improper matter for a writ of mandamus. The district judges are not required to enter specific findings of fact and conclusions of law on a motion to dismiss at the end of plaintiff's case. In essence, the instant petition requests us to create new duties for the district judges contrary to the purpose of a writ of mandamus. The district judge can enter findings following a motion to dismiss at the end of plaintiff's case, if he desires. The current practice only allows a district judge to enter findings at the conclusion of the case. The petition for a writ of mandamus is denied.

No. A-CV-03-85

Supreme Court of the Navajo Nation

Ella Mae Tso (Dec.) , *et al.*, and
Survivors of Harold Tsosie (Dec.), *Petitioners,*
vs.
The Workmen's Compensation Employee Benefit
Review Board of the Navajo Nation, *Respondent*
Decided July 28, 1986

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Raymond Tso, Esq., Crownpoint, New Mexico and Spencer K. Johnston, Esq., Phoenix, Arizona for the Petitioners; William Riordan, Esq., Navajo Nation Department of Justice, Window Rock, Arizona for the Respondent.

Opinion delivered by Austin, Associate Justice.

Claimants, the dependent survivors of Harold Tsosie, seek review of the denial of their claim for Workmen's Compensation Benefits. They contend that (1) the death of Harold Tsosie arose out of and in the course of his employment, and (2) the Workmen's Compensation Employee Benefit Review Board erred by considering as relevant, events and circumstances, which preceded the emergency causing Harold's death. The Claimants also contend that the deceased Ranger is a public safety officer. We affirm the decision of the Board.

Harold Tsosie was employed by the Navajo Nation as Ranger I. These were his duties:

Example of duties:

Assists in the restocking of fish in reservation lakes; patrols and enforces fishing, hunting, boating regulations; assists in the protection and preservation of reservation wildlife; enforces timber tree cutting regulations; assists forestry with fire

prevention; assists in the protection of prehistoric scenic beauty and scientific sites; renders first aid when necessary; assists in emergency, search and rescue operations; provides assistance or information to visitors; maintains records and prepares reports of activities. (Job description for Ranger I).

Harold Tsosie was on compensatory leave, therefore he was not on duty nor was he subject to call on the date of his death. Harold and his brother Jeff drowned in Sawmill Lake on the afternoon of June 11, 1982. The victims had engaged in substantial drinking the night before and on the day of their deaths. A blood alcohol sample taken from Harold was lost during transmission to the laboratory.

Harold's employer issued him a tribal ranger vehicle and equipment consisting of a life jacket, a flotation device, a first aid kit, a spool of rope and a two-way radio. Harold had removed the equipment, radio antenna, and the emblems identifying the tribal vehicle before transporting his brothers and friends to the lake in the ranger vehicle. Beer was consumed by the group on the trip to the lake and at the lake. The male members of the group decided to swim. Immediately thereafter, Harold's brother Pat, began inducing Jeff, the other brother, to swim across the lake. Jeff swam about three-fourths across the lake before he started struggling. Harold, who was taking off his clothes, was alerted to the emergency, and he plunged into the lake to effect a rescue. In attempting rescue, Harold and his brother drowned. Harold was not trained or qualified in water rescue operations as a Ranger I. In its findings the Board concluded that Harold and his friends had gone to the lake to swim and engage in their own personal social activities.

An award under the Workmen's Compensation Laws of the Navajo Nation is governed by statute. By law the Claimants must prove (1) that the death was a result of an accident; and (2) that the death arose out of the employment; and (3) that the death arose while in the course of employment. 15 N.T.C. § 1021. Clearly the statute requires that a claimant prove all its elements to effect recovery. Here there is no dispute that Harold Tsosie died as a result of an accident.

The Navajo Workmen's Compensation Act is not founded upon Navajo traditional notions of compensation, although the Navajo practice of reparation to an injured party may parallel compensation pursuant to the Act. Instead the Navajo Workmen's Compensation Laws are based upon their state counterparts. Consequently, non-Navajo sources are ideal for clarification and guidance.

Upon proper proof Section 1021 awards benefits for work connected injury or death which "arose out of" the employment and are sustained "in the course of" the employment. Established sources have construed "arose out of" to refer to the origin or cause of the injury, and "in the course of" to

refer to the time, place, and circumstances under which the injury occurred. *Goodyear Aircraft Corporation v. Gilbert,* 65 Ariz. 379, 181 P. 2d 624 (1974); *Royall v. Industrial Commission,* 106 Ariz. 346, 476 P. 2d 156 (1970); 1 Larson, Workmen's Compensation Law § 610 (rev. ed. 1985). The Navajo Nation adheres to the same construction by statute. At 15 N.T.C. § 1002 (b), course and scope of employment is defined as: "the time, place and circumstances under which the accident occurred."

The purpose of Workmen's Compensation is to assist injured workers. With that in mind, each case must be studied on its own set of facts to determine if the accident arose out of and in the course of employment. See *Food Products Corporation v. Industrial Commission,* 129 Ariz. App. 208, 630 P. 2d 31 (1981); *Royall v. Industrial Commission,* 106 Ariz. 346, 476 P. 2d 156 (1970). The "arising" and "course" tests involve consideration of different factors as mentioned above. However, to effectuate its purpose of assisting injured workers, it is often necessary to consider these factors together to determine sufficient "work connection" to enable a claimant to recover. See 1 Larson, Workmen's Compensation Law § 610 (rev. ed. 1985).

In this case we begin with whether Harold Tsosie died in the course of his employment. If Harold died doing what a person so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time, then we are convinced that Harold died in the course of his employment. See *City of Phoenix v. Industrial Commission,* 104 Ariz. 120, 449 P. 2d 291 (1969). In essence the question centers on whether Harold was on duty when he died. It is undisputed that Harold Tsosie was on leave from work and he was not on call for duty at the time of his death. Voluntarily removing all "duty" equipment from the vehicle, including the antenna and emblems identifying the vehicle, shows that Harold considered himself off duty and not subject to call. Harold's presence at the lake was not motivated by his employer nor by his intent to perform any of his enumerated duties. (For example enforcing fishing regulations.) We agree with the Board that Harold and his friends were engaging in personal social activities, outside the course of his employment, when he died.

The Claimants, however, urge us to classify Harold as a public safety officer and apply the emergency rule consistent with *Conley v. Industrial Commission,* (Colo. App.), 601 P. 2d 648 (1979). There a police officer's death was held compensable, when the officer was killed while directing traffic during a flood, even though the officer was off duty prior to the onset of the emergency. The Court emphasized that the police officer was "on call" twenty-four hours a day, seven days a week, and the officer died performing duties that a police officer would ordinarily perform in conjunction with such an emergency. Navajo police officers are public safety

officers. They complete formal police training at the Navajo Police Academy. In contrast, Harold Tsosie lacked the requisite police training to be classified as a public safety officer. More experienced Navajo Rangers do complete formal police training at the academy but Harold was not among them. Harold Tsosie was a Ranger I and not a public safety officer therefore the reasoning in *Conley* is inapplicable. Further the facts show that Harold was not "on call" twenty-four hours a day, seven days a week, and he was not performing his duties at the time of his death like the officer in *Conley.* The emergency rule would apply if Harold's employment brought him to the lake where he encountered a moral obligation to effect a rescue. That was not the case here.

The final issue concerns consideration of relevant evidence by the Board. The Claimants argue that only events which succeeded the onset of the emergency are relevant since Harold was "pulled" into duty by the emergency. First, we disagree with Claimants in light of 15 N.T.C. § 1010 (d), which gives the Board authority "to perform such discovery activity as may be deemed necessary to fully explore *all* aspects surrounding the occurrence and injury." (Emphasis supplied). And the Board "may conduct investigations in such a manner as in its judgment is best calculated to ascertain the substantial rights of the parties and to carry out the spirit of this chapter." 15 N.T.C. §1010 (e). Clearly the Tribal Council gave the Board broad powers of review to fully explore all aspects surrounding the accident while carrying out the intent of the Navajo Workmen's Compensation Act. Second, we agree with the respondent that the employment does not arise out of the emergency.

For these reasons the award of the Workmen's Compensation Review Board denying compensation is affirmed.

Tso, Chief Justice and Bluehouse, Associate Justice concur.

No. A-CV-08-84

Supreme Court of the Navajo Nation

Navajo Skill Center, et. al., *Appellants,*

vs.

Ellen Benally, *Appellee*

Decided July 14, 1986

OPINION

Before McCabe, Chief Justice, Tso and Bradley, Associate Justices.

[redacted]

Richard W. Hughes, Esq., Albuquerque, New Mexico for Appellants and Genevieve K. Chato, Esq., Fort Defiance, Arizona for Appellee.

Opinion delivered by Tso, Associate Justice.

Appellee was employed as an instructor by the Navajo Skill Center in January, 1982. She was later promoted to Manager of Student Services. On February 18, 1983, appellee was terminated effective February 22, 1983. The termination letter was dated February 18, 1983, was signed by the Acting Executive Director, and informed appellee that she had five working days to appeal to the Board of Directors of the Navajo Skill Center. During the time appellee was employed the Skill Center established grievance procedures.

Appellee appealed and a hearing was scheduled before the Board of Directors on March 8, 1983, in Albuquerque, New Mexico. Another employee, Rosemary Benally, who was terminated at the same time also had her hearing scheduled for March 8 in Albuquerque. The appellee was informed of the hearing date on March 2. The pleadings contain statements that appellee who lived next door to Rosemary Benally requested Rosemary to arrange for legal representation. There is no indication that appellee took any other measures on her own behalf during the interval between March 2 and March 8. Appellee did not attend that scheduled hearing nor did she communicate with the Board.

On March 9 appellee was notified that the Board had upheld her termination. On March 10 appellee asked the Board to reconsider.

On April 7, 1983, appellee filed a complaint in the Crownpoint District Court against the Navajo Skill Center, and the acting Executive Director and the Board of Directors. Appellee alleged that her due process rights under the Indian Civil Rights Act and the Navajo Bill of Rights and her right of freedom of association had been violated, that the Navajo Skill Center had failed to follow the grievance procedures, and that the Board should have held their meeting in Crownpoint rather than Albuquerque.

A jury trial was held on February 1, 1984. Appellee was awarded reinstatement and back pay. The Navajo Skill Center appealed this verdict.

The appeal was allowed on two general issues: the scope of judicial review of administrative action and whether the Skill Center was immune from suit under the Sovereign Immunity Act. The Court finds that its decision on the scope of judicial review is dispositive and does not decide the issue of whether the Skill Center may assert the defense of sovereign immunity.

At the outset the Court had to determine whether the Navajo Skill Center was a governmental agency subject to the principles of administrative law.

The Navajo Skill Center was incorporated as a nonprofit corporation under the laws of New Mexico on September 8, 1982. Its purposes as stated in the Articles of Incorporation were to provide vocational educational and related services to the Navajo Tribe and others and to engage in activities that would alleviate or eliminate poverty among the Navajo people or lessen the burdens of tribal government. The Navajo Tribal Council authorized the Skill Center as a tribal entity (Navajo Tribal Council Resolution ACN-147-81). The Skill Center was established by the Navajo Nation to carry out certain governmental purposes and functions.

The government of the United States has long used corporations as agencies created to facilitiate and execute governmental purposes and functions. In *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784 (1939), the U.S. Supreme Court recognized that Congress may create corporations as an appropriate means for carrying out the powers of government. In *U.S. v. Doherty,* 18 F. Supp. 793 (D. Neb.), aff'd 94 F. 2d 295 (8th Cir.), cert. denied 303 U.S. 658 (1937), the court said:

> "[T]he proposition that Congress has power to create a corporation as an agency of the government to fulfill governmental purposes and to endow it with powers of a private corporation is not now open to question." 18 F. Supp at 794.

Finally, the federal government in Title 5 U.S.C. (Government Organiza-

tion and Employees) recognizes that governmental corporations are administrative agencies. 5 U.S.C. § 105.

The Court holds that the Navajo Skill Center was a governmental agency subject to administrative laws and procedures.

Judicial review of administrative action is reasonable and necessary. There are certain fundamental principles that support such review. Some form of judicial review strengthens rather than weakens the administrative process. Judicial review develops the principles of fairness and due process which are necssary for the administrative body to obtain respect for and obedience of its decisions. Denial of judicial review would be a deprivation of what the courts have to offer. Judges become specialists in civil rights issues, in the interpretation of statutes, in defining and enforcing fair procedures, in determining whether findings are supported by substantial evidence, and in determining whether there has been an abuse of discretion. Finally, judicial review of administrative action is consistent with the principle and desirability of appellate review of trial court proceedings.

Judicial review of administrative action may be authorized by statute, implied in the inherent powers of the courts, or mandated by civil rights guarantees of due process and equal protection. Thus it is rare that *all* agency action is insulated from some form of judicial review. The questions then in each individual case become (1) what action is reviewable (2) when is it reviewable (3) what is the scope of review and (4) which court will do the initial reviewing.

Administrative agencies frequently are both quasi-legislative and quasi-judicial. Certain rule making and judicial type activities are committed to them along with duties of implementing and administering a program. Administrative bodies are designed for the development and application of expertise in the area committed to them.

Because administrative bodies and the courts both have judicial functions it is necessary to sort out the function of both and to distinguish when each may act. This is much like the jurisdictional levels between trial courts and appellate courts.

One of the earliest statements of divisions of functions by the U.S. Supreme Court involved the Interstate Commerce Commission. The ICC was an early administrative body and had the authority to fix rates for carriers of interstate commerce. The rate setting activities were challenged by both the carriers and the users of the carriers. In *ICC v. Union Pacific Railroad Co.,* 222 U.S. 541, 32 S. Ct. 108, 56 L. Ed. 308 (1912), the railroad challenged the power of the ICC to fix rates and the manner in which the rate was set in this particular instance. The U.S. Supreme Court said:

". . . it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory

power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." 56 L. Ed. 308, 311.

The Court finds that the ICC case contains the statement of judicial review which is still valid. Thus, judicial review of administrative action will be whether the act was beyond or outside the power of the agency, based upon a mistake as to the applicable law, a violation of civil rights guarantees, not supported by the evidence, or the procedures were arbitrary and unreasonable.

In determining when agency actions will be reviewed, the doctrines of primary jurisdiction and exhaustion of administrative remedies have been developed. Primary jurisdiction refers to the concept that the agency should act first. Exhaustion of administrative remedies is the concept that the agency should complete its procedures before the courts interfere. The exhaustion doctrine is very sound and ultimately serves the interests of judicial efficiency and economy. The exhaustion doctrine prevents the courts from interfering until the administrative process has been concluded. This process has been committed to the administrative body by the legislature and it should be permitted to run its course. The doctrine also requires parties to attempt to redress their grievance without resorting to the courts. Lastly, the exhaustion doctrine helps prevent confusion between the courts and the administrative bodies which would arise if a party were able to seek relief in two different forums.

Because of the court's continuing duty to balance the rights and interests of all parties, however, there are times when exhaustion of administrative remedies is not required. Generally, exhaustion will not be required:

1. When the administrative remedy is inadequate. Inadequacy may include unreasonable delay of agency action, inability of the agency to come to a decision, or lack of authority to grant the relief to which the party is entitled.
2. When the complainant will suffer irreparable injury if required to exhaust administrative remedies.
3. When the agency is clearly acting or attempting to act in excess of its authority.

4. When pursuing the administrative process would be futile such as when an agency indicates that it will not consider a party's challenges to its past policies or decisions, which are of questionable legality.

In the instant case the Court can find no basis upon which the appellee should have been permitted to avoid the requirement of exhausting her administrative remedies. Further, the Court cannot ignore the situation of the co-worker who pursued her remedies and was reinstated in her job. The co-worker upon request was given a change of location and date for her hearing. The Court finds that appellee was inattentive to her own affairs and less than diligent in pursuing her own interests. In the balancing of the rights and interests of the Skill Center and the appellee this Court cannot find it unreasonable to require appellee to assume her responsibilities in protecting her own interests. The Grievance Procedures were established for the use and benefit of both the Skill Center and its employees. Neither party may arbitrarily elect not to follow them and then be allowed to resort to the courts when the results are adverse.

The Court has some questions as to exactly what the grievance procedures are and whether they were followed in the appellee's case. The Court holds, however, that the administrative body must first have the opportunity to make these determinations within the context of its own procedures. The agency was not presented with that opportunity in this case.

The decision of the Crownpoint District Court in this matter is reversed and vacated.

No. **A-CV-16-86**

Supreme Court of the Navajo Nation

Chuska Energy Company,
A New Mexico Corporation, *Petitioner,*
vs.
The Navajo Tax Commission and Mr. Lawrence White, Conferee
of the Navajo Tax Commission, *Respondents*
Decided October 10, 1986

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Samuel Pete, Esq., Window Rock, Arizona for the Petitioner; Robert W. Hanula, Navajo Nation Department of Justice, Window Rock, Arizona for the Respondents.

Opinion delivered by Austin, Associate Justice.

Petitioner Chuska Energy Company brought this action in the Supreme Court seeking to enjoin the Navajo Tax Commission and its Conferee from enforcing subpoenas duces tecum, issued by the Conferee to officers, agents, and employees of the Petitioner. Chuska contends that the Conferee "*does not* have authority to issue subpoenas" and that the terms of the subpoenas "exceed the scope of examination of *pertinent* records" as set forth by law.[1] PETITION FOR INJUNCTIVE RELIEF, allegations numbered 10 and 12. We scheduled the case for oral arguments to decide: (1) when the Supreme Court can issue an injunction; and (2) whether an injunction shall be issued in this case.

Chuska Energy Company is a New Mexico Corporation engaged in business as an oil and gas operator under an agreement with the Navajo Nation. The Navajo Tax Commission operates under the Executive

1. Chuska also argues that the Commission lacks regulations for discovery or production of records and as to who is responsible for the cost of production of records. These concerns are not addressed in this Opinion.

Branch of the Navajo Nation Government. On August 1, 1985, the Commission notified Chuska that it had been assessed with a possessory interest tax for the year 1985. Chuska disputed the assessment and requested administrative review. The review had progressed to Formal Conference with Lawrence White presiding as Conferee when the instant action was filed.[2]

On May 14, 1986 and on June 16, 1986, Conferee White issued suppoenas duces tecum to Joe F. Thomas, Glenda J. Bass, and Robert L. Berge; all officers, agents, and employees of Chuska. On June 30, 1986, Chuska filed a motion to quash the subpoenas with the Commission. Chuska's motion alleged that the subpoenaed documents were irrelevant and immaterial to the assessment and that the disclosure of the documents would be detrimental to Petitioner's business. PETITIONER'S MOTION TO QUASH dated June 30, 1986. On July 1, 1986, Chuska's Motion to Quash was denied by Conferee White.[3] The following day Chuska filed this action seeking injunctive relief.

I. Background

The Supreme Court is vested with limited jurisdiction. This jurisdictional limitation compels an initial examination of the sources of this Court's power to issue injunctions, prior to considering Chuska's petition for injunction relief. The Supreme Court's appellate jurisdiction is established at 7 N.T.C. § 302, which gives the Court power to review final judgments and final orders of the District Courts and certain administrative agencies.[4] The Supreme Court's original jurisdiction stems from 7 N.T.C. § 303, which gives the Court supervisory authority over lower courts through extraordinary writs. *In the Matter of Contempt of: Arnold Sells,* 5 Nav. R. 37 (1985); *McCabe v. The Honorable Robert B. Walters,* 5 Nav. R. 43 (1985); see also *Yellowhorse Inc. v. The Honorable Robert Yazzie,* 5 Nav. R. 85 (1985). 7 N.T.C. §303 further authorizes the Supreme Court to

2. There are four levels of review in the administrative tax appeal process: Informal Conference; Formal Conference; Hearing Officer; and the Navajo Tax Commission. The final order of the Tax Commission is appealable to the Navajo Nation Supreme Court. Title 24, Navajo Tribal Code.

3. Conferee White denied the motion stating: "Neither the Statutes nor the Tax Administration Regulations provide for an action to quash the summons and subpoena issued pursuant to § 239, 339 or 439 and Regs. §§ 1.135 and 1.139. CECO's Motion is without statutory or regulatory authority. Finding no authority to bring such an action, the Motion to Quash must be denied as premature for lack of jurisdiction." ORDER DENYING MOTION TO QUASH, July 1, 1986, page. 2.

4. The Judicial Reform Act of 1985 defines District Courts as including the Children's Courts of the Navajo Nation. 7 N.T.C. § 103.

issue any writs or orders necessary and proper to the complete exercise of its jurisdiction. This power is available, pursuant to the Court's appellate jurisdiction, to preserve or protect the Supreme Court's jurisdiction. See *Nez v. Bradley,* 3 Nav. R. 126 (1982); see also *Federal Trade Commission v. Dean Foods Company, et al.,* 384 U.S. 597, 86 S. Ct. 1738 (1966). The Supreme Court's jurisdiction to issue an injunction is derived from two sources within 7 N.T.C. § 303; the necessary and proper clause and through its powers to supervise the lower courts.

II. Original Jurisdiction

A petitioner seeking an injunction from the Supreme Court must proceed under 7 N.T.C. § 303. This section grants the Supreme Court both appellate and original jurisdiction. An evaluation of the proceeding and the purpose for the injunction will dictate the nature of jurisdiction invoked. Original jurisdiction is founded at that part of 7 N.T.C. § 303 which reads:

> The Supreme Court shall have the power to issue any writs or orders. . . to prevent or remedy any act of any Court which is beyond such Court's jurisdiction, or to cause a Court to act where such Court unlawfully fails or refuses to act within its jurisdiction.

Petitions requesting an exercise of the Supreme Court's supervisory authority over lower courts have been initiated pursuant to this part. See *In the Matter of Contempt of: Arnold Sells,* 5 Nav. R. 37 (1985); *McCabe v. The Honorable Robert B. Walters,* 5 Nav. R. 43 (1985). Courts, as used in Section 303, pertain to the District Courts and the Children's Courts of the Navajo Nation.[5] The appropriate relief under 7 N.T.C. §303 includes the writs of mandamus, prohibition, superintending control, and an injunction. See *Yellowhorse Inc. v. The Honorable Robert Yazzie,* 5 Nav. R. 85 (1985), (application for writs of mandamus and prohibition denied). The statute mandates that any writ or order granted by the Supreme Court pursuant to its original jurisdiction shall be directed at a court. 7 N.T.C. § 303. Consequently, an original petition seeking an injunction must allege the Supreme Court's original jurisdiction under Section 303 and identify the court to be enjoined. Proof of the factors which necessitate restraint is also required.

We now examine Chuska's petition seeking injunctive relief. The petition alleges that the Supreme Court has jurisdiction to grant an injunction

5. This Opinion will not decide whether courts as used in 7 N.T.C. §303 includes quasi-judicial forums within administrative agencies. Here that forum would be the Hearing Officer.

pursuant to 24 N.T.C. § 234 (b) of the Tax Code. PETITION FOR INJUNCTIVE RELIEF, allegation numbered 18. We disagree. 24 N.T.C. § 234 (b) does not empower the Supreme Court with original jurisdiction to issue injunctions. Neither can the Supreme Court properly use 24 N.T.C. § 234 (b) to invoke its supervisory authority over lower courts. An appeal to the Supreme Court of a final Tax Commission decision is the only remedy available under 24 N.T.C. § 234 (b).

Nonetheless Chuska argued during oral arguments that its request for an injunction is proper under 7 N.T.C. § 303. The Supreme Court can enjoin, pursuant to its original jurisdiction established at Section 303, but that power is conditional upon Chuska showing that Formal Conference is a court. See 7 N.T.C. § 303. The evidence does not justify such reasoning. Formal Conference lacks the basic characteristics of a court. It lacks an adversarial setting and Conferee White is not authorized to accept only sworn testimony, apply the rules of civil procedure, or even rule on the admissibility of evidence. A formal record of the Formal Conference is not required to be maintained. See *Regulations of the Navajo Tax Commission, Rules and Procedures for Administrative Appeals,* § 1.820 *et seq.* (Compare with *Appeal Before Hearing Officer,* § 1.830 *et seq.*). To hold that the Supreme Court can supervise Conferee White and the proceedings in Formal Conference would amount to a strained interpretation of 7 N.T.C. § 303.

III. Appellate Jurisdiction

We have just concluded that Chuska has failed to present an action under the Supreme Court's original jurisdiction established at 7 N.T.C. § 303. A subsequent inquiry is whether Chuska has a remedy of injunction available pursuant to the "necessary and proper clause" of 7 N.T.C. § 303. The language reads thus: "The Supreme Court shall have the power to issue any writs or orders necessary and proper to the complete exercise of its jurisdiction." (Following provisions omitted.)

As stated earlier, we believe that the necessary and proper clause performs through the Supreme Court's appellate jurisdiction. Any restraint ordered thereunder would serve to preserve or protect the Supreme Court's appellate jurisdiction. A petition for relief under the necessary and proper clause can be initiated by an interested party or on the Supreme Court's own prerogative. An injunction granted thereunder would enjoin a party from impeding the appellate jurisdiction of the Supreme Court. Situations inciting action under the necessary and proper clause include cases where the Supreme Court has lawfully acquired jurisdiction but efforts are being pursued to defeat jurisdiction; where the status quo must be maintained

pending review of an action on appeal; and where the Supreme Court has potential appellate jurisdiction but there is interference with that jurisdiction which prevents perfection of the appeal. The test is to show a need to preserve and protect the Supreme Court's appellate jurisdiction.

Chuska's petition does not allege a need to preserve or protect the Supreme Court's appellate jurisdiction. Chuska has not shown that either Conferee White or the Commission is hampering the appellate process concerning the assessment issue. Neither has it been shown that Conferee White's order will deny Chuska a right to appeal. In every respect, Chuska has not satisfied the test which would warrant an injunction to preserve or protect the Supreme Court's appellate jurisdiction.

The final inquiry relates to another aspect of the Supreme Court's appellate jurisdiction. The Supreme Court's appellate jurisdiction is sometimes reiterated in statutes governing administrative agencies. Here 24 N.T.C. § 234 (b), as amended in 1984, illustrates that point. The relevant part of Section 234 (b) states: "Appeals from final actions of the [Tax] Commission. . . shall be made only to the [Supreme Court] of the Navajo Nation. . . ." This part is consistent with 7 N.T.C. § 302 of the Judicial Reform Act of 1985, which grants the Supreme Court appellate jurisdiction "to hear appeals from final judgments and other final orders of the District Courts of the Navajo Nation *and such other final administrative orders as provided by law.*[6]" (Emphasis added.)

The burden is imposed upon the Petitioner to establish that the Supreme Court has jurisdiction to review a final decision pursuant to either 7 N.T.C. § 302 or 24 N.T.C. § 234 (b). As previously stated, Chuska brought its petition for injunctive relief pursuant to 24 N.T.C. § 234 (b), of the tax laws governing possessory interest tax. In contrast to 7 N.T.C. § 303, neither 24 N.T.C. § 234 (b) nor 7 N.T.C. § 302 grants the Supreme Court authority to issue an injunction. 24 N.T.C. § 234 (b) permits direct appeals of final Tax Commission decisions to the Supreme Court. Assuming that Chuska's petition is an appeal, then the question is whether the Conferee's denial of Chuska's motion to quash the subpoenas is a final order of the Commission which is appealable to the Supreme Court.

The Supreme Court is unavailable for review until all the substantial rights of the parties have been determined in the lower tribunal, whether that tribunal be District Court or administrative agency. The case must be fully adjudicated on the merits, and the entry of the final decision must preclude further proceedings in the lower tribunal. This was the Tribal Council's intent upon empowering the Supreme Court with jurisdiction to hear "final" decisions pursuant to 7 N.T.C. § 302.

6. The Court will leave the interpretation of "and such other final administrative orders as provided by law" for a future case.

An examination of Chuska's petition reveals its non-compliance with the "final" decision requirement of either 7 N.T.C. § 302 or 24 N.T.C. § 234 (b). Chuska's rights and the merits of the assessment issue remain undetermined at this point. The merits of the case have progressed only to the second level of the tax administrative review process with rights of appeal to the Hearing Officer and the Tax Commission intact. Conferee White's order of denial of Chuska's motion to quash cannot be interpreted as disposing of the merits of the assessment issue thereby the case is not ripe for appeal. Neither is the issuance of an administrative subpoena in the midst of a valid administrative proceeding an appealable action. Chuska's petition, alleging jurisdiction pursuant to 24 N.T.C. § 234 (b), therefore is an interlocutory appeal and Navajo Law precludes interlocutory appeals. See Orders in *Thompson v. General Electric Credit Corporation,* 1 Nav. R. 234 (1977); and *Todachine v. Navajo Tribe, et al.,* 1 Nav. R. 245 (1977). The Tax Commission has not entered a final decision therefore Chuska's appeal is premature. We hold that Chuska has failed to establish this Court's jurisdiction to entertain its petition pursuant to either 24 N.T.C. § 234 (b) or 7 N.T.C. § 302.

IV. Conclusion

The Supreme Court has the power to enjoin under its original jurisdiction and under the necessary and proper clause. 7 N.T.C. § 303. Chuska's petition seeking injunctive relief falls outside the jurisdictional perimeters of 7 N.T.C. § 303. Therefore an injunction cannot be granted by the Supreme Court in this case.

Chuska contended at oral arguments that if the Supreme Court denied its petition, it will be left without a forum to vindicate its rights. We disagree. We believe the District Court is available to Chuska for declaratory and injunctive relief. Chuska's request for an injunction from the Supreme Court is therefore denied.

Chief Justice Tso and Justice Bluehouse concur.

No. A-CV-18-85

Supreme Court of the Navajo Nation

Leslie Sells, *Appellant,*

vs.

Helen Sells, *Appellee*

Decided October 17, 1986

OPINION

Before Tso, Chief Justice, Austin and Yazzie, Associate Justices.

[redacted]

Vivian Gordy, Esq., Tuba City, Arizona for Appellant and Andy G. Smith, Esq., Chinle, Arizona for Appellee.

Opinion delivered by Tso, Chief Justice and Yazzie, Associate Justice.

I. Statement of Facts

This case involves a divorce action between appellant-husband and appellee-wife. The District Court of Chinle, Arizona, awarded the wife, who is 53 years old, in ill health and unemployed, $500.00 monthly alimony and a substantial portion of the marital property, including a grazing permit for 127 sheep units, 70 head of cattle, 15 horses and 500 head of sheep. The court awarded the husband a 1984 GMC pickup truck and a grazing permit consisting of 40 sheep units. The husband is employed full-time, earning a yearly income of $38,000. The parties were married to each other 28 years. They have six (6) children, four of whom are adults.

II. Issues

The marital property and alimony awarded to the wife raises these issues:

1. Did the District Court abuse its discretion in awarding $500.00 a

month alimony to the wife who received a substantial portion of the marital property, including income-bearing property?

2. Did the District Court abuse its discretion in awarding alimony to the wife for an unlimited time period?

Tribal Courts are empowered to dissolve marital relationships by granting divorces. This involves a winding up of matters between the parties such as dividing the property, making provisions for paying debts, deciding matters pertaining to the children, and insuring that the parties are able to care for themselves. In doing so, the courts must use objective standards or guidelines that will be applied equally to the circumstances of the divorcing parties.

The case at bar clearly shows that the Supreme Court must establish guidelines to assist the District Courts in determining whether to award alimony. This Court cannot review an alimony award for abuse of discretion until guidelines for awarding alimony are in place.

The power of the Supreme Court to fashion guidelines for the District Courts is based upon the following general principles:

1. Power to review for abuse of discretion;
2. The need for uniform and impartial laws throughout the Navajo Nation; and
3. The superintending authority of the Supreme Court.

Therefore, before we can review for abuse of discretion by the lower court, this Court must set forth guidelines on the issues.

Issue I: Did the District Court abuse its discretion in awarding $500.00 a month alimony to the wife who received a substantial portion of the marital property, including income-bearing property?

Alimony is a sustenance or support of the wife by her divorced husband. In the Anglo world, this stems from the common-law rights of the wife to support by her husband. If allowed in a divorce action, alimony is awarded either in terms of (1) money payment on a periodic or permanent basis, or (2) a lump sum of money of final property settlement on a one time basis. Under state law, alimony is generally allowed by statute.

The Navajo Nation has no standard by statute for determining alimony. This Court, however, is not entirely without alimony guidelines. *Charley v. Charley,* 3 Nav. R. 30 (1980). This Court first resolved the question of whether the courts of the Navajo Nation are empowered to award alimony in *Johnson v. Johnson,* 3 Nav. R. 9 (1980). After deciding that nothing in Navajo tradition or custom prohibits a Navajo court to award alimony, the court applied the New Mexico law under 7 N.T.C. § 204, and allowed an alimony award in a divorce action. *Id.,* p. 11.

There are no fixed rules by which the Court can determine the amount of alimony. This Court in *Charley* held that alimony must be decided on a case-by-case basis in light of what is "fair and reasonable." The guidelines it established which must be considered in light of the "fair and reasonable" standard include:

1. The needs of the spouse seeking alimony;
2. Age of the spouse requesting alimony;
3. Means of support;
4. The earning capacity, including future earnings of the parties;
5. The length of marriage;
6. The amount of property (with values) owned by the parties.

This Court must now set additional guidelines which the District Courts of the Navajo Nation must also consider in a fair and reasonable manner when awarding alimony. The guidelines include but are not limited to:

1. The reasonable market value of marital property apportioned to the spouse seeking alimony and the ability of such spouse to meet his or her needs independently;
2. The economic circumstances of each party, including:
   a. Health;
   b. Station (work or social position);
   c. Vocational skills or need for retraining or to acquire new skills;
   d. Employability;
   e. Opportunities to acquire capital assets.
3. The liabilities of each of the parties;
4. The contribution of a spouse as a homemaker or the contribution of each spouse to the family;
5. Who will have the children, and their needs;
6. Considerations of Navajo traditional and customary Navajo law, where applicable;
7. All other relevant facts.

(See *Shorty v. Shorty,* 3 Nav. R. 151 [1982].)

In applying the standard in *Charley,* supra, the wife in a divorce action was denied alimony because she was only married for two years. Since the wife was also young, healthy, and able to work, she failed to meet the standard. On the other hand, the facts in *Johnson* reached a different result. The parties in that case were divorced after having been married for 28 years. The wife was 52 years of age and unemployed. She was awarded support on the rationale that alimony was to compensate the female spouse

who was unable to earn for herself the same level of material comforts which she enjoyed during converture. *Johnson* at p. 10.

The factors considered by *Charley* and *Johnson* in determining alimony do apply to the instant case. The wife, now fifty-three (53) years old, is in ill health, unemployed, and having been married to her husband for 28 years definitely meets the standards of *Charley,* supra. Likewise, the facts here are identical to the situation of the wife who received alimony in *Johnson,* supra. However, applying the guidelines as a whole to the case at hand, it is difficult to say whether under *Charley* and *Johnson* above the wife is entitled to support from her husband.

The Court finds that the division of property was done in a "fair and just" manner consistent with 9 N.T.C. § 404. See *Shorty,* supra. Among the alimony guidelines of this Court, one important factor is the marital property apportioned to the spouse seeking alimony, as well as the value of the property. In the instant case, the wife was awarded certain income producing property which includes 500 head of sheep and 70 head of cattle. Given this distribution, we are unable to determine from the record what the wife's income is likely to be. There are no facts in the record to suggest what annual income will be derived. The amount of marital property apportioned to a spouse has a direct impact on the alimony awarded to that spouse. This issue must be considered where distribution of marital assets greatly enhance the ability of the spouse seeking maintenance to meet his or her needs independently. Here, the wife certainly will derive income from the 500 head of sheep and 70 head of cattle. No doubt, sheep produce income from the sale of lambs and wool. Cattle, like sheep, reproduce in numbers which guarantee continuous income for Navajo livestock owners. We are unable to determine from the record how much income will be derived from these livestock. Facts are needed to determine this question. Once a court knows how much income will be generated by the income producing property then the court can determine how much alimony, if any, should be awarded. Until more facts are gathered to determine the value and income to be derived from the property apportioned to the wife, we are not in position to decide whether the District Court abused its discretion on this particular issue.

Before addressing the next issue we will review the *Charley* decision that the law of the State where the spouse and children reside will apply to determine the standard for alimony. We reverse the *Charley* decision on this particular point. State laws do not control domestic relations within our jurisdiction. *Williams v. Lee,* 358 U.S. 217 (1959). State laws are only used by the Courts of the Navajo Nation to decide legal issues of first impression. If the Courts of the Navajo Nation apply State law in Tribal Courts too often, then our courts would be only mirror images of Anglo courts.

The counsels of record in this case must not ignore Navajo case laws when addressing legal issues. The soul of this Court is to apply Navajo Tribal law, especially where our custom and tradition are appropriate. We need to promote uniformity, consistency and predictability in developing Navajo law. To apply State law to determine alimony would only create confusion and even encourage forum shopping. For example, if the parties live in Arizona, they may choose to file their action in New Mexico merely because they believe the Navajo courts in that state provide "better" relief.

In fairness to the court in *Charley* it should be pointed out that at the time *Charley* was decided the Navajo Courts were required to apply the law of the state in which the court was sitting if there was no applicable Federal or Navajo law. In the Judicial Reform Act of 1985, this requirement was abolished. 7 N.T.C. § 204 now makes application of state law discretionary with the courts. This allows the Navajo Courts to adopt and develop law that best meets the needs of the Navajo people. It also prevents various courts within the Navajo system from being required to apply different law.

Issue II. Did the District Court abuse its discretion in awarding alimony to the wife for an unlimited time period?

The divorce decree requires the husband to pay alimony to the wife in the amount of $500.00 per month "until further order of this court." Once a court has determined that alimony in a particular case is necessary and appropriate, the court may order it paid until the court makes other orders modifying the amount or stopping payments all together. Often the trial court is unable to see into the future and know the exact date on which alimony will no longer be needed. An award "until further order of court" allows either party to file a motion to modify the award if circumstances change following the decree. Certain alimony awards are also limited by the death or remarriage of the receiving spouse.

This Court believes the appellant may have thought the words "permanent alimony" meant the award could never be changed. This phrase is frequently used in state courts to distinguish an alimony award in a final decree from the temporary alimony the court may allow while the case is pending. Whether the alimony is labeled permanent or indefinite, it may be subject to future modification by the court.

This action is hereby remanded to the district court to hold an evidentiary hearing and make findings of fact to determine (1) the income to be derived from the income producing property and (2) the amount of alimony awarded in the case at hand. The award of alimony should be awarded consistent with the guidelines set forth in this Opinion.

No. A-CV-14-86

Supreme Court of the Navajo Nation

Navajo Nation Division of Resources, *Appellant,*

vs.

Felix Spencer, *Appellee*

Decided December 1, 1986

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

William A. Riordan, Esq., and Gerri J. Harrison, Esq., Navajo Nation Department of Justice, Window Rock, Arizona for Appellant; Virginia Duquet, Esq., DNA-People's Legal Services, Inc., Window Rock, Arizona for Appellee.

Opinion delivered by Austin, Associate Justice.

This case concerns the Supreme Court's jurisdiction to review an appeal from a final decision of an Appeal Authority acting pursuant to the Navajo Nation Personnel Policies and Procedures. We believe that the disposition of the case hinges upon the interpretation of 7 N.T.C. § 302, as it is codified in the Judicial Reform Act of 1985.

The pertinent facts show that Appellee Felix Spencer was fired from his job with the Navajo Nation Division of Resources on March 30, 1984. Spencer requested a grievance hearing pursuant to the Navajo Nation Personnel Policies and Procedures, which is appended to Title Two of the Navajo Tribal Code. The hearing was held before the Tribal Grievance Committee on July 16, 1985. The Committee decided in favor of Spencer. The Appellant Division of Resources appealed the Committee's decision to the Chairman of the Navajo Nation. The Chairman's Office appointed a member of the Navajo Tribal Council's Advisory Committee as Appeal Authority to hear the appeal. After hearing the appeal, the Appeal Authority decided in Spencer's favor. Spencer then requested clarification of the Appeal Authority's decision which led to another hearing before a second Appeal Authority. On April 28, 1986, the second Appeal Authority also

decided in Spencer's favor. On May 28, 1986, the Division of Resources filed an appeal alleging that the Appeal Authority exceeded his authority as set forth in the Navajo Nation Personnel Policies and Procedures. Spencer filed a motion to dismiss the appeal alleging that the Supreme Court lacked jurisdiction to hear the appeal. We set the case for oral arguments to decide whether the Supreme Court has jurisdiction to review a final decision of the Appeal Authority.

The Navajo Tribal Council created the Navajo Nation Supreme Court and it directed the Supreme Court to hear appeals and render decisions based upon the law, equity, and tradition. Navajo Tribal Council Resolution, CD-94-85. The Tribal Council guaranteed fulfillment of its intention by basing the Supreme Court's jurisdiction on the same statutory provisions that it used to create the High Court. Consequently, the Supreme Court can acquire and exercise jurisdiction only in the manner prescribed by the Tribal Council in Title Seven of the Navajo Tribal Code.

The Tribal Council has authorized the Supreme Court to accept and review only cases which have satisified appellate requirements, and those which petition for extraordinary writs. This restriction has enabled the Tribal Council to create a Supreme Court with limited jurisdiction. *Chuska Energy Company v. The Navajo Tax Commission, et al.,* 5 Nav. R. 98 (1986). In comparison, the District Courts of the Navajo Nation are courts of general jurisdiction.

The Supreme Court's acquisition of jurisdiction and the limitations under which that jurisdiction is exercised is explained in *Nez v. Bradley,* 3 Nav. R. 126 (1982). There Chief Justice McCabe said:

> Appeal courts, unlike trial or district courts, are limited in the kinds of cases they hear. They usually get their authority to act from a constitution or statute, and they are limited to the powers expressly set forth in those laws. . . .Within the Navajo Nation, the jurisdiction of the Court of Appeals is fixed, limited and expanded only through the action of the Navajo Tribal Council.

3 Nav. R. at 129. These principles will guide our examination of the statutes in the Judicial Reform Act of 1985 as they relate to this case.

The Division of Resources filed its notice of appeal alleging Supreme Court jurisdiction under 7 N.T.C. § 801 (a) of the Judicial Reform Act of 1985. We disagree with the Appellant. 7 N.T.C. § 801 (a) is not the Supreme Court's jurisdictional statute. 7 N.T.C. § 801 (a) establishes the time limits and the requirements for filing a notice of appeal. Instead, the basis of the Supreme Court's appellate jurisdiction is located at 7 N.T.C. § 302. *Chuska Energy Company v. The Navajo Tax Commission, et al.,* 5 Nav. R. 98 (1986). Jurisdiction is granted in the following terms:

> Section 302. Jurisdiction—Generally
>
> The Supreme Court shall have jurisdiction to hear appeals from final judgments

and other final orders of the District Courts of the Navajo Nation and such other final administrative orders as provided by law. The Supreme Court shall be the Court of final resort.

The first part of section 302 allows an appeal of a final judgment of a District Court provided the appeal conforms to 7 N.T.C. § 801 (a). This part of section 302 is not at issue here. Our issue concerns the second part of section 302 which permits appeals from final administrative orders. Specifically, does 7 N.T.C. § 302 permit an appeal of the final decision of an Appeal Authority, who has acted pursuant to the Navajo Nation Personnel Policies and Procedures? The answer is embedded in the words "as provided by law" in section 302.

The Division of Resources argues that under general principles of administrative law the Supreme Court has power to review the final decision of the Appeal Authority. Spencer's response is that general principles of administrative law are inapplicable because the Navajo Nation has not enacted an Administrative Procedure Act. We disagree with the Division of Resources on this point. The Supreme Court's appellate jurisdiction is not derived from general principles governing administrative law. The Supreme Court can acquire and exercise jurisdiction only in the manner dictated by the laws enacted by the legislative body.

Spencer contends that under section 302, the Supreme Court has jurisdiction to review only those final administrative decisions which have been expressly provided for by statute. Spencer's interpretation requires that a statute expressly provide for an appeal from a final administrative decision to the Supreme Court. It is Spencer's position that not all final administrative decisions are appealable to the Supreme Court. The Division of Resources proposes a different meaning of "as provided by law." According to the Appellant, those words merely removed District Court jurisdiction over certain areas like taxation and workmen's compensation, and it effectively gave the Supreme Court exclusive jurisdiction over those areas.

The Court must interpret and construe tribal statutes to effectuate the intent of the Tribal Council. Ambiguous statutes may require examining extrinsic material such as the legislative record to ascertain the Tribal Council's intent. Plain and unambiguous statutes will be given effect as written.

We believe that the provision providing for appeals from final administrative decisions in section 302 is plain and unambiguous. First, we disagree with the Division of Resource's interpretation of section 302. The Appellant's interpretation may result in the District Court and the Supreme Court exercising concurrent jurisdiction in those areas in which section 302 did not remove District Court jurisdiction. This will create confusion and impede judicial efficiency. Next we agree with Spencer's interpretation of section 302. An appeal from a final administrative deci-

sion is permitted only if a statute exists which expressly provides for an appeal to the Supreme Court. This was clearly the Tribal Council's intent when it enacted section 302. Our decision is consistent with Spencer's position that not all final administrative decisions are appealable to the Supreme Court.

The Tribal Council has established certain administrative agencies whose final decisions are appealable to the Supreme Court pursuant to statute. Those areas in which appeals are provided by law include workmen's compensation, elections, taxation, and labor. The Tribal Council obviously knows how to expressly provide for appeals of final administrative decisions by statute. The Personnel Policies and Procedures, and the statutes under which these Procedures have beem promulgated, fail to provide for an appeal of a final Appeal Authority decision to the Supreme Court. We hold that the Supreme Court lacks jurisdiction under the current law to review a final decision of the Appeal Authority.

It is inappropriate for the Supreme Court to exercise jurisdiction in this case without clear authorization from the Tribal Council. Perhaps in the future the Navajo Tribal Council will enact an Administrative Procedure Act which will govern appeals from administrative agencies. Until that Act is reality, it is inappropriate for the Supreme Court to "create" its own jurisdiction in an area where the Tribal Council has not spoken. If the Appellant believes that the grievance proceedings have been conducted outside the law, then it has other remedies available in appropriate forums. Accordingly, the appeal is dismissed.

Chief Justice Tso and Associate Justice Bluehouse concur.

No. A-CV-22-86

Supreme Court of the Navajo Nation

Jonas Mustach, *Appellant,*

vs.

The Navajo Board of Election Supervisors, *Appellee.*

Decided January 22, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

Raymond Tso, Esq., Crownpoint, New Mexico for the Appellant; June L. Lorenzo, Esq., Navajo Nation Department of Justice, Window Rock, Arizona for the Appellee.

Per Curiam.

This is an election case in which the Appellant, Jonas Mustach, appealed the dismissal of his Statement of Grievance by the Appellee, Navajo Board of Election Supervisors. We heard the case on October 13, 1986, and the next day we reversed the Board and ordered a special election.

Mustach's Statement of Grievance, which alleged four voting irregularities at Red Mesa Chapter during the 1986 primary elections, was filed on August 22, 1986. Mustach had been a candidate for the Navajo Tribal Council in the 1986 primary elections. The Statement was presented to the Board at its meeting in Gallup, New Mexico on August 26, 1986. There the Board, by a vote of six in favor and zero opposed, recommended that the staff "further investigate this case, contact all poll officials if [sic] all accusations are true or not." Navajo Board of Election Supervisors, *Board Meeting Minutes*, dated August 26, 1986. The Board's recommendation resulted in a compilation of personal statements from voters and poll officials associated with the Red Mesa Chapter.

