IN THE SUPREME COURT FOR THE STATE OF ALASKA

Rozella Simmonds and Jeff Simmonds, Petitioners, v. Edward Parks, Respondent, State of Alaska, Intervenor-Respondent.	)	Supreme Court No.: S-14103

Trial Court Case **No: 4FA-09-2508 CI**

PETITION FOR REVIEW FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
HONORABLE JUDGE PAUL R. LYLE, SUPERIOR COURT JUDGE

BESSIE STEARMAN'S BRIEF

Michael J. Wenstrup
ABA 0505012
104 Kutter Road
Fairbanks, AK 99701
Phone: 907-374-3825
Fax: 907-488-0003
michaelwenstrup@yahoo.com
Attorney for Bessie Stearman

Filed in the Supreme Court of
Of the State of Alaska this
15 day of August, 2013.
Marilyn May, Clerk of the Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Court Rules

ALASKA CONSTITUTION

Article 1 Section 1. Inherent Right.

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the employment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Article 1 Section 3. Civil Right.

No person is to be denied the enjoyment of any civil or political right because of race, color, creed, sex, or national origin. The legislature shall implement this section.

Article 1 Section 7. Due Process

No person shall be deprived of life, liberty or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Article 4 Section 1. Judicial Power and Jurisdiction

The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Statutes

Section 25.25.101. Definitions

(4) "home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately preceding the time of filing of a complaint or comparable pleading for support and, if a child is less than six months old, the state in which the child lived from birth with a parent or person acting as a parent; a period of temporary absence of a parent or person acting as a parent is counted as part of the six-month or other period;

Section 25.30.300 Initial Child Custody Jurisdiction

(a)Except as otherwise provided in AS 25.30.330 a court of this state has jurisdiction to make an initial child custody determination only if

(1) this state was the home state of the child within six months before the commencement of the proceeding;

(2) this state was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent of person acting as a parent continues to live in this state;

(3)a court of another state does not have jurisdiction under provisions substantially similar to (1) or (2) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under provisions substantially similar to As 25.30.360 or 25.30.370, and

(A) the child and the child's parents, or the child and at least one parent or a person acting as a parent , have a significant connection with this state other than mere physical presence and

(B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(4) all courts having jurisdiction under criteria specified in (1)-(3) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under provisions substantially similar to AS 25.30.360 or 25.30.370; or

(5) no court of another state would have jurisdiction under the criteria specified in (1)-(4) of this subsection.

(b) The provisions of (a) of this section are the exclusive jurisdictional bases for making a child custody determination by a court of this state.

(c) Physical presence of or personal jurisdiction over a party or a child is not necessary or sufficient to make a child custody determination.

Sec. 25.30.310 Exclusive, Continuing Jurisdiction

(a) Except as otherwise provided in AS 25.30.330 a court of this state has made a child custody determination consistent with As 25.30.300 or 25.30.320 has exclusive, continuing jurisdiction over determination until
   (1) a court of this state determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection in this state concerning the child's care, protection, training and personal relationships; or
   (2) a court of this state or a court of another state determines that neither the child, nor a parent, nor a person acting as a parent presently resides in this state.

(b) A court of this state has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make and initial determination under AS 25.30.300.

Sec. 25.30.320. Jurisdiction to Modify Determination

Except as otherwise provided in AS 25.30.330 a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under AS 25.30.300(a)(1),(2), or (3) and

(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under provisions substantially similar to AS25.30.310 or that a court of this state would be a more convenient forum under provisions substantially similar to AS 25.30.360; or
(2) a court of this state or a court of the other state determines that neither child, nor a parent, nor a person acting as a parent presently resides in the other state.

Sec. 25.30.330._ Temporary Emergency Jurisdiction

(a)A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(b) If there is no previous child custody determination that is entitled to be enforced under this chapter and if a child custody proceeding has not been commenced in a court of a state having jurisdiction under provisions substantially similar to AS 25.30.300- 25.30.320 or provisions substantially similar to as 25.30.300-25.30.320. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under AS25.30.300-25.30.320 or provisions substantially similar to AS 25.30.300-25.30.320, a child custody determination made under this section becomes a final determination if it so provides and this state becomes the home state of the child.