The Board met again on September 4, 1986, when they voted, six in favor and zero opposed, to dismiss Mustach's case. However, the Board also allowed Mustach an option to appeal the dismissal and request "a

hearing within 15 days before the Navajo Board of Election Supervisors." Navajo Board of Election Supervisors, *Board Meeting Minutes*, dated September 4, 1986. Mustach was notified of the Board's decision to dismiss by letter dated September 9, 1986. In part the letter advised Mustach that "the statement of grievance filed by you does not contain facts to allow the Board to determine whether a recall is in order. You may request a hearing within 15 days of receipt of this letter if you so desire."

On September 9, 1986, Mustach requested a hearing before the Board. The Board granted the hearing and the hearing was scheduled for September 17, 1986. Mustach was notified of the hearing in the late evening of September 16, 1986. The following day Mustach appeared at the hearing with some hastily gathered witnesses and without counsel.

The hearing proceeded before six Board members.[1] After hearing testimony from each of the witnesses, the Board adjourned into executive session to discuss the case, and to formalize a decision. Apparently, while in executive session, three of the Board members "were told" not to vote on the final decision. Navajo Board of Election Supervisors, *Tr.* at 31. The non-voting three Board members were all members of the Navajo Tribal Council. Navajo Board of Election Supervisors, *Tr.* at 31. Upon reconvening, the remaining three Board members voted unanimously to dismiss Mustach's case. Mustach was notified of the Board's decision to dismiss the case by letter dated September 22, 1986. The following day Mustach requested a rehearing before the Board, which was denied on October 2, 1986.

Mustach filed his notice of appeal on October 7, 1986. We granted the appeal on three initial issues: (1) who are the Board of Election Supervisors and the Board of Election Commissioners; (2) what percentage of the Board / Commissioners constitutes a quorum, and what is the rule where the law is silent on quorum; and (3) whether the action taken by the Board on September 17, 1986, constitutes an official act, and is therefore valid and binding. When the Court reviewed the initial pleadings these seemed to be the only issues. However, as responsive briefs and documents were filed, and as the Court heard oral arguments, the Court became aware of a fourth issue: whether the Board had followed the procedures established for resolving an election contest in this case. The Court will decide these four issues in this Opinion.

The Navajo Board of Election Supervisors has undergone three name changes since its creation in 1966.[2] Counsel for the Board has diligently edu-

1. In 1984, the Navajo Tribal Council fixed the Board Membership at ten. Presently nine members comprise the Board with one vacancy. Three of the present nine Board members are also members of the Navajo Tribal Council.

2. These have been the names: a) Board of Election Supervisors of the Navajo Tribe; b) Navajo Election Commission; and c) Navajo Board of Election Supervisors.

cated the Court on these changes, including the Board's background in general. Consequently, the Court is now aware that the Navajo Election Commission and the Navajo Board of Election Supervisors are the same body with the latter being its official name. See *Navajo Tribal Council Resolution,* CAU-38-84.

We now address the issue pertaining to the Board's adherence to the laws governing the resolution of election contests and disputes. The Navajo Tribal Council authorized the Board to establish and enforce rules and regulations governing Navajo Nation elections. 11 N.T.C. §52. One of the duties of the Board is to hear and resolve all election contests and disputes arising from Navajo Nation elections. 11 N.T.C. §51A(7).

The Board is mandated to follow certain procedures when resolving election contests and disputes. These procedures are established at 11 N.T.C. §51A(7)(a), (b), (c), (d), and (e), and are as follows:

(a) Within ten days of the incident complained of or the election, the complaining person must file with the Board a statement setting forth the reasons why he believes the election law has not been complied with. If, on its face, the statement of election contest is insufficient under the election law, the statement shall be dismissed by the Board.

(b) If the election contest is not dismissed, the Board shall conduct a hearing within 15 days thereafter to determine if the allegations in the statement are true and supported by the law.[3] At the election contest or dispute hearing, the contestant and respondent may appear in person or through legal counsel. The contestant shall have the burden of proving the allegations contained in the statement of contest or dispute by a preponderance of the evidence, unless a more stringent burden of proof is required by other provisions of the Election Law or Tribal Code.

(c) If, after the hearing, it is unclear whether the allegations in the statement are true or not, the Board shall further investigate the matter complained about.

(d) The Board shall render its decision orally at the conclusion of the hearing or may request the parties to submit briefs within a time period specified by the Chairman of the Board, and issue a written decision thereafter.

(e) A party who wishes to appeal from a Board decision must file a notice of appeal with the Supreme Court of the Navajo Nation within ten (10) days after the decision is made.[4]

3. This part is subject to two interpretations: a) If the election contest is not dismissed, the hearing must be held within 15 days after the Statement of Grievance is filed; or b) If the election contest is not dismissed, the hearing must be held within 15 days after the decision not to dismiss the Statement of Grievance is entered. The interpretation of this part is not an issue before the Court, therefore clarification will be left to the Board.

4. The Board and all appellants are advised that our new Navajo Rules of Civil Appellate Procedure, Rule 7, requires that the appellant attach a copy of the Board's final decision to the notice of appeal. This means that in each case, the Board must enter a final written decision.

The function of the Court, when reviewing the action of the Board, is to determine whether the Board abused its discretion or failed to follow its procedures. *Johnson v. June*, 4 Nav. R. 79 (1983); *Williams v. The Navajo Election Commission*, 5 Nav. R. 25 (1985). While reviewing for the Board's compliance with its procedures, we must also decide if the Board in resolving the election contest or dispute, violated the rights of the contestant.

Mustach's case is replete with evidence showing that the Board failed to follow the law on resolution of election contests and disputes. The Board is required to review the Statement of Grievance on its face for sufficiency under the election law upon presentation. 11 N.T.C. §51A (7)(a). The Board then must either dismiss the Statement, or if the Statement is not dismissed, schedule a hearing on the merits of the allegations contained in the Statement. 11 N.T.C. §51A (7)(a) and (b).

The Board's first violation of the election law occurred with its failure to schedule a hearing for Mustach after nondismissal of Mustach's Statement. Instead of scheduling the required hearing, the Board committed another violation by ordering an investigation into allegations in the Statement. Under the law, an investigation succeeds the hearing, and is justified only "[i]f, after the hearing, it is unclear whether the allegations in the statement are true or not." 11 N.T.C. §51A(7)(c).

On September 4, 1986, the Board decided to dismiss Mustach's Statement. This decision was arrived at after the Board reviewed the reports compiled from the investigation. The third violation occurred when the Board failed to finalize its decision to dismiss. A final decision at this point would have allowed Mustach to immediately appeal to the Supreme Court, and the appeal would have been reviewed and heard in mid September.

Instead of entering a final decision, on September 4, the Board allowed the case to linger by advising Mustach to request a hearing before the Board within 15 days. This was followed by a letter dated September 9, 1986, which also advised Mustach to request a hearing "if you so desire." There lied the fourth violation of the election law. The law required the Board to set a hearing for Mustach. 11 N.T.C. §51A(7)(b). It does not place the burden upon Mustach, or any contestant, to request a hearing before the board.

The procedures established for resolution of election contests and disputes were not intended to be discretionary with the Board. The Tribal Council, for reasons of due process and speeding resolutions of election contests and disputes, intended that these procedures be followed. There are other obvious reasons: election ballots for the general election must be printed well in advance of the general election; resolution of a primary election contest is limited to the time between the primary and general elections; delaying resolution of the contest results in reduced campaign time for candidates; and the parties often incur unnecessary financial expenses. We hold that the Navajo Board of Election Supervisors failed to follow the election law in resolving

Mustach's Statement of Grievance. The failure to follow the election law was highly prejudicial to Mustach.

The Indian Civil Rights Act of 1968, 25 U.S.C. §1302(8), guarantees procedural due process in hearings before tribal administrative agencies. We know that the Navajo Nation does not possess a constitution. For this reason, it is incumbent upon the Navajo Nation Courts to preserve the concepts of due process of law. *Halona v. MacDonald*, 1 Nav. R. 189 (1978). Procedural due process, under the Indian Civil Rights Act, relates to the requisite characteristics of proceedings seeking to effect a deprivation of liberty or property. *Yazzie v. Jumbo,* 5 Nav. R. 75 (1986).

Procedural due process encompasses notice and an opportunity to be heard before a proper tribunal. *Yazzie v. Jumbo, Id.* Due process requires that notice of hearing be given sufficiently in advance of the scheduled date of hearing, so that the party will have reasonable time to prepare.

In this case, Mustach was notified of the hearing in the late evening and only a few hours before the scheduled time for hearing. The results were as expected. Mustach had no time to locate counsel and very little time to contact and prepare witnesses. Mustach appeared at the hearing totally unprepared to present his case. These are exactly the results which due process must protect against. These circumstances lead us to hold that, under the principles enunciated above, Mustach was not afforded due process.

The final two issues concern the Board's quorum requirement, and whether the September 17, 1986 decision of the Board was valid. We hold that the Board lacked a quorum, therefore its September 17, 1986 decision is invalid.

The rule is that in the absence of special rules of procedure adopted by a body, or adopted for it by an outside power having the right to do so, its procedure is governed by parliamentary law. 59 Am.Jur. 2d *Parliamentary Law* §3; 67A C.J.S. *Parliamentary Law* §4; *McCormick v. Board of Education, etc.,* 58 N.M. 648, 274 P. 2d 299, 308 (1954). Title 11 of the Navajo Tribal Code does not contain specific rules of procedure for meetings of the Navajo Board of Election Supervisors. Counsel for the Board has advised us that, because rules of procedure have not been adopted by the Board and by the Navajo Tribal Council, the procedure for Board meetings and hearings have been conducted using general parliamentary law. Brief for Appellee at 6. We agree that parliamentary law is appropriate where the Board has not adopted rules of procedure for Board meetings.

A quorum of a legally constituted body must be present at a meeting in order to validate its action or to transact business. 67A C.J.S. *Parliamentary Law* §6b; Summary quoted in *McCormick v. Board of Education, etc., Id.* A quorum, in the absence of a statute or rule defining a quorum, is the majority of a definite or limited number of members. 67A C.J.S. *Parliamentary Law* §6b; *Federal Trade Commission v. Flotill Products,*

Inc., 389 U.S. 179, 183 (1967). Thus, five of the present nine Board members would constitute a quorum for the purpose of transacting business.

The Board's position is that, because six of the nine Board members attended the September 17, 1986 hearing, it had a legally sufficient quorum to conduct an official hearing. A plausible argument with which we disagree. The September 17 makeup would indeed be a quorum for transacting any business other than Mustach's hearing.

The Board's position fails to recognize another rule of parliamentary law: "Members disqualified because of interest cannot be counted for the purpose of making a quorum, or a majority of the quorum." 67A C.J.S. *Parliamentary Law* §6b; *Enright v. Hecksher,* 240 F. 863 (1917). Here the three Board members who were disqualfied from voting on the final decision were Navajo Tribal Council members. Mustach was also a member of the Navajo Tribal Council.

The record of the September 17, 1986 hearing reflects disqualification of the three Tribal Council members: "Members of [the] Navajo Tribal Council, Mr. Haskie, Mr. Milford and Mr. Bradley *were told* to be excused [sic] from making decision." Navajo Board of Election Supervisors, *Tr.* at 31 (emphasis ours). It does not matter that the three disqualified Board members "were present during the entire grievance hearing." Brief for Appellee at 7. The determining factor is that the three Board members were disqualified from voting on the final decision due to a conflict of interest. The conflict arose because the three disqualified Board members and Mustach were all members of the Navajo Tribal Council. To prevent a conflict, the hearing should have been conducted before a Board comprised of non-Tribal Council members. Any decision resulting from a hearing entered by a Board lacking a quorum is invalid.

After oral arguments, and on October 14, 1986, we asked the parties to suggest a remedy with special consideration for the nearness of the general election. The parties agreed that a special election for the Red Mesa chapter would be the most feasible. Thus, our order reflects that agreement, and also our own decision to redress Mustach for the Board's disregard of the election laws. The Navajo Board of Election Supervisors's decision to dismiss Mustach's Statement of Grievance is reversed, and a special election ordered.

No. A-CV-20-86

Supreme Court of the Navajo Nation

In the Matter of: A.O., a minor child,
No. SR-AN-248-86
The Navajo Nation, *Appellant,*
vs.
Bryan O'Hare, *Appellee.*
Decided February 10, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

William E. Miller, Jr., Esq. and Daryl June, Esq., Navajo Nation Prosecutor's Office, Window Rock, Arizona for the Appellant; James Jay Mason, Esq., Gallup, New Mexico for the Appellee.

Per Curiam.

The Appellant, Navajo Nation through its Prosecutor's Office, appealed the dismissal of its Petition For Adjudication Of A Dependent Child by the Shiprock Children's Court. We granted the appeal to decide whether the Navajo Nation Children's Courts have jurisdiction over Child Dependency Petitions involving Navajo children, where the alleged conduct upon which the Petition is based, occurred outside the exterior boundaries of the Navajo Indian Reservation.

The Navajo-mother and Anglo-father are involved in a protracted custody dispute concerning the child in the state district court of New Mexico. The mother, who had been living in Albuquerque, New Mexico, took the child and returned with the child to the Shiprock area of the Navajo Nation in violation of a state court order. Shortly thereafter, the mother initiated the filing of a Petition For Adjudication Of A Dependent Child in Shiprock Children's Court.

On June 15, 1986, the Navajo Nation Prosecutor's Office filed the Petition alleging that the Navajo child had been sexually abused by the father, and that the alleged abuse had occurred in Albuquerque, New Mexico,

which is outside the exterior boundaries of the Navajo Indian Reservation. The Petition alleged that the Shiprock Children's Court had jurisdiction, pursuant to 9 N.T.C. §1055 (1985), of the Navajo Nation Children's Code. On June 30, 1986, the Shiprock Children's Court entered an ex-parte order giving temporary custody of the child to the Navajo Division of Social Welfare, and the Court also ordered that the child be made a ward of the Shiprock Children's Court.

On July 29, 1986,[1] the Appellee, Bryan O'Hare, moved to dismiss the Petition for lack of jurisdiction by arguing that the alleged sexual abuse was "committed in Albuquerque, New Mexico, which is beyond [the] jurisdiction of the Shiprock Children's Court of the Navajo Nation." Appellee's Motion to Dismiss, filed July 29, 1986. The Appellee also sought dismissal under the Uniform Child Custody Jurisdiction Act, because the Navajo Nation was not the home state of the child, because the child had not resided in Indian Country for six months. Appellee's Motion to Dismiss, filed July 29, 1986. The Appellee's Motion to Dismiss was taken under advisement and the next day, on July 30, 1986, the Shiprock Children's Court dismissed the Petition for lack of jurisdiction, and the child was released to New Mexico authorities.

The United States Supreme Court has said that Indian Tribal Courts must have the first opportunity to determine their jurisdiction. *National Farmers Union Insurance Cos., et al. v. Crow Tribe of Indians, et al.*, 471 U.S. 845, 105 S.Ct. 2447 (1985). Although that case dealt with the question of whether a federal district court had properly granted an injunction against execution of a tribal court judgment, the rule is equally applicable where, as here, actions concerning the child had been filed in three separate jurisdictions. One case is pending in the state court of New Mexico to determine the child's custody following a divorce. The other was an Application for a Writ of Habeas Corpus, filed in federal district court of New Mexico, to compel the Navajo Nation to release the child to its father, and to enjoin any proceedings in Shiprock Children's Court concerning the child. The third action is the dependency petition in Shiprock Children's Court, which is the subject of this appeal.

Regardless of the proceedings initiated in other jurisdictions involving the child, the Shiprock Children's Court had a duty to decide its jurisdiction. Our review of the Children's Court record, and specifically the order dismissing the Petition, leads us to conclude that the order was entered without finding facts necessary to determine jurisdiction. The order itself

1. On this same date, the presiding Judge of the Shiprock Children's Court was served with Summons and an Application for a Writ of Habeas Corpus and Injunction, which had been filed by the Appellee in the United States District Court for the District of New Mexico. The hearing on the application for the Writ and Injunction had been scheduled for August 1, 1986 in Albuquerque, New Mexico.

does not contain findings of fact which would justify dismissing the Petition for lack of jurisdiction.

A preliminary inquiry for a Navajo Nation Children's Court is to decide whether it has subject matter jurisdiction of the case. Subject matter jurisdiction over child dependency cases is vested in the Navajo Nation Children's Courts by virtue of 9 N.T.C. §1055(1) (1985): "The Children's Court shall have exclusive original jurisdiction of all proceedings under the Children's Court in which a child is alleged to be a. . . dependent child. . . ." At 9 N.T.C. §1002, subsection 15(E) (1985), a dependent child is defined as one "who has been. . . sexually abused by his parent. . . ." Thus, the Navajo Nation Children's Court must decide if the petition alleges that the minor is a dependent child. In this case, the Petition of the Navajo Nation has alleged that the child has been subjected to sexual abuse by the father. The Shiprock Children's Court therefore has subject matter jurisdiction over the Navajo Nation's Petition.

The inquiry then shifts to 9 N.T.C. §1055(4) (1985), to determine whether the Navajo Nation Children's Court has jurisdiction over the child. The first part of §1055(4) deals with jurisdiction over custody matters. We will not discuss custody in this appeal. Our concern is the final part of §1055(4) which determines whether the Shiprock Children's Court has jurisdiction over the dependency petition involving the child, A.O. The statute reads as follows: "The Children's Court shall have exclusive jurisdiction over any Navajo child who resides or is domiciled within the borders of Navajo Indian Country, or who is a ward of the Children's Court." 9 N.T.C. §1055(4) (1985). The parties have acknowledged that the child is of one-half blood Navajo, and the child is enrolled in the Navajo Tribe. With these undisputed facts, we can only conclude that A.O. is a Navajo child for purposes of §1055(4).

Based upon the record before us, we are unable to determine either the residence of the child, the domicile of the child, or whether the child was properly made a ward of the Children's Court, pursuant to 9 N.T.C. §1405 (1985). Lacking these crucial findings of fact, we are unable to decide whether the Shiprock Children's Court had jurisdiction over the dependency petition concerning the child, A.O.

Nonetheless, we must set this rule to guide the Navajo Nation Children's Courts: In a dependent child case under the Navajo Nation Children's Code, if any of the factors (residence, domicile, ward of court) in 9 N.T.C. §1055(4), is proven by a preponderance of the evidence, then the Children's Court has jurisdiction over the Navajo child, even where the alleged conduct giving rise to the petition occurred outside the exterior boundaries of the Navajo Indian Reservation. The rule we have established is justified in light of the Navajo Nation's recognized interest in its children. Congress, in the Indian Child Welfare Act, 25 U.S.C. §1901(3), 9 STAT. 3069 (1978), has

found "that there is no resource that is more vital to the continued existence and integrity of Indian Tribes than their children. . . ." The most precious resource of the Navajo Nation is indeed its children. Having recognized this, the Navajo Tribal Council enacted the Navajo Nation Children's Code, to protect this vital resource of the Navajo Nation.

The order dismissing the Petition is reversed, and the case is remanded to the Shiprock Children's Court to determine if any of the factors in §1055(4) exists, and for proceedings consistent with this Opinion.

No. A-CV-12-85

Supreme Court of the Navajo Nation

In the Matter of Contempt of:
Kee Yazzie Mann
Decided February 20, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Joe Washington, Esq., Flagstaff, Arizona for the Appellant.

Opinion delivered by Austin, Associate Justice.

The Appellant, Kee Yazzie Mann, appealed an order of the Crownpoint District Court which held him in direct criminal contempt for disobeying a writ of habeas corpus. Appellant Mann urges reversal on two points: (1) the district court lacked venue to issue the writ of habeas corpus; and (2) the district court erred in summarily punishing him for contempt.

On March 27, 1986, the mother of the child filed a petition for a writ of habeas corpus in the Crownpoint District Court. The petition alleged that Appellant Mann had refused to return his born-out-of-wedlock child to its mother following a brief visit. That same day, a writ of habeas corpus was issued commanding Appellant Mann to bring the child before the Crownpoint District Court on April 4, 1985.

On April 4, 1985, Appellant Mann appeared in court pro-se, and without the child. Counsel for the mother then moved to have Appellant Mann held in contempt for disobeying the court's order to have the child before the court on that date. In response to the motion, the district judge without further hearing, found Appellant Mann guilty of interfering with judicial proceedings under the Criminal Code, 17 N.T.C. §477. The record does not show that Appellant Mann was advised of the criminal contempt charge, nor given an opportunity to explain his alleged contemptuous conduct. The record is also devoid of the facts upon which the conviction for direct criminal contempt was based. Appellant Mann was sentenced to a payment of a fine of $100.00. See JUDGMENT AND MITTIMUS, dated April 4, 1985.

I. Venue

Appellant Mann contends that Rule 26, Navajo Rules of Civil Procedure, requires our reversal, because that rule mandates that, "an action shall be filed in the district in which any defendant resides or in which the cause of action arises." Brief for Appellant at 1. Appellant Mann argues that at the time the petition was filed he resided in Tuba City district, and the cause of action arose in Window Rock district, because that was where the mother released custody of the child.

Jurisdiction of a court is not the same as venue of a court. Jurisdiction refers to the power of a Navajo Nation court to decide a case on its merits, while venue refers to the district in which the case may be heard. Venue is procedural and not jurisdictional. See *Lynch v. Lynch,* 3 Nav. R. 219 (Window Rock D. Ct. 1982). Reversals are appropriate where a district court adjudicates a matter over which it lacked jurisdiction.

Venue is a privilege asserted by the party in whose favor it runs to have the case tried in a convenient forum. Venue is waived if the party who holds the privilege fails to timely object to venue in the district in which the suit had been brought. Appellant Mann's reliance on Rule 26, Navajo Rules of Civil Procedure, is proper, but he has failed to show that he made a timely objection to venue in the Crownpoint District Court. The record shows that Appellant Mann first raised the venue issue in his motion for reconsideration of the order adjudging him in contempt. By then, the circumstances resulting in the issuance of the writ of habeas corpus had been resolved, and the case had been dismissed. We hold that Appellant Mann has failed to timely object to venue in the Crownpoint District Court, thereby resulting in a waiver of his venue privilege.

II. Contempt

Navajo Nation courts have inherent power to punish for contempt of their authority and to coerce compliance with their orders. *In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R. 85 (1979); *In the Matter of Contempt of: Arnold Sells,* 5 Nav. R. 37 (1985); *See also Navajo Nation v. Davis,* 3 Nav. R. 248 (Window Rock D. Ct. 1982). A failure to obey a writ of habeas corpus is contemptuous behavior punishable by the court. The power of Navajo courts to punish for contempt must be exercised within the bounds of due process embodied in the Indian Civil Rights Act, 25 U.S.C. §1302(8) (1968), and the Navajo Bill of Rights, 1 N.T.C. §8 (1967) (current version at 1 N.T.C. §3 (1986)).

Contempts are either civil or criminal, and either direct or indirect. *In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R.

85 (1979); *Navajo Nation v. Davis,* 3 Nav. R. 248 (Window Rock D. Ct. 1982). The purpose for which the court exercises its contempt powers will determine whether the contempt is civil or criminal. *Matter of Klecan,* 93 N.M. 637, 603 P. 2d 1094 (1979); *Perry v. O'Donnell,* 759 F. 2d 702 (9th Cir. 1985). Thus civil contempt proceedings are used to preserve and enforce the rights of litigants, and to compel obedience to the orders, writs, mandates and decrees of the court. Criminal contempt proceedings are used to preserve the authority and vindicate the dignity of the court. *Matter of Klecan,* 93 N.M. 637, 603 P. 2d 1094 (1979); *accord Hing. v. Thurston,* 101 Ariz. 92, 416 P. 2d 416 (1966).

Direct contempts are those contemptuous acts committed in the presence of the judge, while indirect contempts are those contemptuous acts committed outside the presence of the judge. *In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R. 85, 87 (1979); *Matter of Klecan,* 93 N.M. 637, 603 P. 2d 1094 (1979); *Hing v. Thurston,* 101 Ariz. 92, 416 P. 2d 416 (1966). The direct-indirect distinction is important for purposes of procedure. The court can dispose of a direct contempt summarily, while it must hold a hearing if the contempt is indirect. *In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R. 85 (1979).

The record shows that Appellant Mann was charged with direct criminal contempt for his disobedience of the writ of habeas corpus. The issue of whether the judge properly classified the contempt as criminal was not raised. Nonetheless, our judges must have discretion to proceed with a contempt charge in a manner consistent with the "purpose" rule that we have adopted above. *Cf. In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R. 85 (1979) (district judges have discretion to determine what acts constitute contempt).

Judges sometimes find it difficult to make the direct-indirect distinction. Our opinion is that if the judge must rely upon facts beyond his knowledge, or upon the confession of the contemnor, or upon the testimony of others to ascertain facts necessary to determine the contempt, then the contempt is indirect. In a case where it is difficult to determine whether the contempt is direct or indirect, then justice is better served if the contempt is adjudicated as indirect.

In this case, Appellant Mann's disobedience of a valid court order is indirect contempt. The judge lacked personal knowledge of the facts which would show why the child was not brought before the court. It is unlikely that Appellant Mann can be convicted of criminal contempt without either his confession or the testimony of others. We have also said that a failure to obey a court order is indirect contempt. *In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R. 85, 87 (1979).

Punishment for contempt, as in this case, usually results in loss of property or liberty. It is imperative then that Navajo courts comply with due process in contempt proceedings. A person alleged to be in indirect civil or criminal contempt of court must be notified of the charges, have a right to be represented by counsel, have a reasonable time to prepare a defense, and have an opportunity to be heard. The alleged contemnor must have their day in court. The rules of criminal procedure are also applicable to indirect criminal contempt proceedings.

A judge can punish summarily if the contemptuous behavior occurred before the judge. Summary punishment is appropriate whether the contempt is denoted civil or criminal. However, our opinion is that Navajo courts must still afford due process protections in direct contempt proceedings. The judge must advise the contemnor of the charges and give the contemnor an opportunity to explain the contemptuous conduct. The order of contempt must show that the judge saw or heard the conduct constituting the contempt and that the contempt was committed in the presence of the court. The order must also state the facts constituting the contempt and the punishment imposed.

We have just said that Appellant Mann's contemptuous conduct is indirect. Before Appellant Mann can be convicted of indirect criminal contempt, he must have been afforded a hearing which complied with due process. The record reflects that Appellant Mann was not given a hearing. Therefore his rights to due process have been violated.

In comparison, had the matter been a direct criminal contempt, then the court must still afford Appellant Mann with due process. The record does not show that Appellant Mann was given notice of the charges, or even allowed an opportunity to explain his conduct. The record is also devoid of facts which would support Appellant Mann's conviction of criminal contempt.

We hold that Appellant Mann's right to due process was violated when he was convicted of contempt without being afforded a hearing. We have no choice but to reverse and dismiss the district court order adjudging Appellant Mann in direct criminal contempt of court. Whatever fine Appellant Mann has paid to the court shall be returned, and the district court record shall reflect a dismissal.

Chief Justice Tso and Associate Justice Bluehouse concurred.

No. **A-CV-23-85**

Supreme Court of the Navajo Nation

Alfred John, Jack John, and Helen Willie, ***Defendants and Appellant,***
and
Larry Kee Yazzie, ***Appellant,***
vs.
Russell and Elsie Herrick, Plaintiffs-Appellees.
Decided March 3, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Joe W. Washington, Esq., Tuba City, Arizona for the Appellants; Inja Nelson, Esq., DNA-People's Legal Services, Window Rock, Arizona for the Appellees.

Opinion delivered by Austin, Associate Justice.

There are two appellants in this case. First, attorney Larry Kee Yazzie appeals the order which adjudged him in contempt for failure to inform the district court of the attorney's fee rule in *Hall v. Arthur,* 3 Nav. R. 35 (1980). Second, Jack John appeals the same order which denied his motion to collect attorney's fees from the Appellees, Russell and Elsie Herrick.

The Herricks sued defendants for personal injuries and property damage sustained in a two-vehicle accident they claim was caused by Alfred John. Appellant John was sued on the theory that he negligently entrusted a vehicle he had "purchased" and "owned" to Alfred John. Complaint, Count III.

Appellant John retained attorney Yazzie to defend him. Appellant John's answer shows that he moved for dismissal of the suit against him for plaintiffs's failure to state a claim, and to have the court award him attorney's fees. At trial, Appellant John's motion to dismiss was granted, and he then renewed his motion for an award of attorney's fees. The record does not show, nor has counsel for the Herricks shown on appeal, that the Herricks objected to the motion for attorney's fees at trial. The final order shows

that the court awarded $545.00 in attorney's fees to Appellant John. Order of May 28, 1985. The court instructed attorney Yazzie to draft the final order which was signed by the district judge.

Two months after entry of the final order, and upon motion of the Herricks, the court held a hearing to reconsider its award of attorney's fees. Upon reconsideration, the court found that *Hall v. Arthur, Id.,* precluded an award of attorney's fees to Appellant John. The court then amended its May 28, 1985 order to show that attorney's fees were denied to Appellant John. Order of August 9, 1985. This is the order that Appellant John is appealing.

Attorney Yazzie did not participate in the reconsideration hearing, but nonetheless, the court found that attorney Yazzie "knew or reasonably should have known" of the attorney's fee rule in *Hall v. Arthur, Id.,* and that he had failed to inform the court of the rule. Order of August 9, 1985. This finding resulted in the court holding attorney Yazzie in contempt. The record shows that attorney Yazzie was not notified of the contempt charge, nor was he given an opportunity to be heard. Attorney Yazzie was ordered to pay a fine of $25.00, or be jailed for three days.

I. Contempt

Navajo Nation Courts have inherent power to punish for contempt. *In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R. 85 (1979); *In the Matter of Contempt of: Arnold Sells,* 5 Nav. R. 37 (1985); *In the Matter of Contempt of: Kee Yazzie Mann,* 5 Nav. R. 125 (1987); *See also In the Matter of Daniel Deschinny,* 1 Nav. R. 66 (1972); *Washburn v. McKensley,* 1 Nav. R. 114 (1977); *Mike v. Mike,* 1 Nav. R. 183 (1978). And contempts are either civil or criminal, and either direct or indirect. *In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R. 85 (1979); *In the Matter of Contempt of: Kee Yazzie Mann,* 5 Nav. R. 125 (1987). But the court must always first determine whether the person's conduct constitutes contempt. Thus, our issue is whether attorney Yazzie's failure to inform the court of the attorney's fee rule in *Hall v. Arthur,* 3 Nav. R. 35 (1980), constitutes contempt.

Contempt is any act which is calculated to hinder, obstruct, or embarrass the court in the administration of justice, or which lessens the dignity or authority of the court. BLACK'S LAW DICTIONARY 288 (5th ed. 1979). A failure to obey an order of the court is contempt. *In the Matter of Contempt of: Kee Yazzie Mann, Id.; Washburn v. McKensly,* 1 Nav. R. 114 (1977); *See also In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R. 85 (1979). Attorney Yazzie did not disobey an order of the court, therefore he cannot be held in contempt for disobeying an order.

But has attorney Yazzie in any way hindered, embarrassed, or obstructed the administration of justice? We hold that he did not. Attorney Yazzie's first request for attorney's fees appeared in the answer to the complaint. An alert opposing counsel would immediately prepare an objection and argue inadequate research of the law. Attorney Yazzie renewed his motion for attorney's fees at trial. Herricks's counsel should have immediately objected to the motion, citing *Hall v. Arthur,* 3 Nav. R. 35 (1980), in support, and thus placing the issue of attorney's fees before the court. Our Opinion is that attorney Yazzie properly presented his request for attorney's fees twice, and we will not condone holding an attorney in contempt for good faith practice.

Although ethical considerations require an attorney to disclose all applicable laws on the issues at trial, *see In the Matter of Daniel Deschinny,* 1 Nav. R. 66 (1972), in this case where opposing counsel has failed to mount opposition to a motion, it is highly inappropriate to hold attorney Yazzie in contempt. Inaction by Herricks's counsel is like consenting to the request for attorney's fees, and thus attorney Yazzie was under no further obligation to present supporting or conflicting authorities, unless requested by the court.

We acknowledge that Navajo courts have authority to determine what acts constitute contempt. *In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R. 85 (1979); *Cf. In the Matter of Contempt of: Kee Yazzie Mann,* 5 Nav. R. 125 (1987). But our holding in this case does not lessen that authority. Our opinion is that attorney Yazzie properly proceeded before the court, and holding an attorney in contempt for proper practice is a clear abuse of discretion. *See In the Matter of Summary Contempt of: Leonard R. Tuchawena,* 2 Nav. R. 85 (1979).

II. Attorney's Fees

The attorney's fees rule within the Navajo Nation is that each party in litigation is responsible for their own attorney's fees, *Hall v. Arthur,* 3 Nav. R. 35 (1980). Recognized exceptions are (1) when a statute provides for attorney's fees, *Hall v. Arthur, Id.;* (2) when the case presents a special set of circumstances, *Hall v. Arthur, Id.; Morgan v. Morgan,* 5 Nav. R. 64 (1985); and (3) if a pleading or document is not submitted in good faith, or it contains material misstatements of fact or law, or it is not made upon adequate investigation or research. *Judicial Conference Resolution* (1982); 1 N.L.J. 5144.

Appellant John must prove that his case is an exception to the rule before he is entitled to attorney's fees. Appellant John first contends that his case presents a special set of circumstances. Contempt proceedings and con-

tracts providing for payment of attorney's fees are a special set of circumstances. *Hall v. Arthur,* 3 Nav. R. 35 (1980). So is an action for dissolution of marriage. *Morgan v. Morgan,* 5 Nav. R. 64 (1985). Appellant John has failed to show that his case falls into one of these areas, therefore his case does not present a special set of circumstances.

The Courts must exercise restraint in creating exceptions to the Navajo rule on attorney's fees. In a prior decision we said: "We would prefer that the Navajo Tribal Council, as the governing body of the Navajo Nation, approve any deviation from this general rule." *Hall v. Arthur,* 3 Nav. R. at 41 (1980). This does not mean that in an appropriate case, supported by sound reasoning, this Court cannot create another exception.

Next we consider Appellant John's contentions that the Herricks's pleadings were not submitted in good faith, nor based upon adequate investigation or research. These contentions are not supported by evidence showing how pleadings were not submitted in good faith, nor were we shown evidence proving inadequate investigation or research.

Appellant John directs us to look at the dismissal of the suit itself to find support for his arguments. He argues that the court has found a lack of merit in the complaint, and that alone proves bad faith pleading, and inadequate investigation or research. We decline to adopt such reasoning. Many suits are dismissed for lack of merit without an award of attorney's fees.

A request for attorney's fees must be supported by evidence proving that the pleadings were not submitted in good faith, or that the pleadings were submitted without investigating the relevant facts or without researching the applicable law. In the instant case, a mere assertion of bad faith based upon dismissal of a suit will not suffice. We hold that Appellant John has failed to prove an exception to the Navajo rule on attorney's fees.

III. Mandate

The order of the Window Rock District Court holding Appellant Larry Kee Yazzie in contempt is reversed and dismissed. The record of the district court shall show a dismissal of the contempt charge. All fines that Mr. Yazzie has paid for contempt shall be returned.

The order of the Window Rock Distrct Court denying Appellant Jack John's motion for attorney's fees is affirmed. Each party to this appeal is responsible for their own attorney's fees on appeal and in the action in the district court.

Chief Justice Tso and Associate Justice Bluehouse concur.

No. A-CV-05-87

Supreme Court of the Navajo Nation

The Navajo Tribe of Indians, *Plaintiff-Appellee,*

vs.

Yellowhorse, Inc., Mary Ann Yellowhorse and Betty Yellowhorse Chauncey, *et al., Defendants-Appellants.*

Decided March 10, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

John Yellowhorse, Esq., Houck, Arizona for the Appellants; Donna C. Chavez, Esq. and Elouise Chicharello, Esq., Navajo Nation Department of Justice, Window Rock, Arizona for the Appellee.

Per Curiam.

The findings of fact, conclusions of law, and final judgment were entered by the Window Rock District Court on December 15, 1986. The Appellants, Betty Yellowhorse Chauncey and Mary Ann Yellowhorse, filed their notice of appeal on January 26, 1987. On February 12, 1987, Appellee, Navajo Tribe of Indians, filed a motion to dismiss the appeal, alleging that the appeal was not timely filed pursuant to Rule 2(c), Navajo Rules of Appellate Procedure. The Appellants did not respond to the motion. We agree that the appeal is untimely and we dismiss the appeal.

A party desiring to appeal from a final district court judgment "shall within *30 days* after the day such judgment or order is rendered appeal to the Supreme Court stating fully the grounds for appeal." 7 N.T.C. §801(a) (1985) (emphasis added). Navajo appellate rules require that an appeal from a district court judgment must be filed within 30 calendar days of the date the final judgment or order is entered into the record.[1] Rule 2(c), *Navajo Rules of Appellate Procedure.*

1. Rule 8(a), *Navajo Rules of Civil Appellate Procedure* (effective March 1, 1987), requires that an appeal must be filed "not later than thirty (30) days after the entry of the judgment from which the appeal is taken, unless a different time is provided by law."

7 N.T.C. §801(a) is a jurisdictional statute, therefore this Court lacks jurisdiction to review an appeal which is not filed within the time prescribed. *Window Rock Mall, Ltd., et al. v. Day IV,* 3 Nav. R. 58 (1981). We will always dismiss an appeal which has not been filed within 30 days of entry of the final judgment by the district court. Entry of the final judgment means the day the judgment is signed by the district judge. The 30 days appeal period begins to run the day after the judgment is signed by the district judge. *See Yabeny v. Tome, et al.,* 1 Nav. R. 257 (1978); Rule 20, *Navajo Rules of Appellate Procedure; See also* Rule 5(a), *Navajo Rules of Civil Appellate Procedure.*

In this case, the district judge signed the final judgment on December 15, 1986, and the notice of appeal was filed on January 26, 1987. The appeal was not filed until 42 days after entry of the final judgment. This Court lacks jurisdiction to review the Appellants's appeal. The appeal is dismissed as to Appellants Mary Ann Yellowhorse and Betty Yellowhorse Chauncey for failure to comply with 7 N.T.C. §801(a) (1985).

No. A-CV-02-86

Supreme Court of the Navajo Nation

Riverview Service Station, ***Plaintiff-Appellee,***

vs.

Thomas Eddie, ***Defendant-Appellant.***

Decided March 11, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Steven Boos, Esq., DNA-People's Legal Services, Mexican Hat, Utah for the Appellant; Herman Light, Esq., Shiprock, New Mexico for the Appellee.

Per Curiam.

The issue in this case is whether the Supreme Court must automatically enlarge the time for filing an appeal if the appeal is filed by mail. We decide in the negative and dismiss the appeal.

The final judgment was signed by the district judge on January 6, 1986. The Appellant claims that the notice of appeal was mailed to the Supreme Court Clerk on January 31, 1986. The Clerk received the notice of appeal by mail on February 10, 1986, and it was filed on the same date. The Appellee filed a motion to dismiss the appeal alleging that the appeal was not timely. The Appellant responded raising the issue before us.

Within the Navajo Nation, an appeal is not timely unless it is filed with the Supreme Court Clerk within 30 days after entry of judgment by the district court. 7 N.T.C. §801(a); *Window Rock Mall, Ltd., et al. v. Day IV,* 3 Nav. R. 58 (1981); *The Navajo Tribe of Indians v. Yellowhorse, Inc., et al.,* 5 Nav. R. 133 (1987). Entry of judgment is the day that the district judge signs the final judgment or order and the appeal time begins to run the next day. *The Navajo Tribe of Indians v. Yellowhorse, Inc., et al., Id.* 7 N.T.C. §801(a) is a jurisdictional statute. *Window Rock Mall, Ltd., et al. v. Day IV,* 3 Nav. R. 58 (1981). Thus, the Supreme Court will not enlarge the time period for mail filing of an appeal.

The Appellant argues that he mailed the appeal several days prior to expiration of the time period, and the delay was beyond his control. This argument is unacceptable, because the Appellant assumed the risk of delay when he decided to file his appeal by mail. The time limits set forth in 7 N.T.C. §801(a) will not be enlarged for mail filings. The only possible enlargement is if the thirtieth day falls on a Saturday, Sunday, or court holiday. Then the appeal may be filed by the end of the next business day. Rule 20, *Navajo Rules of Appellate Procedure; See also* Rule 5(a), *Navajo Rules of Civil Appellate Procedure.*

The record shows that the appeal was not timely filed in this case. We have no choice but to grant the Appellee's motion to dismiss the appeal.

No. A-CV-32-86

Supreme Court of the Navajo Nation

Mavis E. Benally, *Plaintiff-Appellee,*

vs.

Barbara Black, *Defendant-Appellant.*

Decided March 11, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Peter Breen, Esq., Navajo Legal Aid and Defender Service, Window Rock, Arizona for the Appellant; Larry Kee Yazzie, Esq., Tuba City, Arizona for the Appellee.

Per Curiam.

The issue in this case is whether the Appellant is entitled to a new trial on the grounds that the judge who presided at the trial on the merits of the case did not enter the final judgment. We remand for a new trial.

District Judge Walters presided over the trial on the merits of the case, but before he could enter his findings and the final judgment, he was placed on administrative leave. Judge Walters was ordered to refrain from performing any judicial duties while on administrative leave. District Judge Brown replaced Judge Walters. Even though Judge Brown did not hear the evidence in this case, and otherwise being unfamiliar with the case, he entered the final judgment. The final judgment was drafted by Appellee's counsel and submitted to Judge Brown for his signature without notice to Appellant's counsel.

Appellant Black's appeal was opposed with Appellee's Motion to Dismiss the Appeal. Appellant Black responded to the motion to dismiss, and she requested that we dispose of the case on the record. Appellee Benally has raised two arguments in her motion to dismiss, and they concern the motion for reconsideration and substitution of counsel. These two alleged procedural errors have been cured, therefore they will not be considered in this Opinion.

Our opinion is that a litigant is entitled to a decision on the merits from the judge who heard and saw the evidence, passed upon the credibility of witnesses, and observed the atmosphere of the trial. To require a judge, who did not preside over the trial, to enter findings and a final decision in a case with which he is unfamiliar, is to deny the parties due process of law.

In this case, Judge Brown is alien to the case for which he entered a final decision. Judge Brown did not hear or see the evidence, pass upon the credibility of witnesses, or otherwise observe the trial. We hold that, within the Navajo Nation, only the judge who presided at the trial shall enter findings of fact, conclusions of law and the final judgment or order.

The final judgment entered by the Honorable Judge Brown is reversed and the case is remanded for a new trial on the merits. We suggest that it is in the best interests of the parties to settle out of court. The motion to dismiss the appeal is denied. The Appellee's request for an award of attorney's fees is denied.

No. A-CV-07-87

Supreme Court of the Navajo Nation

John Brown Jr., *Appellant,*

vs.

The Navajo Board of Election Supervisors, *Appellee.*

Decided March 11, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

Samuel Pete, Esq., Window Rock, Arizona for the Appellant; Gerri J. Harrison, Esq., Navajo Nation Department of Justice, Window Rock, Arizona for the Appellee.

Per Curiam.

The Appellant, John Brown Jr., filed a Statement of Election Contest alleging three election irregularities which he claimed caused him to lose the 1986 general election for the Navajo Tribal Council. The only irregularity on appeal is the allegation that 53 absentee votes, which were declared spoiled, should have been included in the final count.

The votes were counted three times and each count showed that Appellant Brown had lost the election. The counts are as follows: (1) November 4, 1986: 252-226; (2) November 6, 1986: 252-226; and (3) November 18, 1986: 227-199. The 53 spoiled votes were not counted on November 18, 1986, but they were included in the other two counts.

The Navajo Board of Election Supervisors dismissed Appellant Brown's Statement for insufficiency after finding that the Statement did not set forth reasons why Appellant Brown believed the election law was not complied with. On appeal Appellant Brown presents two issues: (1) whether the Board abused its discretion in dismissing his Statement for insufficiency; and (2) whether the spoiled ballots should have been included in the final result.

The election laws provide that an election contestant must file a Statement which contains reasons why the contestant believes the election law was not complied with. 11 N.T.C. §51(a)(7)(A). The Statement must be

dismissed if, on its face, it is insufficient under the election laws. 11 N.T.C. §51(a)(7)(A). However, the election laws fail to specify what constitutes a sufficient Statement.

A Statement will be sufficient on its face if it specifies which election law was violated, *Williams v. The Navajo Election Commission,* 5 Nav. R. 25 (1985), and if it contains enough facts to raise the issue that the election results are not regular and proper. *See Johnson v. June,* 4 Nav. R. 79 (1983). These facts, as they appear in the Statement, must support the allegation that an election law was violated. *Williams v. The Navajo Election Commission,* 5 Nav. R. 25 (1985). Finally, the Statement taken as a whole, which shall include all attached documents, must raise a possibility that the election results will be impeached. *Johnson v. June,* 4 Nav. R. 79 (1983).

The Board must be careful not to make a decision on the merits of the allegations while reviewing a Statement on its face for sufficiency. The only purpose of face review is to determine if the Statement contains sufficient facts to raise an issue which would require a hearing.

The Board has considerable discretion in determining whether the Statement is sufficient on its face. Absent a clear abuse of that discretion this Court will not disturb the Board's decision. *Johnson v. June, Id.* Appellant Brown has failed to show on appeal how the Board abused its discretion. Appellant Brown's only argument appears to be that the Board abused its discretion by failing to grant him a hearing prior to dismissing his Statement. However, the election law requires a hearing only if the Statement is not dismissed for insufficiency. 11 N.T.C. §51(a)(7)(B); *Mustach v. The Navajo Board of Election Supervisors,* 5 Nav. R. 115 (1987). We hold that the Navajo Board of Election Supervisors did not abuse its discretion in dismissing Appellant Brown's complaint for insufficiency.

Appellant Brown then argues that he should have been given a hearing on the merits to determine whether the spoiled ballots should have been included in the final result. However, this argument lacks merit in the face of ample evidence that the spoiled ballots were included in the count twice, and even then, the results showed that Appellant Brown had lost the election. The Board did not abuse its discretion by denying Appellant Brown a hearing to determine this issue. Especially in light of the rule which states that, "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." *Johnson v. June,* 4 Nav. R. at 82 (1983). With or without the spoiled ballots, Appellant Brown lost the election.

The dismissal of the Statement of Election Contest by the Navajo Board of Election Supervisors is affirmed. The motion of the Navajo Board of Election Supervisors to dismiss the appeal is granted.

No. A-CV-18-86

Supreme Court of the Navajo Nation

In the Matter of Adoption of:
Baby Boy Doe, a Minor,
No. TC-CV-44-85.
Decided April 3, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Joe W. Washington, Esq., and Larry Kee Yazzie, Esq., Tuba City, Arizona for the Appellants; Thomas Scott Groene, Esq., and Timothy Joe, Esq., DNA-People's Legal Services, Inc., Mexican Hat, Utah for the Appellee.

Opinion delivered by Tso, Chief Justice.

Appellants have moved the Supreme Court to reconsider its Order, dated August 12, 1986, dismissing appellants' notice of appeal and denying the request for appeal. The Supreme Court's Order was based on the following grounds:

1. The Appeal was untimely.
2. A copy of the final judgment was not attached to the notice of appeal.
3. Appellants failed to pay the required filing fee.
4. Appellants failed to file a supporting brief.
5. Appellants requested a Trial De Novo, which has been abolished by the Judicial Reform Act of 1985.
6. Appellants' notice of appeal is improper in all respects.

On June 6, 1986, the Tuba City District Children's Court entered its final custody decree returning the minor child to the appellee.

On July 3, 1986, appellants deposited in the U.S. Postal Mail, at the Tuba City Post Office by certified mail, return receipt requested, a notice of appeal together with a final decree of the Children's Court, supporting brief, and a ten dollar check for filing fee.

It appears the package reached the Window Rock Post Office sometime on July 7, 1986, the last day for filing the notice of appeal.

The Post Office did not inform the Clerk of the Supreme Court that a certified mail item had arrived and was ready to be picked up.

The package was returned to the Law Office of Larry Kee Yazzie around August 5, 1986, indicating it was unclaimed by the Supreme Court Clerk.

On July 23, 1986, upon notice that appellants's original notice of appeal had not reached the Navajo Nation Supreme Court, appellants refiled their notice of appeal.

On August 12, 1986, the Supreme Court dismissed the appellants' notice of appeal and denied their request for appeal for failure to comply with the appropriate rule that requires a notice of appeal to be filed within thirty days of entry of the order or judgment being appealed.

Appellants contend that the notice of appeal was properly and timely filed with the Navajo Nation Supreme Court, when it was properly deposited in the U.S. mail at Tuba City Post Office on July 3, 1986.

The underlying issue is whether an appeal is considered properly and timely filed by the act of mailing the notice of appeal within the time for appeal, but which is received or filed with the Clerk of the Navajo Nation Supreme Court after the time for filing the notice has expired.

The method of originating an appeal in all cases where the appeal is permitted by law is found at Rule 2, *Navajo Rules of Appellate Procedure* (1978 ed.).

a) All appeals shall originate by filing a Notice of Appeal with the Clerk of the Court of Appeals in writing, including with it a brief explaining the grounds for the appeal. A certified copy of the judgment or order being appealed, signed by the judge and dated, must be attached to the Notice of Appeal and a ten dollar filing fee must be paid at the time of filing.
b) The Clerk shall not accept any appeal for filing and no appeal shall be considered filed until the fee has been paid and a copy of the final judgment has been attached.
c) 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.
d) When the Notice of Appeal has been prepared, the appellant shall file a copy of the Notice of Appeal with the District Court and shall have this copy dated by the clerk. The District Court shall be notified of the appeal in the above manner no later than the same day the Notice of Appeal is filed with the Court of Appeals.

Rule 2(a) and (c) prescribe the filing of a notice of appeal with the Clerk of the Supreme Court as the exclusive method of originating an appeal.

The logical implications of the language of these sections is that failure to file a timely notice of appeal with the Clerk of the Supreme Court affects the validity of an appeal.

To file an instrument, it simply must be delivered to the clerk at the office where it is required to be filed; delivery to the clerk at any other place, even though he endorses it "filed" is not sufficient. 15A Am Jur 2d, *Clerks of Court,* §23.

Another inference of Rule 2 is that the notice of appeal is considered filed with the clerk when it is received into her custody or control with all fees paid. Since timely filing of the notice of appeal is held to be essential to the jurisdiction of the Supreme Court, the precise time that the notice is filed is of essence. The most certain way of effecting timely filing is to deliver the notice to the office of the clerk personally on or before the date for filing.

The failure to file a notice of appeal within the time limits specified by statute is a jurisdictional defect and requires a dismissal by the Court. *Window Rock Mall, Ltd. v. Day,* 3 Nav. R. 58 (1981); *Sorrell v. Navajo Nation,* 3 Nav. R. 23 (1980).

Since personal delivery is often inconvenient and expensive, mailing is very frequently resorted to. When filing an appeal is to be effected by mail, it must be borne in mind that the notice must be received by the clerk within the time allowed for filing.

Uncontrollable delay in the mail has generally been held to warrant extension of the time for appeal. It remains however, that if a notice of appeal is to be mailed, ample time for delivery should be allowed. Neglect to place it in the mail early enough so that in the normal course it could be expected to reach the clerk within the time for appeal would not be excusable neglect. Further, the appellant who mails the notice of appeal should take steps to make sure that it is delivered in time. The notice is deemed filed when it is delivered into the custody or control of the clerk.

The controlling date, in respect to perfecting an appeal, is that on which the appeal is filed, rather than that on which it is mailed. *Matter of Bad Bubba Racing Products, Inc.,* 609 F. 2d 815 (1980).

A litigant cannot sit idly by and allow his appellate filing deadline to approach and then argue that compliance with deadlines should be excused, since his letter was posted in sufficient time to meet the deadline if mail had followed its ordinary course. *Wright v. Deyton,* 757 F. 2d 1253 (1985).

Deposit of a notice of appeal in the mail is not equivalent to filing the notice of appeal for purposes of the rule governing time within which the notice of appeal must be filed. *Sanchez v. Board of Regents of Texas Southern University,* 625 F. 2d 521 (1980).

We therefore hold that an appeal is not considered filed until it is

received into the custody and control of the Clerk of the Supreme Court, at the place of business, with all necessary documents stamped by and fees paid to the Clerk. If documents are mailed to the Clerk, they must be received on or before the expiration of the specified time. The controlling date is the date on which it is filed, and not on which it was mailed.

Therefore the appellants's request for Reconsideration is denied and this Court's Order dated August 12, 1986 is reaffirmed.

Austin, Associate Justice Dissenting.

It should be noted that the order dismissing the appeal in this case was entered several months prior to our decisions in *The Navajo Tribe of Indians v. Yellowhorse, Inc., et al,* 5 Nav. R. 133 (1987) and *Riverview Service Station v. Eddie,* 5 Nav. R. 135 (1987). In these latter decisions, we held that the 30 days requirement must be strictly complied with, because the Court desired uniformity under the new Rules of Civil Appellate Procedure.

This case was decided under the old Rules of Appellate Procedure, which has since been superceded by new civil appellate rules. Therefore, my dissent is limited to this case.

I believe that the appeal should have been considered timely in this case, because the blame for the Clerk failing to receive the notice of appeal lies entirely with the U.S. Postal System. The package containing the notice of appeal and all required items was sitting at the post office on the date the appeal time expired, but because of the failure of postal workers to insert notice into the Court's post office box, the package was not picked up by the Clerk. In a case, such as here, where blame does not lie with the Appellant or the court, then I believe dismissing the appeal on failure to comply with a time deadline is a harsh penalty. For these reasons I dissent in this case.

No. A-CV-13-87

Supreme Court of the Navajo Nation

Viva Rancho Motors, Inc., *Plaintiff-Appellant,*

vs.

Mike Tully, *Defendant-Appellee.*

Decided May 22, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

F.D. Moeller, Esq., Farmington, New Mexico for the Appellant; Leonard Tsosie, Esq., DNA People's Legal Services, Inc., Crownpoint, New Mexico for the Appellee.

Opinion delivered by Bluehouse, Associate Justice.

This case requires us to interpret Rule 8(a) *Navajo Rules of Civil Appellate Procedure,* effective March 1, 1987. We hold that the notice of appeal was filed beyond the 30 days requirement of Rule 8(a), NRCAP. We therefore dismiss the appeal for lack of jurisdiction.

The judge of the Crownpoint District Court signed the final judgment in this case on March 6, 1987. The clerk of the Crownpoint District Court received and stamped the district judge's final judgment on March 16, 1987. Appellant Viva Rancho Motors filed its notice of appeal with the Supreme Court Clerk on April 17, 1987. Appellee Mike Tully has filed a motion to dismiss by alleging that the notice of appeal is untimely pursuant to Rule 8(a), NRCAP.

Appellant Motors argues that under Rule 2(c), *Navajo Rules of Appellate Procedure,* an appeal is timely if it is "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.*" Appellant's Response to Motion to Dismiss, page 1. According to Appellant Motors, the date the judge signs the final order is not the date the final order is entered into the record. Appellant Motors argues that the date the final order was entered into the record in this case was March 16, 1987, and not the date of the judge's signature.

On the other hand, Appellee Tully argues that the date the judge signs the final order is crucial for purposes of appeal. He argues that in this case the appeal was filed 42 days after the judge signed the final order, which makes the appeal late by 12 days. Further, Appellee Tully argues that even if time is computed as argued by the Appellant, the notice of appeal is still late by two days.

It is well settled in this jurisdiction that the date the district judge signs the final order is the date used for computing appeal time. *Window Rock Mall, Ltd., et al. v. Day IV,* 3 Nav. R. 58 (1981); *The Navajo Tribe of Indians v. Yellowhorse, Inc., et al,* 5 Nav. R. 133 (1987); *Riverview Service Station v. Eddie,* 5 Nav. R. 135 (1987). In computing appeal time, the day after the judge signs the final order is day one. *The Navajo Tribe of Indians v. Yellowhorse, Inc., et al.,* 5 Nav. R. 133 (1987). And we have held that "entry of judgment" under Rule 8(a), NRCAP, means the date the judge signs the final order. *The Navajo Tribe of Indians v. Yellowhorse, Inc., et al., Id.* Furthermore, we also construe 7 N.T.C. §801(a) (1985), to allow time computation of appeals from the date the district judge signs the final order.

Appeals submitted by mail must be received and stamped by the Supreme Court Clerk within the time allowed for filing under Rule 8(a), NRCAP, to be timely. *In the Matter of Adoption of: Baby Boy Doe,* 5 Nav. R. 141 (1987); *Riverview Service Station v. Eddie,* 135 (1987). A notice of appeal must be filed by the thirtieth day during normal business hours, which is between the times of eight o'clock in the morning, and five o'clock in the afternoon. We emphasize that no pleading of any sort is accepted for filing after five o'clock in the afternoon.

In this case the notice of appeal is untimely, even as computed by the Appellant. The Court lacks jurisdiction over the appeal. The appeal is therefore dismissed.

No. A-CV-03-87

Supreme Court of the Navajo Nation

Genevieve Notah, *Petitioner-Appellee,*

vs.

Danny Francis, *Respondent-Appellant.*

Decided June 19, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Allen Sloan, Esq., Window Rock, Arizona for the Appellant; Kinsey D. Yazza, Esq., Navajo Legal Aid and Defender Service, Window Rock, Arizona for the Appellee.

Opinion delivered by Tso, Chief Justice.

This case raises the questions: (1) whether the statute of limitations can bar enforcement of an order awarding child support; (2) whether unsolicited in-kind contributions must be credited to reduce child support payments due; and (3) whether a party's overall financial situation must be considered in determining the amount of child support payments.

The final judgment entered by the Chinle District Court on May 7, 1979, ordered the appellant, Danny Francis, to pay $150.00 per month to the appellee, Genevieve Notah, for the support of their child. Mr. Francis made one payment on August 20, 1979, despite Ms. Notah's requests for payment in July, 1979, December, 1983, and January and February, 1984. Mr. Francis has remarried, and has three children by his present wife.

On June 16, 1986, Ms. Notah petitioned the Chinle District Court for an order to show cause why Mr. Francis should not be held in contempt for failure to comply with the May, 1979, judgment. On August 4, 1986, the district court found Mr. Francis in contempt, and imposed a penalty which was suspended in lieu of his resumption of support payments. The district court took the issues now on appeal under advisement, and on December 16, 1986, the court entered its decision ordering Mr. Francis to pay $12,600.00 in delinquent support payments over three years. The court

further ordered that in-kind contributions made by Mr. Francis could not be credited to reduce the delinquent amount. Mr. Francis moved for reconsideration on January 7, 1987, which was denied, and this appeal followed.

I. Statute of Limitations

Mr. Francis argues that Ms. Notah's claim for unpaid child support is an action on a debt, and that, because it was brought over seven years after the final judgment awarding child support, it is barred by the statute of limitations. 7 N.T.C. §602[1] (1985). Further, Mr. Francis argues that the judgment can be enforced only by a writ of execution, which must be brought within five years of the original judgment. 7 N.T.C. §705 (1985). Although the statute of limitations is tolled if the person bringing the action is a minor, 7 N.T.C. §602(f) (1985), Ms. Notah brought this action in her own name and on her own behalf, and thus Mr. Francis contends that such an action is not tolled, but falls under the five year limitation.

The district court rejected this argument by deciding that child support is a continuing obligation which is not subject to the statute of limitations. The court based its decision in part on an Arizona Supreme Court decision, *State v. Nerini,* 61 Ariz. 503, 151 P. 2d 983 (1944). However, this Court has long recognized a father's absolute obligation under Navajo tradition to provide support for his children. In *Tom v. Tom,* 4 Nav. R. 12 (1983), we held:

> 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.

Id. at 13. As this Court said in *Arviso v. Dahozy,* 3 Nav. R. 84, 85 (1982), the primary party to be considered in such cases is the child. Thus, child support is not a right of the mother to payments, which may be waived if the mother does not assert it within a given time, but an obligation of the father to his child, continuing for as long as the child needs that support.

1. §602(b)(1) sets a limit of three years after the cause of action accrues for actions for debt "where indebtedness is not evidenced by a contract in writing." §602(d) sets a limitation of five years for civil actions where no limit is otherwise described.

In *Begay v. Brown*, 3 Nav. R. 103 (1982), this Court considered the similar question of whether the statute of limitations barred the petitioner's action for forcible entry and detainer to recover property rights awarded her under a final divorce judgment. We held that the original judgment obligated the respondent to respect the petitioner's right to possession whenever she chose to assert it, because the respondent's presence on the land was a continuing trespass, against which limitation did not run. *Id.* at 104.

In this case, Mr. Francis's obligation is clear, because the duty to provide support imposed by the court joins with the natural duty a father owes his child under Navajo custom. Although support might be paid to the mother, it is a duty owed to the child, continuing for as long as it is needed or for the period indicated in the court order, and it cannot be waived by the mother's failure to take legal action. Therefore, we hold that orders providing for child support payments, or for payment of arrearage resulting from delinquent support payments, cannot be barred by the statute of limitations, the doctrine of laches, or any reliance by the father on the mother's previous failure to act to enforce the father's obligation. We base this holding neither on state law nor on any tolling of the statute of limitations.[2] Rather, our holding rests on the absolute obligation established by Navajo tradition to provide for the support of one's children, and the public policy that, in such cases, the child's welfare must take precedence over a technical analysis of the extent of the parents' legal rights and duties.

Mr. Francis also argues that the child lives with her maternal grandmother, and not with Ms. Notah, and that he therefore should not have to make payments to Ms. Notah. This reasoning is unacceptable because the obligation is to the child, and not to the mother, and therefore it does not depend on the mother's particular arrangements for caring for the child. If Mr. Francis's support payments are not being used for the child's benefit, he may bring this to the attention of the district court, but such arguments will not justify escaping the duty to make support payments to the child. The best interest of the child is always the overriding consideration, and the district courts must look at the parents' arrangements with the aim of promoting the child's welfare.

II. In-Kind Payments

Mr. Francis argues that the district court erred in denying credit against support arrearage for his in-kind contributions of clothing and a bedroom

2. Thus, our decision does not rely on the principle, advanced in *Becenti v. Laughlin*, 4 Nav. R. 147, 148 (Window Rock D. Ct. 1983), that a legitimate attempt to collect on a money judgment tolls the statute of limitation. The appellee's claim would not be barred even if she had made no previous attempt to obtain payment.

set. However, he cites no precedent supporting this contention, nor can this Court find any. The district court's judgment of May 7, 1979, set support payments at $150.00 per month, without mentioning in-kind contributions. The court never modified that judgment, and Mr. Francis does not assert that Ms. Notah ever agreed to substitute in-kind contributions for the payments ordered under the final judgment.

This Court has no objection to in-kind contributions in lieu of money payments in complying with court-ordered child support. As a matter of policy, this method of payment might be very useful in cases where, for example, the father is unemployed, and would be better able to provide services or materials aside from money. However, one party is not free to substitute in-kind payments without the other party's or the court's consent; to allow that would be to allow a party unilaterally to modify the court's order. Therefore, we hold that in-kind contributions may be credited to child support payments when allowed by the court, or when both parties consent to the substitution. In cases where the court order has not been modified to allow in-kind contributions, the burden of proof shall be on the party providing the contributions to show the other party's consent. The value of in-kind contributions must be agreed upon by the parties or determined by the court, and may cover all or part of the monthly support payment. Where, as here, the court order was not modified, nor prior consent obtained, in-kind contributions shall be considered a gift to the child, without any effect on support payments due.

III. Arrearage Payments

The district court found that Mr. Francis owed $12,600.00 in delinquent child support, and ordered him to pay this amount within three years. Adding this to the $150.00 per month already due, Mr. Francis's payments would be $500.00 per month. Mr. Francis argues that $500.00 per month is unreasonable, and that he cannot afford to pay that amount.

This Court has repeatedly directed the district courts to take a party's ability to pay into consideration in determining the amount of support payments. In *Arviso v. Dahozy, supra,* we considered the question of arrearage payments, and we remanded that case to the district court with instructions to consider the father's income, property and other resources in setting the period within which the arrearage must be paid. 3 Nav. R. at 85. We stated that the primary concern is the child's welfare, not penalizing the delinquent party, and that the arrearage must be paid as soon as possible consistent with the father's ability to pay. *Id.* Similarly, in *Tom v. Tom, supra,* we held that the father must pay as much as necessary, "given his abilities and resources at any given time." 4 Nav. R. at 13.

The overriding function of child support is to provide for the welfare of a child, in a manner that is in the child's best interest. Just as no one should have to be reminded of his obligation to pay child support, the parent receiving the payments should not delay in seeking enforcement of court-ordered child support if the other parent fails to pay. Undue delay not only imposes a hardship on the child, it also causes the arrearage to pile up to the point where the delinquent parent might be unable to pay it off. Of course, we must insist that arrearages in support payments must be paid as quickly as possible; to decide otherwise would encourage non-payment. However, payments must not be set at a level that would ruin the party ordered to pay, or cause extreme hardship to that party's present family. Courts must insist that parents accept their responsibilities to their children, but must not make it impossible to meet those responsibilities.

In this case, the record contains no evidence that the court made detailed findings of the appellant's resources or his obligations to his present family. This is primarily the appellant's fault, because he is in the best position to provide that information. However, the district court's order is incomplete without such an examination, and we remand the case with instructions to consider whether the period within which the arrearage must be paid should be extended. On remand, the burden of proof shall be on the appellant to show that he is unable to pay $500.00 per month in combined past and present child support. The court will set payments at a level that will allow the arrearage to be paid promptly, consistent with the welfare of all children affected by the court's order.

Finally, this Court admonishes the appellant that the proper recourse is to seek a modification in the district court if he disagrees with court-ordered child support payments. This Court will not condone a party neglecting its obligation and, when court action is initiated, raise inability to pay as a defense. In these cases, the presumption on appeal favors the district court, and this Court will not engage in a detailed consideration of arguments that should have been made below.

Affirmed in part, remanded in part for further proceedings consistent with this decision.

No. A-CR-01-86

Supreme Court of the Navajo Nation

Benjamin Johnson, ***Defendant-Appellant,***

vs.

The Navajo Nation, ***Plaintiff-Appellee.***

Decided June 23, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Benjamin Curley, Esq., Window Rock, Arizona for the Appellant; Jane Nez, Esq., Prosecutor's Office, Window Rock, Arizona for the Appellee.

Opinion delivered by Bluehouse, Associate Justice.

The appellant, Benjamin Johnson, is appealing his conviction on January 7, 1986, in the Window Rock District Court, of one count of battery, 17 N.T.C. §316 (1977). We initially granted the appeal to decide whether the district court erred in finding that the force used by the defendant in self-defense was not reasonable or necessary, and whether the district court erred in its sentencing of the defendant. At oral arguments, the parties narrowed the appeal only to the issue of sentencing.

This case arises out of an incident between the appellant and one Loretta Shirley, which ended in the appellant striking Ms. Shirley with a stick. At trial, and in a motion for acquittal, the appellant claimed that he was under an immediate threat of severe physical harm, and acted in self-defense. The court, sitting without a jury, denied the motion for acquittal and found the appellant guilty of battery. The court decided that the force used was excessive and that it did not constitute justifiable self-defense under 17 N.T.C. §215(d) (1977). The transcript shows that, at the end of the trial, the court sentenced the appellant to two months probation "in lieu of" a sentence mandated under 17 N.T.C. §316(b). That section provides for imprisonment for a term not to exceed 180 days; a fine not to exceed $500.00; or both. The court's Judgment and Mittimus, dated

January 7, 1986, shows a sentence of 180 days in jail or a $500.00 fine, which were suspended and two months probation imposed.

The appellant cites *Navajo Nation v. Jones,* 1 Nav. R. 14 (1971), in support of his contention that the court erred in imposing probation prior to his being sentenced under §316(b). Further, the appellant argues that if the district court intended to correct the original sentence in the Judgment and Mittimus, the appellant should have been present for the imposition of the new sentence.

Navajo Nation v. Jones, Id., presents a situation identical to this case. There, the defendant was convicted of assault and battery, and he was sentenced to 90 days probation, notwithstanding the prescribed penalty of a period of labor or, if the individual is unwilling to work, a jail sentence or fine. On appeal, Chief Justice Kirk declared the sentence of probation invalid by holding that the court must first impose a sentence mandated by law before suspending it and substituting probation. Justice Kirk reasoned that a valid sentence is necessary in the event that the defendant violates probation, in which case the law required that the defendant serve the original sentence increased by half. 1 Nav. R. at 15 and 16. Justice Kirk further decided that a sentence not according to law was a form of cruel and unusual punishment, which is prohibited by the Navajo Bill of Rights, 1 N.T.C. §7 (1967). 1 Nav. R. at 18. As Justice Kirk said, "A convicted person is entitled to be sentenced in accordance with the law and not sentenced in accordance with what some individual believes is best for him; anything less is not justice under the law." *Id.* at 15. Because probation is not a prescribed sentence under the Navajo Tribal Code, it may not be imposed prior to a sentence.

Although the Navajo Tribal Code has been revised since *Jones* was decided, the law regarding probation remains substantially the same as in 1971. 17 N.T.C. §224 (1977), gives courts the discretion to suspend a sentence and release the defendant on probation, but it does not allow an original sentence of probation. It is essential that a lawful and clearly-defined sentence be imposed on a defendant in the defendant's presence in open court. In this case, it appears that the sentence allowed in §316 was imposed outside the presence of the defendant and after he had been sentenced to probation. In addition, the Judgment and Mittimus imposed the maximum jail term or the maximum fine allowed by law, even though the court had noted that the defendant acted to some extent in reasonable self-protection. This appears to contradict 17 N.T.C. §1817(d) (1959), which states, "The penalities listed in Chapter 3 of this title are maximum penalties to be inflicted only in extreme cases." Even where sentences are suspended in favor of probation, the original sentence determines the penalty to be imposed if a defendant violates probation. 17 N.T.C. §1818(b) (1959). Therefore, district courts should take great care to follow the procedural

and substantive requirements of the law in determining sentences. The defendant's conviction is reversed and the charge against the defendant dismissed.

No. A-CR-01-87

Supreme Court of the Navajo Nation

The Navajo Nation, *Plaintiff-Appellee,*

vs.

Wilson Devore Jr., *Defendant-Appellant.*

Decided June 23, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

F.D. Moeller, Esq., Farmington, New Mexico for the Appellant; William E. Miller Jr., Esq., Office of the Prosecutor, Navajo Nation, Window Rock, Arizona for the Appellee.

Opinion delivered by Bluehouse, Associate Justice.

The Defendant, Wilson Devore Jr., appeals his conviction by the court of Reckless Driving. 14 N.T.C. §455 (1972). The Judgment and Mittimus was signed by the district judge on April 9, 1987, and the defendant filed his notice of appeal on May 12, 1987. On May 15, 1987, the Navajo Nation filed a motion opposing appeal arguing that the notice of appeal was not timely filed pursuant to Rule 2(c), Navajo Rules of Appellate Procedure. We agree with the Navajo Nation and dismiss the appeal for lack of jurisdiction.

An appeal of a final judgment or order must be filed with the Supreme Court "within 30 days after the day such judgment or order is rendered. . . ." 7 N.T.C. §801(a) (1985). This statute is jurisdictional, and this Court is without jurisdiction unless the appeal is filed within 30 days after the final order is signed by the district judge. *The Navajo Tribe of Indians v. Yellowhorse, Inc., et al.,* 5 Nav. R. 133 (1987); *Riverview Service Station v. Eddie,* 5 Nav. R. 135 (1987); *Viva Rancho Motors, Inc., v. Tully,* 5 Nav. R. 145 (1987); *Window Rock Mall, Ltd., et al. v. Day IV,* 3 Nav. R. 58 (1981). And if mail filing is used, the notice of appeal, a certified copy of the final order, and the filing fee must all be received and stamped as filed by the Supreme Court Clerk within 30 days from the date the final order is

signed by the district judge. *In the Matter of Adoption of: Baby Boy Doe,* 5 Nav. R. 141 (1987); *Viva Rancho Motors, Inc. v. Tully,* 5 Nav. R. 145 (1987).

We interpret Rule 2(c), Navajo Rules of Appellate Procedure[1], as being consistent with 7 N.T.C. §801(a) (1985). We have stated before that the language, an appeal must be filed "within thirty calendar days of the date the final judgment or order being appealed was entered in the record by the District Court," means the appeal time begins to run the day after the district judge signs the final order. *The Navajo Tribe of Indians v. Yellowhorse, Inc.,* 5 Nav. R. 131 (1987); *See also In the Matter of Adoption of: Baby Boy Doe,* 5 Nav. R. 141 (1987).

The appeal in this case was filed one day late. In the case of *Whitehorse v. The Navajo Nation,* 4 Nav. R. 55 (1983), the appeal was dismissed for being one day late. There is no doubt that we have declined to review appeals for lack of jurisdiction in the past for lateness. This case fits into that category of cases.

The motion to dismiss the appeal is granted.

1. The Navajo Rules of Appellate Procedure still governs criminal appeals to this Court. These rules will remain in effect until new rules of procedure for criminal appeals are adopted.

No. A-CV-34-86

Supreme Court of the Navajo Nation

The Navajo Housing Authority, *Defendant-Appellant,*

vs.

Howard Dana and Associates, *Plaintiff-Appellee.*

Decided July 3, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Genevieve K. Chato, Esq., Fort Defiance, Arizona for the Appellant; Albert Hale, Esq., Window Rock, Arizona for the Appellee.

Opinion delivered by Tso, Chief Justice.

This case is an appeal from the Window Rock District Court's November 24, 1986 Opinion and Order. The district court denied the Defendant Navajo Housing Authority's (NHA) Motion to Quash Writ of Execution, Motion for Stay of Execution, and dismissed the Petition for Writ of Prohibition against further issuance and service of writs of executions. NHA is seeking to prevent the enforcement of a May 2, 1978 judgment awarded to Plaintiff Howard Dana and Associates (Dana) by the Window Rock District Court.

On May 2, 1978, Dana recovered a judgment for $104,864.14 plus court cost of $25.00 for two contract causes of action against NHA. The Window Rock District Court found that Dana had entered into three separate contracts with the NHA: a 1970 contract for architectural services; a 1971 contract for architectural services; and a 1972 contract for inspection services. The district court awarded Dana $13,622.00 under the 1970 contract; found that Dana had been fully paid under the 1971 contract; and found that the 1972 contract was valid, despite lack of HUD approval, and awarded Dana $91, 242.14 as a detrimental reliance interest. Dana was awarded a total of $104,864.14. The Court of Appeals affirmed the judgment on November 27, 1978, but held that the 1972 contract was not a valid contract, because of lack of HUD approval. *Dana v. Navajo Housing Authority,* 1 Nav. R. 327 (1978).

NHA filed an appeal with the Supreme Judicial Council on December 27, 1978 and obtained a stay of execution on December 28, 1978. The Supreme Judicial Council affirmed the judgment and vacated the stay on August 13, 1979. Dana requested a writ of execution on June 17, 1980, which was denied on April 22, 1982. Dana then sought to enforce the judgment by a writ of execution obtained on September 21, 1982. The writ was served on NHA's account with the Great Western Bank, Window Rock, Arizona. The bank refused to release any funds until they conferred with their attorney. NHA filed a Motion to Quash the Writ of Execution and a Motion for Stay of Execution on October 21, 1982. NHA also filed a petition for a Writ of Prohibition against further issuance and services of writs of execution on October 28, 1982. There were several continuances in this matter, and on November 24, 1986, the Window Rock District Court denied all three motions and ordered that Dana be granted a writ of execution. NHA appealed the district court's ruling to the Supreme Court on December 30, 1986. A stay of execution was issued by the Supreme Court on March 3, 1987. On June 12, 1987, the parties reached an agreement on the 1970 contract. The issues on appeal to this Court concern only the 1972 contract.

NHA is not contesting the judgment amount or the finding of breach of contract, but raises the following issues as to Dana's ability to execute upon the judgment:

I. Whether execution on the judgment is barred under 7 N.T.C. §705 (1956).
II. Whether NHA's property and funds are immune from levy and execution under 6 N.T.C. §§616(b)(1) (1966) and 623 (1977).
III. Whether NHA waived its defense of immunity from levy and execution by failing to raise it in the district court.

7 N.T.C. §705 is a statute of limitations on the issuance of writs of execution to enforce money judgments. It provdes in part that:

"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."

At common law, when a debtor obtained a stay of execution the limitation period for enforcement of the judgment was tolled until the stay was terminated. *Wakefield v. Brown,* 38 Minn. 361, 37 N.W. 788 (1888). Arizona allows tolling of the statute of limitation on enforcement of judgments when a stay of execution is in effect. *North Star Development Corp. v. Wolfswinkel,* 146 Ariz. 406, 706 P. 2d 732 (App. 1985).

Statutes of limitation are enacted to bring legal controversies to a conclu-

sion after a definite time. Public policy does not favor judgments lingering indefinitely, and the debtor has a right to be free from execution on a stale judgment. However, where the creditor has not slept on his rights, but rather has been prevented from executing on the judgment by stays of execution, then justice requires tolling of the statute of limitations. The stay of execution is for the benefit of the debtor and he should not be allowed to take unfair advantage of it. We hold that the statute of limitations at 7 N.T.C. §705, is tolled during the periods that a stay of execution is in effect.

Our holding means that the writ of execution sought by Dana to enforce the judgment was not barred by 7 N.T.C. §705, as the time periods during which the stays of execution were in effect do not count toward the five years limitation period. However, a writ of execution cannot be used to levy and execute on certain property held by NHA, absent a waiver of immunity. This leads to the issue of whether NHA is immune from levy and execution under 6 N.T.C. §§616(b)(1) and 623. These statutes read as follows:

> The Navajo Tribe gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities, the Authority to agree by contract to waive any immunity from suit which the Navajo Housing Authority might otherwise have. . . . 6 N.T.C. §616(b)(1). §616(b)(1).

> All property, including funds acquired or held by the Authority pursuant to this subchapter, shall be exempt from levy and sale by virtue of an execution, and no execution or other judicial process shall issue against the same nor shall any judgment against the Authority be a charge or lien upon such property. 6 N.T.C. §623.

The Court believes that *Namekagon Development Co. v. Bois Forte Reservation Housing Authority,* 517 F. 2d 508 (8th Cir. 1975), is controlling on this issue. That case involved a suit against a tribal housing authority for breach of contract. The provisions of Sections 2(a) and 6 of the Reservation Housing Ordinance in that case are the same as provisions in 6 N.T.C. §§616(b)(1) and 623 in this case. Section 2(a) reads exactly the same as 6 N.T.C. §616(b)(1), except in place of "Navajo Tribe" it reads "Council." Section 6 and 6 N.T.C. §623 are identical, except the word "ordinance" appeared in place of the word "subchapter" in Section 6. *Namekagon* held that Section 2(a) (or 6 N.T.C. §616(b)(1) in this case) waived tribal immunity with respect to the right to be free from suit, and that the right to be free from judicial execution could be waived by a contract provision. *Id.*

6 N.T.C. §616(b)(1) is a waiver of the NHA's immunity with respect to the right to be free from suit, but 6 N.T.C. §623 places restrictions on that waiver, by exempting from levy and execution certain property and funds

held by NHA. Any conditional limitation placed on a Tribe's waiver of immunity must be strictly construed in favor of the Tribe. *Maryland Casualty Co. v. Citizens National Bank of West Hollywood, et al.*, 361 F. 2d 517 (5th Cir. 1966). We hold that, under 6 N.T.C. §616(b)(1), the NHA can waive its immunity from levy and execution by contract. The contract language that waives the NHA's immunity from levy and execution must be clear and express, and any ambiguity will not be construed as a waiver of immunity.

Namekagon interpreted, as a waiver, a contractual provision between the plaintiff and the defendant which stated: "[F]unds have been reserved by the Government and will be available to effect payment and performance by the Purchaser hereunder. . . ." If a similar contractual provision were present here, then under *Namekagon,* Dana would be permitted to levy and execute on the judgment. However, we are precluded from examining the contents of the 1972 contract between the parties in an attempt to find waiver, because it has been held that the 1972 contract was not a valid contract. *Dana v. Navajo Housing Authority*, 1 Nav. R. 327 (1978). Without a valid contract there can be no contractual waiver of immunity. We hold that there was no waiver of the NHA's immunity from levy and execution under the 1972 contract. The result is that Dana has a judgment for $91,242.14, which it cannot collect from NHA's property or funds secured under §623. Dana may be able to levy and execute on property and funds which fall outside the protection of §623.

The final issue is whether the defense of immunity from levy and execution can be raised for the first time on appeal. Sovereign immunity is a jurisdictional defense, which need not be raised at trial. *Edelman v. Jordan,* 415 U.S. 651 (1974). We hold that sovereign immunity is a jurisdictional defense, which may be raised for the first time on appeal. But to avoid waste of judicial and litigant resources, the defense of sovereign immunity should be asserted early.

The stay of execution granted by this Court to the Navajo Housing Authority is vacated. The order denying the Navajo Housing Authority's motion to quash the writ of execution is reversed. The petition for prohibition against further issuance of a writ of execution is granted so far as it complies with this Opinion.

No. A-CV-01-85

Supreme Court of the Navajo Nation

In the Matter of the Estate of:
Annie Belone
Yilth Habah Dawes, *Appellant,*
vs.
Helen D. Yazzie, *Appellee.*
Decided July 10, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Walters, Associate Justices.

[redacted]

Daniel Deschinny, Sr., Esq., Window Rock, Arizona for the Appellant; Loretta Morris, Esq., DNA-People's Legal Services, Inc., Crownpoint, New Mexico for the Appellee.

Opinion delivered by Tso, Chief Justice.

This is a probate case, on appeal from an order entered by the Window Rock District Court. The order is dated November 21, 1984, and it was amended twice; the first time on December 27, 1984, and the second time on January 11, 1985. The final distribution ordered is as follows:

To Yilth Habah Dawes—98 sheep units from Grazing Permit No. 6802 including three horses and 25 acres of farmland.
To Helen D. Yazzie—99 sheep units from Grazing Permit No. 6802 including three horses with Brand EEA and ten acres of farmland.

Mrs. Annie Belone, an enrolled member of the Navajo Tribe, and a resident of Ft. Defiance, Arizona died intestate on May 10, 1978, at the age of 90. In its order of November 21, 1984, the district court found that she had been a single woman without any immediate family except for the appellee, Helen D. Yazzie. On October 3, 1978, the Window Rock District Court appointed Chee Dawes, as administrator of the estate. The court dismissed the matter of the estate without prejudice on January 9, 1981, after a hearing on November 13, 1980, in which Chee Dawes failed to appear.

On October 11, 1983, Ms. Yazzie filed an action in the Crownpoint District Court to quiet title to the grazing permit and the two land use permits involved in this case, and that court granted her title to all the permits on January 26, 1984. On July 2, 1984, the Window Rock District Court reopened the probate case on motion by Ms. Dawes, and appointed Ms. Dawes administratrix of the Belone estate as successor to her husband, who had died on January 8, 1981. Also on July 2, 1984, the Crownpoint District Court vacated its judgment awarding the grazing and land use permits to Ms. Yazzie, so that the entire matter could be decided by the Window Rock District Court. Ms. Yazzie filed notice of her claim to the entire estate, referring to the deceased as her "adoptive mother," on August 1, 1984, and Ms. Dawes submitted her final report on the estate, allotting the grazing and land use permits to herself, on August 15, 1984.

The first order by the Window Rock District Court was signed on November 21, 1984. It awarded 97 sheep units from Grazing Permit No. 6802, the brand EEA, and the land use permit for 25 acres of land to Ms. Dawes. 75 sheep units from the same grazing permit and the land use permit for 10 acres were awarded to Ms. Yazzie. After Ms. Yazzie moved for reconsideration on December 19, 1984, based on the court's failure to allocate 25 sheep units of the grazing permit, the court amended its order on December 27, 1984. In this modification, the court changed Ms. Dawes's award to 98 sheep units, including three horses, and awarded Ms. Yazzie 99 sheep units, with three horses, and the brand EEA. The court's January 11, 1985 order explained that the court had entered the December 27 modification, because the November 21 order had not allocated 25 sheep units, and that Rule 23, *Navajo Rules of Civil Procedure,* allows the court to reopen a case at any time to correct error. The court's November 21, 1984 order identified Ms. Yazzie as a "claimant" to the estate. In that order, the court found that Ms. Yazzie sustained her claim, through her own testimony and that of people who know her, that she was raised by the decedent, thus establishing the parent-child and child-parent relationship according to Navajo tradition, and entitling her to a share of the estate. The order is unclear as to what the court meant by referring to Ms. Yazzie as a "claimant," and whether the court found that the decedent had lawfully adopted Ms. Yazzie under Navajo common law.

On appeal, Ms. Dawes raises the issues of: (1) whether Ms. Yazzie's August 1, 1984 claim to the estate was barred by the statute of limitations; (2) whether the court erred in considering the issue of traditional adoption, because the issue had not been properly pleaded in Ms. Yazzie's original claim; and (3) whether the court erred in its finding, based on the testimony of an expert witness, that Ms. Yazzie had been adopted by the decedent according to Navajo common law.

I. Statute of Limitations

Statutes of limitation fix the time within which an action must be brought. They do not confer any right of action, but simply restrict the period in which the right, otherwise unlimited, can be asserted. Thus, statutes of limitations are not matters of substantive rights, but are available only as defenses.

Under current Navajo law, in force since February, 1980, there is no specific limitation for probate cases, but the limitation for civil action for which no limitation is otherwise prescribed is five years. 7 N.T.C. §602(d); *Tribal Council Resolution* CF-19-80. Prior to February, 1980, the limitation for civil actions was six years. *Tribal Council Resolutions* CJ-51-56 and CO-69-58. Rule 1(h), *Navajo Rules of Probate Procedure* (currently in effect), requires that probate actions must be brought within six years, but this particular rule is based on the pre-1980 limitation for civil actions.

Therefore, there is no doubt that the statute of limitations applies to probate actions, and that the previous limitation of six years would apply to this case. However, the statute of limitations cannot be invoked to bar consideration of this matter. Ms. Belone died on May 19, 1978, and the case was filed on October 3, 1978, as case no. WR-CV-586-78. The case was dismissed without prejudice in 1981, and reopened for good cause on July 2, 1984. The present action is thus a continuation of the 1978 action, which was brought by Ms. Dawes's predecessor as administrator of the estate, and that action was within the statute of limitations.

Any heir or other interested party may file an answer to the administrator's final report at any time prior to the date set for final hearing. Rule 7, *Navajo Rules of Probate Procedure.* Pursuant to Rule 7, NRPP, Ms. Yazzie had a right to present her claim to the estate prior to the date set for the final hearing. The administrator of an estate must submit a final report within 30 days after his appointment, after which a final hearing is to be scheduled. Rule 7, NRPP. Because Chee Dawes, the original administrator, had not submitted a final report when the case was dismissed without prejudice on January 9, 1981, no final hearing had been scheduled. The final hearing did not take place until after the case was reopened on July 2, 1984. Thus, Ms. Yazzie did not have an opportunity to state her claim to the estate until after July 2, 1984, and her right to litigate her claim was not cut off by the statute of limitations or by prior action by the court.

II. Proper Pleading of the Adoption Issue

Parties present claims in probate cases by means of pleadings. Rule 2, *Navajo Rules of Probate Procedure.* These pleadings must closely conform

to the requirements of Rules 4, 5, and 6 of the Navajo Rules of Civil Procedure. It is essential that they contain a statement of the grounds on which a claim against the estate is made. Where a claim relies on Navajo custom, the custom must be alleged, and the pleading must state generally how that custom supports the claim. If local custom is alleged, and it is different from the custom generally followed throughout the Navajo Nation, the pleading must so state. This is necessary for two reasons: (1) to ensure due process by allowing the adverse party to properly prepare his case, undertake discovery, and determine whether to present his own expert witness on Navajo custom; and (2) to allow the court an opportunity to determine exactly how that custom affects the case.

In this case, Ms. Yazzie based her claim to the estate on the contention that she is the child of the decedent, whom she described as her adoptive mother. Her pleading did not state what Navajo custom supported her claim. Based upon the contents of her answer, one might have assumed that she would attach legal adoption papers to her answer to support her claim. Here, Navajo custom was not alleged until trial. We hold that where, as here, a party's pleading does not indicate a reliance on Navajo custom, that party may not later offer evidence and seek relief under Navajo custom.

III. Traditional Adoption

Although Ms. Yazzie did not plead Navajo custom and tradition in her answer to the final report, we will still consider the issue of traditional adoption for purposes of guidance. Rule 6(9) of the Navajo Rules of Probate Procedure sets out the order of precedence for distributing the estate of a person who dies intestate. Children of decedent are second in order, brothers and sisters sixth, and nephews and nieces seventh. Ms. Yazzie is the decedent's niece, and claims to be her adopted daughter. Ms. Dawes's husband was the decedent's brother, and thus Ms. Dawes inherited her husband's interest in the estate upon her husband's death. The decedent left no other surviving children. Under Rule 6(9), NRPP, if Ms. Yazzie is the decedent's daughter, she is entitled to the entire estate. If she is not the decedent's daughter, then the estate will be divided among the decedent's surviving brothers and sisters, or their heirs.

Rule 6(10), NRPP, states, "If there is shown to be a Navajo custom concerning the distribution of the property, the property will descend according to that custom, even if the custom is in conflict with any other provision of this rule." This rule follows 8 N.T.C. §2(b),[1] as well as 7 N.T.C.

1. "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

§204(a),[2] which requires courts to apply any laws or customs of the Navajo Nation not prohibited by applicable federal laws. In this case, custom can be used to show either that the decedent had adopted Ms. Yazzie, or that custom supported Ms. Yazzie's claim to a portion of the estate.

Because established Navajo customs and traditions have the force of law, this Court agrees with the Window Rock District Court in announcing its preference for the term "Navajo common law" rather than "custom," as that term properly emphasizes the fact that Navajo custom and tradition *is* law, and more accurately reflects the similarity in the treatment of custom between Navajo and 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, 1 *Commentaries on the Law of England* 62 (emphasis in the original), cited in *In the Matter of the Estate of Boyd Apachee*, 4 Nav. R. 178, 179-81. (Window Rock D. Ct. 1983). Navajo custom and tradition may be shown in several ways: it may be shown through recorded opinions and decisions of the Navajo courts or through learned treatises on the Navajo way; it may be judicially noticed; or it may be established by testimony of expert witnesses who have substantial knowledge of Navajo common law in an area relevant to the issue before the court. *Id.;* 7 N.T.C. §204 (b).

Where no question arises regarding custom or usage, the court need not avail itself of experts in Navajo culture. Rule 5, *Navajo Rules of Evidence.* 7 N.T.C. §204(a) requires the court to take judicial notice of Navajo traditional law. Even if custom and tradition are arguably matters of factual evidence, and not simply reading the law as it is printed, it is clear that a court can take judicial notice of customs as adjudicative facts. Thus, if a custom is generally known within the community, or if it is capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned, it is proven. In the Navajo context, the comment by a Dean of one law school that "judicial notice may only be taken of those facts every damn fool knows" is appropriate. E. Cleary, *McCormick on Evidence*, §329, (3rd ed. 1984). However, if a district court takes judicial notice of a particular custom as Navajo common law, it must clearly set forth in its order the custom on

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the decedent are entitled to be his heirs." However, in *Sells v. Sells,* 5 Nav. R. 104 (1986), this Court held that Navajo courts must follow Navajo case law wherever possible, and may apply state law only to decide legal issues of first impression.

2. In *Sells v. Sells, Id.,* we interpreted the Judicial Reform Act of 1985, 7 N.T.C. §204, to make the application of state law discretionary with the courts, assuming no Navajo case law is directly on point. Courts may "adopt and develop law that best meets the needs of the Navajo people." *Id.* at 108.

which it is relying, so that the basis for its decision is clear and can be reviewed by this Court. In this case, the district court did not identify the custom it used for its division of the estate, and therefore we conclude that it must not have taken judicial notice of custom for the purpose of applying Navajo common law.

All evidence must be authenticated to the satisfaction of the judge before it is admitted. Rule 30, *Navajo Rules of Evidence.* Thus, if a party, as in this case, intends to present the testimony of an expert witness to support his claim that a particular custom constitutes Navajo common law, he must satisfy the court that his use of an expert witness is proper. Non-Indian jurisprudence distinguishes between a lay witness and an expert witness. A lay witness can testify only to his first-hand knowledge of the facts. An expert witness can draw inferences from facts that a trier of fact would not be competent to draw. E. Cleary, *McCormick on Evidence* §13 at 33.

Before testimony of an expert witness is admitted, the court must determine that the witness is qualified because his skill, knowledge or experience in the pertinent field makes it likely that his opinion or inference will aid the trier of fact in the search for truth. The expert's knowledge may be derived from reading, from practice, or, as is more commonly the case, from both. Further, an expert's testimony is admissible only if the knowledge from which he draws his inferences is so specialized as to be beyond the understanding of laymen, although some jurisdictions will admit expert testimony concerning matters about which the jurors may have general knowledge, if the expert opinion would still aid their comprehension of the issue. A court may decide not to admit expert testimony if it believes that the state of the pertinent area of knowledge does not permit a reasonable opinion to be asserted even by an expert. It may also decline to admit such testimony if the court believes that an opinion based upon particular facts cannot be grounded on those facts. E. Cleary, *McCormick on Evidence,* §13 at 33, 34.

Apart from Rule 30, the Navajo Rules of Evidence lacks specific rules regarding expert witness qualifications. We stated in *George v. Navajo Nation, et al.,* 2 Nav. R. 1 (1979), that:

> The qualifying of expert witnesses is one area of trial procedure which is left to the sound discretion of the trial judge.
>
> There is no substitute for first-hand observation and examination of the qualification of such experts. The [Supreme Court] must exercise considerable restraint in this area and must resist the temptation to jump in and substitute its own opinion for the opinion of the trial judge or reverse his judgment on this basis.
>
> Given the justifiable reluctance on our part to outguess the District Court on matters of this nature, we must, however, exercise our power of review and determine whether there is some reasonable basis behind the judge's exclusion of. . .witnesses offered as experts. . . .