(c) If there is a previous child custody determination that is entitled to be enforced under this chapter or a child custody determination that is entitled to be enforced under this chapter or a child custody proceeding has been commenced in a court of a state having jurisdiction under AS 25.30.300-25.30.320 or provisions substantially similar to AS 25.30.300-25.30.320, an order issued by a court of this state under the section must

specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under AS25.30.300-25.30.320 or provisions substantially similar to AS 25.30.300-25.30.320. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) A court of this state that has been asked to make a child custody determination under this section, on being informed that a child custody proceeding has been commenced in or a child custody determination has been made by, a court of a state having jurisdiction under AS25.30.300-25.30.320 or provisions substantially similar to AS25.30.300-25.30.320 shall immediately communicate with the other court. A court of this state that is exercising jurisdiction under AS25.30.300-25.30.320, on being informed that a child custody proceeding has been commenced in, or a determination has been made by, a court of another state under a statute substantially similar to this section, shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

(2) A court of this state or a court of the other state determines that neither the child, nor a parent, nor a person acting as a parent presently resides in the other state.

Sec. 25.30.330 Temporary Emergency Jurisdiction

(a) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(b) If there is no previous child custody determination that is entitled to be enforced under this chapter and if a child custody proceeding has not been commenced in a court of a state having jurisdiction under provisions substantially similar

to Alaska Stat. § 25.30.300 - 25.30.320, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under Alaska Stat. § 25.30.300 - 25.30.320 or provisions substantially similar to Alaska Stat. § 25.30.300 - 25.30.320. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under Alaska Stat. § 25.30.300 - 25.30.320 or provisions substantially similar to Alaska Stat. § 25.30.300 - 25.30.320, a child custody determination made under this section becomes a final determination if it so provides and this state becomes the home state of the child.

(c) If there is a previous child custody determination that is entitled to be enforced under this chapter or a child custody proceeding has been commenced in a court of a state having jurisdiction under Alaska Stat. § 25.30.300 - 25.30.320 or provisions substantially similar to Alaska Stat. § 25.30.300 - 25.30.320, an order issued by a court of this state under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under Alaska Stat. § 25.30.300 - 25.30.320 or provisions substantially similar to Alaska Stat. § 25.30.300 - 25.30.320. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or the period expires.

(c) A court of this state that has been asked to make a child custody determination under this section, on being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under Alaska Stat. § 25.30.300 - 25.30.320 or provisions substantially similar to Alaska Stat. § 25.30.300 - 25.30.320 shall immediately communicate with the other court. A court of this state that is exercising jurisdiction under AS 25.30.300 - 25.30.320, on being informed that a child custody proceeding has been commenced in, or a child custody determination has been

made by, a court of another state under a statute substantially similar to this section, shall immediately communicate with the court of that state to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order.

Sec. 25.30.350. Simultaneous Proceedings

(a) Except as otherwise provided in AS 25.30.330, a court of this state may not exercise its jurisdiction under AS 25.30.300 - 25.30.390 if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child had been previously commenced in a court of another state having jurisdiction substantially in conformity with this chapter unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under provisions substantially similar to AS 25.30.360.

(b) Except as otherwise provided in AS 25.30.330, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties under AS 25.30.380. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(c) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may

(1) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(2) enjoin the parties from continuing with the proceeding for enforcement; or

(3) proceed with the modification under conditions it considers appropriate.

Sec. 25.30.410 Duty to Enforce

(a) A court of this state shall recognize and enforce a child custody determination of a court of another state if the court of the other state exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter.

(b) A court of this state may use a remedy available under other law of this state to enforce a child custody determination made by a court of another state. The procedure provided by AS 25.30.400 - 25.30.590 does not affect the availability of other remedies to enforce a child custody determination.