Id. at 6.

Within the bounds of that case, we now set forth the following general guidelines within which district court judges may exercise their discretion to admit or exclude expert testimony. The trial judge must satisfy himself that an expert witness on Navajo custom is in fact an expert in this area. A witness's qualifications on custom may come from reading or practice, or from other evidence of a witness's understanding of custom. In the latter category, a witness may be qualified based upon his familiarity with Navajo traditions acquired by oral education, or his adherence to a traditional way of life, or through his long-term interest in deepening his knowledge of Navajo custom, or through his status within the community as a person with a special knowledge of custom. After the court determines that a witness is qualified as an expert, the witness can draw inferences from facts that the trier of fact would not be competent to draw.

In cases where Navajo custom is disputed, and might determine the outcome, the court should hold an informal pre-trial conference with two or three expert witnesses as appointed by the court, as authorized in Rule 24(a), Navajo Rules of Evidence. The parties and their counsels may attend, but their participation should be limited to asking questions to clarify the expert witnesses' conclusions. The expert witnesses may discuss among themselves how Navajo custom should be applied in the case before the court, until they arrive at a consensus. This is the way Navajos have traditionally clarified their understanding of customs, and it is more appropriate than the adversarial system where each party tries to interpret custom to benefit its own interests.

Within these guidelines, the court can determine admissibility of expert testimony within its discretion. This Court cannot add its own specific standards by which a witness will be qualified as an expert in matters of Navajo custom beyond these guides. However, where, the outcome of a case on appeal depends on a question of Navajo common law, that was established in the proceedings below through an expert witness, this Court must review, as a matter of law, whether the district court followed the proper procedure in determining the expert witness's qualifications as regards the custom or tradition applicable to the specific circumstances and locale involved. Therefore, where expert testimony is admitted, the record must show clearly the basis of the expert witness's specialized knowledge, and why it is particularly relevant to the question before the court.

In this case, the court found that Ms. Yazzie sustained her claim "by her own testimony as well as by those who knew her." *In the Matter of the Estate of Annie Belone*, No. WR-CV-586-78, Order dated November 21, 1984 (Window Rock District Court). Ms. Yazzie states in her opposing brief that the court "heard the testimony of an expert witness and took judicial notice of matters testified to concerning Navajo custom adoption and inheritance." Brief for the Appellee at 4. Ms. Dawes's brief states that Ms. Yazzie introduced the testimony of an expert witness, but that the testimony did not

cover the specific circumstances of this case. Brief for the Appellant at 11, 12. Because the parties did not provide a transcript of the expert witness's testimony to this Court, and because the district court's orders did not mention the expert witness, there is nothing in the record to show that the district court (1) found that the expert witness was qualified, (2) found that the witness's testimony was directly relevant to the issues being litigated, or (3) examined the witness's qualifications to draw inferences from the specific facts of this case. Without such findings, the record contains no evidence which shows that Ms. Yazzie was the decedent's adopted daughter. Therefore, Ms. Yazzie cannot base her claim to the decedent's estate on a theory of traditional adoption.

In her Response to Final Accounting and Response and Objection to Administratrix's Motion to Dismiss Claim Against the Estate, filed with the district court, Ms. Yazzie also argues that, even apart from her child-parent relationship with the decedent, she is entitled to a portion of the estate through her father, Willie Dawes, who was the decedent's brother. However, Willie Dawes died before the decedent, as did the decedent's husband and son. Therefore, Ms. Yazzie's claim under this argument is without merit. The decedent was survived by one brother, Chee Dawes, who was Ms. Dawes's husband, and two sisters, Nettie Rose Dawes and Maggie Dawes. According to Rule 6(9), NRPP, these three take precedence in inheritance over Ms. Yazzie as the decedent's niece. Ms. Yazzie has established no grounds that would justify disregarding that rule.

Finally, Ms. Yazzie argues that the district court has equitable powers to distribute the decedent's grazing and land use permits in a fair and just manner. However, in the absence of clear indication that the decedent intended to leave all or part of her estate to Ms. Yazzie, the district court's equitable powers do not allow it to ignore the clear and unambiguous directions contained in Rule 6, NRPP.

The findings of the lower court do not support the award of property to Helen Yazzie. The court's conclusion that Ms. Yazzie was adopted according to Navajo common law is not supported by the record. We hold that the district court erred in its division and distribution of property in this case.

The heirs are clearly the one brother and two sisters. The portion of the estate awarded to Chee Dawes must be further probated to his surviving issue, and the portion awarded to Maggie Dawes must likewise be probated to her issue. The decision of the district court in this case is reversed and the matter is remanded to the Window Rock District court for distribution of the decedent's estate consistent with this Opinion.

No. A-CV-24-85

Supreme Court of the Navajo Nation

Gary Davis, ***Plaintiff-Appellant,***

vs.

Gloria Davis, ***Defendant-Appellee.***

Decided July 22, 1987

OPINION

Before Bluehouse, Acting Chief Justice, Austin and Neswood (sitting by designation), Associate Justices.

[redacted]

William P. Battles, Esq., Fort Defiance, Arizona for the Appellant; James Jay Mason, Esq., Gallup, New Mexico for the Appellee.

Opinion delivered by Bluehouse, Acting Chief Justice.

This case involves an appeal from the Window Rock District Court's August 15, 1985 Final Decree of Dissolution of Marriage. The court granted the plaintiff, Gary Davis, a divorce from the defendant, Gloria Davis, and awarded permanent care, custody and control of the child to the defendant, Gloria Davis. The parties stipulated to the division of all the property. Mr. Davis is appealing the district court's findings on the issues of paternity and division of property and debts.

Mr. Davis and Mrs. Davis were married on June 6, 1976 in Chinle, Arizona. They lived together as husband and wife until they separated in June of 1984. Mrs. Davis informed Mr. Davis that she was seeking a divorce on October 3, 1984. Mr. Davis filed suit seeking dissolution of the marriage on November 28, 1984. A child, conceived sometime in late May or early June of 1984, was born on February 19, 1985.

At trial Mrs. Davis testified that Mr. Davis was not the father of the child, and that she had engaged in an active sexual relationship with a third party during the period conception occurred. Mrs. Davis also testified that she had sexual intercourse with Mr. Davis only once during the period of conception, and that she was inaccessible to Mr. Davis during the rest of the period of conception. Mr. Davis stated that he maintained

an active sexual relationship with Mrs. Davis during the critical period. Mr. Davis underwent a vasectomy in the fall of 1982, and a reversal in February of 1984. A semen analysis was done on June 21, 1984; the results were not conclusive as to Mr. Davis's ability to father a child. The record includes a letter from a doctor stating that there was a possibility that Mr. Davis fathered the child. At some point in the proceedings, Mr. Davis requested blood grouping tests to determine the child's paternity. However, this request was later withdrawn in favor of the presumption that a child conceived and born during the marriage is presumed to be a child of the marriage.

In its final decision, the court found that Mr. Davis had "presented no expert evidence of his ability to have children during the critical time period," and that Mr. Davis was not the father of the child. Findings numbered 5 and 8. The court also found that Mrs. Davis overcame the presumption of legitimacy through her "testimony and other testimony." Finding numbered 7.

On the other issue, the record shows that the parties submitted a list of property and debts to the court and stipulated that the property and debts had been divided. The only remaining issue was the valuation placed on each item of property. The parties presented no evidence on valuation on appeal.

I. Property

In a divorce the division of property and debts should be fair and just. *Charley v. Charley*, 3 Nav. R. 30 (1980). The parties agreed to a division of the property and debts, and stipulated to the agreement in court. It is well settled that a party has waived his right to disagree by not raising the issue at the district court. *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (1979). If Mr. Davis did not agree with the division of property and debts, he should have objected at the trial. The record does not contain any evidence that Mr. Davis objected to the division of property and debts in the district court. Mr. Davis has presented no proof on appeal that he objected. The record is conclusive that issues relating to the property and debts have been stipulated to by the parties and that the distribution is fair and equitable.

An issue was raised regarding the valuation placed upon the property. However, Mr. Davis did not pursue this issue on appeal, but instead he appears to argue that the property and debt distribution was unfair. Even if there were questions as to valuation, Mr. Davis would be precluded from making that argument, because he has of his free will stipulated to the distribution of property and debts. Where there is no showing of injustice, the par-

ties will be bound by their stipulation. The district court's final decision on the division of property and debts is affirmed.

II. Paternity

The issue of whether a married woman has standing to assert that her child born during wedlock is illegitimate is of first impression within the Navajo Nation. Under non-Navajo common law a married woman lacked standing to assert that her child is illegitimate. The rule was used to prevent married women from gaining custody of a child in a divorce proceeding solely upon assertions of illegitimacy. Public policy and the preservation of good morals also precluded the assertion of illegitimacy by a married woman. In New Mexico it has been held that a child born in wedlock is considered legitimate, and the mother cannot bastardize him. *Sacas v. Olmos*, 47 N.M. 408, 143 P.2d 871 (1943). Under non-Navajo common law only a husband had standing to dispute the paternity of his wife's child. The modern trend is to allow the mother the same ability to assert that her husband is not the father of her child.

In this case, to allow the husband standing to raise the issue of illegitimacy, and not the wife, raises questions of equal protection under the Navajo Bill of Rights, 1 N.T.C. §3 (1986), and the Indian Civil Rights Act, 25 U.S.C. §1302(8). Aside from these laws protecting civil rights, the Navajo people have traditionally recognized that Navajo women have equal status with Navajo men to participate in decisions affecting family and tribe. Based upon tradition and custom, the wife has equal standing in Navajo Courts to assert that her husband is not the father of her child. However, the district courts must not rely solely upon the wife's claims of illegitimacy in awarding custody of the child.

The principle that a child born to a married woman is presumed to be legitimate is universally recognized. The Navajo traditional view is consistent with this presumption, in that a child born during a marriage is considered the issue of that marriage. The presumption of legitimacy is based upon broad principles of natural justice. It was developed to protect the child from the disabilities attached to the status of illegitimacy. This presumption insures that the child has a father to support and care for him. It is one of the strongest presumptions known to law.

The presumption of legitimacy of a child born to a married woman is strong, but it may be rebutted by competent and relevant evidence. The burden of overcoming the presumption is upon the party challenging it, and the evidence must be clear and convincing. *State v. Mejia*, 97 Ariz. 215, 399 P. 2d 116 (1965); *State ex. rel. Munoz v. Bravo*, 139 Ariz. App. 393, 678 P.2d 974 (1984).

The Court is hesitant to stamp a child born in wedlock as illegitimate. Facts merely creating doubt and suspicion are not sufficient to rebut the presumption. Neither is evidence showing the mother's infidelity during the period of conception sufficient, by itself, to overcome the presumption. However, clear and convincing evidence proving one of the following will overcome the presumption of legitimacy: (1) That the husband is infertile or sterile and unable to father children; or (2) That the husband was entirely absent from his wife during the period conception must have occurred; or (3) That the husband was present but no sexual intercourse took place during the period of conception.

Blood grouping tests have been used with great success in other courts for determining paternity. Blood grouping tests may be used to exclude a person as the child's father, only where the court has satisfied itself as to the qualification of the expert testifying about the test procedures and results. If the evidence points with an equal degree of certainty to the husband and another man as father of the child, the doubt will be resolved in favor of legitimacy rather than illegitimacy. *Jackson v. Jackson,* 182 Okl. 74, 76 P.2d 1062 (1938).

The burden of overcoming the presumption of legitimacy is on Mrs. Davis because she is the party challenging it. Evidence was presented by Mrs. Davis that her husband had undergone a vasectomy in the Fall of 1982. However, the evidence also showed that Mr. Davis had a reversal in February 1984. We believe Mrs. Davis has failed to prove infertility through evidence of a vasectomy which was later reversed. The court then found that Mr. Davis had not presented any expert evidence of his ability to father children after he introduced evidence of the reversal. The district court erred in placing the burden of proving his ability to father children on Mr. Davis. The burden of proof is on Mrs. Davis to prove that her husband is sterile; not on Mr. Davis to prove that he is not.

The evidence on Mr. Davis's access to Mrs. Davis is conflicting. Mrs. Davis presented evidence that she was out of town and inaccessible during part of the critical time period, and she testified that she had intercourse with Mr. Davis once during this period. To overcome the presumption on the grounds of access, Mrs. Davis must prove that Mr. Davis had no access to her, or that no sexual intercourse took place during the period of conception. The final decision does not contain a finding on access, therefore we are unable to determine which facts were found by the district court to be credible. A finding that Mrs. Davis overcame the presumption based upon "her testimony and other testimony" does not answer the issue of access, and it does not support the finding that the presumption was rebutted.

The record does not support the finding that Mrs. Davis met her burden of proof with clear and convincing evidence. The judgment of the Window

Rock District Court on paternity cannot be sustained. The Court reverses the final decision on paternity, and remands to the Window Rock District Court for a hearing on the issue of paternity consistent with this Opinion.

No. A-CV-21-85

Supreme Court of the Navajo Nation

In the Matter of the Estate of: Mae D. Benally
Wilson Benally, et. al., *Appellants,*
vs.
Raymond Denetclaw, *Appellee.*
Decided July 31, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Herman Light, Esq., Shiprock, New Mexico for the Appellants; Loretta Morris, Esq., DNA-People's Legal Services, Inc., Crownpoint, New Mexico for the Appellee.

Opinion delivered by Bluehouse, Associate Justice.

Wilson H. Benally has appealed the Crownpoint District Court's distribution of the estate of his wife, Mae D. Benally. Ms. Benally, a member of the Navajo Tribe, died on January 31, 1981. Her last place of residence was Naschitti, New Mexico, which is within the exterior boundaries of the Navajo Nation. She left behind a son from a previous marriage and a son and four daughters from her most recent marriage. The husband is Wilson Benally, who is the appellant in this case. The son from a previous marriage is Raymond Denetclaw, who is the appellee.

The following property is at issue on appeal:

1. Grazing Permit No. 14-1476 for 70 sheep units issued on June 17, 1976 to Mae D. Benally and Wilson Benally. Mae D. Benally had inherited 11 sheep units, included in this permit, from her father in 1976. *In the Matter of the Estate of Clarence Denetclaw*, No. WR-C-PB-486-75, Final Probate Decree (Window Rock D. Ct., February 19, 1976).

2. A land use permit issued to "May D. Benally" and approved July 9, 1953, for 9.5 acres of agricultural land, described as plot A-93. The second page of the permit designates "Raymond, Harry, Virginia Benally" as

beneficiaries upon Mae D. Benally's death. Land Use Permit, p. 2. This page is dated February 16, 1953. "Raymond Benally" is Raymond Denetclaw. Harry Benally is the son of Mae and Wilson Benally. Virginia Benally is the eldest daughter of Mae and Wilson Benally. She is now Virginia Winters.

3. One of six strings of coral beads removed from Ms. Benally's set of jewelry after her death.

On November 30, 1983, the Crownpoint District Court appointed Raymond Denetclaw as administrator of the estate. The district court received Mr. Denetclaw's final report on April 18, 1984. This report stated that the property "passes to the heirs," i.e., the surviving husband and six children, but did not suggest how the property was to be distributed. Final Report at 4.

On August 3, 1984, Raymond Denetclaw submitted an "Administrator's Argument concerning Distribution of the Estate," in which he stated that 11 sheep units from Grazing Permit No. 14-14-76 were Mae D. Benally's separate property, and that the rest of the estate was the community property of Mae and Wilson Benally. Administrator's Argument at 1. Mr. Denetclaw requested the 11 sheep units for himself, arguing that "In Navajo custom, the oldest child usually have more rights than the younger siblings." Administrator's Argument at 2, 3. He also argued that Land Use Permit No. A-93 should be divided between the three beneficiaries designated by Mae D. Benally on page 2 of the permit. Finally, he alleged that the coral beads intended for Mae D. Benally's children were improperly in the possession of Ruth Johnson, Mae D. Benally's sister.

On May 14, 1985, Wilson Benally submitted an "Answer and Counter-Proposal to Distribution Stipulation." He conceded that the 11 sheep units inherited by Mae D. Benally should be awarded to Raymond Denetclaw, but argued that he himself should receive the other 59 sheep units. He also argued that the land governed by the land use permit for plot A-93 was "relatively used by the responding parties," and that he should be named "permanent administrator" for all the heirs. Answer at 1. Wilson Benally's answer did not suggest how the beads should be distributed.

The Crownpoint District Court held a hearing on July 18, 1985, and issued a decree distributing the estate on August 7, 1985. The court noted that Harry Benally was not present at the hearing, and found: (1) that Mae D. Benally's heirs were her husband and six children; and (2) that Raymond Denetclaw was entitled to one string of beads, which had improperly been given to Ruth Johnson. Acting "in accordance with Wilson Benally's oral stipulation in court," Probate Decree at 2, the court awarded 10 sheep units each to Wilson Benally and his four daughters, 11 sheep units to Raymond Denetclaw, and 9 sheep units to Harry Benally. The court further ordered Harry Benally's 9 sheep units combined with Raymond Denetclaw's 11, and a grazing permit of 20 sheep units issued to Raymond Denetclaw. The court

divided the land use permit for plot A-93 between Raymond Denetclaw, Harry Benally, and Virginia Winters, as proposed by Raymond Denetclaw. Finally, the court ordered one string of coral beads returned to Raymond Denetclaw. Wilson Benally submitted a motion for reconsideration on September 6, 1985, which the district court denied on September 13, 1985. Mr. Benally filed a timely notice of appeal on September 6, 1985.

This Court has determined that probable cause exists to grant the appeal. In his Brief on Appeal, Mr. Benally requested a trial *de novo*. However, trial *de novo* has been eliminated by the Judicial Reform Act of 1985; this act limits appellate review to issues of law. 7 N.T.C. §803 (Supp. 1986). For the same reason, this Court may not consider evidence, not introduced at trial in the district court, to which Mr. Benally refers in his brief. This case involves the proper application of Navajo Probate Rules.

I. Division of Estates Under the Navajo Tribal Code

A. NAVAJO COMMON LAW

Navajo law governing inheritance requires that:

> 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.

8 N.T.C. §2(b) (1977). In *In the Matter of the Estate of Annie Belone,* 5 Nav. R. 161 (1987), this Court set forth the procedure for applying Navajo custom in legal proceedings. In the pleadings, "[w]here a claim relies on Navajo custom, the custom must be alleged, and the pleading must state generally how that custom supports the claim." *Id.* at 164. At trial, a party can prove custom through previous case law, learned treatises, or expert testimony. *Id.* at 165. The court may also judicially notice a custom. *Id.* at 165. In the latter case, the court "must clearly set forth in its order the custom on which it is relying . . . ." *Id.* at 165, 166.

In his pleadings, Wilson Benally did not allege any Navajo custom to support his proposed stipulation. Raymond Denetclaw alleged only that "[i]n the Navajo custom, the oldest child usually have more rights than the younger siblings." "Administrator's Argument," dated August 3, 1984, at 3. Mr. Denetclaw did not argue how this "custom" supported his requested division of property. The district court's order does not mention Navajo custom. The record does not support a division of the estate according to Navajo common law. Therefore, the division must follow state law as applied in Navajo case law and the Navajo Rules of Probate Procedure.[1]

1. In *Sells v. Sells,* 5 Nav. R. 104 (1986), we determined that courts must apply Navajo case law whenever possible, relying on state law to resolve only questions of first impression. *Id.* at 107, 108.

B. STATE LAW UNDER THE RULES OF PROBATE PROCEDURE

Whenever a decedent is survived by a spouse, the court probating the estate must first determine what part of the estate is community property, and what part was the decedent's separate property. In doing so, the court must apply the laws of the state in which the decedent resided, interpreted in light of the Navajo Rules of Probate Procedure and Navajo case law. 8 N.T.C. §2(b) (1977).[2]

9 N.T.C. §205 (1977) states that:

> 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.

See also Rule 5, NRPP. Property acquired during the marriage is presumed to be community property unless shown to be separate. *Mitchell v. Mitchell*, 104 N.M. 205, 719 P.2d 432, 439 (1986), *cert. denied*, 104 N.M. 205, 719 P.2d 60 (1986). Inherited property is separate, even if acquired during the marriage. *Willie v. Willie*, 4 Nav. R. 31, 32 (1983); *Portillo v. Shappie*, 97 N.M. 59, 636 P.2d 878, 880 (1981). Separate property comingled with community property is still separate if it can be clearly traced and identified. *Mitchell*, 719 P.2d at 439.

On the death of a spouse, one-half of the community property belongs to the surviving spouse, and cannot be willed away. Rule 5, NRPP. In New Mexico, if the decedent did not leave a will, the decedent's half of the community property also goes to the surviving spouse. Rule 6(3)(c), NRPP. One-fourth of the decedent's separate property goes to the surviving spouse, and the remaining three-fourths goes to the decedent's children. *Id.*.

C. THE GRAZING PERMIT

Of the 70 sheep units in Grazing Permit No. 14-14-76, Raymond Denetclaw introduced evidence showing that Mae D. Benally had inherited 11 sheep units, which were thus her separate property. One-fourth of these, or three sheep units, belong to Wilson Benally. Adding the 59 sheep units that are community property, a total of 62 sheep units must go to Mr. Benally. The remaining eight must be divided among the remaining six heirs. Thus, each of Ms. Benally's children is entitled to 1⅓ sheep units. However, in Grazing District No. 7, grazing permits may not be subdivided into parts of less than ten sheep units. 3 N.T.C. §785(3) (1977). The *Navajo Reservation Grazing Handbook*, issued by the Resources Committee of the Navajo Tribal Council to regulate the district grazing committee's issuance of grazing per-

2. This assumes that no federal law or Navajo statute applies. 7 N.T.C. §204 (Supp. 1986). If Navajo case law interprets a state law, that interpretation becomes Navajo common law, and as such, it takes precedence over state case law, or even over later changes in state statutes. *Id.*

mits, contains a similar provision. *Navajo Reservation Grazing Handbook* at 24. Thus, according to the Grazing Handbook, the eight sheep units cannot be distributed strictly according to the Rules of Probate Procedure. An award of 1⅓ sheep units is clearly incompatible with Navajo law governing the grazing permit system. See *Navajo Reservation Grazing Handbook* (1957). A distribution consistent with the Navajo grazing permit system must be considered.

In accordance with Wilson Benally's stipulation, the district court ordered a roughly equal division of the grazing permit among all seven heirs. It is clear that Mr. Benally may make a gift of any part of the estate to which he is entitled. However, such a stipulation as Mr. Benally's could have been made for many reasons, including duress and his counsel's ignorance of Mr. Benally's legal rights. Before the distribution in the stipulation is considered as a gift, Mr. Benally must have been aware of his legal right to 62 sheep units. The record does not show that Mr. Benally knew he was entitled to 62 sheep units. Therefore, the stipulation is unenforceable, and it is inconsistent with Navajo probate law.

D. THE LAND USE PERMIT

The first page of the land use permit for plot A-93 is stamped as having been approved on July 9, 1953. The second page, containing the assignment upon Mae D. Benally's death to three of her children, is dated February 16, 1953. Because two of these three children are also children of Wilson Benally, this court must assume, absent contrary evidence, that Mae and Wilson Benally were married when the land use permit was approved, and that the permit was therefore acquired during the marriage. Thus, unless the permit can be identified as the separate property of Mae D. Benally, the presumption according to law is that it is community property. *Mitchell v. Mitchell, supra*, 719 P.2d at 439. The status of the land use permit requires additional findings of fact.

Under New Mexico law, if a decedent leaves a will that fails to provide for one or more of his children, whether born before or after the will was executed, the omitted child receives a share in the estate equal in value to that which he would have received under the intestate succession law. N.M. Stat. Ann. §45-2-302 (1978).[3] The provisions of this section can be defeated in

3. §45-2-302 is titled "Pretermitted children," and provides in part:
A. If a testator fails to name or provide in his will for any of his children born or adopted before or after the execution of his will, the omitted child or his issue receives a share in the estate in value to that which he would have received if the testator had died intestate unless.
1. it appears from the will that the omission was intentional;
2. when the will was executed, the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or
3. the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

several ways; none of which has been alleged in this case. *Id.* It is not clear from the record whether Ms. Benally's listing of beneficiaries to the land use permit is testamentary in nature. If the land use permit is testamentary, then Ms. Benally may will one-half of the land use permit as her share of community property; or the entire land use permit if it is her separate property. However, the court must be careful to see that pretermitted heirs are protected.

The district court must also determine whether Ms. Benally's listing of beneficiaries to the land use permit is like an assignment of beneficiaries in an insurance policy. If that is the case, the portion of the permit that is not community property may be divided among the beneficiaries listed.

II. Land and Grazing Permits in Navajo Law

Land use and grazing permits within the Navajo Nation are not "owned" in the same sense that property can be owned in fee simple under the Anglo-American legal system. Although land use and grazing permits are sold or passed through inheritance, all transfers are subject to regulation by district land boards and grazing committees. *See, e.g.*, 3 N.T.C. §237(1) (supp. 1986); 3 N.T.C. §§708(a), 784 (1977). In allotting permits, these committees must consider, among other things, the policies of insuring (1) that tracts assigned by land use and grazing permits are large enough to be economically viable, and (2) that land is put to its most beneficial use. *See* 3 N.T.C. §§233 (2), 237(2), 237(6) (Supp. 1986); 3 N.T.C. §§217(a), 703(3) (1977). *See also, In the Matter of the Estate of Charley Nez Wauneka, Sr.,* 5 Nav. R. 79 (1986). Further, under Navajo common law, a person can only maintain a "right" to productive land if he is personally involved in its beneficial use. *See Wauneka, Id.* at 83, 84.

Title 3 of the Navajo Tribal Code gives courts discretion in the division of estates, so that tracts of land are kept intact and so that the most beneficial use of the land is encouraged. Tribal courts have authority to order that land use permits be transferred to the decedent's "most logical heir." 3 N.T.C. §785(1) (1977).[4] This Court has held that Navajo land policy, which opposes dividing the land into ever smaller parcels, precludes the literal application of intestate succession laws under some circumstances. *Wauneka, Id.* at 83. Courts probating land use and grazing permits must avoid splitting up the permits wherever possible, so long as the rights of all the heirs are protected. *Id.* at 83.

Within Navajo common law, the primary means of achieving this goal of Navajo land policy has been the customary trust. *Id.* at 82. Land placed in

4. 25 C.F.R. (1987) does not specifically regulate intestate succession for grazing and land use permits.

a customary trust is held for the benefit of the family unit. *Id.* Courts must appoint as trustees those who are in the best position to encourage beneficial use of the land. *Id.* at 82, 84. All individuals involved in the trust have an interest in the land, and have the right to use it as long as their use is not contrary to the interests of another member of the trust. However, those who make their living from the land should have day-to-day responsibility for its management. *Id.* at 83.

The most important limitation on a court's use of the customary trust in probating an estate is that the members of the trust must be able to cooperate if the trust is to be viable. *Id.* at 82. In *Wauneka*, for example, we determined that the heirs would be unable to cooperate harmoniously in managing a customary trust. *Id.* However, one heir had worked the land for most of his life, and depended on the land for his livelihood, whereas the other heirs had not involved themselves in farming, and intended to sell their interests in the land. *Id.* at 83. Thus, a court may include in a customary trust only those who the court determines will be able to cooperate in the trust's management. Other heirs must be compensated from the estate in the approximate value of their share in the trust property.

The customary trust is so called because, in Navajo custom, land is held and managed for the benefit of the clan and the family. The aim of a customary trust is to keep tracts of land and grazing permits intact and in the family. Therefore, land and grazing permits held in customary trust should descend in somewhat the same way as property held in joint tenancy with right of survivorship. That is, once a customary trust is established, those involved in the trust cannot normally devise their interests in the land or grazing permits to their heirs, as that would cause the rights to be split up among more and more owners. Rather, the permits remain intact, and the last surviving member of the original trust will end up owning the entire permit. However, common-law requirements governing the creation and destruction of joint tenancies do not apply to the customary trust, which is a product of Navajo common law.

Regardless of whether the customary trust or another means of distribution is used, a court probating land use and grazing permits held and used by a family unit must consider the pattern of land use and the relationships within the family in dividing the estate. If the court establishes a customary trust, it must consider these factors in deciding whom to include in the trust and whom to compensate with other property. Interests in productive land cannot simply be divided up according to the intestate statutes, as with other assets.

III. Instructions on Remand

A. THE LAND USE AND GRAZING PERMITS

The proper distribution of Ms. Benally's estate depends in part on questions of fact not resolved in the record, and we must therefore partially reverse the district court and remand for a new hearing. The laws of intestate succession entitle each of Ms. Benally's children to an interest equal to 1⅓ sheep units of the grazing permits. Each of the children is entitled to an interest equal to ⅙ or 1/12 of the land use permit, depending upon whether the land use permit is found to be community or separate property. Wilson Benally is entitled to the remainder of the permits. However, the court must keep these permits intact to the extent possible.

Because all of the heirs have interests in both permits, the court must determine which of the heirs are presently using the land, and which of them can cooperate in managing the land and utilizing the grazing permit. The court may then consider these options: (1) a customary trust with right of survivorship under the laws of the state where the property is located; (3) a tenancy in common, with restrictions on transfer of interests to non-family-members and provisions prohibiting later division and distribution of the land; (4) awarding one or both permits to the most logical heir who can make the most beneficial use of the permits; or (5) dividing one or both of the permits, but only if the resulting division, when combined with other land and grazing permits owned by the awardee in the same district, are large enough to be productive and economically viable.

To the extent that the heirs can cooperate, this Court prefers a customary trust for the benefit of the family. Those heirs who cannot cooperate must be compensated with assets from the estate in the approximate value of their interests in the land use and grazing permits. However, even if such compensation is impossible, Navajo land policy still precludes the piecemeal division of productive land. Further, those heirs who have not maintained a connection with the land may be included as beneficiaries of a customary trust, or may receive other assets as compensation, but they may not receive a separate land use or grazing permit from the estate.

B. THE CORAL BEADS

The decedent's parents and siblings are entitled to one item of the decedent's personal effects, as selected by the family. Rule 6(1), NRPP. The district court found that, at the time of Mae D. Benally's death, six strings of her beads were set aside by the family for her children. Although Raymond Denetclaw is not entitled to the beads under the letter of Rule 6(1), the district court's ruling is in accordance both with the spirit of Rule 6(1) and with

Navajo custom, whereby family members meet to discuss a person's property matters after that person's death. *See In the Matter of the Estate of Ray Lee*, 1 Nav. R. 27, 30 (1971). Therefore, the district court's order that Ruth Johnson must return the string of coral beads to Raymond Denetclaw is affirmed.

Affirmed in part and reversed and remanded in part.

No. A-CV-10-87

Supreme Court of the Navajo Nation

Donna Christensen Chavez, *Plaintiff-Appellee,*

vs.

Marshall Tome, dba The Navajo Nation Enquiry, *Defendant-Appellant.*

Decided September 18, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Samuel Pete, Esq. Window Rock, Arizona for the Appellant; Paul E. Frye, Esq., Albuquerque, New Mexico for the Appellee.

Opinion delivered by Tso, Chief Justice.

This libel case is on appeal from a final judgment entered by the Crownpoint District Court on February 11, 1987. On October 27, 1986, a judgment on the issue of liability was entered against the defendant, Marshall Tome, for failure to comply with the discovery rules and the court's orders compelling discovery. The court also awarded $1,020.00 in attorney's fees to plaintiff, Donna Chavez. The issue of damages was tried before a jury, which awarded Chavez $10,000.00 in damages. The court further ordered Tome to print a retraction in his newspaper, *The Navajo Nation Enquiry.* Tome is appealing the district court's October 27, 1986 finding of liability and award of attorney's fees, and the court's February 11, 1987 final judgment awarding actual and punitive damages, and order to print a retraction.

Marshall Tome, doing business as *The Navajo Nation Enquiry* (Enquiry), published a series of articles about Donna Chavez during 1985 and 1986. The focus of the articles was a case in which Chavez, an attorney in the Navajo Nation Department of Justice, represented the Navajo Nation. Chavez filed a complaint for libel against Tome on April 1, 1986, claiming that Tome had recklessly and maliciously defamed her by publishing a variety of false statements. The statements in question were published in August, September, and November of 1985, and they accused Chavez of lying to a judge, and bribing a judge to obtain favorable rulings. It was also reported in the

March 1986 issue of *The Navajo Nation Enquiry* that Chavez had been "ousted by the Ute Tribe" for causing problems throughout the community. Chavez sought monetary damages and a retraction of the alleged defamatory statements.

Tome retained Margaret Wilson as counsel, and he filed an answer and a demand for a jury trial on May 5, 1986. On July 25, 1986, Tome was served with a Notice of Deposition Duces Tecum through his attorney, which requested that Tome produce thirty-six categories of documents at the deposition scheduled for August 19, 1986. Included in the request for documents was the policies and procedures for *The Navajo Nation Enquiry.* On August 4, 1986, Chavez filed a motion to personally serve Tome with a Subpoena Duces Tecum to assure that the documents would be available at the deposition. On August 6, 1986, the court denied the motion by ordering that service of the Notice of Deposition Duces Tecum on Tome's counsel was sufficient to assure that all requested documents would be produced by Tome at the deposition.

The deposition was held on August 19, 1986, in Gallup, New Mexico. Tome was represented at the deposition by Earl Waits, Ms. Wilson's associate. Waits stated that he was appearing with Tome for the deposition only and that Tome would be "retaining other counsel to proceed in this matter." (Tome Deposition at p. 5.) However, Ms. Wilson would continue to represent Tome until substitute counsel was obtained.

Tome appeared at the deposition without any of the documents requested in the Notice of Deposition Duces Tecum. The record does not show that Tome filed any motions for protective orders, nor any objections, at anytime regarding the documents. When asked why he did not bring the requested material to the deposition, Tome stated that he had other things to do which he thought were more important than coming to the deposition. (Tome Deposition at p. 26.) A three hour recess was taken to allow Tome to go to his office in Window Rock and get the documents. Tome returned from Window Rock with only the back issues of the *Navajo Nation Enquiry* stating that his brother had taken the rest of the documents to another location. (Tome Deposition at p. 100.)

On September 8, 1986, Ms. Wilson moved to withdraw as counsel for Tome. Attached to the motion was a letter written by Ms. Wilson's doctor, dated August 14, 1986, which stated that Ms. Wilson was advised to stop working at this time so that she could recover from injuries. The letter, we presume, was written to someone other than the district court. [1] The district

1. The letter states that Ms. Wilson was involved in a single car accident on December 15, 1985, which resulted in physical injuries. On July 20, 1986, she was re-injured while riding in a small engine aircraft. Since that time she has been unable to perform the tasks necessary in the practice of law. The last paragraph states: "Because the usual treatment modalities have not been successful. . . I have advised her to stop working at this time. . . . In the meantime I feel it is medically necessary that her electricity be turned on and that she be able to heat her house."

court denied the motion on September 17, 1986, finding that the motion did not comply with Rule 27 of the Navajo Rules of Civil Procedure. Rule 27 requires that new counsel be named before a motion to withdraw can be granted.[2] The motion filed by Ms. Wilson did not name new counsel. In denying the motion, the court directed Ms. Wilson to advise Tome to act quickly and obtain new counsel. The court then allowed Ms. Wilson two weeks to file another motion to withdraw if Tome did not secure counsel. Ms. Wilson did not file another motion to withdraw.

On September 17, 1986, the court also found that Tome had previously been ordered to produce certain discovery materials which Tome had not produced and made available to Chavez. The court was referring to its order of August 6, 1986. The court ordered Tome to make those materials available to Chavez within fifteen days.

On September 22, 1986, Chavez filed a "Motion To Compel Production of Documents," which the court granted on September 24, 1986. Tome was ordered to produce the documents requested in the Notice of Deposition Duces Tecum by October 1, 1986, otherwise "judgment shall be entered against him upon the application of plaintiff." Order of September 24, 1986.

Also on September 22, 1986, Chavez filed a "Motion To Compel Disclosure Of Alleged Sources And To Compel Answers To Questions Asked At Deposition." This motion was granted on September 24, 1986. In the Order Compelling Discovery, the court ordered Tome to disclose the sources for each article concerning Chavez in the *Enquiry,* the financial and business aspects of the *Enquiry*, and to provide Chavez with a witness list. The court further warned Tome that if the orders were not complied with by October 7, 1986, "judgment shall be entered against him on application of plaintiff." Order of September 24, 1986.

On October 9, 1986, Chavez filed an "Application for Judgment" based upon Tome's failure to comply with the September 17 and 24 orders. On October 27, 1986, the district court entered judgment for Chavez on the issue of liability, and the court awarded Chavez $1,020.00 in attorney's fees. The attorney's fees were for the costs of the motions to compel discovery. The court found that Tome had not complied with four of its orders: the order of August 6, 1986, ordering Tome to produce documents; the order of September 17, 1986, compelling Tome to produce documents; and the order of September 24, 1986, compelling discovery of information disclosed by Tome at his deposition. The court also found that Tome had not made any motions for reconsideration, or other objections to the orders to compel production of the documents or to compel discovery. Neither had Tome filed a motion

2. Whenever counsel has once appeared either in open court or by motion to represent a party, such counsel shall be responsible to the Court for his actions and shall not be allowed to withdraw from the case except by order of the Court upon written motion naming new counsel and stating good cause. Rule 27, NRCP.

for a protective order regarding the Notice of Deposition Duces Tecum.

On November 6, 1986, Tome secured new counsel and made a motion to set aside the October 27, 1986 judgment. Tome claimed that his prior counsel had inadequately represented him and he argued that that was sufficient grounds for setting aside a judgment. The motion was denied and on January 9, 1987, a jury trial was held on the issue of damages. The jury found that Chavez had suffered actual damages of $8,823.87. The damages were for mental suffering, emotional distress, and loss of reputation. An additional $1,176.13 was awarded as punitive damages. Aside from the jury's monetary award, the court ordered Tome to print a retraction on the front page of three consecutive issues of his newspaper, *The Navajo Nation Enquiry.*

I. Failure to Comply with Discovery

A.

On October 27, 1986, the district court entered judgment against Tome and awarded Chavez attorney's fees, after finding that Tome had consistently failed to comply with the discovery rules and the court's orders compelling discovery. Tome argues that his failure to comply with the rules and orders was due to the incapacity of his counsel, Ms. Wilson, and that it is unjust to punish him, by entering judgment against him, for the failings of his counsel. Tome further argued that he was denied due process because the notices of the discovery orders were sent to his counsel and not to him personally. The Court is unpersuaded by these arguments.

The district judge has the discretion to impose sanctions, including entry of judgment against a defendant for failure to obey discovery orders. *Four Corners Auto Sales, Inc., et al. v. Begay,* 4 Nav. R. 100 (1983). Our review on appeal is thus limited to deciding whether the district judge abused her discretion in entering judgment and attorney's fees against Tome. Absent a clear abuse of discretion, this Court will not disagree with a district judge's decision. *In the Matter of Contempt of: Arnold Sells,* 5 Nav. R. 37 (1985).

Entry of judgment against Tome is not an abuse of discretion, if the judge found that Tome flagrantly disregarded the court's orders compelling discovery, or if Tome flagrantly abused the discovery process. *Four Corners Auto Sales,* 4 Nav. R. at 103. Entry of judgment is also proper if Tome willfully, or in bad faith, failed to comply with the court's discovery orders. A Notice of Deposition Duces Tecum, which requested documents, was served upon Tome, through his counsel Ms. Wilson, shortly after it was filed on July 25, 1986. Ms. Wilson had not attempted withdrawal at the time of service,

thereby Chavez rightfully served the notice on Tome's counsel. At least three weeks elapsed between service and the deposition date of August 19, 1986. During these three weeks Tome did not file any objections to the request for discovery of documents. A party served with a Notice of Deposition Duces Tecum has the burden to object, otherwise lack of action will be construed as a consent to comply with the discovery request. An unchallenged discovery request has the effect of a court order. Tome was ably represented and his failure to motion for a protective order, or otherwise object, means he consented to produce documents requested in the Notice of Deposition Duces Tecum. After such consent, a failure to comply with the discovery request, without adequate excuse, can be sufficient for a finding of willfulness to support entry of judgment.

Tome appeared at the deposition without the documents. During questioning, Tome admitted that he had received the Notice of Deposition Duces Tecum from his attorney several days prior to the deposition date. (Tome Deposition at p. 26.) When asked why he had not brought the documents, and specifically the policies and procedures, he responded that he had other things to do which he considered more important than coming to the deposition. Nonetheless, a three hour recess was taken so Tome could cure his noncompliance by getting the documents from his office in Window Rock. However, Tome returned without the documents, most notably the policies and procedures, despite his earlier testimony that they were located in Window Rock. (Tome Deposition at p. 34.)

The district judge could rightfully conclude from these facts that Tome's intent from the beginning was not to cooperate with discovery. Obviously, Tome was aware of the type of documents that he had to produce at the deposition, and he had sufficient time to gather those documents. Otherwise, Tome had sufficient time to file a motion for a protective order or to file an objection to Chavez's request for documents. The record is clear that Tome personally knew he was to produce certain documents, and he consented to produce those documents, yet he deliberately disregarded the discovery request by failing to produce the documents.[3] His statement, that he had other important things to do rather than come to the deposition, is another indication of his willful refusal to abide by the discovery rules.

The district judge must consider all the circumstances of the case to determine whether the defendant acted flagrantly or willfully in disregarding the discovery process, or in disobeying the court's discovery orders. Tome's refusal to produce documents at his deposition was not the only evidence considered by the district judge. The record shows that Tome failed to obey

3. At one point during Tome's deposition, Mr. Waits assured Chavez's counsel that, "we will provide the documents that you're requesting." This statement was made prior to the three hour recess. Tome Deposition at p. 31.

court ordered discovery on two occasions and he disobeyed two subsequent orders compelling discovery. All these orders were served upon Tome through his counsel of record, Ms. Wilson. The transcript of Tome's August 19, 1986 deposition is replete with evidence showing evasive testimony.

The two orders compelling discovery, that were entered on September 24, 1986, are of particular significance. One of these orders compelled production of the same documents requested in the Notice of Deposition Duces Tecum filed on July 25, 1986. The record shows that the order compelling production of documents was the fourth request made by Chavez for those documents. No party to a lawsuit should have to undergo unnecessary expense and effort in an attempt to consistently discover the same materials while the other party simply ignores the discovery orders. At some point the judge must impose sanctions to insure that the court's rules and orders are complied with and that the party requesting discovery is not unduly prejudiced. The judge must exercise control and management over the cases to insure that cases move in a timely and orderly fashion. Otherwise recalcitrant parties only impede the timely and orderly administration of justice, and in the process deprive other litigants in other cases of scarce judicial resources. In addition, both orders compelling discovery warned Tome that his failure to comply by a certain date would result in entry of judgment for Chavez. Again he ignored this warning and chose not to comply with the court's orders.

After a review of the facts and the transcript of the deposition, this Court agrees that Tome flagrantly and willfully disregarded the discovery process and the district court's orders. We hold that the district court did not abuse its discretion by entering judgment on liability against Tome under these circumstances.

B.

Tome has also raised the incapacity of his counsel as a reason for his disregard of the discovery process and for disobeying the court's orders. A party cannot avoid the consequences of the acts or omissions of his counsel. *See Tracey v. Heredia*, 4 Nav. R. 149 (Window Rock D. Ct. 1983); *Sutherland v. ITT Continental Baking Co., Inc.*, 710 F. 2d 473 (8th Cir. 1983). The incapacity of counsel will not allow a party to escape the consequences of having freely selected that particular counsel. A party to a suit has a responsibility to maintain contact with his counsel and assure that his case is being handled properly. The court cannot be made the watchdog of the attorney-client relationship to assure that the client has made a good choice as to his attorney. This would be inconsistent with our system of representative litigation. Further, it would be unfair to penalize the opposing party and make them relitigate all the issues, when there is an action for malpractice available

to any party who feels that their counsel's conduct has fallen below what would be reasonable under the circumstances.

Tome had a responsibility to maintain contact with his counsel, and the counsel had a similar responsibility to Tome. The court cannot dictate or oversee the relationship between Tome and his counsel, Ms. Wilson. When Tome became aware of Ms. Wilson's intention to withdraw he should have immediately obtained other counsel. The record shows that Tome knew, at least at the time of deposition, of Ms. Wilson's intent to withdraw, yet he took no steps to protect his own interest. We hold that incapacity of Tome's counsel, under the facts of this case, is not a valid excuse for disobeying the court's discovery orders or for ignoring the discovery process.

C.

Tome also argues that his right to due process under the Indian Civil Rights Act, 25 U.S.C. §1302(8) (1968), was violated when notices of the proceedings were sent to his counsel of record and not to him. Due process requires that a party be given notice of any proceeding and afforded an opportunity to be heard. *Yazzie, et al. v. Jumbo, et al.*, 5 Nav. R. 75 (1986); *Navajo Engineering and Construction Authority v. Noble,* 5 Nav. R. 1 (1984). It is an established rule that notice to the counsel of record serves as notice to the client. *Tracey v. Heredia*, 4 Nav. R. at 149 (Window Rock D. Ct. 1983); *Smith v. Ayers*, 101 U.S. 320 (1880).

The district court record listed Ms. Wilson as Tome's counsel of record. All the court orders were mailed to Ms. Wilson's office, and none were returned to the court. The court could presume that Ms. Wilson was receiving her mail, and had notice of the orders. We hold that Tome had notice of the proceedings and the due process requirement of notice under the Indian Civil Rights Act and the Navajo Bill of Rights, 1 N.T.C. §3 (1986 Amendment), were satisfied.

D.

The final issue arising from the October 27, 1986 judgment concerns the attorney's fees awarded to Chavez. The rule within the Navajo Nation is that each party is responsible for their own attorney's fees. *Hall v. Arthur,* 3 Nav. R. 35 (1980); *John, et al. v. Herrick,* 5 Nav. R. 129 (1987). One recognized exception to this rule is where the case presents a special set of circumstances. The courts must exercise restraint in allowing recovery of attorney's fees, but where evidence shows a special set of circumstances, the awarding of attorney's fees is appropriate.

In this case, the district court found that there had been a flagrant disregard of the discovery rules and the court's orders. Tome's disregard of the rules and

disobedience of court orders forced Chavez to incur additional costs to force compliance. We hold that a failure to comply with the discovery rules and the court's orders, is a special set of circumstances justifying an award of attorney's fees. It is appropriate to charge Tome for the unnecessary costs he forced Chavez to incur, because of his willful failure to comply with the rules and orders. The district court's award of attorney's fees in the amount of $1,020.00 is affirmed.

II. Damages

A.

The United States Supreme Court has held that compelling a newspaper to print that which "reasons" tells them not to publish is an unconstitutional violation of the First Amendment's guarantee of Freedom of the Press. *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 41 L. Ed. 2d 730 (1974). Similarly, the Navajo Bill of Rights, 1 N.T.C. §1 (1986 Amendment), and the Indian Civil Rights Act, 25 U.S.C. §1302(1) (1968), guarantees the right of the press to be free of governmental intervention. The choice of material to be printed is a protected exercise of editorial control and judgment and the government is prevented from regulating this process. A responsible press is desirable, but it cannot be legislated by the Navajo Tribal Council or mandated by the Navajo courts. This does not mean that the press is free to print libelous material; because the government does have a legitimate interest in protecting an individual's good name. A person who proves libel or slander may recover monetary damages for the actual harm suffered. This financial liability will serve as a deterrent and help assure that the press acts in a responsible manner.