Sec. 25.30.909. Definitions

In this chapter,

(7) "home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months, including any temporary absences of the child or parent or person acting as a parent, immediately before the commencement of a child custody proceeding, except that, in the case of a child who is less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned, including any temporary absences;

...

(15) "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or a

territory or insular possession subject to the jurisdiction of the United States;

Federal Statutes

ICWA § 1911

25 .S.C. § 1911. Indian Tribe Jurisdiction Over Indian Child Custody Proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

STATEMENT OF THE ISSUES

The issues presented in this Court's July 9, 2012 order granting the petition are:

1. Did the Minto Tribal Court have subject matter jurisdiction to terminate Park's parental rights?

2. Did the Minto Tribal Court have personal jurisdiction over Parks and S.P.? Did Parks consent to the jurisdiction of the Minto Tribal Court? Did Parks as a non-Native parent have the right to transfer his case from the Minto Tribal Court to state court?

3. Did the Minto Tribal Court provide Parks with a meaningful opportunity to present his case when it refused to let his attorney speak for him in the tribal court?

4. Did the Minto Tribal Court provide Parks with adequate notice that his attorney would only be able to make arguments by submitting them in writing beforehand?

5. If Parks was denied meaningful opportunity to be heard in the tribal court, was the denial prejudicial if the Minto Tribal Court had jurisdiction?

6. What effect, if any, does Park's failure to exhaust his remedies by appealing in the tribal court have on his due process claim?

7. Was the issue of jurisdiction fully and fairly litigated in the Minto Tribal Court?

8. If the tribal court order is not entitled to full faith and credit, what is the appropriate remedy? If the tribal court order is vacated, should the instant action be converted to a CINA proceeding, remanded to the Minto Tribal Court for further proceedings, or remanded to the superior court?

STATEMENT OF THE CASE

Respondent Bessie Stearman incorporates and relies on Respondent Edward Parks Statement of the Case and Procedural History [Res. Parks Br. 2-12] as well as the State of Alaska's Brief's Statement of the Case [SOA Br. 2-8].

STANDARD OF REVIEW

Respondent Bessie Stearman incorporates and relies on the State of Alaska's Standard of Review on page 8 of its Brief.

ARGUMENT

Ms. Stearman agrees with and adopts the brief of both the State of Alaska and Mr. Parks. As such, Ms. Stearman will only contribute additional arguments where she deems necessary or appropriate.

This case could be, as the Petitioners advocate, about the rights of all Alaska tribal courts to have their decisions given full faith and credit without review or it could be about the rights of two parents being given a minimum amount of due process when any tribunal seeks to terminate their parental rights. The former will affect thousands of Alaskans; the latter will address the simple issue of whether in this case, with these facts, parental rights should have been terminated by

the Minto Tribal Court.

This Court should continue the case-by-case analysis discussed in State v. Native Village of Tanana.[1] Petitioners want to focus on potential for a far reaching decision in this case. The parents simply want a higher standard of due process to be applied before their parental rights can be terminated.

I. The Minto Tribal Court did not have subject matter jurisdiction to terminate Parks' or Stearman's parental rights.

Petitioners erroneously focus their attention on the broad implications of whether the parents have to be from the same tribe in order for a tribal court to have subject matter jurisdiction, but this case should be about the due process rights of all parents in any Alaskan or Tribal Court. Non-tribal member parents must have some right to object to the jurisdiction of a tribal court—the mere fact that a child has some quantum of tribal blood should not be the sole determination. Both Mr. Parks and Ms. Stearman did not want the Minto Tribal Court involved in this case—and advocated for Mr. Parks' Tribe to have jurisdiction or for the State of Alaska, yet the Minto Court ignored their pleas.

Additionally, Petitioners analogize the child's tribal membership as the lynchpin in determining subject matter

[1] State v. Native Village of Tanana, 249 P.3d 734, 751-752 (Alaska 2011).

jurisdiction to "home state" determinations in child custody cases. [Pet. Br. 14-15] Petitioners claim it "is the child's status that is relevant and nothing more." [Pet. Br. 15] This analogy is not apt because a child's "home state" is not determined genetically but by physical location of the child.[2] A child's "home state" may change simply by the child living in another state for a period of 6 months or more.[3] This gives the parents large discretion in determining what state court system will have jurisdiction over the child. Petitioners argue that parents of any of native child have no chance to avoid tribal jurisdiction—no matter how far away they move.

The petitioners have outlined the extreme position of what could happen if this Court decides that subject matter or personal jurisdiction do not exist for non-tribal members. Conversely, a ruling in favor of petitioners' position that any child eligible for enrollment in a tribe is subject to tribal jurisdiction without an analysis of the situation of that child's life could lead to even more absurd and radical situations. Any child eligible for enrollment in a tribe, regardless of the degree of relation establishing enrollment, lack of physical or emotional ties to the tribe, and

---

[2] AS 25.25.101. (4)
[3] Id.

unwillingness of the parents to be involved with the tribe—would be subject to tribal jurisdiction according to the petitioners.[4]

Ms. Stearman adopts and incorporates the arguments of the State on this issue. [SOA Br. 9-21]

II. The Minto Tribal Court termination order is not entitled to full faith and credit because the tribal court lacked personal jurisdiction over Parks and Stearman.

It is a fact that Alaska Tribes have a more difficult time establishing tribal courts than the lower 48 tribes. In the lower 48, people will have more notice that they may be under tribal jurisdiction based on their contact with a reservation. Alaska Natives do not have the benefit of reservations[5], so Alaska Tribal Courts cannot rely on physical proximity to establish personal jurisdiction. Thus, petitioners attempt to avoid the issue of Mr. Parks and Ms. Stearman's lack of personal jurisdiction by tying their jurisdiction to that of their child's.

Petitioners argue that the "status exception" to personal jurisdiction ties parental personal jurisdiction to that of the child's personal jurisdiction. [Pet. Br. 20-21] This argument fails for two reasons. First, the "status exception" applies in cases where one parent is absent from the state or refuses to

[4] This example
[5] There is one reservation in Alaska, the Metlakatla, but it is an exception to the rule that Alaska Natives do not have reservations.

participate in the court proceeding. In such cases, the Court can exercise jurisdiction over that parent based on having jurisdiction over the child. In the case at hand, neither parent was a willing participant in the Minto Tribal Court.

The second reason this argument fails is that it assumes that tribes have personal jurisdiction for all children eligible for tribal enrollment, regardless of physical or emotional ties to the tribe. This assumption essentially eliminates all standard parental due process rights for any person in any state—or country for that matter—who has a child that could qualify for enrollment in any tribe. This was not the purpose of the Indian Child Welfare Act(ICWA). ICWA's reason for creating tribal courts was not to eliminate parental due process rights but prevent states from "improperly removing Indian children from their parents, extended families, and tribes."[6] Parents of native children and non-native children should be treated at least similar if not equal due process rights. A non-native child born in Alaska is not subject to Alaska Courts if the parents move to Texas[7] and a native child should not be automatically subject to personal jurisdiction merely for being

[6] State v. Native Village of Tanana, 249 P.3d 734, 738 (Alaska 2011).
[7] AS 25.25.100(4). If a court has not taken up the issue of "home state" status because the child has never been in front of the court and a child has been domiciled for at least six months in the new state, the birth state of a child has no jurisdiction over that child.

born native if no other factors tie that child to the tribe and the parents do not consent.

The petitioners proposed policy that all children eligible for tribal enrollment always have personal jurisdiction in that tribal court is an over reach with potentially dire consequences. Parents may have many varied reasons for not wanting their child's tribe to be involved with their lives-domestic violence, personal animosities, sibling rivalries, a sense of prejudice, or numerous other scenarios. A child that has not been enrolled, that does not receive benefits from a tribe, that does not interact with a tribe—should not be automatically subject to what could essentially be a foreign entity to that child or her parents.

Thankfully, this Court does not have to decide these overwhelming issues of subject matter and personal jurisdiction at this time because the lack of minimal due process given to the parents in this case enables this Court to uphold the Superior Court's ruling on other grounds.