We believe the printing of a retraction can serve as a method of mitigating damages. If the publisher voluntarily prints a retraction, the monetary damages may be reduced. To be effective the retraction must be published in the same manner and calculated to reach the same audience as the original material.

The decision to print a retraction rests with the publisher, and the court is prohibited by the Navajo Bill of Rights and the Indian Civil Rights Act from ordering a retraction. We hold that the district court erred in ordering that a retraction be printed.

B.

The remedy for libel is an action for damages. The damages may be actual, special, or punitive. The types of actual injury inflicted by the defamatory

statements includes harm to reputation and public standing, personal humiliation, mental and emotional anguish and suffering. The finding of injury must be supported by competent evidence. However, because of the type of injury caused, the evidence need not prove an actual dollar amount of injury. The jury has the discretion to determine the actual dollar amount of injury by considering all the evidence. The jury's finding is limited only by the general rule that the award not be excessive, and that it be supported by competent evidence. This Court will not overturn a jury's determination of actual damages, unless it finds that the award is unsupported by the evidence. Tome has not provided a transcript to support his position that the jury's award of actual damages is not supported by the evidence. See Rule 9(b)(1), NRCA P. Tome has not met his burden of showing that the jury's award was not supported by the evidence.

C.

Punitive damages do not compensate for an injury, but rather are used to punish bad conduct and deter similar conduct in the future. The awarding of punitive damages may tend to inhibit a free press. Therefore, punitive damages are appropriate only in cases where it is shown that the publisher acted with knowledge of the falsehood of his statements, or acted with reckless disregard for the truth. In this case, the issue of liability was not heard on the merits. Tome's knowledge of the falsehood of his statements, or his reckless disregard for the truth, were not established. For these reasons we hold that the district court erred in awarding punitive damages.

The Crownpoint District Court's October 27, 1986 judgment, on the issue of liability and the award of $1,020.00 for attorney's fees, is affirmed. The awarding of $8,823.87 for actual damages is affirmed. The award of $1,176.13 in punitive damages and the court's order that a retraction be printed are reversed.

Affirmed in part, and reversed in part.

No. A-CV-16-85

Supreme Court of the Navajo Nation

Daisy Johnson, as Guardian of Clifford Gould
and Clifford Gould, *Plaintiffs-Appellants,*
vs.
The Navajo Nation, John Doe and Other Unknown
Individual Police Officers of the Navajo Nation,
Individually, *Defendants-Appellees.*
Decided October 20, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

F. D. Moeller, Esq., Farmington, New Mexico for the Appellants; Joseph L. Rich, Esq. Gallup, New Mexico for the Appellees.

Opinion delivered by Austin, Associate Justice.

The plaintiffs, Daisy Johnson and Clifford Gould, appealed the Order entered by the Shiprock District Court, which dismissed their suit against the defendants, the Navajo Nation and other unknown Navajo Police Officers, on sovereign immunity grounds. The numerous issues raised on appeal can be summarized as follows: (1) whether the Navajo Nation can be sued pursuant to the insurance exception of the Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 854(c) (1980), where the insurance carrier becomes insolvent after suit is filed; and (2) whether the Indian Civil Rights Act, 25 U.S.C. Sec. 1301 *et seq.* (1968), is explicit federal law, which authorizes suit against the Navajo Nation pursuant to the Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 854(a) (1980).

On November 15, 1983, the plaintiffs sued the Navajo Nation and unidentified Navajo Police Officers on a theory of gross negligence. The plaintiffs alleged that the incidents resulting in physical injuries to plaintiff Gould occurred on or about September 10, 1983. The plaintiffs alleged district court jurisdiction pursuant to the insurance exception of the Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 854(c) (1980), and under

the Indian Civil Rights Act, 25 U.S.C. Sec. 1301 *et seq.* (1968), which the plaintiffs alleged was explicit federal law allowing suit against the Navajo Nation pursuant to the Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 854(a) (1980).[1]

On January 5, 1984, the defendants filed a motion to dismiss the complaint by alleging that: "There is a reservation of rights by the insurance carrier in which they deny such coverage in any claim asserting punitive damages. Under such reservations of rights the Navajo Nation is immune." Defendant's Memorandum in Support of Motion to Dismiss at 1, 2. The court denied the motion to dismiss on January 10, 1984. The defendants then filed a notice of appeal of the denial of their motion to dismiss on February 16, 1984. The appeal was denied on June 25, 1984, because "the order appealed from is not a final order or judgment." Order of Navajo Court of Appeals, No. A-CV-06-84 (1984).

Ambassador Insurance Company, a Vermont Corporation, had been the insurance carrier for the Navajo Nation at the time the plaintiffs' cause of action accrued and at the time the plaintiffs' suit was filed. On November 10, 1983, the Vermont Commissioner of Banking and Insurance was appointed receiver of Ambassador. On March 30, 1984, the receiver filed in the Vermont state court an "Application for An Order Of Liquidation Of Ambassador Insurance Company." Ambassador Insurance Company was determined to be insolvent, as of March 31, 1984, without reasonable prospects for rehabilitation. *In Re: Ambassador Insurance Company, Inc.*, No. S444-83 Wn. C. (Washington Superior Court, State of Vermont).

On January 2, 1985, the defendants again filed a motion to dismiss, based upon sovereign immunity grounds, by alleging that the district court had no jurisdiction under any of the theories alleged by plaintiffs in their complaint. The defendants argued that the plaintiffs had not cited any federal law or regulation, or tribal law or regulation, which explicitly allowed an exception to the Navajo Sovereign Immunity Act. The defendants further argued in their motion that the Navajo Nation's insurance carrier, Ambassador Insurance Company, Inc., had become insolvent and was in liquidation, thereby foreclosing district court jurisdiction under the insurance exception to sovereign immunity.

The defendants' motion to dismiss was granted on July 1, 1985. The district court found that it had no jurisdiction over the Navajo Nation without

1. The plaintiffs also alleged district court jurisdiction under the "1850" and "1868" Treaties between the United States and the Navajo Nation. We will not address whether these theories grant jurisdiction to the district court over the Navajo Nation, because the appeal can be decided on the issues identified above.

The plaintiffs also alleged that "42 US Code 1983 [and] 28 US Code 1301" also are federal statutes "which give explicit authorization to sue the Navajo Tribe." Brief of Plaintiffs at 3, 4. We disagree with the plaintiffs on these arguments.

its expressed consent, and that the Navajo Nation may be sued in Navajo courts only pursuant to the expressed exceptions under the Navajo Sovereign Immunity Act. The court also found that the plaintiffs had not cited any federal law or regulation, or tribal law or regulation, which explicitly allowed suit against the Navajo Nation. The court further found that the Navajo Nation's insurance carrier was insolvent, thereby the plaintiffs had no insurance claim.

On July 29, 1985, the plaintiffs filed this appeal by essentially raising the issues identified above. The appeal was granted and the case was scheduled for oral arguments to be heard on October 10, 1986. The plaintiffs' counsel, however, requested a continuance due to scheduling conflicts with a jury trial, so oral arguments were rescheduled to October 17, 1986. On October 7, 1986, the defendants filed a motion to continue the case "indefinitely" until after the Navajo Tribal Council had taken the opportunity to act upon proposed amendments to the Navajo Sovereign Immunity Act. The defendants argued that the proposed amendments would materially affect the issues on appeal to the Court. The plaintiffs joined in the motion to continue. We granted the defendants' motion to continue indefinitely on October 13, 1986. The parties were ordered to submit their notices of readiness for oral arguments when they were ready.

On December 11, 1986, the proposed amendments to the Navajo Sovereign Immunity Act were passed by the Navajo Tribal Council. See *Navajo Tribal Council Resolution*, CD-60-86. The amendments essentially allowed suit against the Navajo Nation for wrongful deprivation or impairment of civil rights guaranteed under the Navajo Bill of Rights, 1 N.T.C. Sec. 1 *et seq.* (1986 Amendment).

On February 19, 1987, the plaintiffs filed a motion for setting a hearing on appeal. On April 28, 1987, the defendants concurred in the motion for setting the hearing on appeal. On May 5, 1987, we requested supplemental memorandums from the parties. Oral arguments were heard on June 12, 1987.

I.

The right of the Navajo Nation to assert a defense of sovereign immunity whenever it is sued is beyond question. The Navajo Nation retains all those attributes of sovereignty, which have not been taken away by Congress, or ceded by Treaties between the Navajo Nation and the United States. The power to raise a defense of sovereign immunity, and to waive the doctrine of sovereign immunity, is still within the inherent sovereign powers of the Navajo Nation. The Navajo Tribal Council exercised this power in 1966, when in the course of enacting laws pertaining to housing

projects, it expressed the Navajo Nation's right "to assert the defense of sovereign immunity in any lawsuit against the Navajo Tribe." 6 N.T.C. Sec. 616(b)(1) (1978).

The doctrine of sovereign immunity received little attention in Navajo courts prior to the 1980 Navajo Sovereign Immunity Act. It was mentioned in *Tapaha v. The Navajo Housing Authority*, 1 Nav. R. 5 (1969), but nothing else. The Court first recognized that the Navajo Nation possessed sovereign immunity in *Dennison v. Tucson Gas and Electric Co.*, 1 Nav. R. 95 (1974). That case also implied that tribal officials who acted outside the law were not protected by the doctrine. This implication took root in *Halona v. MacDonald*, 1 Nav. R. 189, 202 (1978), where the Court stated that the "doctrine [of sovereign immunity] does not protect wrongdoing." *Accord Davis v. The Navajo Tribe*, 1 Nav. R. 370, 381 (Crownpoint D. Ct. 1978). Otherwise the Court acknowledged that the Navajo Nation and its governing body enjoyed the protections of sovereign immunity. *Halona*, 1 Nav. R. at 202.

The most vigorous discussion of the doctrine of sovereign immunity occurred in *Keeswood v. The Navajo Tribe*, 2 Nav. R. 46 (1979). That decision established a number of important principles which we must consider in each case raising the issue of sovereign immunity in Navajo courts. First, the Court recognized that the doctrine of sovereign immunity is judicially created and the courts have power to waive the doctrine. However, the Court declined to waive the doctrine, but instead urged the Navajo Tribal Council to act on the subject. Second, the Court recognized that tribal officials are immune from suit only when they are acting within the scope of their official capacities. Finally, the Court held that "the Navajo Tribe cannot be sued without its consent." *Keeswood*, 2 Nav. R. at 55.

Sovereign immunity is jurisdictional, therefore the Navajo Nation's defense of sovereign immunity automatically raises questions concerning the district court's jurisdiction over the Navajo Nation. The general rule in federal and state courts is that an Indian Tribe is immune from suit, unless Congress has explicitly authorized suit against the Indian Tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *See also United States v. United States Fidelity & Guaranty Company*, 309 U.S. 504 (1940). It is also now known that an Indian Tribe, in the exercise of its inherent sovereignty, can consent to be sued. *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981); *See also Puyallup Tribe v. Department of Game of the State of Washington*, 433 U.S. 165 (1977); *Morgan v. Colorado River Indian Tribe*, 103 Ariz. 425, 443 P.2d 421 (1968).

Within the Navajo Nation, the courts are created by the Navajo Tribal Council. 7 N.T.C. Sec. 253 (1959). Jurisdiction of the Navajo courts is also established by the Navajo Tribal Council. 7 N.T.C. Sec. 253 (1959) (district court jurisdiction); 7 N.T.C. Sec. 302 (1985) (Supreme Court jurisdiction). But neither of these jurisdictional statutes deal with suits against the Navajo Nation.

It was not until 1980, perhaps at the "urging" of the Court in *Keeswood*, 2 Nav. R. at 55, that the Navajo Tribal Council passed the Navajo Sovereign Immunity Act. In that Act, the Navajo Tribal Council has made it plain that: "Jurisdiction of the Trial Court of the Navajo Tribe shall not extend to any action against the Navajo Nation without its expressed consent." 7 N.T.C. Sec. 257 (1980). The Navajo Tribal Council then created certain exceptions through which it expressed the Navajo Nation's consent to suit. 7 N.T.C Sec. 854 (1980). These Navajo statutes are consistent with the rule established by federal case law that a sovereign's expressed consent will give jurisdiction to a court over the sovereign. *United States v. King,* 395 U.S. 1 (1969); *United States v. Testan*, 424 U.S. 392 (1976). In addition, the statutes are also in harmony with the rule that an Indian Tribe may consent to suit. *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981).

Initially, we studied the Navajo Nation's general jurisdiction statute, 7 N.T.C. Sec. 253, to see if that statute gave the Navajo district courts jurisdiction over the Navajo Nation. We conclude that the Navajo Nation has not expressed its consent to be sued under 7 N.T.C. Sec. 253. Otherwise, that statute empowered the district courts with civil jurisdiction over suits in which the express consent of the Navajo Nation to suit is not required. Indeed, Section 253 would give the district courts jurisdiction over ultra vires actions of tribal officials without running afoul of the sovereign immunity doctrine.

A.

With this background established we now turn to the first issue on appeal. That issue concerns the insurance exception in the Navajo Sovereign Immunity Act, which reads as follows: "The Navajo Nation may be sued in the Courts of the Navajo Nation with respect to any claim for which the Navajo Nation carries liability insurance." 7 N.T.C. Sec. 854(c) (1980). By this law the Navajo Nation has expressly waived its immunity. A Navajo court would have jurisdiction over the Navajo Nation in a case that falls within this exception. *See Keeswood v. The Navajo Tribe*, 2 Nav. R. 46 (1979); *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981).

The Navajo Sovereign Immunity Act was passed to insure that people having legal claims against the Navajo Nation would have a means of presenting those claims in Navajo courts. Otherwise, legislative inaction might have compelled creating judicial waivers to the Navajo Nation's sovereign immunity. *See Keeswood v. The Navajo Nation*, 2 Nav. R. 46 (1979).

Essentially, the insurance exception to sovereign immunity has been enacted for the benefit of injured parties, and thus, it must be interpreted to the benefit of the injured plaintiff. This is supported by the record of the

Navajo Tribal Council debate preceding passage of the Navajo Sovereign Immunity Act. The record is clear that a person injured by the Navajo Nation has "the right to sue the Navajo Nation" under the insurance exception. *Record of the Navajo Tribal Council Minutes*, page 348, April 30, 1980.

The intent behind the insurance exception led us to conclude that sovereign immunity is waived, and the court has jurisdiction under Section 854(c), if there is evidence that the Navajo Nation was insured for plaintiff's claim when suit was filed. It is immediately after suit is filed that the court is best able to determine whether it has jurisdiction over the Navajo Nation. Mere evidence of insurance does not give the district court jurisdiction. The law requires that the plaintiff's claim be covered under the insurance policy before the court can assert jurisdiction over the Navajo Nation. See 7 N.T.C. Sec. 854(c) (1980). This is consistent with the principle that the sovereign can impose conditions upon the manner in which it can be sued. *Beers v. Arkansas*, 20 How. 527, 15 L.Ed 991 (1857); *See also The Navajo Housing Authority v. Howard Dana and Associates,* 5 Nav. R. 157 (1987); *Lee v. Johns,* 3 Nav. R. 229 (Shiprock D. Ct. 1982).

Once the court has obtained jurisdiction under the insurance exception, that jurisdiction cannot be defeated by a later insolvency of the insurance company. At least that is how we construe Section 854(c) of the 1980 Navajo Sovereign Immunity Act. Jurisdiction over the Navajo Nation is based upon a finding that the Navajo Nation was insured at the time of suit and that the insurance covered the claims presented by the plaintiff.

Jurisdiction of the court is not dependent upon the question of whether the insurance company is able to pay. This is how 7 N.T.C. Sec. 854(c) (1980), must be construed, otherwise the rights of injured claimants to have their cases heard in Navajo courts will be denied solely upon the financial irresponsibility of the Navajo Nation's insurance carrier. In addition, any other construction will defeat the very purpose for creating an insurance exception to the Navajo Nation's defense of sovereign immunity.

The expressed intent of the Navajo Tribal Council is to redress injuries caused by the Navajo Nation. We refuse to believe that this intent can be voided by the actions of third parties unconnected to the Navajo Nation, and who have no responsibility in formulating government policy for the Navajo people.

It is the responsibility of the Navajo Nation, and not the plaintiffs, to screen and hire reputable insurance companies. The Navajo Nation must not be allowed to divest the district court of jurisdiction simply because it has made a poor selection of an insurance company.

In this case, both parties agree that the Navajo Nation was insured at the time of the incidents giving rise to the suit and at the time suit was filed. We are not sure whether the plaintiffs' claims were covered by the policy then in

effect. That is a matter for the district court to decide. We hold that in this case, under 7 N.T.C. Sec. 854(c) (1980), the district court has jurisdiction over the Navajo Nation if the Navajo Nation was insured at the time suit was filed and if the insurance policy covered the claims presented by the plaintiffs.

B.

The second issue is whether the Indian Civil Rights Act (ICRA), 25 U.S.C. Sec. 1301 *et seq.* (1968), explicitly authorizes suit against the Navajo Nation in Navajo courts, under the explicit federal law exception to the Navajo Sovereign Immunity Act, 7 N.T.C. Sec. 854(a) (1980). Like the insurance exception, this issue also concerns the district court's jurisdiction over the defendant Navajo Nation.

The plaintiffs argue that the ICRA is federal law which authorizes suit against the Navajo Nation in Navajo courts pursuant to 7 N.T.C. Sec. 854(a) (1980). Furthermore, according to plaintiffs, the United States Supreme Court, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), has made it plain that Indian Tribes can be sued in tribal courts for violations of the ICRA. Plaintiffs want us to hold that the ICRA has waived the sovereign immunity of the Navajo Nation in Navajo courts. For the reasons set forth below, we will not so hold.

It has been said that Congress has plenary authority over Indian Tribes. *United States v. Kagama*, 118 U.S. 375 (1886); *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903). But our stance is that Congress has special authority relating to Indian Affairs, in fulfillment of its unique trust obligations to protect and preserve the inherent attributes of Indian tribal self-government, consistent with the sovereign status of Indian tribes as recognized by the treaties, policies, decisions, Constitution and other laws of the United States.[2] Under this special authority, Congress has the power to consent to the waiver of sovereign immunity by an Indian Tribe and in specific instances may waive a tribe's sovereign immunity.

A congressional waiver of an Indian Tribe's sovereign immunity must be unequivocally expressed and not implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, 59. Has Congress in the ICRA unequivocally expressed that the Navajo Nation's sovereign immunity be waived for suits alleging violations of the ICRA? This question has been decided by the United States Supreme Court: "[T]he provisions of [25 U.S.C] Section 1303 can hardly be read as a general waiver of the tribe's sovereign immunity. In the absence here of any unequivocal expression of contrary legislative intent, we conclude that suits against the tribe under the ICRA are barred by its sovereign immunity

2. See AMERICAN INDIAN RESOURCES INSTITUTE, INDIAN TRIBES AS SOVEREIGN GOVERNMENTS (1987).

from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59. We agree with the United States Supreme Court that the ICRA does not expressly waive the sovereign immunity of Indian Tribes, including the Navajo Nation in any court.

The plaintiffs concede that the IRCA lacks express provisions waiving an Indian Tribe's immunity from suit. Nonetheless, the plaintiffs argue that *Santa Clara Pueblo v. Martinez,* 438 U.S. 49 (1978), requires that the Navajo Nation waive its immunity in Navajo courts for suits brought against it under the ICRA. Implicit in plaintiffs' position is that the Navajo Nation should be held responsible for monetary damages if found guilty of ICRA violations.

Plaintiffs read *Santa Clara Pueblo v. Martinez, Id.,* too broadly. Nowhere in the decision did the Supreme Court say that Congress, in the ICRA, has waived the sovereign immunity of Indian Tribes in tribal courts. To the contrary, following application of the rules for congressional waiver of tribal sovereign immunity, the Supreme Court concluded that suits against Indian Tribes under the ICRA were barred by its sovereign immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59. Likewise, if the ICRA does not waive tribal sovereign immunity in federal courts, then under the same analysis, it does not waive the sovereign immunity of the Navajo Nation in Navajo courts, unless the Navajo Nation has expressed its consent to be sued under the ICRA.

Absent express congressional waiver of tribal sovereign immunity, the decision to waive the immunity of the Navajo Nation for civil rights actions rests entirely with the Navajo Nation.[3] A decision to waive sovereign immunity is an exercise of sovereignty by the Navajo Nation for the benefit of its citizens and for the good of the Navajo government. After carefully studying the ICRA, we conclude that the ICRA does not explicitly authorize suit against the Navajo Nation in Navajo courts, under Section 854(a) of the 1980 Navajo Sovereign Immunity Act.

The Navajo people are entitled to a representative and accountable Navajo Tribal Government. For this reason, important decisions having direct consequences on the Navajo tribal treasury should be made by the elected representatives of the Navajo people. If we hold that the ICRA has waived the sovereign immunity of the Navajo Nation in Navajo courts, we will be sanctioning an attack on the tribal treasury. Such decisions are best made by elected Navajo representatives after consultation with their constituents.

In addition, the funds of the Navajo Nation are not unlimited. Each year the funds maintained by the Navajo Nation for the operation of the Navajo Tribal Government is exceeded by the people's demand for more govern-

3. On December 11, 1986, the Navajo Tribal Council amended the Navajo Sovereign Immunity Act to allow for suits against the Navajo Nation for wrongful deprivation or impairment of civil rights. *Navajo Tribal Council Resolution*, CD-60-86.

mental services. IRCA suits, which result in money damages against the Navajo Nation, will only divert funds allocated for essential governmental services.[4]

Santa Clara Pueblo v. Martinez, Id., does instruct us that Indian Tribes should provide forums "to vindicate rights created by the ICRA." 436 U.S. at 65. Indian Tribes may have to amend their laws, or enact laws, which will conform to the rights created by the ICRA, because the ICRA "has the substantial and intended effect of changing the law which [tribes] are obliged to apply." 436 U.S. at 65. The Navajo courts have always been available for the enforcement of civil rights created by the ICRA and the Navajo Bill of Rights, 1 N.T.C. Sec. 1 *et seq.* (1986 amendment).[5] Enforcement has generally been through suits against tribal officials for violations of tribal laws.[6] The laws protecting the civil rights of citizens in Navajo Country have been in effect even prior to enactment of the 1968 ICRA. Navajo Bill of Rights, 1 N.T.C. Sec. 1 *et seq.* (enacted October 1, 1967). Finally, the Navajo Bill of Rights contains substantially the same rights as those found in the ICRA.

The Order of the district court on the issue of the insurance exception is reversed. The Order of the district court on the issue of the Indian Civil Rights Act is affirmed. The case is remanded to the district court for proceedings consistent with this Opinion.

4. The recent amendment to the Navajo Sovereign Immunity Act allows certain suits against the Navajo Nation for civil rights violations, and money damages, if awarded, are covered by the Navajo Nation's insurance. *Navajo Tribal Council Resolution*, CD-60-86, December 11, 1986.

5.The following is a partial list of cases in which civil rights have been enforced by the Navajo courts: *Halona v. MacDonald*, 1 Nav. R. 189 (1978); *Yazzie v. Board of Election Supervisors*, 1 Nav. R. 213 (1978); *Navajo Nation v. Browneyes*, 1 Nav. R. 213 (1978); *Deswood v. Navajo Board of Election Supervisors*, 1 Nav. R. 306 (1978); *Gudac v. Marianito*, 1 Nav. R. 385 (1978); *George v. The Navajo Tribe*, 1 Nav. R. 1 (1979); *Navajo Nation v. Bedonie*, 2 Nav. R. 131 (1979); *Nez v. Bradley*, 3 Nav. R. 126 (1982); *Help v. Silvers*, 4 Nav. R. 9 (1983); *Navajo Housing Authority v. Betsoi*, 5 Nav. R. 5 (1984); *McCabe v. Walters*, 5 Nav. R. 43 (1985); *Mustache v. The Navajo Board of Election Supervisors*, 5 Nav. 5. 115 (1987); *Chavez v. Tome*, 5 Nav. R. 183 (1987).

6. The ICRA and the Navajo Bill of Rights may also be enforced against Navajo Nation officials under the Navajo Sovereign Immunity Act. *See* 7 N.T.C. Sec. 854(d) (1980).

No. A-CV-29-87

Supreme Court of the Navajo Nation

Harold Billie, Individually and on behalf
of others similarly situated, ***Plaintiff-Appellee,***
vs.
John Abbott, as Director of the Utah
Office of Recovery Services, ***Defendant-Appellant.***
Decided October July 29, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

R. Dennis Ickes, Esq., Salt Lake City, Utah for the Appellant; Steven Boos, Esq. and Scott Groene, Esq., DNA-People's Legal Services, Mexican Hat, Utah for the Appellee.

Opinion delivered by Bluehouse, Associate Justice.

The controlling issues in these consolidated appeals are: (1) whether the appeal from the order granting a preliminary injunction is timely; and (2) whether an order denying a motion to dismiss for lack of jurisdiction is a final appealable order.[1]

The preliminary injunction enjoining the defendant, John Abbott, was signed by the district judge on August 21, 1987. The order denying Abbott's motion to dismiss for lack of jurisdiction was signed by the district judge on September 1, 1987.

According to counsel for Abbott, his secretary telephoned the district court clerk on September 18, 1987, to inquire about the date when the two orders were signed. The secretary was informed by "Rose" from the district court that both orders were signed by the judge on September 1, 1987. Apparently, Abbott relied upon these communications with "Rose" and filed two notices of appeal on October 01, 1987. The first is an appeal of

1. There are other issues presented by these appeals which we will not address. The appeals can be decided on the issues identified here.

the order granting the preliminary injunction, and the second is an appeal of the order denying the motion to dismiss.

I. Preliminary Injunction

This Court lacks jurisdiction over an appeal that is not filed within 30 days after the district judge has signed the final order. *The Navajo Tribe of Indians v. Yellowhorse, Inc.*, 5 Nav. R. 133 (1987); *Riverview Service Station v. Eddie*, 5 Nav. R. 135 (1987). In a prior case we said that "[t]he failure to file a notice of appeal within the time limits specified by statute is a jurisdictional defect and requires a dismissal by the Court." *In the Matter of Adoption of: Baby Boy Doe*, 5 Nav. R. 141 (1987). By statute, all appeals, unless otherwise provided by law, must be filed within 30 days after the district judge has signed the final order. 7 N.T.C. Sec. 801(a) (1985); Rule 8(a), NRCAP. Abbott's appeal of the order granting the preliminary injunction was filed 10 days after the time elapsed for filing the notice of appeal. We hold that this Court lacks jurisdiction over the appeal of the order granting the preliminary injunction.[2]

We are not persuaded by Abbott's argument that the appeal must be considered timely because Abbott relied upon information from Rose that the judge signed the orders on September 1, 1987. First, the Court takes judicial notice of the fact that Rose is not a clerk of the district court. Second, the court clerk is not held to a higher standard of legal knowledge than the attorney. *Tome v. Navajo Nation*, 5 Nav. R. 14 (1984). For this reason attorneys must not rely upon oral communications solicited from court staff. The law within this jurisdiction requires that an appeal must be filed based upon a written final order of the district court, and not based upon oral communications with district court clerks. The record is clear that Abbott's appeal of the order granting the preliminary injunction is late. This Court lacks jurisdiction to review that appeal on the merits.

II. Motion To Dismiss

This Court has jurisdiction "to hear appeals from *final* judgments and other *final* orders of the District Courts of the Navajo Nation. . . ." 7 N.T.C. Sec. 302 (1985). (Emphasis ours). A person can only appeal from a "*final* judgment or other *final* order of a District Court of the Navajo

2. By this holding, we do not decide whether an appeal from an order granting a preliminary injunction is interlocutory.

Nation. . . ." 7 N. T. C. Sec. 801(a) (1985). (Emphasis ours). The inquiry then is whether an order denying a motion to dismiss for lack of jurisdiction is a final order of the district court that can be appealed.

We took the opportunity to touch upon the concept of finality of district court orders in the context of appellate jurisdiction in *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98 (1986). There we recognized that a final court order results after all the substantial rights of the parties have been litigated and decided on the merits by the district court. *Chuska Energy Company, Id.* We further said that, "the entry of the final decision must preclude further proceedings in the lower tribunal." *Id.* at 102.

In effect, an order that precludes further proceedings on the merits will terminate a case. Thus, an order that terminates a case is final for purposes of appealability, even where it does not determine the merits of a case. In this case, the order denying the motion to dismiss did not terminate the case. We hold that an order denying a motion to dismiss is interlocutory and not final for purposes of appealability.

Interlocutory appeals are not allowed within the Navajo court system. *Chuska Energy Company, Id.*[3] However, certain questions of law can be certified to the appellate court for review. *Navajo Housing Authority v. Betsoi*, 5 Nav. R. 5 (1984). The denial of the motion to dismiss in this case is interlocutory and it can not be appealed.

Both appeals from the respective orders of the Window Rock District Court are dismissed for lack of jurisdiction. Further, the motion for sanctions is denied.

3. See also Orders of dismissal in *Thompson v. General Electric Credit Corporation*, 1 Nav. R. 234 (1977); *Todachine v. The Navajo Tribe*, 1 Nav. R. 245 (1977); *Pelt v. Pelt*, 2 Nav. R. 127 (1979); *Mike v. Pete*, 2 Nav. R. 129 (1979); *Sellers v. Babbitt Ford, Inc.*, 2 Nav. R. 147 (1979); *In the Matter of the Estate of: Nez*, 3 Nav. R. 15 (1980).

No. **A-CV-19-87**

Supreme Court of the Navajo Nation

Lula M. McClellan, ***Petitioner-Appellee,***

vs.

Carl R. McClellan, ***Respondent-Appellant.***

Decided November 3, 1987

OPINION

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.

[redacted]

Larry Kee Yazzie, Esq., Tuba City, Arizona for the Appellant; Gary E. LaRance, Esq., Tuba City, Arizona for the Appellee.

Opinion delivered by Tso, Chief Justice.

On September 18, 1986, Petitioner Lula McClellan filed a Petition for Dissolution of Marriage in the Tuba City District Court. On January 27, 1987, Respondent Carl R. McClellan was personally served off the Navajo Reservation by a deputy from the Coconino County Sheriff's Department. Apparently, the petitioner did not request and obtain authorization from the Tuba City District Court to serve process upon the respondent through the Coconino County Sheriff's Department.

On March 16, 1987, the petitioner filed a Motion for Default Judgment alleging that the respondent had been personally served, and despite such service, the respondent had not filed an answer to her petition. On April 16, 1987, the respondent filed a motion to dismiss the petition for lack of personal jurisdiction. The respondent alleged in his motion that service of process upon him by the sheriff's deputy was improper. The respondent's motion to dismiss was denied on April 22, 1987. The respondent appealed the order denying his motion to dismiss on May 28, 1987.

Apparently, the respondent is under the mistaken belief that by appealing the order denying the motion to dismiss, this Court would have jurisdiction to review the issue relating to service of process. This Court's appellate jurisdiction covers *final* orders, or *final* judgments, entered by the Navajo District Courts. 7 N. T. C. Sec. 302 (1985); 7 N. T. C. Sec. 801(a)

(1985). *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98 (1986).

An order denying a motion to dismiss for lack of jurisdiction is not a final order that can be appealed. *Billie v. Abbott*, 5 Nav. R. 201 (1987). Indeed, a non-final order is merely interlocutory, and within the jurisdiction of the Navajo courts, interlocutory appeals are not allowed. *Chuska Energy Company v. The Navajo Tax Commission*, 5 Nav. R. 98 (1986); *Billie v. Abbott*, 5 Nav. R. 201 (1987). Here the order denying the motion to dismiss did not terminate the case. Neither did it decide the merits of the issues between the parties.

Interlocutory appeals only promote piecemeal litigation of the case. If parties in a case were allowed to appeal each adverse order of the district court prior to final judgment, this Court would be overburdened with appeals from one case. In addition, our decision on each order appealed would unduly interfere with the orderly administration of justice in the district court. For these reasons we hold that the order denying the motion to dismiss in this case is not a final appealable order. The appeal is dismissed for lack of jurisdiction.

No. WR-CV-430-84

District Court of the Navajo Nation
Judicial District of Window Rock

Fern Ann Benally, Personal Representative of the Estate of Monica Lula Benally, *Plaintiff,*

vs.

The Navajo Nation, *et al., Defendants.*

Decided April 15, 1986

OPINION

Before Robert Yazzie, District Court Judge.

Samuel Pete, Esq., Window Rock, Arizona for the Plaintiff; Joseph Rich, Esq., Gallup, New Mexico for the Defendants.

Opinion delivered by Yazzie, District Court Judge.

I. Findings Of Fact

This case involves a claim for the wrongful death of a minor child. The allegations are that on May 7, 1984, Defendant Phillip Lee, in the course of employment with the Navajo Nation, while driving a Navajo tribal vehicle, struck and ran over a three year old child, Monica Lula Benally, who was at the time crossing a dirt road (commonly referred to as Bureau of Indian Affairs Route No. 36) located about six miles west of the Nenahnezad Boarding School within the Navajo Reservation. It is further alleged that as a result of this accident, the minor child died about one (1) hour later at the Shiprock Public Health Service Hospital, Shiprock, New Mexico.

ISSUE I: WHAT IS THE NAVAJO LAW FOR WRONGFUL DEATH ACTIONS, INVOLVING THE DEATH OF A MINOR

A wrongful death action is a lawsuit brought by or on behalf of a deceased person's beneficiaries (e.g. spouse, parent, children, etc.), alleging that death was caused by the willful or negligent act of another. *See*

Black's Law Dictionary (5th Ed.). Under Anglo common law, "the death of a human being could not be complained of as an injury." *Baker v. Barton*, 1 Campbell 493, 170 Eng. Reprint 1033 (1808); *see also* Prosser On Torts, p. 902. This rule was later altered by state statutes. Most states have allowed civil actions for wrongful death and, or survival actions by statute, allowing a decedent's heirs or personal representative to make claims for the loss of the decedent; they also sometimes allow the representative to bring claims that the decedent might have brought. The neighboring states of New Mexico, Arizona, and Utah have enacted wrongful death statutes. Although the Navajo Nation has never formally adopted either a statute to create a cause of action for wrongful death, or a survival statute, a claim for the wrongful death of a tribal member has, however, been long recognized by Navajo common law. *See Estate of Boyd Apachee*, 4 Nav. R. 178, 179-180 (Window Rock D. Ct. 1983) (defining Navajo common law to include custom, case law and matters commonly known or easily verified in recognized works on Navajo common law.).

The Anglo common law, as stated by *Baker v. Barton, Supra*, and Prosser, *Supra*, does not allow a wrongful death action, unless enacted by legislation. The Courts of the Navajo Nation are not bound by this rule of Anglo common law.

7 N.T.C. Section 204 provides that:

> [The Court has used the 1959 statute, because this action was commenced in 1984, prior to the enactment of the Judicial Reform Act of 1985.]
> (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 ordinance or customs of the Tribe, not prohibited by such Federal laws.
> (b) Where any doubt arises as to the customs and 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.

By the clear terms of Section 204(a), if there is an existing custom, then that customary law should be applied, and state law does not have application. Thus, defendant is correct that under 204(a), custom, where it exists, is held to be superior to the common law of the states.

This Court finds that Navajo common law recognizes a wrongful death action. The Navajo experts who testified about the Navajo *concepts of tort, especially recovery* of damages for wrongful death said that:

> When a Navajo dies from the careless conduct of another, the person responsible for the death pays the immediate family livestock and silver jewelry.

Defendant referred to a written source, which explained:

". . .[W]hat is expected in all cases of injuries that arise between traditional Navajos is that the person who did the injury will make a symbolic material payment for the loss that he has caused. . . ." (See *"Torts in Tribal Courts"* by Barry K. Berkson, Esq., A presentation for the National American Indian Court Judges Association in Reno, Nevada, January 28, 1970).

Plaintiff's complaint in the instant case alleges that the death of her minor child was caused by the negligence of the defendant. Under the current Navajo case law, negligence is defined as the failure to exercise the duty of care owed to the injured party, thereby proximately causing injury. *Mann v. Navajo Tribe*, 4 Nav. R. 83 (198?). Plaintiff has urged that Defendant Phillip Lee was required to meet a higher than ordinary standard of care when operating a vehicle on Navajo roads. *Navajo Tribe of Indians v. Littleman*, 1 Nav. R. 33 (1971). This Court agrees. The *Littleman* case was a criminal appeal, in which the Court of Appeals took judicial notice of the state of Navajo roads, and the need for extra care while driving, and recommended certain action be taken regarding certain safety measures in places where there are apt to be children near roadways. The defendant, therein, was found guilty for failing to exercise due care while driving a vehicle upon a roadway, after striking and killing a six year old who was crossing the highway immediately in front of defendant's truck at the time. The Court of Appeals acquitted defendant, because of insufficient evidence to sustain a finding of guilt beyond a reasonable doubt.

Considering the traffic, the road condition, and the fact that pedestrians many times walk the Navajo roads without notice, in the case at hand, Phillip Lee was under a duty to use a higher degree of care while operating the vehicle at the time.

ISSUE II: WHAT IS THE MEASURE OF DAMAGES IN A WRONGFUL DEATH OF A MINOR UNDER NAVAJO COMMON LAW

In the instant case, Plaintiff Fern Ann Benally, in her complaint for the wrongful death of her minor child, is seeking recovery for the following damages against the defendants:

1. General damages for the negligent act of defendant.
2. Special damages for funeral and burial expenses.
3. The monetary worth of the life of the deceased minor (including loss of earnings and financial support).
4. Compensation for the loss of affection, love and companionship of her deceased minor child.

5. Damages for pain and suffering experienced by the deceased minor between the time of her injury and death.

This Court does not agree with the defendant's contention that a wrongful death action is foreign to the custom and tradition of the Navajo people. Compensation for wrongful death of a human being is and always has been recognized at Navajo common law. The Navajo experts in testimony before this Court, on the issue of whether human loss from a wrongful act is compensable, agreed with the following:

When a Navajo dies from the careless conduct of another, the person responsible for the death pays the immediate family livestock and silver jewelry.
If a person dies in a wrongful death situation, the closer relative would be given sheep to relieve that person from loneliness. How many sheep will be given varies depending upon what will fix the victim's mind. One at fault will say, "I will give this for payment."

In other situations, where there is wrongful death, survivors get together and discuss what compensation should be given to make up for the wrongdoing. When a settlement is reached among the survivors and the one at fault, payment may be made by giving sheep, a belt, or even one strand of beads. Sometimes, survivors may object and demand that more should be given.

Whatever property of value is given for the wrong doing, the paying back, "Nalyeeh " would make the person in sorrow get better, feel better, regain strength, and be able to go forth again in this life.

Finally, the "Nalyeeh" (a paying back of restitution), seems to be used today mostly in connection with what would be considered civil matters, but in the past this symbolic restitution was usually all that would be required of the person who committed a criminal act, as well. Nalyeeh, traditionally, has the power to correct wrongs of any kind. . . *The law of the People-Dine' Bibee Haz' a' nii',* Volumes I-IV, Ramah High School, Ramah, New Mexico, 1972, Dan Vicenti, et al.

Regarding the wrongful death of a minor child, the expert testimony added that:

If a child died as a result of wrongful death in a situation where the minor was run over by a car, payment for funeral expenses would be expected by the immediate family.

Children are highly valued by Navajo families. Parents depend upon their children. They are resourceful in terms of future financial support and education. Youth should have full life to gain money, property and good life.

Defendants contend that the principle of Navajo torts does not result in an "intolerable burden upon all human activity" because the damages sought are not a direct monetary repayment for the loss and all of its

ramifications, but only token. Human loss cannot be fully compensated for by money. This is certainly not the case in today's Navajo world. The value and expectation of the Navajo people with respect to money have changed. For example, the value of dollars and cents, for pain and suffering of a person disabled by an accident, has become a significant consideration for damage recovery, even to a traditional Navajo person.

To be sure, money cannot replace the life of a child who dies from an accident. The Navajo experts stated what all Navajos know; compensation for loss is part of our way. It is true that the payback "nalyeeh" in the past may have been adequate if it was three horses, ten head of sheep, a belt or strand of beads. The value of such compensation may have been high yesterday. Times have changed. More Navajos work for money today. The concepts of payment have changed. The law of Navajo tort has also changed. Yesterday, wrongful death resulting from automobile accidents was unheard of. Today, deaths caused by automobile accidents are not only real, but there are numerous incidents of highway fatalities.

Payment of material goods alone is no longer adequate. In *Bryant v. Bryant*, 3 Nav. R. 194 (Shiprock D. Ct. 1981), the jury had no problem awarding money damages for the losses caused plaintiffs. There was no talk of sheep or horses in that opinion. Whether or not the award for the death of the two minors was adequate is a question this Court does not address. The Shiprock jury decided on the evidence before it. The jury in the instant case at hand will do the same.

Navajos today look to their own codes and tribal law to seek fair compensation. The Court acknowledges, as defendant pointed out, the following important point:

> The continued importance placed upon the private symbolic renumeration of injured parties as a cornerstone of Navajo justice is a factor that cannot be ignored by judges and law advocates who seriously desire that the legal institutions offer Navajo people a solution to their problems. *The Law of the People—Dine' Bibee Haz' a' nii, Id.*

The Navajo Tribal Council has ensured that an injured party be fairly compensated for the loss he or she has suffered; for the injury inflicted as the result of the act of the person at fault. 7 N.T.C. Section 701(b).

The Court finds that the notion of fair compensation today should include compensation that would be normally available anywhere a person might file a wrongful death action. It is the opinion of this court that the purpose of 7 N.T.C. Section 701(b) in light of Navajo common law discussed above, is to compensate plaintiffs in wrongful death actions for the following damages:

—Special damages, such as funeral and burial expenses, and medical expenses incurred.

—General damages for the negligent act of defendant, including (a) the sorrow,

mental anguish, pain and suffering of the plaintiffs; (b) loss of affection, love and companionship of the decedent.
—Damages for the pain and suffering of the deceased minor between the time of her injury and death.
—Damages for the monetary worth of the life of the deceased minor, including loss of earnings and financial support. *Bryant v. Bryant,* 3 Nav. R. 194 (Shiprock D. Ct. 1981), allowed the jury to determine the value of a child's life based upon their own understanding, taking into account the Navajo culture, the economy of the reservation, the usual ages of marriage, and many other things, to value a life in terms of the loss caused others.

Judgment

IT IS THEREFORE ORDERED that, as a choice of law in the instant case, the Navajo common law of tort in a wrongful death action and the measure of damages based upon the notion of fair compensation under 7 N.T.C. Section 701(b), will be applied as explained in the opinion above.

Nos. CP-CV-12-86, CP-CV-15-86

CP-CV-17-86, CP-CV-24-86, CP-CV-31-86

District Court of the Navajo Nation

Judicial District of Crownpoint

Sandoval, *et al., Plaintiffs,*

vs.

Tinian, Inc. *et al., Defendants.*

Decided July 11, 1986

OPINION

Before Robert Yazzie, District Court Judge.

Paul Fife, Esq., Albuquerque, New Mexico for the Plaintiffs; Tim F. O'Brien, Esq., Albuquerque, New Mexico for the Defendants.

Opinion delivered by Yazzie, District Court Judge.

Findings of Fact

1. Plaintiffs are Navajo Indians.
2. Defendant Tinian, Inc. is a non-Indian corporation; defendant Javen Tanner is a non-Indian.
3. These actions concern commercial transactions occurring at the defendants' primary place of business, which is the Torreon Super Mart in Torreon, New Mexico.
4. The Torreon Super Mart is located within the boundaries of the Torreon Chapter and within Township 18 North, Range 4 West N.M. P.M.
5. The southernmost portion of the Torreon Super Mart building; a strip 8 to 10 feet wide, is located on Navajo Indian Allotment No. 011093.
6. Customers of the Torreon Super Mart park in an area south of the building; this area is also located on Allotment 011093.
7. The Torreon Super Mart's sewage lagoon is located on Allotment 011093.
8. The population within the boundaries of the Torreon Chapter is 81.7 percent Indian.

9. Approximately 80 percent of the Torreon Super Mart's customers are Navajo Indians.
10. All of the land within Township 18 North, Range 4 West is either owned by Navajo Indians or the Navajo Tribe, or leased to Navajo Indians, except for ¾ of a section, which is partially owned and partially leased by Tinian, Inc.; in other words, almost 98 percent of the land within the township is owned or leased by Navajo Indians.
11. The Torreon Chapter is a part of the Eastern Navajo Agency and elects a representative to the Navajo Tribal Council.
12. Grazing on federal lands in the Torreon Chapter is controlled by the District 15 Land Board, an agency of the Navajo Tribe, through a cooperative agreement between the tribe, the Bureau of Indian Affairs, and the Bureau of Land Management.
13. The Navajo Police Department in Crownpoint provides law enforcement services to the Torreon community.
14. Medical services in Torreon are provided by a clinic operated under contract with the Indian Health Service.
15. The Bureau of Indian Affairs operates a school in Torreon.
16. The water system in Torreon was built by the Indian Health Service and is maintained by the Navajo Tribe; the Torreon Super Mart receives its water from that system and pays no fees for the use of the water or the maintenance of the system.
17. The Torreon Super Mart is not located within the boundaries of the Navajo Treaty Reservation or the Executive Order 709 Reservation.

Opinion and Order

The facts of this case are as set out in the findings of fact made by this court. *supra*. The questions which must be answered based on those facts and the applicable law are as follows: (A) Does this court have jurisdiction over the defendants in these cases and over the subject matter of the lawsuits; (B) Does this court have the power to issue declaratory judgments, and if not, is that cause to dismiss these lawsuits?; and (C) Does the fact that the plaintiffs have requested relief based on state law mandate the dismissal of these actions? Each of these questions will be addressed in this opinion.

JURISDICTION

Defendants have claimed that this court does not have personal jurisdiction over them or subject matter jurisdiction over the transactions which

are the basis for the plaintiffs' complaints. Defendants argue that they are a non-Indian corporation and a non-Indian individual doing business outside the boundaries of the Navajo Reservation, and that the transactions occurred outside those boundaries. It is true that the Torreon Super Mart, defendants' principal place of business, is located in the off-reservation portion of what is known as Navajo Indian Country. However, as the findings of fact show, the Torreon Super Mart is located within the Torreon Chapter, which itself is part of the Eastern Navajo Agency. The Super Mart is unconnected to Navajo territory, as would be an enterprise operating in Albuquerque. This court must, then, analyze the facts of these cases and of the situation in Torreon to determine whether the court's exercise of jurisdiction over these cases is proper.

A. SUBJECT MATTER JURISDICTION

It should be noted at the outset that if the Navajo Tribal Council has not acted to assert jurisdiction over the Torreon Chapter and transactions occurring therein, this court would have no such jurisdiction. However, the council has done so. 7 N.T.C. §253 defines the jurisdiction of the trial courts of the Navajo Nation, in pertinent part, as follows: "(2) Civil Causes of Action. . . . All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur in Navajo Indian Country." This provision covers any defendant, including a non-Indian, and all transactions entered into in Navajo Indian Country. 7 N.T.C. §254, as amended in 1985 by Tribal Council Resolution CJY-57-85, then delineates the areas that are included in Navajo Indian Country: "all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo communities, all Navajo Indian allotments. . . ." Since it is undisputed that Torreon is within the Eastern Navajo Agency, it is clearly within the ambit of this definition of Navajo Indian Country. Therefore, the Navajo Nation has granted this court jurisdiction to hear civil cases where the defendant resides in or has caused an act to occur in Torreon. This court must now consider whether that grant of jurisdiction was proper.

The Navajo Tribal Court of Appeals has upheld the validity of a similar jurisdictional resolution which defined the territorial jurisdiction of the tribe to include the Eastern Navajo Agency and Land Management Districts 15, 16 and 19 (excluding Gallup). *Navajo Tribe of Indians v. Holyan*, 1 Nav. R. 78 (1973). The *Holyan* court noted that the tribal council had passed its resolution, CMY-28-70, after considering evidence regarding land status and population in the Eastern Navajo Agency. That resolution stated that the entire Eastern Navajo Agency is a dependent Indian community and, thus, is part of Navajo Indian Country. The

Holyan court held that the facts cited by the Council were a sufficient basis for that determination. In so holding, the court considered the definition of Indian Country, which is found at 18 U.S.C. §1151. Indian Country under that statute includes reservations, dependent Indian communities and allotments. In considering whether the Eastern Navajo Agency met the requirements of that definition, the court applied the analysis of "dependent Indian community" found in *U.S. v. Martine*, 442 F. 2d 1022 (10th Cir. 1971), which is the authoritative case on the question. The 10th Circuit in *Martine* held that three factors should be considered when deciding whether an area is a dependent Indian community: the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and the federal government, and the established practice of governmental agencies toward the area. The *Holyan* court analyzed each of these factors with regard to the Eastern Navajo Agency and held that the agency is indeed a dependent Indian community. Under *Holyan*, then, which is binding precedent on this court, Torreon is a dependent Indian community and part of Navajo Indian Country.

In addition, an analysis of the facts presented in this case shows that there could be no question that Torreon is a dependent Indian community under the *Martine* and *Holyan* analysis. Torreon is a Navajo community with a population that is 81.7 percent Navajo. Within the township, in which the defendants' place of business is located, almost 98 percent of the land is owned or leased by the Navajo Tribe. The relationship of the inhabitants of Torreon to the tribal and federal governments is the same as the relationship between those governments and reservation dwellers. The tribal and federal governments provide police protection, medical services, water system maintenance, schooling, and other services to Torreon's inhabitants. Finally, federal and tribal agencies have an established practice of treating Torreon as a Navajo community. Torreon sends a representative to the Navajo Tribal Council; the Bureau of Land Management and the Bureau of Indian Affairs have entered into an agreement with the Navajo Tribe so that the tribe's land board controls grazing on federal lands within the Torreon community. Consideration of all of the above factors leads inescapably to the conclusion that Torreon is a dependent Indian community and is part of Navajo Indian Country.

Defendants argue that 18 U.S.C. §1151 is a criminal statute and should not be applied to civil cases. Defendants would limit this court's jurisdiction in civil matters involving non-Indians to cases arising on the reservation. These arguments are without merit. There is no reasonable basis for a holding that this court's territorial jurisdiction is more limited in civil cases than in criminal cases. In addition, the Navajo Tribal Council has mandated that this court's jurisdiction be coextensive with the Indian Country definition found in 18 U.S.C. §1151. Its power to do so is con-

firmed by statements made by the United State Supreme Court and other courts. In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the Supreme Court stated that "While §1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." 420 U.S. at 427, note 2 (citations omitted). The Federal District Court of Utah has stated that it is well settled that the definition applies to questions of civil jurisdiction. *Ute Indian Tribe v. Utah*, 521 F. Supp. 1072 (D. Utah 1981).

The Tribal Council's mandate and the statements made in the above cases recognize that the same important policy considerations, which require that tribal courts have jurisdiction on the reservation, apply to situations involving off-reservation dependent Indian communities and allotments. A dependent Navajo community such as Torreon will have a population which is mostly Navajo; the Navajo Tribe will provide many services to that population; and that population will have a voice in the way the tribe is run. It is crucial that the tribal courts have jurisdiction to hear disputes between the members of that Navajo population and businesses, Indian or non-Indian, who would locate within the community and engage in commerce with that population. *Cf. Williams v. Lee,* 358 U.S. 217 (1959), and *Kennerly v. District Court,* 400 U.S. 423 (1971), in which non-Indian businesses located within Indian Country were required to sue in tribal courts instead of state courts to resolve disputes with Indians.

Defendants argue that this court does not have jurisdiction over these cases because the transactions, which are the subjects of the lawsuits, occurred on fee land and involved a non-Indian entity. It is difficult to determine whether the transactions did occur on fee land because, as defendants have admitted, the south portion of the Torreon Super Mart building and the area where the customers park, are located on a Navajo Indian allotment. This court notes that defendants' claim that the parking area is located on a highway right-of-way running through the allotment; this court also notes, however, that the 18 U.S.C. definition of Indian Country includes all rights-of-way running through allotments.) Plaintiffs would not have had access to defendants' store if the allotment had not been used by defendants; therefore the allotment certainly contributed to the consummation of the transactions. The actual signing of the contracts could have occurred on defendants' fee land or on the allotment; this court cannot say because no evidence was introduced to shed light on that subject. Fortunately, it is not necessary for this court to determine the answer to that question. Defendants' fee land is located in the middle of a dependent Navajo community. Defendants are therefore in the same position as an owner of fee land located within a reservation. The United States Supreme Court has held that a tribe retains inherent sovereign power to

exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. "A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States,* 450 U.S. 544 at 565 (1981). *Montana's* language applies to reservations because the case involved fee land within a reservation; however, the same analysis applies to land holders in a dependent Indian community. Defendants have located in the midst of a heavily Navajo community to do business with that community; important portions of the store's facilities are located on Navajo land; approximately 80 percent of the store's customers are Navajo. Under those facts this court certainly has jurisdiction to hear disputes between defendants and Navajo plaintiffs who have done business at defendants' place of business.

Defendants have cited two cases for the proposition that this court's jurisdiction over non-Indians ends at the reservation border: *GMAC v. Chischilly,* 96 N.M. 113, 628 P. 2d 683 (1981), and *UNC Resources Inc. v. Benally,* 514 F. Supp. 358 (D.N.M. 1981). This court notes that neither of these cases concerned consensual transactions between the parties occurring within Navajo Indian Country; that the language in each directly conflicts with the United States Supreme Court's language in the *DeCoteau* case; and that both cases contain unnecessarily broad language which is extremely restrictive of tribal court jurisdiction. This court declines to follow those cases.

B. PERSONAL JURISDICTION

Defendants have argued that this court does not have personal jurisdiction over them because they are non-Indians operating a business on fee land outside the reservation. The discussion of subject matter jurisdiction, however, has shown that defendants' business is located within a dependent Navajo community, deals primarily with Navajos, and avails itself of the use of a portion of a Navajo allotment. These are substantial contacts with members of the Navajo Tribe, and with property lying within the jurisdiction of the tribe; these justify the exertion of this court's jurisdiction over defendants. *International Shoe v. Washington,* 326 U.S. 310 (1945); *Navajo Tribe v. Orlando Helicopter Airways, Inc.*, 1 Nav. R. 40 (1972) (holding that when a non-Indian enters Indian land for the purpose of doing business with Indians, he may very well be said to have submitted to the jurisdiction of the tribal courts); *Thompson and Thompson v. Wayne Lovelady's Frontier Ford*, 1 Nav. R. 282 (Shiprock D. Ct. 1978). This court has personal jurisdiction over the defendants.

Declaratory Judgment Issue

Defendants urge this court to dismiss these cases because one remedy which the plaintiffs have requested is a declaratory judgment. However, declaratory judgments are not the only relief the plaintiffs request; they also request money damages. Even if it were true that this court does not have the power to issue declaratory judgments, the proper remedy would be to strike plaintiffs' requests for such judgments, but hear their claims for money damages. The question of this court's power to issue declaratory judgments is not a jurisdictional question, but rather a question of whether plaintiffs have failed to state a claim for which relief can be granted. Plaintiffs have certainly done so by stating a claim for money damages.

In any event, this court holds that it does have the power to grant declaratory judgments. 7 N.T.C. §253, which is the statutory grant of jurisdiction to the Navajo Tribe's trial courts, states that this court shall have jurisdiction over *all* civil actions in which the defendant resides in Navajo Indian Country or causes an action to occur in Navajo Indian Country. An action for a declaratory judgment is a civil action and this court, therefore, has the power to issue such judgments. In addition, under 7 N.T.C. §204, this court can apply the federal Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, if there is some question over whether "all civil actions" includes actions for declaratory judgments. Defendants' motion to dismiss based on the fact that one form of relief requested in these cases is a declaratory judgment is denied.

Application of State Law

Defendants have also moved to dismiss these lawsuits because plaintiffs are requesting that this court enforce a New Mexico licensing law and a New Mexico consumer protection statute against these non-Indian defendants. Defendants contend that since the relief requested is granted by state law, the state courts are the proper forum to hear these cases. This court cannot accept the proposition for several reasons. First, there is some doubt about whether a New Mexico court would have jurisdiction over these cases; this court's jurisdiction could preclude state court jurisdiction. *See e.g.*, Cohen's *Handbook of Federal Indian Law*, at 342, 355 (1982 ed.), stating that where a tribe has asserted jurisdiction over non-Indian defendants, that jurisdiction may be exclusive. If this court declined to accept jurisdiction, then, plaintiffs could be left without a forum. Second, this court certainly has the power to apply state law to a case, if the facts warrant it, and the state law has not been preempted by federal or tribal law. 7

N.T.C. §204. Therefore, plaintiffs have stated a claim upon which relief could be granted, and their lawsuits should not be dismissed without affording them an opportunity to present evidence to show why state law should apply to these cases. This court could ultimately decide not to apply such law, but that determination should await a hearing on the merits, because it will depend on the nature of the transactions and the existence of federal or tribal law applicable to those transactions. Finally, this court has decided that it is a proper forum in which to hear disputes between defendants and members of the Navajo Tribe. This decision is proper, because the transactions in which defendants and Navajos such as plaintiffs engage certainly affect the welfare of members of the Navajo Tribe. Cf. *Babbitt Ford v. Navajo Tribe*, 710 F. 2d 587 (9th Cr. 1983), *cert, denied,* 104 S. Ct. 1707 (1984). Since this court is the appropriate forum to hear these cases, and it has the power to grant the relief requested by plaintiffs, the motion to dismiss will be denied.

Order

For all of the foregoing reasons, defendants' motion to dismiss these cases is hereby denied.

No. WR-CV-313-85

District Court of the Navajo Nation
Judicial District of Window Rock

Harriet Tracy, *Plaintiff,*
vs.
Peterson Yazzie, *et al., Defendants.*
Decided September 16, 1986

OPINION

Before Robert Yazzie, District Court Judge.

Leonard Tsosie, Esq., Crownpoint, New Mexico for the Plaintiff; Stephen Verkamp, Esq., Flagstaff, Arizona for the Defendants.

Opinion delivered by Yazzie, District Court Judge.

The above-entitled matter coming on defendants' *Motion to Dismiss or Alternatively Elect a Forum* with plaintiff responding to said motion; the court having heard the arguments of the counsels, and being fully aware within the premises, enters the following OPINION and ORDER:

Opinion

Plaintiff filed her petition in this court seeking damages against defendants, who have been sued in their capacity as employees of the State of Arizona, and in their individual capacity. Neither the State of Arizona nor the Arizona Department of Economic Security have been named as party defendants.

Defendants argue that there is simply no basis for the Navajo Nation court to assert jurisdiction. This court finds that such is not the case. It is admitted that all parties to this action are members of the Navajo Tribe of Indians, and that the alleged incident(s) complained of happened in Window Rock, Arizona, upon the Navajo Indian Reservation. By authority of 7 N.T.C. §253(3), and the resolution of the Navajo Tribal Council, passed on July 25, 1985 (Resolution No. CJY-57-85), this court clearly and very plainly has jurisdiction. The jurisdiction of this court is further reinforced by the rulings of the United States Supreme Court in *McClanahan v. Ari-*

zona Tax Commission, 411 U.S. 164, 36 L. Ed. 2d 129, 93 S. Ct. 1257 (1973); *Williams v. Lee*, 358 U.S. 217, 3 L.Ed.2d 251, 79 S. Ct. 269 (1959). Both, *McClanahan* and *Williams*, answer the question that the Navajo Nation court has jurisdiction, and not the Arizona court, whenever causes of action arise on the Navajo Indian Reservation.

As to whether the Navajo Nation court should entertain actions against the state of Arizona; this has been answered in the Navajo Court of Appeals (now Navajo Supreme Court) ruling in *Hubbard v. Chinle School District, et. al.*, 3 Nav. R. 167 (1982). *Hubbard* involved a suit by Arizona state school district employees against the Chinle school district in Chinle District Court. The district court ruled that it had jurisdiction, but exercised discretion under the doctrine of comity and declined jurisdiction. On appeal, Navajo Nation Court of Appeals ruled that Navajo Nation courts do indeed have jurisdiction over suits against a foreign sovereign, using international law as the basis for its rationale. Accordingly, the appeals court ruled that the State of Arizona is a foreign government and it should be recognized as such. The jurisdiction of Navajo Nation courts is inherent and existed prior to the creation of the State of Arizona.

This court is being asked by plaintiff to keep this matter in this court. The court agrees. The Navajo Nation has laws to compensate injured parties for the loss they have suffered.

Finally, defendants provide a lengthy argument that the eleventh amendment to the United States Constitution bars suit in federal courts and Indian courts by private citizens against a state, and that this bar cannot be overcome by naming an individual state official in lieu of the state. The eleventh amendment to the United States Constitution states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign States.

The clear reading of the eleventh amendment to the United States Constitution says nothing about prohibiting courts of Indian Nations, like Navajo Nation courts, from entertaining lawsuits against states like the State of Arizona.

Further, it is has been held in *Talton v. Mayes*, 163 U.S. 376, 16 S. Ct. 986, 41 L.Ed. 196 (1895); and *Native American Church v. Navajo Tribal Council*, 272 F. 2d 131 (10th. 1959), that the first and fifth amendment, respectively, do not apply to Indian Nations without a congressional enactment applying the amendments to Indian Nations. Since the United States Congress has never enacted a law to apply the eleventh amendment, and by the reasoning in *Talton* and *Native American Church v. Navajo Tribal Council, Id.*, this court rules that the eleventh amendment does not apply to prohibit this court from entertaining an action against the State of Arizona or its subdivisions.

Order

IT IS THEREFORE ORDERED that the *Motion to Dismiss or Alternatively Elect a Forum* is hereby denied.

No. CP-CV-100-84

District Court of the Navajo Nation
Judicial District of Crownpoint

Herman Cadman, *Plaintiff,*
vs.
Harry Hubbard, *et al., Defendants.*
Decided September 17, 1986

OPINION

Before Robert Yazzie, District Court Judge.

Robert Ericson, Esq. Fort Defiance, Arizona for the Plaintiff; Joseph Rich, Esq., Gallup, New Mexico for the Defendants.

Opinion delivered by Yazzie, District Court Judge.

I. Findings of Fact

1. This is a negligence action arising from an automobile collision. The accident occurred February 4, 1983, at 3.5 miles west of the turnoff to Standing Rock, New Mexico, on Navajo Route 9.
2. The weather conditions were cold and snowy. The road surface on Route 9 where the collision occurred, was icy. The road is a two-lane highway.
3. Between 4 and 5 p.m., on February 4th, the Plaintiff, Herman Cadman, was driving a 1980 pickup truck on Route 9, traveling west towards Twin Lakes, from Crownpoint, New Mexico.
4. On that same day the Defendant, Harry Hubbard, was also driving a vehicle owned by the Navajo Nation. He was traveling eastbound on Route 9, following a vehicle owned by the witness, Edison Harland.
5. Both the witnesses, Edison Harland, and Defendant Harry Hubbard, met the plaintiff's vehicle as they were travelling eastbound in the same direction on Route 9.
6. As the plaintiff's vehicle approached the defendant's and witness' vehicles, Defendant Hubbard tried to pass witness Harland's vehicle. In doing so, defendant entered into the plaintiff's lane of traffic where he encountered icy and unsafe road conditions.

7. At the same time, the Plaintiff, Herman Cadman was driving at fifty (50) miles per hour on the road surface.
8. When Plaintiff Cadman approached the point of collision, he saw the two vehicles approaching, and the defendant's vehicle attempting to pass Harland's vehicle.
9. Plaintiff Cadman immediately pumped his brakes. He skidded on the road surface into the first on-coming vehicle, Edison Harland's truck. A collision resulted.
10. The vehicle driven by Defendant Hubbard was not involved in the collision itself. Neither Defendant Hubbard nor the Navajo Nation suffered any damages.
11. As the result of the accident, the plaintiff sustained injuries to his spine and ankle. He can walk no more than three (3) blocks without severe discomfort. He suffers pain after any prolonged time of sitting. He cannot lift heavy objects.
12. Both the plaintiff and Dr. Harry Bishara, a witness for the plaintiff, testified that Herman Cadman cannot return to work in his present condition.

II. Conclusions of Law

A. LIABILITY

Given the facts in this case, liability is clear. Both plaintiff and defendant have a duty of care to drive the road surface safely. This duty was breached by the defendant. "But for" Defendant Hubbard's attempt to pass, the plaintiff's vehicle would not have skidded or collided with the vehicle of Edison Harland. Defendent Hubbard was careless by creating a situation that caused the collision. This was a direct and proximate cause of plaintiff's injuries.

The Plaintiff, Herman Cadman, on the other hand, has the same duty of care as the defendant regarding the road conditions on the February 4th accident. Plaintiff Cadman's speed, at (50) miles per hour, on the icy road is not what a reasonable person would travel under such road conditions. He should have slowed down to accommodate the road conditions. Driving at (50) miles per hour was excessive under those road conditions.

B. DAMAGES

As a result of the accident, Plaintiff, Herman Cadman suffered these damages:

1. Pain and suffering

The plaintiff suffered pain for 1,106 days; from the time he was released from Indian Health Service Hospital in Gallup, New Mexico, to the date of trial, April 2, 1986. Plaintiff will be fairly compensated for pain and suffering at $10.00 per day. This adds to $11,060.00 for 1,106 days at $10.00 per day. There is no evidence offered on future pain and suffering.

2. Emotional Distress

Plaintiff testified that he can no longer engage in a number of activities, both recreational and familial. As a result of the accident, he cannot run anymore. He is not able to lift heavy objects nor do any manual labor. He cannot play baseball or basketball like he did before his injury. This causes his extreme emotional distress. The reasonable value for such lost capabilities is $8,000.00.

3. Loss of Income

The plaintiff was employed shortly before the accident, earning $12,000.00 per year. The evidence shows that plaintiff will not obtain gainful employment for five (5) years from the date of the accident. The plaintiff will suffer $60,000.00 in lost earnings. There is no other evidence offered on future loss of income.

This Court finds that the plaintiff suffered total damages of $79,060.00. As stated above, both the plaintiff and defendant were negligent. Therefore, plaintiff's damages must be apportioned according to his relative fault in causing the accident. 7 N.T.C. §701(d).

C. COMPARATIVE NEGLIGENCE

This Court will utilize the doctrine of comparative negligence to determine how damages will be apportioned. Reviewing the doctrine of comparative negligence, and using the briefs submitted on the issue, this Court will determine the degree of fault of each party and apportion damages accordingly.

Comparative negligence developed under anglo law to replace the old and harsh law of contributory negligence. The contributory negligence theory totally barred a plaintiff from any recovery, even if he or she was only slightly at fault. Most courts, including New Mexico and Arizona state courts, have rejected the contributory negligence theory, and have adopted the comparative negligence doctrine.

Comparative negligence allows the plaintiff to recover even if his or her negligence contributed to the accident. The finder of fact will determine both the plaintiff's and defendant's percentage of fault in causing the acci-

dent. Then the plaintiff's damages will be reduced by his or her degree of fault, but will not necessarily be eliminated.

Comparative negligence does not exist at Navajo common law. But the Navajo Tribal Council has adopted 7 N.T.C. §701(d), which provides:

> Where the injury was inflicted as the result of accident, or where both the plaintiff and the defendant were at fault, the judgment shall compensate the injured party for a reasonable part of the loss he has suffered. *(See also Tribal Council Resolution* CJA-1059 §1).

Does 7 N.T.C §701(d) embrace a concept akin to comparative negligence? There is no Navajo case law that interprets 7 N.T.C. §701(d), but it is apparent from the language of 7 N.T.C. §701(d), that comparative negligence is the law of the Navajo Nation, rather than contributory negligence. 7 N.T.C. §701(d) is a comparative negligence statute, because it says that even where the plaintiff and defendant are both at fault in an accident, the injured party shall be compensated for the loss he suffered on a reasonable basis. The question still remains how this Court, under 7 N.T.C. §701(d), will decide to reasonably compensate the injured plaintiff at hand, taking into account his percentage of fault. 7 N.T.C §701(d) provides no guidance in assessing a damage award under the comparative fault doctrine. In the absence of Navajo interpretation, this Court may look to state court interpretations of comparative negligence. 7 N.T.C §204(c).

As explained by the parties' briefs, there are basically two forms of comparative fault in the state courts; the "pure" form and the "modified" form. *See* Goldberg, *Judicial Adoption of Comparative Fault in New Mexico: The Time is At Hand*, 10 N.M. L. Rev. 1, 10-12 (1980). The "pure" form of comparative fault simply compares the respective fault of the plaintiff and defendant. If the plaintiff shares some fault, his damages are adjusted to reflect the degree of his fault. The actual degree of the plaintiff's own fault would not, in and of itself, bar his recovery for damages. The degree of fault would rather, "reduce his recovery of total damages suffered in an amount equal to his degree of fault. . . ." *Scott v. Rizzo*, 96 N.M. 682, 634 P. 2d 1234 at 1241 (1981). For example, a fifty percent (50%) negligent plaintiff will recover (50%) of his damages, or a sixty percent (60%) negligent plaintiff, will recover forty percent (40%) of his damages. The only circumstances in which a careless plaintiff will not recover at all are:

> Where his own negligence, or his carelessness coupled with the carelessness of others, whom are not defendants, constitutes the "sole legal cause" of his damages, *cf. Armstrong v. Industrial Etc. and Equip. Service*, 97 N.M. App. 272, 639 P.2d 81 (1981); and where the defendant's fault adjusted damages, raised in a counter-claim equal or exceed the plaintiff's fault adjusted damages. *Scott v. Rizzo, supra,* 634 P.2d at 1243.

Under the "modified" form of comparative fault, on the other hand, a plaintiff who is equally, or more, at fault than a defendant in an accident will recover nothing, regardless of the injuries he has suffered. In other words, if a plaintiff is found to be fifty percent (50%) or more negligent than the defendant, the plaintiff will be barred from recovering any damages.

What form of comparative fault would serve as a practical rule in this case at hand; the "pure" or the "modified" form? It is the position of this Court that "pure" comparative fault will be applied. The "pure" form is most fitting to the interpretation of 7 N.T.C. §701(d) because:

1. The purpose of 7 N.T.C §701(d) is to reasonably compensate the injured party who was also at fault. The statute fixes no percentage of fault that eliminates the right to compensation. The statute by its very term is a "pure" comparative negligence statute. It is not a "modified" comparative negligence statute.

2. In compensating the injured party on a comparative fault basis, 7 N.T.C. §701(d) does not fix any percentage barring recovery. The intent of the Navajo Tribal Council, in adopting this law, was merely to provide reasonable compensation. The language of the statute was constructed to accomplish that very purpose. To interpret the statute otherwise would defeat the goal of 7 N.T.C. §701(d).

3. Plaintiff is correct in that "modified" comparative negligence does retain some aspect of contributory negligence. If 7 N.T.C §701(d) were to retain part of the all-or-nothing approach of contributory negligence, then that statute would be properly interpreted as the "modified" form of negligence. This is the position of the defendant. That is not the case. This Court agrees with the view adopted in *Li v. Yellow Cab Co.,* 13 Cal. 3d 804, 827-28, 532 P.2d 1226, 1242-43 (1975), that "the modified system simply shifts the lottery aspects of the contributory negligence rule to a different ground. . . ." *Id.* In effect "such a rule distorts the very principle it recognizes, i.e., that persons are responsible for their acts to the extent their fault contributes to an injurious result." *Id.*

4. The Navajo traditional notion of compensating the victims is consistent with 7 N.T.C. §701(d). Navajo traditional experts testified in the wrongful death case of *Fern Ann Benally v. The Navajo Nation, et al., 5* Nav. R. 209 (1986, Window Rock Dist. Ct.) that compensating the victims for their loss is the Navajo way.

The facts are that Plaintiff, Herman Cadman, suffered $79,060.00 in total damages, and that plaintiff and Defendant, Harry Hubbard, shared fault for the accident, which produced Plaintiff Cadman's damages. The pure comparative fault, under 7 N.T.C. §701(d), requires:

1. Fixing Plaintiff Cadman's degree of fault;
2. Fixing Defendant Hubbard's degree of fault;

and

3. Applying the percentage of Plaintiff Cadman's fault to his total damages. The result produces the amount to deduct from Plaintiff Cadman's $79,060.00 in damages.

This Court finds that Plaintiff, Herman Cadman, was 50% at fault in causing the collision and the Defendant, Harry Hubbard, was also 50% at fault.

The damages is determined as follows:

Total damages—$79,060.00
Less 50% of $79,060.00 = $39,530.00
Damage award—$39,530.00

It is therefore ORDERED that defendants pay the Plaintiff, Herman Cadman, $39,530.00 in damages.

No. WR-CV-157-84

District Court of the Navajo Nation
Judicial District of Window Rock

In the Matter of the Estate of:
Joe Thomas.
Decided December 12, 1986

OPINION

Before Robert Yazzie, District Court Judge.

Wesley Atakai, Esq., Window Rock, Arizona for the Petitioner-Administratrix; Samuel Pete, Esq., Window Rock, Arizona for the Claimants.

Opinion delivered by Yazzie, District Court Judge.

Findings of Fact

1. This is a Probate Proceeding.
2. Joe Thomas, C#60,179 (hereinafter referred to as decedent), died without a written will on February 26, 1984.
3. The decedent was married to one Yilnabah Thomas, who predeceased him on April 11, 1983.
4. The following individuals are heirs of the estate:
   A. Art Lee Thomas, C#61,730
   B. Mary T. Silversmith, C#60,182
   C. Mary Cowboy, C#60,973
   D. Annie James, C#61,403
   E. Ray Thomas, C#51,463
   F. Mary T. Six, C# (not known)
   G. Dorothy James, C# (not known)
5. The decedent and his wife had numerous jewelry, household furniture, and valuable household items; all of which were equally distributed among the seven (7) heirs named above.
6. The sole remaining issue is the distribution of one (1) Livestock Grazing Permit, No. #6947, issued to decedent Joe Thomas in District #18 for one-hundred and ninety-three (193) sheep units.

7. Dorothy James, Mary T. Silversmith, Mary Cowboy, and Mary T. Six are asking this court to equally divide the grazing permit among all six (6) heirs.

8. Ray Thomas and Art Lee Thomas claim that decedent orally devised his grazing permit to them. This was done in the presence of Ray Thomas. Other heirs were not present when decedent orally devised the permit.

9. Annie James agrees that decedent's grazing pemit be awarded to Art Lee Thomas and Ray Thomas in equal shares.

10. Ray Thomas and Art Lee Thomas testified that they actually lived in the same camp or household of the decedent prior to his death. They provided constant care to their deceased father by providing him with firewood, domestic water, livestock feed, and food. Other heirs resided elsewhere and did not live at decedent's home prior to his death.

11. Ray Thomas and Art Lee Thomas filed a claim against the estate asking this court to recognize and approve of decedent's oral will.

Opinion

ISSUE: DID DECEDENT JOE THOMAS SATISFY ALL THE REQUIREMENTS IN MAKING AN ORAL WILL?

Claimants, Ray Thomas and Art Lee Thomas, testified that decedent orally devised his grazing permit to them. This was done in their presence. Other heirs were not present when decedent devised the permit. Was the oral will valid under Navajo law?

In the case of *In Re Estate of Chisney Benally,* 1 Nav. R. 219 (1978), a Navajo cannot make an oral will *unless* all of the members of his immediate family are present and agree. In the instant case, all the seven (7) heirs of decedent's estate were not present at the time decedent made his oral will. Is this valid? *In Re Estate of Lee,* 1 Nav. R. 27 (1971), held that an oral will was invalid, because the surviving wife and children were not present when decedent made the alleged oral will. This requirement, however, was limited in *Benally, supra,* in that only members of decedent's immediate family are to be present.

In *Benally, supra,* "immediate family" means those related to decedent by blood ties, adoption or marriage, *and they must be living in the same household* with decedent at the time he makes an oral will. Blood relation alone does not make one a member of the immediate family. Therefore, "immediate family" is clearly defined in *Benally* to include members of the same household who are bound by ties of relationship to decedent.

In the instant case, other than Ray Thomas and Art Lee Thomas, all of

the heirs did not live with decedent when he died. For purposes of an oral will, they are not members of the immediate family. On the other hand, claimants, Ray Thomas and Art Lee Thomas, did live with the decedent when he died. Decedent made the oral will in the presence of his immediate family, namely Ray Thomas and Art Lee Thomas. Both claimants agreed to honor the will after their father's death. The oral will, by which decedent devised his grazing permit to the two claimants, is therefore a valid will. The requirements as set forth in *Benally, supra*, have been met.

It might be argued that Art Lee Thomas and Ray Thomas, as parties against the estate, cannot be permitted to testify to statements made by decedent regarding his oral will. This was adopted as a general rule in *In Re Estate of Lee, supra*, that any testimony of a party relating to his claim cannot be considered in a probate proceeding. In a later case of *In Re Estate of Benally, supra*, the Supreme Court declined to impose that rule. The Court held that the effect of not allowing decedent's immediate family to testify to an existing oral will would invalidate all oral wills. The making of oral wills is a long standing Navajo custom. Oral wills help avoid hardship for the Navajo people, because many Navajos cannot write, cannot afford to have an attorney write a will, and do not understand the concept of a written will. It is important that an alternate method be available by which a person may devise his property. *In Re Estate of Benally, supra.*

The counsels of record also were directed to address whether a grazing permit could be divided and its use transferred to another grazing district. Since the first issue properly disposes of this case, the second issue need not be addressed.

Pursuant to the foregoing opinion, it is ORDERED, ADJUDGED and DECREED that:

1. The proposed distribution of the grazing permit, No. 6947 of decedent, Joe Thomas, C#60,179, is hereby granted.
2. The Livestock Grazing Permit No. 6947, in Land Management District #18, containing one-hundred and ninety-three (193) sheep units, is hereby awarded to RAY THOMAS and ART LEE THOMAS, on a joint undivided basis.
3. The Branch of Land Operations and the District #18 Grazing Committee are hereby required to re-issue said Grazing Permit to RAY THOMAS and ART LEE THOMAS, jointly and on an undivided basis.
4. The said Grazing Permit shall not be transferred to another Land Management District; as prohibited by applicable law.
5. The Administratrix is hereby relieved of her legal duties and responsibilities in this estate.

No. WR-CV-178-84

District Court of the Navajo Nation
Judicial District of Window Rock

Navajo Tribe of Indians, *Plaintiff,*
vs.
Jane Yellowhorse Jones and
Dennis Jones, *et al., Defendants..*
Decided December 15, 1986

OPINION

Before Robert Yazzie, District Court Judge.

Donna C. Chavez, Esq. and Elouise Chicharello, Esq., Navajo Nation Department of Justice, Window Rock, Arizona for the Plaintiff; Robert J. Wilson, Esq., Gallup, New Mexico and John Yellowhorse, Esq., Houck, Arizona for the Defendants.

Opinion delivered by Yazzie, District Court Judge.

Statement of the Case

This action involves a suit on four separate claims against the defendants for damages for: Breach of Contract, Breach of Bailment / Conversion, Negligence, and Fraud. These four claims arise from a management contract entered into in 1982, between the Navajo Nation and Yellowhorse, Inc., to operate an arts and crafts purchasing and marketing program to benefit individual Navajo artisans, thereby relieving some of the unemployment problems on the Navajo Reservation.

I. Findings of Fact
Parties

1. Plaintiff, the Navajo Nation, is a federally recognized Indian tribe occupying and enjoying the beneficial ownership of the Navajo Indian Reservation.

2. Defendant, Jane Yellowhorse Jones, is an enrolled member of the

Navajo Nation and at all times referred to in this cause of action, she operated a business and resided within the exterior boundaries of the Navajo Indian Reservation.

3. Defendant, Dennis Jones, is a non-Indian and at all times referred to in this cause of action, he resided within the exterior boundaries of the Navajo Indian Reservation. Jane and Dennis Jones testified that they were married by a medicine man on December 28, 1978, though evidence was entered that they submitted a sworn affidavit to the Navajo Nation on July 27, 1981, that they were married on June 06, 1981. (See Plaintiff's Exhibits 5 and 6).

4. Defendant, Mary Ann Yellowhorse, is an enrolled member of the Navajo Nation and at all times referred to in this cause of action, she worked within the exterior boundaries of the Navajo Indian Reservation.

5. Defendant, Betty Yellowhorse Chauncey, is an enrolled member of the Navajo Nation and at all times referred to in this cause of action, she worked within the exterior boundaries of the Navajo Indian Reservation.

6. Defendant, John Chauncey, is a non-Indian who resides off the Navajo Indian Reservation in Albuquerque, New Mexico, but who burglarized the Fort Defiance Trading Post on April 04, 1982, and thereby submitted himself to the jurisdiction of the Navajo Nation.

7. All of the acts underlying the cause of action occurred within the exterior boundaries of Navajo Indian Country.

8. Yellowhorse, Inc., was a corporation under the laws of the State of Arizona on December 09, 1982, by Jane Yellowhorse Jones, President, and Dennis Jones, the only other officer of the corporation.

Chronology of Events Leading to the Burglary of the Arts and Crafts

The facts involving these claims center around this essential chronology of events:

AUGUST 02, 1982—NAVAJO NATION ENTERED INTO A ONE-MILLION DOLLAR ($1,000,000) CONTRACT WITH YELLOWHORSE, INC.

9. On December 9, 1982, Defendants, Jane Yellowhorse Jones and Dennis Jones, purported to form a corporation called "Yellowhorse, Inc." of which they were officers. (See Plaintiff's Exhibit 7).

10. On August 2, 1982, the Navajo Nation and Yellowhorse, Inc. entered into a valid and binding management contract in the amount of one (1) million dollars. The contract was entirely funded by a Federal ANA

Grant. It was to be administered from the Fort Defiance Trading Post, a.k.a. J.D.'s Market, where Defendant Jane Yellowhorse Jones held a business site lease. (See Plaintiff's Exhibit 8, the management contract).

11. The purpose of the contract was to expand the opportunity for individual Navajos to sell their jewelry and help relieve the unemployment problem on the Navajo Reservation. The contract authorized defendant to purchase and market Navajo Arts and Crafts with title of such property remaining in the Plaintiff Navajo Nation. The period of the contract was from August 02, 1982, through December 31, 1982.

12. The contract required Defendant Jane Yellowhorse Jones to comply with the contract provisions, which expressly included:

A) Being responsible for the physical custody and storage of the arts and crafts inventory;

B) Maintaining adequate inventory control records;

C) Providing adequate security of the arts and crafts inventory; and

D) Purchasing an insurance policy for the inventory.

13. Defendant Jane Yellowhorse Jones understood the contract provisions as they were discussed with her in detail. Ms. Jones is an experienced dealer in selling and buying Navajo Arts and Crafts, and has been in the business for twenty (20) years.

14. The contract expired on December 31, 1982, but was extended by written modification to December 31, 1983, by the Navajo Nation. (See Plaintiff's Exhibit 74). An express term of the provisions of the original contract, including insurance to be provided by defendants, was to remain in effect, except that no new purchase could occur until sale of 50% of the inventory on hand was done.

JANUARY 14, 1983—SEIZURE OF YELLOWHORSE TRADING POST

15. During the January 11, 1983, inauguration of Chairman Peterson Zah, boxes containing tribal records were reported missing from the offices of the Chairman. A search was undertaken by Navajo Police Officers to locate the missing boxes.

16. On January 14, 1983, Ross Bigman, a BIA Law Enforcement Officer, who was aware of the missing tribal documents, observed boxes with Navajo Tribal markings being removed from the J.D. Market at Fort Defiance to a 1977 Ford Van. He contacted Navajo Police immediately, who arrived shortly thereafter, and discovered boxes of tribal records in the van as well as within a freezer inside the trading post. These were identified as those records missing from the Navajo Tribal Administration Building.

In locating the boxes, Tribal officials discovered a vault in the trading post containing a large amount of arts and crafts. Defendant Dennis Jones

informed the Tribal officials at the time that the arts and crafts were the property of the Navajo Nation.

17. Several witnesses for the Navajo Nation testified that sealing of the vault and securing of the arts and crafts was necessary, because Tribal officials had no knowledge about the Yellowhorse, Inc. contract with the Navajo Nation. There was ample evidence that Howard Bitsuie, former Director of Chapter Development, knew about the contract and had informed Colonel Larry Benallie of the Navajo Division of Public Safety. Eric Eberhard stated that he might have known about the contract before January 14, 1983, but got a copy of the contract a few days later.

Harry Sloan, the accountant, testified that he was on the 1982 Zah Transition Team and explained about the Jones' contract and missing inventory to Mr. Eberhard in December 1982. At the time the vault was seized, auditors of Sloan and Company were in the vault doing an ongoing inventory. Mr. Sloan explained at the time that there was a contract between the Defendant Jones' and the Navajo Nation. Therefore, on January 14, 1983, the Navajo Nation was on notice that a contract existed between the Defendant Jones' and the Navajo Nation. A few days later they had received a copy of the contract.

18. On January 14, 1983, Colonel Benallie then ordered the vault sealed with tape, and a temporary police guard was placed outside the vault door for two weeks. Since no security guard was present at the Fort Defiance Trading Post on January 14, 1983, Colonel Benallie ordered sealing the vault to ensure security and protecting the merchandise from theft. For protection and security of the vault, security guards were posted using Navajo Police Officers to maintain a 24-hour security from January 14, 1983 to January 31, 1983. This was done on a temporary basis. The Navajo Police vacated the premises on January 31, 1983 and Jane Yellowhorse Jones continued to operate the J.D. Market.

19. The vault was sealed. Defendants Jane and Dennis Jones were told that no one could enter without permission of the Navajo Nation. Mr. and Mrs. Jones were the only persons who knew the combination to the vault.

20. Plaintiff's witnesses claim that defendants did not object to the sealing of the vault, and that Dennis Jones was very cooperative and accommodating. In fact, defendants were silent when orders were made to seal and secure the vault.

21. While the vault was closed, the grocery store portion of the trading post was still open for business. Defendant Jane Yellowhorse Jones never gave the vault combination to Navajo Police or officials. The Jones' did not continue to operate the arts and crafts program. On one hand, no Tribal official told them specifically that the contract was terminated in January 1983. On the other hand, no one told the Jones' to continue the contract.

APRIL 05, 1983—ARTS AND CRAFTS BURGLARIZED

22. On Monday night of April 4, 1986, arts and crafts with a cost price of $261,077.75 were stolen from the vault at Fort Defiance Trading Post. A large quantity of jewelry was taken away in duffel bags and gunny sacks by the burglars. (See testimony of Russell Urban; on the amount of inventory stolen, see Plaintiff's Exhibits 61 and 111).

23. Three (3) non-Indians were involved with the theft: John Chauncey, Russell Urban, and Abraham Baldazon. They have all confessed to the burglary of the trading post. They all have been arrested, convicted and sentenced pursuant to plea bargains.

24. Russell Urban, at trial, voluntarily admitted that he and John Chauncey and Abraham Baldazon were responsible for the break-in and theft. He said, "we stole the jewelry" and "it was a safe job." Defendant John Chauncey guaranteed them that the owners of the Fort Defiance Trading Post would be in Albuquerque at a basketball game on the evening of April 04, 1983, and the next early morning hours of April 5th. Defendants, Jane Yellowhorse Jones and Dennis Jones, testified that they were at a basketball game in Albuquerque, New Mexico when the burglary took place on April 4th.

25. According to Russell Urban, John Chauncey was a professional burglar who carefully planned and set up his jobs to minimize the risk. This was accomplished by obtaining inside information from simply being able to personally visit and case the burglary targets. Such was the case at the Yellowhorse Trading Post. He was involved with several burglaries before. Russell Urban testified that he had participated in numerous burglaries with John Chauncey, including one at Black Hat Trading Post in 1980, during the time Jane Yellowhorse and her former husband, Russ Lingren, owned the Black Hat Trading Post. In previous burglaries with John Chauncey, Urban testified that Chauncey was always the ring leader.

26. The burglary at the Yellowhorse Trading Post was planned beforehand by Defendant John Chauncey. He arranged the date for the burglary. He knew where the vault was. He knew the inside layout of the vault. Before the burglary Defendant John Chauncey punched a hole through the cinder blockwall from the outside where the break-in would take place.

27. The defendants and the confessed burglars all knew each other. John Chauncey was formerly married to Betty Chauncey. He also knew Defendants Jane and Dennis Jones. Russell Urban became acquainted with John and Betty Chauncey in 1980, when they became engaged in the Indian jewelry business. On April 03, 1983, the night before the burglary, Defendants, Jane and Dennis Jones, John Chauncey, and Betty Chauncey and her boyfriend Randy Zaragoza, all stayed at the Classic Hotel in Albuquerque, New Mexico. Classic Hotel records show that John Chauncey

rented two rooms at that hotel on March 31, 1983. Betty Chauncey testified that she and Randy Zaragoza were in Albuquerque on March 30 or 31, 1983. The Classic Hotel records also show that John Chauncey, Randy Zaragoza, and Jane and Dennis Jones registered at the hotel on April 03, 1983. Betty Chauncey testified she also stayed at the Classic Hotel on April 03, 1983. On April 29, 1983, three (3) weeks after the April 4th burglary, John Chauncey and Randy Zaragoza again stayed at the Classic Hotel according to hotel records. (See Plaintiff's Exhibits 3(a) thru 3(e)). As a result, plaintiff claimed that there was a conspiracy by the defendants and the burglars to steal the arts and crafts. There is insufficient evidence of the purported conspiracy.

WEAK SECURITY

28. At the time of the April 4th burglary, the only security measure used by Defendant Jane Yellowhorse was a small portable sonaguard alarm system at night. The alarm was purchased about two (2) weeks before the burglary. No security guard was on duty during the burglary. Defendant Jane Yellowhorse Jones admitted that no security guard was provided by her after the first week in February, 1983. The security measures used by defendants was not by any means adequate.

Nora Wauneka, former employee of the Jones' explained that the sonaguard alarm system could not be heard from outside the trading post. She further testified that on April 4, 1983, before the burglary, the alarm accidently set-off while a police officer was passing outside and the officer did not respond. Russell Urban stated that the alarm only sounded for about one minute. (See testimony of Russell Urban.)

29. The investigation reveals that the vault wall, the break-in area, was blown by a sledge hammer. A crow bar was also used. Russell Urban testified that John Chauncey told them beforehand that burglary tools (sledge hammer and crow bar) were placed near the rear (east side) of the Fort Defiance Trading Post. Mr. Urban said, "It was an easy hit." "We knocked out five (5) cinder blocks with the sledge hammer and made a hole where we entered." Debris was later found in and outside the wall. (See testimony of Ross Bigman, BIA Criminal Investigator; see also photographs of the break-in area, Plaintiffs Exhibits 19 and 20).

30. Pat Callahan, a radiographic examination expert in wall construction and a structural engineer, x-rayed the entire wall of the vault room at the Fort Defiance Trading Post in which the burglars entered. He concluded that there was absolutely no metal of any kind within the walls, only cinderblocks. The vault wall was constructed entirely without steel or metal reinforcement. (See Plaintiff's Exhibit 88).

31. Under the contract, at paragraph XXXV(a)4 and 7, defendants

were required to maintain protection, and be responsible for the care and safekeeping of the arts and crafts inventory.

32. The Navajo Nation was not specifically aware of the sonaguard alarm system or the lack of reinforced walls in the vault prior to the burglary. However, the Navajo Nation was on notice that the Jones had not complied with several contract requirements, especially insurance coverage and lack of fidelity bonding for employees.

33. Jack Downey, an expert witness in the field of insurance, and William Taylor, an insurance salesman, both testified that qualification for adequate security for insurance on one million dollars worth of Navajo arts and crafts would require proper security measures such as bolted doors, window covers, and an adequate alarm system and safe, as well as locked jewelry cabinets. Alton Pichard, an expert Indian arts and crafts appraiser and dealer, testified that these requirements would be deemed the standard practice in the Indian arts and crafts industry, and that he always carried insurance on his Indian arts and crafts business.

NO INSURANCE COVERAGE

34. At no time during the entire period of the contract did Yellowhorse, Inc., ever insure the arts and crafts inventory. (See Plaintiff's Exhibits 73A through H). The management contract at paragraph XXXIII clearly says:

"The contractor shall secure, pay premiums for, and keep in force until the expiration of this contract or any renewal period thereof. . . arts and crafts will be insured for at least the amount of their wholesale value."

35. Although a jeweler's block application was sent to Jane Yellowhorse Jones by William Taylor of Marsh and McClennan Insurance Company on September 23, 1982, Ms. Yellowhorse claims she was unable to obtain insurance. Although Tribal officials during the MacDonald administration did assist Defendant Jane Yellowhorse Jones in applying for other insurance, she never applied. William Taylor contacted Defendant Jane Yellowhorse Jones and discussed the requirements for filing an application for Jeweler's Block Insurance. (See Plaintiff's Exhibit 82 and testimony of William T. Taylor).

36. Defendant Jane Yellowhorse Jones attempted to modify the contract by having the insurance requirement waived. On January 05, 1983, the Budget and Finance Committee of the Navajo Tribal Council, instead of changing the contract to waive insurance, merely reaffirmed the contract in its entirety, including the insurance and security requirements. If the Navajo Nation ever intended to waive insurance it would have modified the contract. On the other hand, from the entry of the contract to January 11, 1983, and April 06, 1983, the tribe did not take affirmative

steps to enforce the insurance coverage clause. Even though Defendant Yellowhorse never complied with the insurance requirement, the Navajo Nation did not attempt to formally terminate the contract until after the burglary of April 4, 1983.

37. Defendant Jane Yellowhorse Jones claimed that no insurance company would insure arts and crafts businesses on the Navajo Indian Reservation, because it was considered too risky, and therefore it was impossible to obtain insurance on the arts and crafts program she administered for the Navajo Nation. Jack Downey, an expert in the insurance brokering business, testified that such insurance was readily available to Indian arts and crafts businesses like the one run by the Jones. Mr. Downey testified that this insurance availability was present for many years prior to and including 1982.

38. Clearly, Defendant Jane Yellowhorse Jones never had insurance coverage, although she was obligated to do so under the contract. It was her responsibility to pay for the insurance.

SALE OF STOLEN ARTS AND CRAFTS

39. Much of the jewelry and other craft items stolen on April 04, 1983, were never recovered. Plaintiffs assert the lost items amount to $261,078 in purchase value. (See Plaintiff's Exhibit 61, page 5). The F.B.I. Agent, Charles Moffett, recovered or identified some items in the possession of Manuelita Wagner, a retail seller of Indian jewelry in Albuquerque, who knew Betty Chauncey and regularly purchased jewelry from Ms. Chauncey. Mr. Moffett also recovered other items from a search warrant upon Abraham Baldezon's home. (See Plaintiffs Exhibit 1 and 2). Mr. Baldezon was one of the burglars of the Yellowhorse Trading Post. Betty Chauncey testified that she did not contact law enforcement officials.

Russell Urban testified that he sold Betty Chauncey some of the jewelry stolen from the Yellowhorse Trading Post. She told him she recognized the jewelry and he confirmed where the items came from. She paid him for the jewelry; she never contacted law enforcement officials.

Ms. Wagner testified at her deposition, Page 9, (Plaintiff's Exhibit 99), that Justin Morris identified two bracelets and a necklace in her possession as his work; that he said he had sold those items to the Fort Defiance Trading Post which was robbed. Ms. Wagner bought those items from Betty Chauncey in the summer of 1983. Justin Morris' testimony corroborates Ms. Wagner's deposition. He recognized the remaining three items of jewelry sold to Ms. Wagner by Betty Chauncey. He had not sold the bracelets and necklace to Ms. Wagner himself, but recalled that the items he sold the Navajo Tribe's program were special, because he made them heavier; that is with more silver.

Betty Chauncey's jewelry purchases from Russell Urban was of needlepoint design. Justin Morris did not make needlepoint jewelry. By her own admission, Betty Chauncey purchased stolen jewelry from Urban. Its disposition is unknown. The Justin Morris jewelry that came into possession of Manuelita Wagner was sold to her by Betty Chauncey shortly after the burglary in Fort Defiance. Betty Chauncey testified that she had bought jewelry from the arts and crafts program, which was made by Justin Morris, however, there is no evidence to support her claim. To the contrary, there is solid evidence from the program records examined by Harry Sloan that all sales by the program were recorded on sales invoices as well as in a ledger, and these records show that Betty Chauncey never purchased any jewelry made by Justin Morris. Mr. Morris easily identified his jewelry as items he had made specifically for the Yellowhorse project, with a heavier silver weight.

OTHER MISSING INVENTORY

40. Separate and apart from the April 4th burglary incident, Sloan and Company's closeout audit report shows that from August 05, 1983, through December 31, 1982, $24,313.75 worth of arts and crafts are unaccounted for. Some of the missing inventory were found through a recount, but $10,000 to $12,000 of inventory were still missing prior to the April 04, 1983 burglary. (See Plaintiff's Exhibit 62 at p. 5, item 3(b)(i)(4)).

APRIL 06, 1983—LETTER TO TERMINATE YELLOWHORSE, INC., CONTRACT

41. Chairman Peterson Zah's letter of April 06, 1983, purports to terminate the management contract for the convenience of the Tribe. (See letter of termination, Plaintiff's Exhibit 91).

DISALLOWED COST REPAID TO ADMINISTRATION FOR NATIVE AMERICANS (ANA)

42. Plaintiff Navajo Nation was required to reimburse ANA the amount of loss from the burglary, $261,078.00, as disallowed costs at wholesale value. The Navajo Nation had to bear the loss from its own treasury because there was no insurance coverage. (See Plaintiff's Exhibit 92, 93, 94, 95 and 95(a)).

CHECK WRITING SCHEME TO INDIVIDUAL NAVAJO ARTISANS BEFORE THE APRIL 4TH BURGLARY

43. Plaintiff alleges that defendants committed a fraud through a check

writing scheme. As a part of the management contract, Defendant Jane Yellowhorse opened and maintained a special account with the First Interstate Bank, Gallup, New Mexico. All payments advanced to defendants for the operation of the management contract were deposited into the special account. That was part of the contract agreement. Defendants, Jane Yellowhorse Jones, Betty Chauncey, and Mary Ann Yellowhorse were authorized to sign the special account checks for payment of arts and crafts purchased.

Whatever amount of money in the account at different times during the life of the management contract, the Navajo Nation never took possession nor regained control of the special bank account at any time, until the letter of April 06, 1983, was sent to terminate the contract.

44. Plaintiff claims that defendants wrote checks to each other. There is insufficient proof as to this claim. The plaintiff presented, however, sufficient evidence that Defendant Jane Yellowhorse Jones wrote checks from the special bank account to five (5) Navajo individuals whose names and addresses are fictitious. They have no census numbers and no voter registration records that correspond with where they supposedly resided. All of these fictitious persons were sent certified letters by the plaintiff at their purported address and all were returned as unclaimed (See Plaintiff's Exhibits 98(a) thru 98(I)). These individuals were all "issued" checks signed by Defendant Jane Yellowhorse Jones:

A) Alice Mae Douglas of General Delivery, Mentmore, New Mexico, $645.00 on December 30, 1982;
B) Bob Billie of Post Office Box 98, Fort Defiance, Arizona, $600.00 on December 30, 1982;
C) Rose Mary Peters of Post Office Box 9, Thoreau, New Mexico, $740.00 on December 30, 1982;
D) Frank Begaye of General Delivery, Ganado, Arizona, $152.00 on December 31, 1982;
E) Ivan Kellywood, $400.00 on December 30, 1982;

The following two individuals were not fictitious persons; however, there were program checks issued to them and evidence shows:

A) Jim V. Begaye, by his own testimony did not sell any jewelry to the program on December 30, 1982, nor did he receive or sign a check for a sale on that date issued by Jane Yellowhorse Jones. Mr. Begaye testified his signature was not on the back of the check (Plaintiff's Exhibit 6) and the expert document examinee, Ronald Metzger, testified that the signature on the December 31, 1982, check was not Mr. Begaye's signature based on comparison with samples of his true signature.
B) Louise Morgan testified that she might have sold to the program in December 1982, and that the signature on the check made out to her on December 30, 1982 (Plaintiff's Exhibit 14), was not

signed by her, but could have been made by her daughter. The expert document examiner in comparing that check with Ms. Morgan's true signature testified that they were signed by two different persons.

45. Plaintiff has presented ample expert testimony that the checks issued to the above-named payees are undoubtedly forged. Though the signatures of these fictitious payees are non-genuine, it is unclear as to who actually signed the checks as payees. It is also unclear as to which defendants, if any, actually forged the checks, although it is clear that Ms. Jones signed these checks as payor. (See testimony of Ron Metzger, expert document examiner).

46. Plaintiff further presented evidence that Defendant Jane Yellowhorse Jones, paid her mother, Anna M. Tahy, $12,000 for purchase of a rug only worth $6,000. There is evidence that the check issued was not signed by Anna Tahy. See testimony of Ron Metzger and Alton Pichard.

II. Procedural History

1. Plaintiff filed its original complaint on April 30, 1984. First and second amended complaints were then filed. Thereafter, several pre-trial motions, including discovery requests, motions to dismiss and for summary judgment, were filed.

2. The trial in this case began with the plaintiff presenting its case-in-chief on March 10, 1986, and finishing on March 24, 1986; a total of 14 days.

3. After plaintiff presented its case-in-chief, the Jones' Counsel, Robert J. Wilson, orally moved to dismiss the entire case.

This court allowed the defendants leave to file a written motion and a brief. After several extensions upon their request, defendants filed a motion to dismiss and brief on April 07, 1986. Plaintiff's responsive brief opposing the motion to dismiss was filed on April 22, 1986.

Defendants, Betty Chauncey and Mary Ann Yellowhorse, did not file a motion to dismiss *until* April 16, 1986. Plaintiff filed a response on April 25, 1986. This matter was set to resume on June 03, 1986, with written and proper notice to all parties.

4. On the morning of the scheduled hearing, June 03, 1986, Defendants, Jane Yellowhorse Jones and Dennis Jones, and their Counsel Robert J. Wilson did not appear. Daniel Deschinny, who was allowed to enter as co-counsel with Robert Wilson at the beginning of the trial appeared. Mr. Wilson filed a written motion to vacate the June 03, 1986, hearing. The motion requested for additional time to duplicate the overall plaintiff's testimony and thus prepare an adequate defense. Since the plaintiff finished

its case on March 24, 1986, defendants had sixty (60) days to duplicate the tapes and prepare a complete defense. The court denied such a last minute request. Defendants were not, however, denied a right to duplicate the tapes. This court granted defendants' permission to duplicate the tapes of the entire proceeding. But a request for additional time to prepare a defense simply offered no legitimate reason to further delay the June 3rd trial date.

The case was scheduled to reconvene for trial on June 03, 1986, to allow defendants to present their case. Only Defendants' counsels, John Yellowhorse and Daniel Deschinny, appeared on June 03, 1986. Mr. Deschinny respectfully requested this court to allow him to withdraw from the case, because he stated that his client, Dennis Jones, had ordered him not to appear before this court, and that if he did so, he was fired. Mr. Deschinny was allowed to withdraw as co-counsel of record for Defendants Jane and Dennis Jones. The trial was continued to June 04, 1986, with notice to all parties. On June 4th, this court delivered its oral decision on the motion to dismiss in open court. While other Defendants, Betty Chauncey and Mary Ann Yellowhorse, appeared through their legal counsel, Defendants Jane Yellowhorse Jones, Dennis Jones and their attorney Robert J. Wilson deliberately refused to appear. They never presented their defense, despite an *advance notice* of twenty-nine (29) days, plus almost two years from the date the complaint was filed.

5. When plaintiff ended its case on March 26th, the defendants had sixty (60) days, which is indeed ample time to prepare a defense.

6. Regarding failing to appear of Defendants, Jane Yellowhorse Jones and Dennis Jones, and their attorney, a *written notice* of the June 3 trial date was properly given by this court to all parties, thus allowing defendants twenty-nine (29) days to prepare a defense.

7. On June 3rd, at the instruction of this court, Violet A.P. Lui, Associate Attorney to the Solicitor of the Courts of the Navajo Nation, personally telephoned the office of Defendant's Counsel, Robert J. Wilson, and left a message for him that the June 3rd trial date would be continued to June 04, 1986. Despite this express notice, neither Mr. Wilson nor his clients appeared for the June 4th hearing.

8. Pursuant to the 1968 Indian Civil Rights Act, Defendants Jane and Dennis Jones' right to appear and present their case have been judiciously protected by this court.

9. On June 04, 1983, this court orally ruled on defendants' motion to dismiss, which was granted in part and denied in part. The ruling to each of the four (4) counts is summarized at the beginning of each count in the following opinion. The court allowed the plaintiff to change Count IV, to a claim for negligence, to conform with the evidence presented.

10. No motion for reconsideration was requested by defendants to modify the June 4th decision. It stands as ORDERED.

11. Defendant John Chauncey did not participate in the proceeding at all. The record is clear that he was properly served with a complaint and summons well before the trial date. A judgment by default is entered against Defendant John Chauncey.

12. Defendants Jane and Dennis Jones' Counsel, Robert J. Wilson, filed an application for writs of prohibition and mandamus against this court, which was summarily dismissed by the Navajo Nation Supreme Court on June 06, 1986, for failure to allege legal grounds for the writs and for inability of Counsel Robert J. Wilson to practice in Navajo Tribal Courts, while suspended from practice.

III. Issues

Plaintiff filed the second amended complaint on December 19, 1986, consisting of four counts. Count I: *Breach of Contract.* Count II: *Bailment/Conversion.* Count III: *Negligence.* Count IV: *Conversion* amended to negligence.

In view of the evidence presented, each of the four (4) counts will be examined separately. They will be addressed in terms of these issues:

COUNT I: Did defendants breach their contract with the Navajo Nation for failing to maintain insurance and adequate security system of the arts and crafts inventory?

COUNT II: Did defendants breach their duty as bailees by not providing insurance and keeping the arts and crafts inventory in a safe and secure place? Did defendants participate in the burglary so it could be said that they conspired to convert the arts and crafts to their use?

COUNT III: Did the defendants breach their common law duty of care to plaintiff by failing to provide reasonable security and insurance for the arts and crafts in their possession?

COUNT IV: Did Defendants, Jane Yellowhorse Jones, Betty Chauncey, and Mary Ann Yellowhorse, handle the special bank account, check transactions, and the monies of the Plaintiff Navajo Nation in a negligent manner?

IV. Opinion

Count I: Breach of Contract

ISSUE I: DID DEFENDANTS JANE AND DENNIS JONES ACTING AS AGENTS FOR YELLOWHORSE, INC. BREACH THEIR CONTRACT WITH THE NAVAJO NATION FOR FAILING TO MAINTAIN INSURANCE AND ADEQUATE SECURITY SYSTEM OF THE ARTS AND CRAFTS INVENTORY?

A. The claim against Jane and Dennis Jones for the period of August 1982 through January 14, 1983.

The evidence presented by plaintiff in their case-in-chief is sufficient to support the breach of contract claim in Count I against Defendants, Yellowhorse, Inc. and Jane and Dennis Jones, for the period August, 1982, to January 14, 1983. Plaintiffs also presented sufficient evidence to show a loss of inventory by Defendants, Yellowhorse, Inc., Jane and Dennis Jones, of the plaintiff's arts and crafts program during the period of August, 1982, to January 11, 1983, and that said defendants were responsible for the inventory loss. The motion to dismiss on this claim was therefore DENIED.

In an action for a breach of contract, the party who suffers from the non-performance of the contract may recover compensatory damages if these elements are proven:

1. The parties who breached the contract have a contractual duty to perform the contract;
2. The breaching party failed to perform a contractual obligation, and
3. The non-breaching party suffers a loss as a result of the breach.

There is no breach of contract where the party who allegedly breached proves legal excuse for failure to perform.

In the present case, the audit report of Sloan and Company shows missing inventory worth $10,000.00 to $12,000.00 at the end of the initial contract on December 31, 1982. Defendant Jane Yellowhorse Jones entered into a contract with the Plaintiff Navajo Nation for the period August 2, 1982, to December 31, 1982, later extended to December 31, 1983. She was required to purchase insurance for the inventory at wholesale value until the contract expired or was renewed. The defendant was further required to maintain adequate inventory control and security system for the period of the contract. The maintenance of inventory control also required the defendant to maintain books, records, documents, and accounting procedures and practices sufficient to reflect properly all cost of whatever nature incurred in the performance of the contract and current inventory. (See Plaintiff's Exhibit 8, p. 12, item 8).

There is ample evidence that Defendant Jane Yellowhorse Jones never complied with specified requirements to secure and maintain inventory or

to maintain records and procedures sufficient to properly reflect all costs and inventory. Harry Sloan indicated in his testimony that there was never an adequate maintenance of records and inventory control practices by Yellowhorse, Inc. He further testified that records were not being maintained in a timely manner and that the bookkeeping was poorly maintained throughout the period of the contract. Defendant Jane Yellowhorse Jones had a duty to fulfill the contract and failed to do so.

Because Defendant Jane Yellowhorse Jones failed to comply with the contract requirements, there was a breach of contract for failing to insure inventory, and to maintain inventory control and security system through January 14, 1983. This court also concludes that the missing inventory of $10,000 to $12,000, was a result of the defendants' failing to maintain an inventory control and security system, and failing to insure the inventory as required by contract. As a consequence of defendants' breach, Plaintiff Navajo Nation suffered a loss of $10,000 to $12,000.

The contract also expressly required Defendant Yellowhorse, Inc. to purchase insurance at wholesale value. She argued that she was unable to get insurance for the period of the contract. The Tribal officials knew of this requirement and yet never compelled performance. If the Tribal officials knew of the insurance requirement and failed to enforce its terms, did lack of enforcement mean the insurance requirement was waived? Not so. The Navajo Nation never waived the insurance requirement at any time. In fact, when the contract was renewed, the Budget and Finance Committee of the Navajo Tribal Council, on January 05, 1983, by resolution reaffirmed the contract, including the requirement for insurance and security. (See Plaintiff's Exhibit 74).

The Defendant Jane Yellowhorse Jones well understood the contract provisions. Being an experienced dealer in selling and buying Indian arts and crafts for twenty (20) years, she knew the requirements of maintaining the insurance, security and inventory control. By contract she had to fulfill those duties. She did not do so.

Regarding the amount of missing inventory, this court finds plaintiff was damaged in the amount of $11,000.00. The plaintiff proved that $10,000 to $12,000 of inventory is missing. The defendant, on the other hand, offered no help to ascertain how much was lost.

This court agrees with the plaintiff that "only reasonable certainty is required" to prove the fact and cause of injury to a party, but "the amount of damage, once their cause and fact are shown, need not be proved with the same degree of certainty." 22 Am.Jur. 2nd *DAMAGES,* §23 at 42. There is no bar to recovery if absolute certainty or exactness is not established through mathematic calculations, *Id.* at 42. Therefore, this court awards plaintiff damages based on the wholesale value of plaintiff's missing inventory prior to December 31, 1986. The amount of damages is

$16,500.00 plus prejudgment interest at 10% from December 31, 1982. (This wholesale value is $1.5 × $11,000; the cost price of the missing inventory. See the formula given by Alton Pichard, Plaintiff's Exhibit 64).

Bryant et. al v. Mary I. Bryant, 3 Nav. R. 200 (1982), left the question of prejudgment interest in the Navajo courts open, and provided guidance by stating, "the better rule is that prejudgment interest should be alleged and demanded in the complaint." *Id.* at *201.* Plaintiff Navajo Nation, in the instant case, did plead and demand prejudgment interest at the rate of 10%. This court will follow the principle that an award of prejudgment interest, if pled, is in the sound discretion of the trial court, and award prejudgment interest, because it can be measured with reasonable accuracy. 22 Am. Jur 2d *DAMAGES* §184. The measurement of the prejudgment interest should be from the date of loss to plaintiff, which was determined to be at least as of January 14, 1983, as testified to by Harry Sloan, to the time of verdict. However, in fairness to defendants, the time of verdict will be deemed to be the date this court denied defendants' motion to dismiss, which was June 04, 1986.

Therefore the remedy for prejudgment interest is calculated as follows:

10% of $16,500 = $1,650.00 divided by 365 days = $4.52 per day × 1260 days (from January 14, 1983 to June 04, 1986) = a total of $5,650 due the plaintiff in prejudgment interest plus the $16,500.

B. The claim for breach of contract against Jane and Dennis Jones as agents for Yellowhorse, Inc. for the period of January 14, 1983, to April 06, 1983

There is not sufficient evidence to support plaintiff's breach of contract claims in Count I against Defendants Jane and Dennis Jones as agents for Yellowhorse, Inc., for the period of January 14, 1983, to the time of the burglary at Fort Defiance Trading Post on April 04, 1983. On January 14, 1983, the Navajo Nation regained possession by taking control of the vault from which the arts and crafts were stolen. The motion to dismiss was therefore GRANTED.

Despite Chairman Zah's intentions to be fair to the Jones' by not attempting to terminate the contract until April 06, 1983, the actions of the Tribal officials on January 14, 1983, in sealing and guarding the vault containing the arts and crafts for protection are actions of regaining possession and control of the vault. These acts had the legal effect of terminating the contract. The Tribal officials had knowledge of the existing contract during this incident. Howard Bitsui, former Director of Chapter Development, knowing about the contract, informed the Tribal officials about the contract. Therefore, there is no liability.

The defendants have raised the issue of impossibility of performance, in that Defendants Jane and Dennis Jones were unable to continuously perform the contract after January 14, 1983. This issue need not be addressed

because the contract was terminated on January 14, 1983, which legally excused Defendants Jane and Dennis Jones from further performance.

C. The claim of breach of contract against Defendants Betty Yellowhorse and Mary Ann Yellowhorse.

The claim of breach of contract as to Count I; the motion to dismiss against Defendants Betty Yellowhorse Chauncey and Mary Ann Yellowhorse was GRANTED. Defendants Betty Yellowhorse Chauncey and Mary Ann Yellowhorse were never parties to the contract. This claim therefore does not apply to them.

Count II: Tort: Bailment / Conversion

ISSUE II: DID DEFENDANTS BREACH THEIR DUTY AS BAILEES BY NOT PROVIDING INSURANCE AND BY FAILING TO KEEP THE ARTS AND CRAFTS IN A SAFE AND SECURE PLACE? DID DEFENDANTS PARTICIPATE IN THE BURGLARY SO IT COULD BE SAID THAT THEY CONSPIRED TO CONVERT THE ARTS AND CRAFTS TO THEIR USE?

A. The claim for bailment against Defendants Jane and Dennis Jones for the period of August 1982, through Janaury 14, 1983.

There is sufficient evidence presented by plaintiff to show a breach of bailment contract in Count II against Defendants Jane and Dennis Jones for the period August, 1982, through January 11, 1983. The motion to dismiss this part of the claim was DENIED.

Bailment in its ordinary legal sense means the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed, and the property returned or duly accounted for when the special purpose is accomplished, or kept until the bailor reclaims it. The general rule that the assent of both parties is necessary before a contract, either express or implied in fact, can come into existence is applicable to the ordinary case of a contract of bailment.

In the instant case, this court finds that a bailment contract between the plaintiff and defendants arose through the arts and crafts management contract, and upon the receipt of monies by the defendants from the plaintiff. The receipt of money by Yellowhorse, Inc. constituted an express agreement by defendants to become bailee of the arts and crafts inventory for plaintiff. The bailment also included an agreement by defendants to provide insurance and to keep the arts and crafts inventory in a safe and secure place until marketed or returned to plaintiff upon termination of

the bailment contract. The bailment arrangement between the parties created a duty of care on the part of defendants to provide reasonable care for the arts and crafts merchandise.

This court finds liability against Defendant Yellowhorse, Inc., for breach of bailment contract for the period August 1982, through January 14, 1983, for failing to return the bailed arts and crafts inventory or its equivalent value in money to the plaintiff; the damages to plaintiff are the wholesale value of the missing inventory. The plaintiff was damaged in the amount of $16,500.00, the wholesale value, calculated by multiplying 1.5 times $11,000.00; the cost price of the missing inventory. (See the formula given by Alton Pichard, Plaintiff's Exhibit 64).

B. The claim of breach of bailment against Defendant Jane and Dennis Jones for the period January 14, 1983, to April 06, 1983.

Because the Navajo Nation took possession of the arts and crafts, on January 14, 1983, there was no breach of bailment contract by Defendants Jane and Dennis Jones. The motion to dismiss on this part of the claim was GRANTED.

Again, the act of sealing of the vault, placing Navajo Police guards to maintain security and protection of the inventory and giving verbal instruction to Defendants Jane and Dennis Jones not to enter the vault without prior permission from tribal officials, are acts of regaining possession and control of the arts and crafts inventory. These actions thus terminated the existing bailment contract between the plaintiff and Defendants Jane and Dennis Jones, as agents for Yellowhorse, Inc.

The plaintiff argued that the Navajo Nation did not regain possession of the arts and crafts on January 14, 1983, because Defendant Jane Yellowhorse Jones never gave up the vault combination to Tribal officials, nor did the plaintiff take control of the special bank account until the purported termination of the contract on April 06, 1983. The court holds that, even if plaintiff's allegations are true, defendants were no longer in possession and control of the arts and crafts as bailee after January 14, 1983.

C. The claim for conversion against Defendants, Jane and Dennis Jones, and Mary Ann Yellowhorse

There is also not sufficient evidence of conversion in Count II against Defendants, Jane Yellowhorse Jones, Dennis Jones, and Mary Ann Yellowhorse. As to this claim the motion to dismiss is GRANTED.

A conversion takes place when a person takes property of another for his or her own use or benefit with the intent of permanently depriving the owner of such property.

The plaintiff further asserts by circumstantial evidence that prior to the April 04, 1983 burglary, the Defendants, Jane and Dennis Jones, and

Mary Ann Yellowhorse, conspired with other defendants to steal the arts and crafts. One of the pre-planning sessions supposedly took place at the Classic Hotel in Albuquerque, New Mexico, which involved a meeting among Defendants, Jane and Dennis Jones, John Chauncey, Betty Chauncey and Randy Zaragoza. Even if this were true, the evidence was insufficient to prove a claim for conversion based upon conspiracy.

D. The claim for conversion against Defendants Betty Chauncey and John Chauncey.

Plaintiff has presented sufficient evidence to sustain a cause of action of conversion against Defendants Betty Chauncey and John Chauncey. The motion to dismiss is therefore DENIED.

Defendant Betty Chauncey purchased stolen jewelry from burglar Russell Urban. She also sold other stolen jewelry from the April 4th burglary to Manuelita Wagner, the retail seller of Indian jewelry. Mr. Urban testified that he sold Betty Chauncey jewelry he helped steal from the Yellowhorse Trading Post. Ms. Wagner, at Page 9 of her deposition, testified that she bought from Betty Chauncey two (2) bracelets and one (1) necklace. Justin Morris recognized three of the items that Ms. Wagner had purchased from Ms. Chauncey, as ones he had sold to Yellowhorse Trading Post before the burglary. This evidence clearly shows that Ms. Chauncey knowingly took stolen property of the Navajo Nation with the intent to permanently deprive the plaintiff of ownership.

Concerning Defendant John Chauncey, there is no question that he stole the arts and crafts valued at $261,077.75 from the Fort Defiance Trading Post on April 04, 1983. He confessed being responsible for the break-in and theft. There is ample evidence that he made all the necessary plans to carry out the burglary. He has therefore converted the $261,077.75 worth of goods for his own use and benefit with the intent to permanently deprive the plaintiff of ownership.

This court finds Defendants Betty Chauncey and John Chauncey liable for conversion of the lost inventory. Defendant John Chauncey must pay the Navajo Nation in the amount of $1.5 \times 261{,}077.75 = \$391{,}616.62$ plus punitive damages in the amount of $1,000,000.00. However, it is unclear as to how much of the stolen items were sold by Defendant Betty Chauncey for her profit after the burglary. Betty Chauncey did receive at least $200.00 from Ms. Wagner for jewelry that Mr. Morris sold to the Yellowhorse Trading Post, which was stolen on April 04, 1983. (See Plaintiff's Exhibit "4(a)" and "99"). As previously stated, "only reasonable certainty is required" to prove the fact and cause of injury to a party, but "the amount of damage once their cause and fact are shown need not be proved with the same degree of certainty." 22 Am.Jur. 2d *DAMAGES* §23 at 42. Betty Chauncey presented no evidence to rebut plaintiff's evidence, so this

court will recognize $200.00 as the cost price of the jewelry, and that it would have sold for retail value of $300.00, using the Pichard formulation of $200.00 × 1.5.

This court will allow plaintiff prejudgment interest per *Bryant, et. al. supra*, calculated as follows: 10% of $300.00 = $30.00 divided by 365 days = $.08 per day × 1156 days (April 04, 1983 to June 04, 1986) = a total of $95.00 is due the plaintiff from Betty Chauncey in prejudgment interest plus the $300.00.

This court agrees with plaintiff that punitive damages are allowed by Navajo Statute in this case. 7 N.T.C. Section 701 governs awarding of judgment by the Navajo Tribal Courts. Section (b) of this Statute allows for additional damages to a plaintiff where a defendant has deliberately inflicted the injury. This is analogous to the concept of punitive damages. In *Keeswood et. al. v. Navajo Tribe, et. al.*, 2 Nav. R. 46 (1979), the Navajo Court of Appeals recognized the right of a plaintiff to punitive damages, although in that case they were not awarded because of the absence of evidence of actual malice.

The act of Betty Chauncey, in buying stolen jewelry from Russell Urban which she knew belonged to the Navajo Nation, and then selling other stolen jewelry from the April 04, 1983, burglary and keeping the money, were deliberately and willfully meant to deprive the Navajo Nation of its property. Her actions were malicious, outrageous and wilfull, entitling plaintiff to punitive damages. Punitive damages are awarded to the Plaintiff Navajo Nation against Betty Chauncey in the amount of $10,000.00.

Count III: Tort: Negligence

ISSUE III: DID THE DEFENDANTS JANE AND DENNIS JONES BREACH THEIR COMMON LAW DUTY OF CARE TO PLAINTIFF BY FAILING TO PROVIDE REASONABLE SECURITY AND INSURANCE FOR THE ARTS AND CRAFTS IN THEIR POSSESSION?

A. The claim of negligence against Defendants Jane and Dennis Jones.

There is sufficient evidence in Count III, to show a finding of negligence by Jane and Dennis Jones in not securing insurance, nor providing adequate security on plaintiff's arts and crafts as is reasonable in the arts and crafts industry. Such failure resulted in a loss of plaintiff's property in April, 1983. However, as discussed below, the court finds that the Navajo Nation could have taken, and had a duty to take protective action for the arts and crafts in January 1983. Upon reconsideration, the motion to dismiss as to Count III is therefore GRANTED.

To prove negligence in this case, these elements of negligence set forth by the plaintiff, from *Robinson v. U.S.*, 382 F. 2d 714 (9th Cir. 1967), are:

1. The defendant has a duty to protect the plaintiff from the injury of which the plaintiff complains;
2. Defendant fails to perform that duty; and
3. Such failure proximately caused plaintiff damage.

The plaintiff in the present case argued that defendants owed a duty of care arising out of the contract to the plaintiff to provide insurance and security for the tribe's property. This is reasonable in the Navajo Arts and Crafts industry, as testified to by Alton Pichard, a long time Indian arts and crafts dealer. A breach of that duty of care by the defendants would have been the proximate cause of the damage if the contract had not been terminated from January 14, 1983. Since the contract was terminated, there is no basis to argue that the failure to have insurance or adequate security was the proximate cause of the loss of inventory. Instead, the proximate cause was the Navajo Nation's failure to take the arts and crafts to a more secured vault or to obtain insurance for valuable Tribal property.

Plaintiff is correct that the duty of reasonable care owed by defendants to plaintiff is not one of reasonable standard, but the standard applicable to the defendants in the trade, where a defendant had held himself or herself out to be experienced and trained. *Powder Horn Nursery, Inc. v. Soil and Plant Laboratory, Inc.*, 119 Ariz. 78, 579 P. 2d 582, 1978. Thus, the standard of care plaintiff must prove, if the defendant had a duty to the plaintiff, is that which is reasonable in the arts and crafts trade.

Plaintiff further contends that the standard of care in the arts and crafts industry includes maintaining insurance on arts and crafts and taking reasonable security measures. Alton Pichard, plaintiff's appraiser of arts and crafts, being experienced in Navajo Arts and Crafts for 35 years, testified that he owned a trading post for 25 years. Mr. Pichard testified that the common practice for securing Indian jewelry was to store the jewelry in an all metal vault. He also stated that he had carried an insurance policy to protect any loss. Numerous trading posts with large amount of arts and crafts, on the Navajo Reservation and other reservations, for many years were insured so long as there were adequate window coverings and a dead bolt lock on doors; showcases were locked and an adequate security system installed. In 1982 and 1983, there was coverage for Indian Arts and Crafts programs, which Jane Yellowhorse Jones operated for the Navajo Nation. Insurance market for such programs was a loose market, meaning insurance was available. (See testimony of Jack Downey, expert witness in insurance broker). It is clear from the facts, Jane and Dennis Jones did not maintain proper security; there was no security guard or alarm system

which could be heard from the outside of the trading post. The wall to the vault consisting of cinder blocks was simply inadequate.

This court is of the opinion that the Jones' were negligent in their care of the arts and crafts in the vault of their trading post. However, it is also the opinion of this court that the Navajo Nation was negligent in failing to take protective measures after January 14, 1983. Which party should take responsibility for the loss from the burglary? The court looks for guidance to another opinion of this same District Court, Honorable Tom Tso presiding, which defined what degree of care the Navajo Government must use for property of the Navajo people:

> . . .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,. . .*Tome v. Navajo Nation*, 4 Nav. R. 159 (Window Rock D. Ct. 1983).

This court must conclude that all of the admissible evidence only establishes the poor judgment and management of the Jones', which supports a finding that their negligence caused the losses prior to January 14, 1983. However, as between the Jones' and the Navajo government, the Navajo Nation's negligence from that date to April 06, 1983, was a superseding cause of the loss from the burglary.

B. The claim of negligence against Defendants Betty Chauncey and Mary Ann Yellowhorse.

The claim of negligence as to Count III, the motion to dismiss against Defendants, Betty Chauncey and Mary Ann Yellowhorse, was GRANTED. Since Defendants, Betty Chauncey and Mary Ann Yellowhorse, are not vested with the duty of care to plaintiff to provide reasonable security and insurance of the arts and crafts, the claim of negligence under Count III does not apply to them.

Count IV: Tort: Negligence

ISSUE IV: DID DEFENDANTS JANE YELLOWHORSE JONES, BETTY CHAUNCEY, AND MARY ANN YELLOWHORSE HANDLE THE SPECIAL BANK ACCOUNT, CHECK TRANSACTIONS AND THE MONIES OF THE NAVAJO NATION IN A NEGLIGENT MANNER?

A. The claim of fraud against Defendants, Jane Yellowhorse Jones, Betty Chauncey and Mary Ann Yellowhorse Brooks.

There is not sufficient evidence on Count IV to support a finding of fraud as to any defendants on Count IV, but there is sufficient evidence to

support a claim for negligence against Defendants, Jane Yellowhorse Jones, Betty Chauncey and Mary Ann Brooks in Count IV. Plaintiff was, therefore, allowed to amend its complaint to conform with the evidence presented on negligence. The motion to dismiss as to Count IV against these defendants was DENIED.

Based upon the Court's findings, Defendants, Jane Yellowhorse Jones, Betty Chauncey, and Mary Ann Yellowhorse, were authorized to sign checks from a special bank account with the First Interstate Bank, Gallup, New Mexico. The plaintiff's evidence shows gross mishandling of the special account monies which belonged to the Navajo Nation. Checks were written to Navajo individuals with fictitious names and addresses, and cashed with forged signatures. Furthermore, Anna M. Tahy, the mother of Jane, Betty and Mary Ann Yellowhorse, was overpaid $6,000.00 for a rug which should have cost only $6,000.00; Anna M. Tahy was paid $12,000.00. The defendants clearly had a duty of care to the Navajo Nation to take care of the special bank account. They failed to do so in a gross and reckless manner.

The court finds Defendants, Jane Yellowhorse Jones, Betty Chauncey and Mary Ann Yellowhorse, negligent in the handling of the plaintiff's money in the special bank account. They are individually, jointly and severally liable to plaintiff Navajo Nation in the amount of $18,615.00, plus $5,895.60 in prejudgment interest, and $50,000 in punitive damages.

Order

Pursuant to the above opinion, it is therefore ordered, adjudged and decreed that:

A. On Count I, Breach of Contract Claim, Yellowhorse, Inc. is liable for damages to the Plaintiff Navajo Nation in the amount of $16,500.00, plus prejudgment interest of $5,650.00. It is the Court's opinion that Jane Yellowhorse Jones, aka Jane Lingren, and Dennis Jones are not individually liable for these damages based upon the pleadings and evidence presented.

B. On Count II, Breach of Bailment Contract, Yellowhorse, Inc. is liable for damages to the Plaintiff Navajo Nation in the amount of $16,500.00, plus prejudgment interest of $5,650.00. Jane Yellowhorse Jones and Dennis Jones are not individually liable for these damages based upon the pleadings and evidence presented.

C. On Count II, Conspiracy and Conversion, John Chauncey is liable for damages to the Plaintiff Navajo Nation in the amount of $391,616.62, plus punitive damages of $1,000,000.00.

D. On Count II, Conspiracy and Conversion, Betty Yellowhorse, aka

Betty Chauncey, aka Betty Lou Beasley, is liable for damages to the Plaintiff Navajo Nation in the amount of $300.00, plus $95.00 in prejudgment interest, and $10,000.00 in punitive damages.

E. Count III, Negligence, was dismissed against all defendants.

F. On Count IV, Negligence, Defendants, Jane Yellowhorse Jones, Betty Yellowhorse, aka Betty Chauncey, aka Betty Lou Beasley, and Mary Ann Brooks, aka Mary Ann Yellowhorse, are individually, jointly and severally liable to Plaintiff Navajo Nation in the amount of $18,615.00, plus $5,895.60 in prejudgment interest and $50,000.00 in punitive damages.

G. Each party is to bear their own court costs and attorney's fees.

No. WR-CV-77-86

District Court of the Navajo Nation
Judicial District of Window Rock

In the Matter of the Estate of:
William Al Tsosie.
Decided April 28, 1987

OPINION

Before Robert Yazzie, District Court Judge.

Samuel Pete, Esq., Window Rock, Arizona for the Plaintiff Mary L. Tsosie; William Battles, Esq., Tempe, Arizona for the Defendant Edward Tsosie; Leonard Tsosie, Esq., Crownpoint, New Mexico for Melisa Tsosie and Leona Tsosie, Minors; Arlene Tsosie, pro se.

Opinion delivered by Yazzie, District Court Judge.

Statement of Facts

1. This is a probate proceeding involving the Estate of William Al Tsosie (aka Leonard Tsosie), hereinafter "decedent". He died without a will on September 22, 1985, at PHS Indian Hospital, Fort Defiance, Arizona.

2. At the time of his death, decedent was a resident of the Navajo Indian Reservation at Window Rock, Arizona.

3. Distribution of decedent's Insurance proceeds is the sole dispute among the claimants in this case.

4. Decedent worked for Navajo Tribal Utility Authority, hereinafter "NTUA," from May 26, 1978, to the time of his death, September 22, 1985.

5. While employed with NTUA, decedent had a term life group insurance policy, No. 13657, from the Republic National Life Insurance Company, and he maintained this policy through his employer, NTUA, until he died.

6. Decedent named his following relatives as beneficiaries on his life insurance policy:

(a) Arlene A. Tsosie was named as beneficiary on May 26, 1978. She was identified as decedent's wife on the policy. *Her name was however removed as beneficiary on April 26, 1983.*

(b) Defendant Edward Tsosie, decedent's natural father, was added as a beneficiary on April 22, 1983.

(c) Melissa Tsosie, decedent's minor daughter, was added as beneficiary on May 26, 1978.

(d) Leona Tsosie, decedent's minor daughter, was added as beneficiary on April 6, 1983

(e) Valerie Tsosie, decedent's minor daughter, was added as beneficiary on October 23, 1984.

7. At the time of his death, decedent maintained the above-name individuals, except Arlene Tsosie, as his beneficiaries entitled to receive his insurance benefits in equal shares. Decedent carried a life insurance policy with a face cash value of $60,000.00

8. After decedent died, Republic National Life Insurance Company paid the beneficiaries the following sums:

(a) $15,000.00 was paid to Edward Tsosie on 5 February 1986, of which $3,075.22 was paid to Cope Mortuary for funeral expenses.

(b) $15,000.00 was paid to Mary Lou Tsosie on behalf of Valerie Tsosie on 5 February 1986, of which $2,000.00 remains in the bank account at Sunwest Bank, Tse Bonito, New Mexico.

(c) $30,000.00 was paid to Robert Chiago as Guardian Ad Litem for and on behalf of Melissa and Leona Tsosie. The money is currently held in trust at Citibank in Window Rock, Arizona.

Nature of Claims

9. Plaintiff Mary Lou Tsosie claims to be the lawful wife of the deceased William Al Tsosie, and thereby claims one half (½) interest of the entire $60,000. This money has already been paid and distributed to the above-named beneficiaries.

10. Defendant Arlene A. Tsosie also claims to be a common law wife of decedent, but she has not claimed any interest in the proceeds.

11. Plaintiff Mary Lou Tsosie further claims that her daughter, Amanda Tsosie, should be named by this court as one of the beneficiaries for distribution purposes. Amanda Tsosie is a natural daughter of decedent. She was not named as a beneficiary to the insurance proceeds.

Decedent's Marriage

12. Evidence shows that decedent purportedly maintained two separate marriages at the same time. One with the Plaintiff Mary Lou Tsosie, and the other with Defendant Arlene A. Tsosie. There is a question as to which marriage is valid.

13. Testimony shows that decedent lived with defendant Arlene A. Tsosie from April 30, 1974, to April, 1983. During this period, both parties lived together without a marriage license. Their marriage was never validated by the Courts of the Navajo Nation.

14. While decedent and Arlene A. Tsosie lived together, evidence further shows that:

(a) Two children were born; Melissa Tsosie, born on September 24, 1974, and Leona Tsosie, born on September 6, 1977.

(b) Both parties lived at NHA housing in Navajo, New Mexico.

(c) They also lived together at the residence of decedent's parents at Sawmill, Arizona. (See testimony of Edith and Edward Tsosie).

(d) Decedent and Arlene A. Tsosie held credit and bank accounts together.

(e) Decedent's parents, Edith and Edward Tsosie, related to defendant Arlene A. Tsosie as their daughter-in-law, and her children as their grandchildren. (See testimony of Edith and Edward Tsosie).

(f) Plaintiff Mary Lou Tsosie acknowledged in her complaint that decedent was married to Arlene Tsosie.

15. In 1981, decedent began having an affair with plaintiff Mary Lou Tsosie and they lived together until he died. As a result of this affair, decedent and Arlene A. Tsosie totally ceased their relationship in April, 1983.

16. As a result of decedent's relationship with Mary Lou Tsosie, two children were born: Valerie Tsosie, DOB: 01-10-83 and Amanda Tsosie, DOB: 09-09-85.

17. Decedent and plaintiff obtained a Navajo Tribal Marriage License on October 12, 1984, although he had not divorced Arlene A. Tsosie.

Opinion

There are three (3) issues to be addressed in this case:

ISSUE I: WHETHER A PERSON ONCE MARRIED IS FREE TO REMARRY AGAIN?

Evidence shows that decedent purportedly maintained two separate marriages at the same time. One with Plaintiff Mary Lou Tsosie and the other with Defendant Arlene A. Tsosie. There is a question as to which marriage is valid. Plaintiff Mary Lou Tsosie argues that there is no proof of common law marriage between decedent and Arlene A. Tsosie. Defendant testified that she was married to decedent at common law.

Common law marriages are recognized in the courts of the Navajo Nation. *In The Matter of Ketchum*, 2 Nav. R. 102 (1979). For a common

law marriage to be valid, there must be proof of: (1) consent to be husband and wife; (2) actual cohabitation; (3) actual holding out to the community to be married. In the instant case, Defendant Arlene A. Tsosie and decedent consented to be husband and wife. The consent to be married is often a private matter between husband and wife. There may be no witnesses. This finding of consent or agreement to be husband and wife will usually be based upon the testimony of the party seeking validation of marriage. Arlene A. Tsosie has so testified. *See Etcitty v. Etcitty*, A-CV-23-84.

Decedent and Arlene A. Tsosie lived together from October 30, 1974, to April, 1983. In cohabiting with one another during this period, they held themselves out as husband and wife to the communities at Sawmill, Arizona, and Navajo, New Mexico. They were recognized as husband and wife by decedent's employer (NTUA), and creditors. Decedent's parents, Edith and Edward Tsosie, related to Arlene A. Tsosie as their daughter-in-law and her children as their grandchildren. Furthermore, Plaintiff Mary Lou Tsosie even acknowledged in her complaint that Defendant Arlene A. Tsosie was married to decedent. In view of this evidence, this court finds that a common law marriage did exist between the decedent and Arlene A. Tsosie.

A marriage is presumed valid and the parties attacking the marriage bears the burden of proof of establishing that no marriage in fact existed. *Panzer v. Panzer*, 87 N.M. 29 (1974), and *In Re Duncan's death*, 83 Idaho 254, 360 P. 2d 987 (1961). In the Navajo courts, any parties contesting the invalidity of common law marriage will bear the burden of proof of showing its invalidity. *In Re Ketchum, supra.*

Plaintiff Mary Lou Tsosie and the decedent also obtained a marriage license on October 12, 1984. At this point, Decedent William Al Tsosie purportedly held two marriages at one time. Where a person holds two marriages simultaneously, how does the court decide this issue? The Navajo Tribal Council, at 9 N.T.C. Section 407, provides that in a dual marriage situation, no person once married is free to remarry until such divorce certificate is obtained. 9 N.T.C. Sec. 3, passed July 12, 1945, prohibits plural marriages. *In The Matter of Slowman*, 1 Nav. R. 142, 143 (1977), also made it clear that even a prior custom marriage can only be terminated by divorce. This situation is analogous to the requirement in states recognizing common law marriage that a legal divorce must be obtained to dissolve such marriages.

Defendant Arlene A. Tsosie testified that she never dissolved her common-law marriage with William Al Tsosie. This court agrees. Decedent remained married to her until he died, notwithstanding his complete separation from her. Pursuant to the Navajo law on marriage and divorce, William A. Tsosie was never free to marry Mary Lou Tsosie. Therefore, decedent's subsequent marriage to Mary Lou Tsosie is invalid. Mary Lou

Tsosie's claim, right or interest in decedent's insurance proceeds is, thus, invalid.

ISSUE II: IS A LIFE INSURANCE POLICY OBTAINED AND THE PREMIUMS PAID WITH INCOME RECEIVED BY HUSBAND DURING THE MARRIAGE A COMMUNITY PROPERTY?

Plaintiff Mary Lou Tsosie claims that the life insurance policy was obtained by the deceased William Al Tsosie during their marriage and the policy was their community property. The insurance policy which decedent carried with a face cash value of $60,000.00 is community property and a surviving spouse is entitled to half of the proceeds upon death of the insured. *See, In The Matter of Ben Tsosie*, 4 Nav. R. 198 (1983). Since this court finds that plaintiff was never validly married to decedent, the issue is moot. She has no standing to raise the issue.

In the case of Arlene A. Tsosie, she never filed a claim to any interest in the insurance proceeds at anytime during the course of this proceeding. She was sued as a party-defendant. She fully participated in the hearing of the merits without representation of counsel. Since she never asserted a claim in the proceeds, the four named beneficiaries are entitled to the proceeds in equal shares as provided by decedent's insurance policy.

ISSUE III: WHETHER AN HEIR NOT DESIGNATED AS BENEFICIARY TO AN INSURANCE PROCEED IS ENTITLED TO RECEIVE A SHARE OF SAID PROCEEDS.

Plaintiff Mary Lou Tsosie claims that her daughter Amanda Tsosie should be named by this court as one of the beneficiaries for distribution purposes. Amanda Tsosie is a natural daughter of decedent. She was, however, not one of the designated beneficiaries in her deceased father's life insurance policy. There is no evidence to presume that decedent had ever intended to include his daughter, Amanda Tsosie, as a beneficiary. There is no valid claim for community property and all the named beneficiaries are still alive. Under the circumstance of this case, the insurance proceeds do not become part of the estate.

Decedent specifically designated four heirs as beneficiaries. He intended these individuals to benefit from the insurance proceeds. He never changed the policy during his life time. Such arrangement should and will be recognized by this court.

Order

In review of the foregoing Opinion, this court hereby adjudges, decrees and orders that:

1) The common law marriage between William Al Tsosie, deceased, and Defendant Arlene A. Tsosie be deemed valid as of October 30, 1974;

2) The alleged marriage between William Al Tsosie, decedent, and Plaintiff Mary Lou Tsosie is null and void;

3) Melissa Tsosie, Leona Tsosie, Valerie Tsosie and Amanda Tsosie are recognized as the legitimate children of William Al Tsosie;

4) Melissa Tsosie and Leona Tsosie are each entitled to receive $15,000.00; (¼) one-fourth of the total insurance proceeds;

5) Any claim that Amanda Tsosie, minor child of decedent, be added as a beneficiary to the insurance proceeds is hereby denied;

6) Each party herein bear their own costs and expenses;

7) For such other and further relief as the court may deem proper and just.

No. WR-CV-03-87

District Court of the Navajo Nation
Judicial District of Window Rock

Allan Begay, *et al., Plaintiffs,*
vs.
Penny Karty and Larry Lee, *Defendants.*
Decided August 24, 1987

OPINION

Before Robert Yazzie, District Court Judge.

Lawrence Ruzow, Esq. and Allen Sloan, Esq., Window Rock, Arizona for the Plaintiffs; Damon L. Weems, Esq., Farmington, New Mexico for the Defendants.

Opinion delivered by Yazzie, District Court Judge.

I. Parties

1. Allan Begay, C#70611, and Delores Begay, C#56714, are enrolled members of the Navajo Nation residing at Window Rock.
2. Allan Begay and Delores Begay are husband and wife, having been married on March 25, 1985, and are the parents and natural guardians of Brian Begay, DOB: January 08, 1983, a minor.
3. Larry Lee is a resident of Circle Drive, House 2005, Window Rock.
4. Penny L. Karty is a resident of Window Rock, (Post Office Box 2358, Window Rock, Arizona.)

II. Nature of the Proceedings

1. Plaintiffs sued defendants for a tort cause of action arising from an automobile accident; seeking recovery for personal and property damages.
2. The matter came for a jury trial on December 1–3, 1986, and the jury found defendants not liable, thus awarding no damages. (See special jury verdict.)
3. Plaintiffs then filed a motion for Judgment Notwithstanding the Verdict or in the alternative, a new trial.

III. Statement of Facts

1. This action arises out of a two car accident, which took place on the morning of August 26, 1985, in Window Rock, Arizona, on Navajo Route 12 at the entry into the St. Michaels Subdivision.

2. The accident took place when Larry Lee attempted to turn left from Navajo Route 12 into the St. Michaels subdivision and hit the southbound vehicle driven by Allan Begay.

3. At the hearing on this matter, defendant Larry Lee admitted that after the accident, he told investigating Officer Jeff Johnson of the NDPS that the accident was his fault. His statement was corroborated by the testimony of Officer Jeff Johnson.

4. In addition, Larry Lee admitted receiving a traffic citation for violation of 14 N.T.C. 462, "Failure to exercise due care upon a roadway," arising from the accident.

5. Larry Lee pled guilty to the charge and paid a fine of $50.00. (Plaintiff's Exhibit 2, Testimony of Larry Lee). Even in the face of such admission, the jury found Larry Lee not liable for the August 26, 1985 accident.

6. At the time of the accident (August 26, 1985), plaintiff Allan Begay was traveling to work with his wife, Delores Begay and their 2 year old child, Brian Begay.

7. Plaintiffs testified that their vehicle was in fine shape before the accident, but severely damaged by the accident. (Plaintiff's photograph, Exhibit 3.)

8. Delores Begay testified that she was thrown into the steering wheel by the force of the collision. Brian Begay was thrown into the ignition key (which was in the ignition switch) by the force of the collision.

9. As a result of the accident, Allan Begay and his family had several Navajo blessing ceremonies performed on them for protection purposes.

10. At the time of the accident, Larry Lee was driving a 1982 Chevy Pickup owned by Penny L. Karty with whom he lived.

11. Evidence also shows that Larry Lee was a member of Penny L. Karty's household at the time of the accident. He was operating the vehicle on household business.

IV. Opinion

At the conclusion of the December 3, 1986, jury trial, to determine liability, the jurors were instructed to answer three (3) questions on a special verdict form:

Question No. 1. Was Larry Lee careless?

Question No. 2. Was the vehicle collision of August 26, 1985, the result of the fault or carelessness of both Larry Lee and Allan Begay?

Question No. 3. Were the injuries or damages to the plaintiffs, or any of the plaintiffs, the result of the carelessness or conduct of Larry Lee? (See special verdict form).

In response to Question 1, the jury found that Larry Lee was not careless. In response to Question 2, the jury found that the vehicle accident of August 26, 1985, was the result of the fault or carelessness of both Larry Lee and Allan Begay.

In response to Question 3, the jury found the injuries and damages sustained by the plaintiffs were not the results of the carelessness of Larry Lee.

Following dismissal of the jury, plaintiffs moved for entry of judgment in their favor notwithstanding the verdict, or a new trial. Both parties have submitted briefs to the motion. The manner in which the jurors answered the special verdict raises this issue:

ISSUE: WHETHER THE PLAINTIFFS ARE ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT OR A NEW TRIAL, WHERE THE JURY FINDS DEFENDANTS NOT CARELESS, DESPITE HIS ADMISSION OF LIABILITY FOR THE AUTOMOBILE ACCIDENT?

A Motion For New Trial

Defendants argued that plaintiffs never motioned for a new trial after the jury announced its verdict. Even if they did, defendants further contend that a provision for a new trial does not exist in the Navajo Courts. This is true, but this Court has an inherent power to grant a new trial.

The general rule at common-law has been that granting of motions for new trials is a right, "inherent in all Courts of general common-law jurisdiction." 58 AM. JUR.2d, *New Trial*, Sec. 3, pg. 184. The right to grant a new trial, under appropriate circumstances, is discretionary with the courts, unless it is otherwise specified by statute. *Id.* sec. 199.

The Navajo Court of Appeals has recognized this inherent power. In the case of *Battese v. Battese*, 3 Nav. R. 110 at 111 (1982), the Court stated, in *dicta*:

> In a trial before a jury, the granting of a new trial would require a careful analysis of the evidence *in order to decide whether the jury was confused.*

The issue in *Battese* was the granting of a new trial in a jury trial, but the passage of *dicta* is illustrative in showing that the Navajo Nation Supreme Court will view trial courts as having the power to grant new trials under appropriate circumstances. The dicta clearly shows that the basis for a new

trial in a jury case is one where the court determines that the jury was confused. On the issue of new trials, it is also important to note that the Navajo Rules of Civil Appellate Procedure provide for an extension of time, under Rule 8(b)(4), where there has been an order denying a motion for a new trial. Thus, it seems clear that the Navajo Nation Supreme Court recognize motions for new trial.

One of the accepted basis for the granting of a motion for a new trial is where a jury enters into a special verdict (as was done in this case) which appears to be confused. The encyclopedia notes:

> a verdict rendered may be set aside by the trial court if in the judgment of the trial court the verdict is contrary to law on the issues presented.

58 AM Jur 2d, *New Trial*, Sec. 134, pg. 340. The encyclopedia further notes that:

> A new trial should be granted where the special findings of the jury are inconsistent with one another; some showing the right to a verdict and others showing the contrary.

58 Am Jur 2d, *New Trial*, Sec. 146

In this case, the problem of inconsistent findings in a special verdict is clearly before the Court. The special verdict finding on question No. 1 is that Larry Lee was not careless. The finding in question 2 of the special verdict is at variance with the original finding in question No. 1. Similarly the finding in question No. 3, as to damages being related to the defendant's carelessness, is inconsistent with the finding in No. 2. The Navajo law of comparative negligence would indicate that if a party is at fault in an accident, the party should bear some percentage of the burden of compensating the injured party. *See Cadman v. Hubbard*, No. CP-CV-100-84 (Crownpoint D. Ct. 1986). Thus a jury finding that Larry Lee could have been at fault, even though he was not careless, is a verdict where the findings apparently are inconsistent. One finding would seem to extend liability to Larry Lee and two other findings would not.

In addition, from reviewing the briefs presented to this Court, defendant Larry Lee, while not admitting at trial to fault, did in fact, make admissions of fault to the investigating police officer, and he pleaded guilty to a traffic citation for carelessness. These items of evidence being properly introduced at trial, would seem to indicate that there was no real contest in the trial as to whether Larry Lee was careless. However, the jury found that he was not, while at the same time finding that he may have been part of the cause of the vehicle collision.

This Court, therefore, concludes that, after careful analysis, the jury was confused in its verdict. *See Battese, supra*. This, in return, would be a finding sufficient to support the order for a new trial.

Judgment Notwithstanding The Verdict

Rule 17 of the Navajo Rules of Civil Procedure provides for a motion for a Judgment Notwithstanding the Verdict as follows:

"After the announcement, either party in a civil case may make a Motion for Judgment Notwithstanding the Verdict, which may be granted only if there was no evidence to support the verdict, or if reasonable minds could reach only one verdict." Rule 17, *Annotated Rules of Navajo Civil Procedure*, (1978).

In view that the jury did not make any findings as to damages, much less a fixed percentage of fault, Judgment Notwithstanding the Verdict is inappropriate.

A Judgment Notwithstanding the Verdict is inappropriate, because there really is not any judgment to put in the place of what the jury decided. There was also no motion for a directed verdict, on the question of carelessness by the plaintiff, in this case. It would seem that while the facts clearly show that there was some liability on the part of the defendant, this issue is wide open in terms of the degree of that liability. It would be most appropriate to retry the whole case, especially in view of the fact that the percentage of fault and the amount of damages are still issues for trial.

Based upon the foregoing opinion, this Court hereby grants a new trial on the issue of liability and damages in this case.

No. WR-CV-96-87

District Court of the Navajo Nation
Judicial District of Window Rock

Donald Benally, *et al., Relators,*
vs.
Guy Gorman, *et al., Respondents.*
Decided September 30, 1987

OPINION

Before Robert Yazzie, District Court Judge.

Michael Upshaw, Esq., William Riordan, Esq., and Arita Yazzie, Esq., Navajo Nation Department of Justice, Window Rock, Arizona for the Relators; Richard Hughes, Esq., Dale T. White, Esq., and Sandra Hansen, Esq., Boulder, Colorado for the Respondents.

Opinion delivered by Yazzie, District Court Judge.

Introduction

This case involves the question whether the Navajo Education and Scholarship Foundation (hereinafter NESF or "The Foundation") is a Tribal entity or a private Non-Profit Corporation. The Foundation was organized solely for purposes of raising funds from private and public sources to support the education goals and programs for the benefit of Navajo students.

To determine the legal status of the Foundation, this Court must look at the authority of the Advisory Committee, and the rights and responsibilities of a corporate entity under Navajo law.

Parties

1. Petitioner Michael P. Upshaw is the Attorney General of the Navajo Nation.

2. Relators include Donald Benally, Daniel Tso, Loyce Phoenix,

Rebecca Martgan, Bobby Charley, Richard Kontz, Paul Sage, Kee Ike Yazzie and Manuel Shirley.

3. Respondents include Guy Gorman Sr., Vivian L. Arviso, Elouise DeGroat, Annie D. Wauneka, Alyce Rouwalk, Rosalind Zah, David L. Tsosie and Albert A. Yazzie.

4. All the individual relators and respondents are enrolled members of the Navajo Tribe with permanent residence within the Navajo Nation.

5. Navajo Education Scholarship Foundation, Inc., was established and created on October 12, 1983.

6. The principal place of NESF is at Window Rock, Navajo Nation.

JURISDICTION

7. Jurisdiction arises pursuant to 7 N.T.C. Section 252 (2), in that the causes of action hereto have occurred within the territorial jurisdiction of the Navajo Nation.

Findings of Fact

1. On January 28, 1981, the Navajo Tribal Council adopted a revised Plan of Operation for the Advisory Committee of the Navajo Tribal Council. *See* Resolution CFA-1-81 at 2 N.T.C. Secs. 341-344 (1985 Supp.) In that resolution, the Tribal Council authorized the Advisory Committee "[to] create any enterprises, colleges, ONEO, or other entity of the Navajo Nation by adoption of its Plan of Operation and to amend or rescind that plan. . . ." 2 N.T.C. §343(b).

2. The Navajo Education and Scholarship Foundation was first established by the Advisory Committee; by Resolution ACO-171-83. Under this resolution, the Advisory Committee adopted NESF Articles of Incorporation and declared NESF as a "nonprofit, non-member Corporation." The resolution further provided that:

a) The Chairman of the Navajo Tribal Council appoint NESF Board of Trustees, with Advisory Committee concurrence. See Article V (D).

b) The Advisory Committee has full authority to approve any and all amendments to the NESF Articles of Incorporation. (See Article IX.)

3. On January 30, 1986, the Navajo Tribal Council enacted the Navajo Nation Corporation Code and Navajo Nation Non-Profit Corporation Act by Resolution CJA-2-86, which became effective August 1, 1986.

4. On November 13, 1986, the Advisory Committee approved amendments to NESF Articles of Incorporation by Resolution ACN-183-86. That resolution:

a) Gave the majority of a quorum of NESF, (*See* Article [D]);

b) Eliminated the need for Advisory Committee approval of amendments to NESF Articles of Incorporation, and authorized the NESF Board of Trustees to amend the articles; and

c) The Advisory Committee further authorized NESF Board of Trustees "to comply with the Navajo Tribal law by filing (the amended) Articles of Incorporation with the Commerce Department to comply with the Navajo Tribal Law."

5. The first NESF Board of Trustee, Respondents herein, are:

Guy Gorman Sr.	Alyce Rouwalk
Vivian L. Arviso	Rosalind Zah
Elouise De Groat	David J. Tsosie
Annie D. Wauneka	Albert A. Yazzie

6. On December 18, 1986, the Commerce Department issued NESF a Certificate of Incorporation, authorizing it to transact business within the Navajo Nation as a Non-Profit Corporation.

7. On February 25, 1987, the Advisory Committee passed two resolutions which attempted to:

a) Reestablish NESF, only, as an entity of the Navajo Nation. The Advisory Committee fully rescinded Resolution ACN-183-86, which had created NESF as a private nonprofit corporation, separate from the Navajo Nation. The Advisory Committee further declared the NESF Articles of Incorporation as null and void. *See* Resolution ACF-52-87.

b) Remove all the existing members of Board 1 (Respondents) and replace them with the Relators as successors of NESF Board of Trustees:

Donald Benally	Richard Kontz
Daniel Tso	Paul Sage
Loyce Phoenix	Kee Ike Yazzie
Rebecca Martgan	Manuel Shirley
Bobby Charley	Lewis Calamity

8. On March 13, 1987, the Navajo Nation, and on behalf of Relators, filed Quo Warranto Proceedings against Respondents to prevent Respondents from taking any further action as NESF.

9. Because of the unresolved question of which Board is the valid Board of NESF, it was necessary during the pendency of this action that the Court appoint these persons as the Interim Trustees to manage and direct the daily affairs of NESF.

ISSUES

I. Was the action of the Advisory Committee on November 13, 1986, proper and valid?

II. Was the action of the Advisory Committee on February 25, 1987, proper and valid?

Opinion

INTRODUCTION

When a court is faced with reviewing any legislative action, that review must be conducted under certain principles. The main principle of judicial review is the presumption that the legislative act is proper and legal. The word "presumption" is a legal term which means that a thing is accepted as true or proven unless that presumption is rebutted by evidence to the contrary. One of the factors in determining whether an act is proper or legal is whether the legislative action is rationally related to a legitimate governmental purpose.

A second presumption guiding the courts is that the legislators acted from proper motives. If the legislative body did a proper and legal act, the court will not examine the motives of the legislators. Motives will be examined only to the extent needed to determine if the legislative action should be invalidated on grounds of fraud and bad faith.

A government consists of at least three functions: determination of principles and policies of the society being governed; execution of those policies through the instruments of government; and resolution of questions and disputes arising under the principles and policies of the society.

The formulation of principles and policies should be done as close to the people as possible. In the United States this usually means that the legislative bodies, whose delegates, are representatives of the people. The reason for this is that no government can exist indefinitely without the support and voluntary obedience of a majority of the people.

2 N.T.C. Section 101 says that the Navajo Tribal Council is the governing body of the Navajo Tribe. A review of the Navajo Tribal Code indicates that the Tribal Council, as representatives of the Navajo people, retained to itself the legislative functions, and established the Executive Branch and the Judicial Branch to carry out the other functions of government.

As has happened with the states and federal government, the Navajo Nation government became so complex that further authority had to be delegated. Generally, this delegation has been to administrative agencies. The Navajo Nation is experiencing a development of administrative bodies and of administrative law.

The search for ways to make large and complex government efficient has

not stopped with administrative agencies. Governments also make use of corporations to provide certain governmental services.

It appears to the Court that the underlying questions in this case are delegations of authority and the validity of those delegations.

The Tribal Council has delegated certain powers to the Advisory Committee. Historically, the Advisory Committee has exercised powers in excess of those given to the other committees of the Tribal Council. The Court has not done an extensive study of the history of the Advisory Committee, but finds that the Plan of Operation of the Advisory Committee, which was passed by the Tribal Council on January 28, 1981, is the current delegation under which the Advisory Committee operates. A review of the Navajo Tribal Code shows that many statutes under which the Navajo Nation operates were passed by the Advisory Committee, but not the full Tribal Council. In effect, the Advisory Committee often operates as a second legislative body. The Court, however, does not have the enormous task of deciding whether this is proper. All the court need consider for purposes of this case is whether the Advisory Committee had the power to establish NESF in 1983, and the validity of subsequent acts of the Advisory Committee toward NESF.

The Plan of Operation of the Advisory Committee sets forth the purposes of the Advisory Committee. Those purposes include at 2 N.T.C. Section 341 (b):

(1) Act as the Executive Committee of the Navajo Tribal Council with general authority (as specifically provided herein), to act for the Navajo Tribal Council at such times when the Navajo Tribal Council is not in session.

(2) Monitor and coordinate the activities of all divisions, departments, and enterprises of the Navajo Nation.

The Plan of Operation of the Advisory Committee contains the following enumerated power:

> To create any enterprise, college, ONEO, or other entity of the Navajo Nation by adoption of its Plan of Operation, and to amend or rescind that Plan, and to amend, or rescind the Plans of Operation of any entities already created by the Tribal Council. 2 N.T.C. Section 343 (B) (1).

This is apparently one of the "specifically provided" powers referred to in 2 N.T.C. Section 341 (b)(1).

By this Plan of Operation, the Navajo Tribal Council delegated to the Advisory Committee the power to create and abolish entities of the Navajo Nation. The Court is not able to determine whether this was a new delegation of authority. It is clear that in the early years, tribal entities and enterprises were established by the Navajo Tribal Council.

The word "entity" generally means an organization or body that has some existence independent of its individual members and staff. An entity has a recognized existence and being of its own. For example, the Advisory Committee of the Navajo Tribal Council is an entity. It has existed for many years even though the individual members have changed. An entity may also be a corporation.

Advisory Committee was delegated the power to create entities. The Court finds as a matter of first impression that this delegation by Tribal Council was proper.

The Advisory Committee was given the power to create an entity by adopting its plan of operation. The Advisory Committee was given the power to rescind plans of operation. This implies the right to abolish an entity. The Advisory Committee had the authority to establish NESF as a tribal entity in 1983. The question is whether the Advisory Committee did in fact create the foundation as a tribal entity by adopting its Plan of Operation. The Advisory Committee never adopted a Plan of Operation designated as such for the foundation. The Advisory Committee instead adopted "Articles of Incorporation of the Navajo Education and Scholarship Foundation."

It is easy to assume that because the Navajo Nation did not have a Corporation Code prior to January 30, 1986, that the Navajo Nation could not authorize incorporations prior to that time. This is incorrect. The Court has briefly reviewed the history of corporations in England and the United States. In this review the Court has relied on *Ballentine on Corporations*, Rev. Ed. (1946).

In England, prior to corporation acts, charters were granted either by the king or by a special act of Parliament. In the 19th century, England passed acts that dealt with the chartering of corporations.

In the United States, corporations were created by special acts of the various state legislatures until the 19th century when the states began adopting general incorporation laws open to all applicants. *Ballentine* at section 8 (a) says:

> State legislatures have plenary power to create corporations. Formerly, corporations were created exclusively by special acts—that is, by acts creating a particular corporation, as distinguished from a general law allowing any persons to organize themselves into and be a corporation by complying with prescribed conditions; and corporations may still be created by special act, in the absence of a constitutional prohibition. Corporations may also be created under the authority of general laws. In most of the states, in order to remove the danger of favoritism and corruption in the creation of corporations, the people have adopted constitutional provisions declaring that, with certain exceptions, the legislature shall not pass any special act creating a corporation, but that corporations shall be formed under general laws only; and where there is such a prohibition, a special act creating a

corporation is absolutely void. Formerly when a corporation was to be organized, a private bill had to be introduced in the legislature, referred to a committee, passed through both houses and signed by the governor of the state. Delay, expense and corruption often resulted. General incorporation laws now make it possible for almost any enterprise to be conducted in corporate form upon compliance with simple formalities.

The Court finds that prior to the enactment of the Navajo Nation Corporation Code, the Navajo Tribal Council had the inherent governmental power to charter corporations. This inherent governmental power was recognized by the Navajo Tribal Council in 1979 when it chartered Toyei Industries. The first "whereas" clause of the resolution (CAP-13-79) granting the corporate charter says, "The authority to grant charters to corporations is an element of the inherent sovereignty of the Navajo Nation."

The chartering of corporations was done on an individual basis requiring a separate act of the Tribal Council for each incorporation. With the adoption of the Navajo Nation Corporation Code, the Navajo Nation provided a uniform procedure for the chartering of corporations, and provided certain laws under which each corporation must function.

The Court is persuaded by certain exhibits submitted by petitioners that the authority to charter corporations was never delegated to the Advisory Committee. The Court is particularly persuaded by the minutes of the Tribal Council on January 28, 1981, at which the Plan of Operation of the Advisory Committee was adopted, that such power was deliberately withheld from the Advisory Committee.

On its face the act of the Advisory Committee on October 12, 1983, purporting to grant a charter, was in excess of its authority.

As the Advisory Committee was in the habit of establishing tribal entities, and calling the authorizing document a "Plan of Operation", the Court finds that the Advisory Committee intended to charter NESF as a corporation.

Although the Advisory Committee had no authority on October 12, 1983, to charter corporations, the Court finds that the subsequent course of dealing with the NESF by the Navajo Tribal Government, ratified the act of incorporation.

Navajo students and the public, particularly donors, were allowed to believe NESF was properly chartered. The Budget and Finance Committee of the Navajo Tribal Council authorized a grant to NESF from the Pittsburgh and Midway Coal Mining Company Scholarship account to the Navajo Education and Scholarship Foundation (BFAU-118-86). The Navajo Nation permitted NESF to solicit funds for construction of an education center and to oversee the construction of the center. The Navajo Tribal Council appropriated funds ($1,000,000) toward construction of

the building (CS-72-85). Petitioners' exhibits contain documents which were drawn up to transfer the building to the Navajo Tribe with NESF having the right to lease space in the center as consideration for the efforts of NESF in raising the money to build the center. On October 12, 1983, the Advisory Committee granted a charter to NESF, and the Navajo Tribe Government thereafter acted toward NESF and allowed NESF to be held out to the public as a properly chartered corporation.

The Court is not prepared to say that a governmental function was delegated to NESF. The 1983 Articles authorized NESF to "solicit funds from private and public sources for the support of the educational goals and programs of the Navajo Tribe." (Article III, B.) That article also designates some specific purposes for which the solicited funds could be used. Soliciting funds for the use of Navajo People does not appear to be an exclusive governmental activity. Petitioners cite certain Tribal Code sections on solicitation of funds as support for the argument that NESF was a tribal entity. These sections were passed by the Tribal Council in 1970, making it a crime to solicit funds without authority in the name of the Navajo Tribe, or Navajo groups, "for the purpose of defrauding the Navajo Tribe, the Navajo People, or any group, class or individuals thereof." At the same time, the Tribal Council set forth conditions under which the authority to solicit funds could be granted. Those sections were contained in Chapter 3, of Title 17 of the Navajo Tribal Code. Chapter 3 was repealed in 1977 with the revision of Title 17 which is known as the Navajo Tribal Criminal Code.

The act of incorporation creates an entity that for certain purposes is regarded as a legal person and is entitled to certain civil rights guarantees. May a legislative body delegate to a private "person" certain powers and authority normally exercised by that legislative body? The Court has relied to some degree on *Sutherland Statutory Construction* (4th Ed.), for guidance on the issues of delegation of power. In *Sutherland* the issue of valid delegation comes under the threshold question of constitutionality; particularly the U.S. Constitution. The U.S. Constitution contains broad parameters of the power which each branch of government may exercise. In addition the tenth amendment states:

> The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.

Here we have the enabling document of the U.S. government delegating power from the people to the three branches of government. In the Navajo Nation, the governing power was originally placed in the Tribal Council, which delegated certain powers to the Executive Branch and the Judicial Branch. Despite these differences, and perhaps in light of them, the Court finds the material in *Sutherland* instructive. Section 4.11 of the treatise

deals with the delegation of legislative power to private persons.

Generally, a delegation to a private person, to decide what the law shall be or when a law shall be effective, has been held invalid. On the other hand, delegation of legislative power to private persons which is more of an administrative decision making process has been upheld. The granting of eminent domain powers to privately owned utility companies with the companies having the authority to decide what properties should be taken, and when, has been upheld. Private agricultural and environmental groups have been given the authority to nominate candidates for appointment to a fish and game conservation and control agency. This was upheld on the grounds that a delegation of legislative authority is legal if there are sufficient safeguards to assure that arbitrary power is not concentrated in persons or groups motivated by self-interest. In addition, private persons are frequently delegated powers in the creation of new political subdivisions, such as special drainage, water or reclamation areas, schools, park districts, etc.

The Court is not prepared to say there was a delegation to NESF. If there was, it appears to have been a valid delegation.

NESF has not been delegated any law making powers. The purposes of NESF are limited. NESF is subject to the laws of the Navajo Nation through the Navajo Nation Corporation Code. The Code sets out a procedure for involuntary dissolution and for revocation of the articles of incorporation.

The next question is one of tribal property. The Court is not convinced that NESF has ever had "tribal property" other than that appropriated from the Navajo Tribe to NESF for specific purposes. The Court is thinking in particular of the $1,000,000 appropriated for the building and the one time appropriation from the Budget and Finance Committee in 1986. The 1983 Articles, at Article III B. 2., states as one of the uses of funds collected:

> To provide for the construction of a Navajo Education Center to belong to the Navajo Tribe and to house the programs of the Navajo Division of Education and related programs of the Navajo Tribe. It may do this either by providing funds to the Navajo Tribe for use in constructing said building, or else by otherwise participating in its construction pursuant to agreements entered into between the corporation and the Navajo Tribe.

As for any other property that might have belonged to the Navajo Nation, it appears that it was placed in the control of NESF by the Navajo Nation.

The 1983 Articles at Article IV on dissolution of NESF provides:

In the event of the liquidation or dissolution of the Corporation, whether voluntary or involuntary, no director, trustee, officer of the Corporation, or any other private person shall be entitled to any distribution or division of its assets. Any assets remaining to the Corporation at dissolution or liquidation, after paying or providing for its liabilities, shall be distributed to one or more nonprofit, charitable organizations which are tax-exempt under section 501 (c) (3) of the Internal Revenue Code or its successors, or, if permissible under federal tax law then in effect, to the Navajo Tribe, to be used to carry on activities consistent with purposes for which this corporation was organized. The specific recipients will be determined by written agreement between the Corporation and the Navajo Tribe. Any assets not so distributed by a Court of the Navajo Tribe to such a nonprofit, charitable organization, or to the Navajo Tribe if permissible under federal tax law then in effect, in accordance with said purposes.

Article IV of the 1986 Articles Provides:

In the event of the liquidation or dissolution of the Corporation, whether voluntary or involuntary, no Trustee, Officer of the Corporation, or any other private person shall be entitled to any distribution or division of its assets. Any assets remaining to the Corporation at dissolution or liquidation, after paying or providing for its liabilities, shall be distributed to one or more not for profit, charitable organizations for purposes of awarding scholarships to Navajo students which organizations are tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1954 or its successors.

The 1983 Articles provided for options for disposition of the assets of NESF on dissolution. One of those optional distributee is the Navajo Tribe. It seems unlikely that the Navajo Tribe would be only a possible recipient of property it already owned. The 1986 Articles provide no choices. The only distributees upon dissolution are nonprofit organizations providing scholarships to Navajo students. The assets, which are acquired to benefit Navajo students, must be distributed for their benefit upon dissolution of NESF.

In addition, the Nonprofit Code at section 320 prohibits shares of stock and dividends. Section 303 permits a merger or consolidation only if the corporation surviving the merger is a nonprofit corporation.

The situation is somewhat analogous to a trust with NESF being the trustee and Navajo students being the beneficiaries.

This is very different from the situation in *Tome v. Navajo Nation*, 4 Nav. R. 159 (Window Rock D. Ct. 1983), where the contemplated transaction would have given a private individual absolute ownership of tribal assets. In *Tome*, the Court also found that there were sufficient disparities in the valuation of the assets to raise the questions of fiduciary responsibilities and good faith in the transfer of assets. Through the NESF, money is taken in and distributed outside the legislative process. Through the NESF

certain people are designated to oversee the funds. It does not appear that any intrinsic governmental powers have been delegated to the Foundation. The Court further finds that no tribal assets have been removed from the intended beneficiaries. NESF, both prior to November 13, 1986, and after, receives and distributes funds for the benefit of Navajos.

The Court holds that the Advisory Committee chartered the NESF and that the Navajo Nation ratified that by subsequent acts. This holding is very limited as it pertains to NESF. Advisory Committee has the power to create and abolish tribal entities. It does not have the power to grant corporate charters.

NESF was given the power to solicit donations and to distribute those donations. The Court is not convinced, however, that this is an exclusive delegation. The Court sees no prohibition on the Navajo Nation soliciting and negotiating for scholarship and educational donations to be given to the Navajo Nation or to NESF. The Navajo Nation through its appropriate governmental bodies may channel donations to NESF or may make appropriations to NESF. The Navajo Nation may also make other depositions of educational and scholarship donations to the Navajo Nation that are not inconsistent with the terms and conditions of the donation.

No specific property has been identified to the Court as being in question. The Court can address the issue only in the limited manner above.

ISSUE I.

Was the action of the Advisory Committee on November 13, 1986, proper and valid?

The 1983 Articles provided for participation by the Advisory Committee in two instances. The trustees were to be appointed by the Chairman of the Navajo Tribal Council and their appointment concurred by the Advisory Committee, Article V. D. Article IV provided:

> These Articles of Incorporation may be amended by a majority vote of the Board of Trustees. Prior written notice of at least two weeks shall be given to all members of the Board of Trustees of any proposed change in the Articles. No amendment or alteration of the Articles of Incorporation shall take effect until the same is approved by a vote of the Advisory Committee of the Navajo Tribal Council.

On November 13, 1986, the Advisory Committee, by resolution ACN-183-86, approved amended Articles of Incorporation for NESF. This action of approval was authorized under the original Articles of Incorporation.

The Advisory Committee also authorized NESF to file the amended Articles with the Commerce Department to comply with Navajo Tribal

law. It is not clear that the Advisory Committee had the authority to direct such filing. It is clear, however, that NESF had the authority to file its Articles and receive a certificate of incorporation.

NESF was already a corporation chartered by the Navajo Nation. When NESF filed its amended Articles on November 13, 1986, it subjected itself to the laws of the Navajo Nation for the regulation and supervision of corporations as contained in the Navajo Nation Corporation Code.

The action of the Advisory Committee in approving the amended Articles was proper, even though by the act the Advisory Committee approved a change in the way the Board is selected, and it removed from the Advisory Committee any authority to approve future amendments to the Articles of Incorporation.

The Court has found nothing in its review of this case and the law, which could have prohibited the Advisory Committee from retaining in the Articles of Incorporation, certain powers and authority even though the corporation is registered under the Navajo Nation Corporation Code. This was not done.

ISSUE II

Was the action of the Advisory Committee on February 25, 1987, proper and valid?

Prior to passage of the Navajo Nation Corporation Code, corporations chartered by the Navajo Nation were dissolved either voluntarily or involuntarily by act of the Tribal Council. Just as the Corporation Code provides a uniform method for the chartering of corporations, it also provides uniform procedures for the regulation of corporations.

One of the rights of corporations is due process. The Court finds that at the very least this means that changes in the corporate structure must be according to law. The Navajo Nation Corporation Code provides procedures for the amendment of articles of incorporation and procedures for the dissolution of corporations. Once the foundation became a corporation, it automatically received the legal right to have the law followed in actions regarding the foundation.

The Court understands the desire of the Advisory Committee to continue to have input into NESF. As was expressed earlier in this opinion, the Court generally will not examine the motives behind a legislative act if the act itself is proper and valid. The opposite is also true. The Court will not examine the motives behind a legislative act if the act itself is improper or invalid. The act of the Advisory Committee on February 25, 1987, was not according to the law of the Navajo Nation and the best of intentions will not make it so.

NESF was incorporated on October 12, 1983. It registered under and became subject to the Navajo Nation Corporation Code on November 13, 1986, by filing its Articles of Incorporation. The Court holds that any subsequent acts toward NESF, which were not in accord with its Articles of Incorporation and with the Navajo Nation Corporation Code, are invalid and of no effect.

No. **SR-AN-246-86**

Children's Court of the Navajo Nation
Judicial District of Shiprock

In the Matter of: A. O., A Minor,
SR-AN-246-86
Decided November 18, 1987

OPINION

Before Marilou B. Tso, Children's Court Judge.

William E. Miller, Jr. Esq. and Daryl June, Esq., Navajo Nation Prosecutor's Office, Window Rock, Arizona, for the Petitioner; James Jay Mason, Esq., Gallup, New Mexico, for the Respondent.

Opinion delivered by Tso, Children's Court Judge.

I. Introduction

This case was remanded to the Shiprock Children's Court by the Order of the Navajo Nation Supreme Court; such Order entered February 10, 1987. In its Order of February 10, the Supreme Court mandated:

. . .This case is remanded to the Shiprock Children's Court to determine if any of the facts in §1055 (4) exists and for proceedings consistent with this option. (Order of February 10, 1987, page 6).

In the body of the Navajo Nation Supreme Court opinion, the applicable law governing the remand was stated as:

Under the Navajo Children's Code, if any of the factors (residence, domicile, ward of the court) in 9 N.T.C. §1055 (4) is proven by a preponderance of the evidence, then the Children's Court has jurisdiction over the Navajo child, even where the alleged conduct giving rise to the petition occurred outside the exterior boundaries of the Navajo Indian Reservation. *Id.*

With these directions in mind, this Court will enter findings of fact as instructed by the Supreme Court, (at page 5 of the February 10, 1987 Order).

II. Findings of Fact

The findings of fact now entered by the Shiprock Children's Court are made against a complicated background of litigation over the custody of the child, A. O. The custody battle has been waged by the parents of the child for years. This case came before the Shiprock Children's Court originally on a petition by the Navajo Nation Prosecutor's Office alleging dependency of the child, arising out of allegations of sexual abuse of the child while she was in the custody of her father in Albuquerque. This Court never reached the substantive issues underlying the petition for dependency, having dismissed the case for lack of jurisdiction. It is with the jurisdictional factors in mind, that the Court now enters findings of fact as directed by the Navajo Nation Supreme Court. The findings will be broken down into the following categories.

1. Findings relative to residence and domiciles;
2. Findings relevant to the Children's Court wardship over the child.

A. Residence and Domicile

1. On June 25, 1986, a petition for adjudication of a dependent child was filed by the Shiprock District Juvenile Presenting Officer, alleging sexual molestation of the child, by her Anglo father in Albuquerque, New Mexico, from April to June, 1986, and further alleging that the child was domiciled within the exterior boundaries of the Navajo Nation.
2. At the time the petition for dependency was filed, the child was the subject of a custody order entered by the Second Judicial District Court of the State of New Mexico, for Bernalillo County (hereinafter referred to as the State Court). The Order, entered December 05, 1984, provided that the mother of the child could have custody of the child for two week periods, alternating with two periods for the custodial father, during the summer months. The mother's first summer visitation, under the Order would run from June 01 to June 14th each year. (Order of December 05, 1984, Exhibit 5 to the Motion to Dismiss of Father at E(4).).
3. The State Court Order of December 05, 1984, provided that the father of the child was the custodial parent of the child (*Id.* at D).
4. On or about June 05, 1986, the mother picked up the child for a visitation. (Affidavit of Father, Exhibit 1 to the Motion to Dismiss, at No. 25: the factual assertion of the Affidavit has not been controverted by the Navajo Nation). The Court finds that the mother picked up the child, either for a weekend visitation (Affidavit *Id.*) pursuant to her first two week summer visitation under the State Court Order. (Order of December 05, 1984 *supra.*)

5. As of June 15, 1986, the natural mother's right to visitation had ceased, and she did not thereafter return the child to the custodial parent.
6. On July 10, 1986, during a delay in the proceedings of this Court caused by the Navajo Nation's lack of readiness to proceed on its petition for dependency, the State Court issued an Order finding the mother to be in violation of its custody Order of December 05, 1984. (Order, Exhibit 7 to the father's Motion to Dismiss.)
7. On July 29, 1986, this Court was presented with the father's Motion to Dismiss, which, *inter alia,* alleged that the child had been removed to the Navajo Nation in violation of the State Court custody decree and that the Navajo Nation was not the "home state" of the child. (Motion to Dismiss and Affidavit, Exhibit 1).
8. On July 30, 1987, this Court held a hearing on the petition for dependency. At such hearing, the Court questioned witnesses and examined evidence. The evidence showed, by a preponderance, that the following were true:
   a) The child was brought to the Navajo Nation on June 19, 1986, by her mother shortly before having the Juvenile Presenting Officer file the petition for adjudication of a dependent child;
   b) At the time the petition for dependency was filed in the Navajo Nation Court, the mother had violated her visitation rights under the State Court Custody Order. The mother claimed in open court that she kept the child because of the alleged abuse by the father.
   c) The State Court Custody Orders came about after a prolonged divorce struggle which had cases filed at the Shiprock District Court and in State Court. In the State Court proceedings for divorce, the mother appeared and litigated the case. At the time of the divorce action she resided in Albuquerque, New Mexico, and there is no question that the State Court had jurisdiction over the parties and subject matter in its divorce decree of June 12, 1984, and subsequent child custody Orders.
   d) The State Court Custody Order provided that the father should be the custodial parent with the mother having weekend visitations and visitations during the summer and holidays as specified in the Order of December 05, 1984.
   e) The June 25, 1986, petition for dependency was filed by the presenting officer at the insistence of the mother.

B. Findings of Fact Regarding Wardship

1. On June 30, 1986, the Shiprock Juvenile Presenting Officer filed a motion for an *ex-parte* custody Order, which was granted by the Court on the same date. In so doing, this Court

asserted jurisdiction over the proceedings, making the child a ward of the Court by giving temporary legal custody to the Navajo Division of Social Welfare.

2. The June 25, 1986, petition for dependency alleged that the child was domiciled and resided within the boundaries of the Navajo Nation. The June 30th *ex-parte* motion alleged that the Court had jurisdiction.
3. The jurisdiction of this Court was first challenged on July 29, 1987, when the father filed his Motion to Dismiss with the Court.

III. Conclusions of Law

While the Navajo Nation Supreme Court did not directly address the need for conclusions of law by the Court, this Court will enter conclusions of law, because of the particularly sensitive nature of the jurisdictional issues presented by this case.

A. Subject Matter Jurisdiction

1. This is a dependency proceeding, and as such, this Court has "exclusive original jurisdiction of all proceedings under the Children's Court in which a child is alleged to be a. . .dependent child. . . . (§1055 (1) of the Navajo Nation Children's Code.)
2. This Court's exercise of subject matter jurisdiction is affected by the provisions of §1055 (4) of the Navajo Nation Children's Code regarding territorial jurisdiction. Under that section of the code, this Court may decline jurisdiction "in appropriate circumstances where a forum with concurrent jurisdiction is exercising its authority," and this Court shall have exclusive jurisdiction "over any Navajo child who resides or is domiciled within the borders of Navajo Indian Country or who is a ward of the Children's Court."
3. The exclusive jurisdiction of this Court involves an interrelationship of subject matter and personal jurisdiction, which requires for proper exercise of subject matter jurisdiction that a child be properly before the Court. *In the Matter of: Katherine Denise Chewiwi,* 1 Nav. R. 120, 123 (1977).

B. Conclusions relative to domicile

1. Under 9 N.T.C. §1002 (19), the lawful domicile of a child of divorced parents is the domicile of the custodial parent.
2. The domicile for purposes of this Court's jurisdiction is established at the time of the alleged acts.
3. The custodial parent of A. O. was the natural father, and he had such custodial rights at the time of the acts alleged in the petition

for dependency. Whatever custodial rights that the mother may have had, as a result of the State Court Order; those rights did not exist at the time that this dependency petition was filed. This Court, while not bound by full faith and credit, is obliged to extend comity to the State Court determination of the mother's violation of her custody rights as a result of the State Court's Order of July 09, 1986. *See, In the Matter of the Guardianship Of: Katherine Denise Chewiwi, Id.* at 126. This Court concludes that the State Court has continuing jurisdiction over the custody matter involving the child, and this Court may properly look to the State Court's construction of its own custody order in making the determination as to lawful custody rights during the period of time relevant to this petition for dependency.

4. The domicile of A. O. was properly the domicile of the custodial parent, and as such, that domicile was not within the exterior boundaries of the Navajo Nation.

C. Conclusions of Law relative to residence

1. The Navajo Children's Code, at §1055 (4), provides that the Children's Court shall have exclusive jurisdiction over any Navajo child "who resides...within the borders of Navajo Indian Country."
2. The term "residence" is not specifically defined in the Children's Code, nor anywhere else in the Navajo Tribal Code. Navajo case law does not provide a specific definition of "residence." This Court concludes that "residence" means living in a place, establishing a home in that place, so that a person can claim certain rights as a legal resident or be subject to certain legal responsibilities or obligations. *Cf. Perez v. Health and Social Services*, 573 P.2d 689 (N.M. App. 1977). The requisites for residence of a child go beyond mere physical presence procured by the violation of an existing visitation right under the custody order of another jurisdiction. *Cf. In the Matter of Guardianship of: Katherine Denise Chewiwi,* 1 Nav. R. at 124. To conclude otherwise would be to encourage the type of forum shopping which has repeatedly been discouraged by the Courts of the Navajo Nation. *See, e.g. Frejo v. Barney,* 3 Navajo R. 237 at 238 (1982); *In Re: Chewiwi,* 1 Nav. R. 120 (1977); *Custody of B.N.P., B.P., L.P., J.R.* 4 Nav. R. 155 (1983); *In Re: Custody of Platero, et. al.,* WR-CV-121-83.
3. Facts in this case compel the Court to conclude that the mother had previously been a resident of Albuquerque, (or is it Los Alamos?) and that her return to the Navajo Nation was directly related to the effort to procure this Court's intervention in the child custody proceedings that were on-going in the State Court.

The Court concludes that the mother was not herself a resident of the Navajo Nation at the time the petition for dependency was filed, nor was the child a resident of the Navajo Nation.[1]

D. Conclusions of law relative to Wardship

1. This Court has concluded that neither the requisites of residence or domicile exists in this case, so the final issue for conclusion on jurisdiction over this dependency proceeding turns on the child's relationship to this Court. In other words, the Navajo Nation Supreme Court has said that if this Court finds that the child was already a ward of the Court before the dependency petition was filed, then the Court would have jurisdiction. The basic principle of law is that the domicile of a child who is a ward of the Court is the location of that Court. *Matter of the Adoption of Buehl,* 87 Wash. 2d 649, 555 P.2d 1334 (1976).
2. The Navajo Nation Supreme Court has asked this Court to determine if the child was properly made a ward of the Children's Court pursuant to §1405 of the Children's Code. By its terms, §1405 makes children who are *domiciled* or *residing* within Navajo Indian Country a ward of the Children's Court when they are voluntarily placed outside the Navajo Nation and the consent for placement is filed with the Court. The ward status attaches when the child leaves Navajo jurisdiction. Thus, §1405 required a finding of Navajo residence or domicile first. Then there must be a finding that the child was voluntarily placed outside Navajo Country and the consent was filed with the Court.
3. This Court has already concluded that there was neither residence nor domicile of the child in this case. §1405 of the Children's Code would therefore not directly apply in this case. This case was not initiated under the auspices of the Indian Child Welfare Act of 1978.
4. This Court concludes, however, that its power to assert wardship over a child was also inherent in the Navajo Tribal Council's directive that the Navajo Tribal Council's directive that the Children's Court, "in the exercise of its duties and its exercise of any duties to perform by other offices under its supervision or control, shall utilize such social services as may be available to the tribal, federal, or state government." 9 N.T.C. §1051(4). This section, coupled with 9 N.T.C. §1108(1) (a), relative to temporary custody,

1. Interestingly, the Office of Prosecutor of the Navajo Nation, in a recently filed Motion to Dismiss, has entered its in court admission that the child has never been, during the time of these proceedings, either a domiciliary or a resident of the Navajo Nation. (See Motion to Dismiss, dated June 8th, 1987). This admission was not, however, made at the time the Court issued its original dismissal for want of jurisdiction.

clearly contemplates that the Children's Court has the power to make interim determinations as they relate to a dependent child, and in so doing to make the child a temporary ward of the Court.

5. In this case, the Court's order of wardship was entered at the same time that the presenting officer made the motion for temporary custody. At that time, this Court had been advised by the presenting officer and by the Office of the Prosecutor that there was no jurisdictional question and that there was no issue relative to residence or domicile involved in this dependency proceeding. Based upon such representations, the Court asserted its right to declare A. O. a ward of the Court.
6. The Court was not aware of any underlying jurisdictional problem in this case until the Motion to Dismiss filed by the father on July 29, 1986.
7. The Court concludes that its assertion of wardship over A. O. during the preliminary proceedings in this action and prior to an adjudication of the Court's underlying jurisdiction, did not in of itself confer jurisdiction on the Children's Court over this dependency action.

E. Conclusions as they relate to the Court's exercise of Jurisdiction

1. The Court concludes that it had concurrent, rather than exclusive original jurisdiction, over this action. In recognizing this issue, the Children's Court along with its dismissal of the dependency action, issued a Minute Order on July 30, 1986, whereby A. O. was released to the care of a psychologist who was directed to take the child directly to the New Mexico Court Clinic for an evaluation and to consult with the New Mexico Second Judicial District expeditiously.
2. The Court concludes that the State Court in the Fifth Judicial District of New Mexico constituted a "forum with concurrent jurisdiction [which] is exercising its authority" over the matter of the custody and care of the child, A. O.
3. This Court concludes that this is an appropriate case for it to decline jurisdiction, both because it does not have exclusive jurisdiction over this action, and because of the way in which the presence of the child was procured on the Navajo Nation.

Order

The Court having so concluded, hereby reaffirms its Order of August 5, 1986, which was further clarified through an Opinion and Order dated October 24, 1986, that this Court does not have proper jurisdiction to pro-

ceed with the case and appropriately remanded the matter to the Second Judicial District of New Mexico.

This Order shall also serve to clarify the Office of Prosecutor's Motion to Dismiss filed June 9, 1987, and Respondent's Response filed on June 16, 1987. Accordingly, the Motion to Dismiss is hereby Granted for want of jurisdiction; not venue. The matter of venue is not at issue in this case.