Ms. Stearman adopts and incorporates the arguments of the State on this issue. [SOA Br. 38-44]

III. The Minto Tribal Court denied Parks and Stearman a meaningful opportunity to present his case when it refused to let his attorney speak in its proceedings.

It is a well-established principle of constitutional law that custody of one's minor children is a fundamental right.[8] Termination hearings "implicate fundamental interests comparable to those at stake in a criminal prosecution"[9]—whether in state or Tribal court. "Few forms of state action are both so severe and so irreversible."[10] Parents in termination cases "are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation."[11] As such, any agency—tribal based or state based—attempting to terminate parental rights must afford a minimum of due process to the parents.[12]

The Petitioners and the Amici Tribes essentially argue that (1) it is well established policy that attorneys are not permitted to speak in tribal courts, (2) that attorneys lack the skills and training to work in Tribal Courts, and (3)Tribal Courts lack the skills and training to work with attorneys. [Pet. Br.36-40. Ami. Br. 7-9]. The Petitioners further argue that "minimal due process" means "complete lack of notice or

---

[8] Santosky v. Kramer, 455 U.S. 745 (1982), Stanley v. Illinois, 405 U.S. 645 (1972).
[9] In re A.S.W., 834 P.2d 801, 806 (Alaska 1992).
[10] Santosky v. Kramer, 455 U.S. 745, 759 (1982).
[11] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 30 (1981) (Blackmun, J., dissenting).
[12] Star *Starr v. George*175 P.3d 50, 55 (Alaska 2008).

complete lack of a hearing." [Pet. Br. 29] These arguments are not convincing.

First, it is not a well established policy that attorneys are not permitted to speak in tribal courts. The record indicates contradictory evidence that Mr. Parks was told he could have an attorney but never told the attorney could not speak on his behalf. (Exc. 1081-1082)The Minto Tribal Court Procedures on the hearing process do not exclude an attorney from addressing the court, gives the presiding judge discretion in who may participate and gives parties rights "which include and exceed those of the Indian Civil Rights Act[ICRA]".[13] These written procedures, available to the parties prior to the hearing, do not state that an attorney may not speak at the hearing. It implies that an attorney would or at least could be given the opportunity to speak. Neither Mr. Parks and Ms. Stearman, nor their attorney, were ever told that they would not have use of their attorney at the hearing.

Next, the Petitioners argue that it is bad policy to allow or insist that an attorney be allowed to speak on behalf of a client in Tribal Court because attorneys lack the training and skill to adapt to Tribal Court procedures and traditions. This argument is absurd. Attorneys in Alaska must adapt to many

[13] [Exc. 33, 41]

different types of tribunals, councils and cultures when practicing law. A jury in Anchorage is different than a jury in Fairbanks which is different than a jury in Kotzebue. Administrative hearings often have relaxed rules and non-lawyers sitting as hearing officers.[14]

All competent trial attorneys must be adapt at learning the rules, traditions, and culture of the various types of situations that require an attorney to advocate on behalf of a client. A mediation or settlement conference is different than a trial. Alaska has many wellness courts that require attorneys normally appearing in contested criminal proceedings to operate in a non-adversarial manner. In any given day, an attorney may be called upon to argue in a formal setting such as federal court and then immediately turn around to represent a client in front of a informal, non-adversarial, municipal planning commission or platting board. Lawyers are required to provide competent representation which includes understanding the nature of the tribunal at hand.[15] Attorneys must always remember the old adage—know your audience.

---

[14] For example, under AS 23.30.005, a Workers Compensation Board is comprised of three hearing officers—one representing labor, one representing industry, and appointed attorney. Additionally, under 8 AAC 45.120 (e) technical rules of evidence and witnesses do not apply in Workers' Compensation hearings.

[15] Alaska Rules of Professional Conduct, Rule 1.1.

Any attorney appearing before a tribal court should adjust their style and mannerisms to the tribal courts in order to competently represent the client's interest.

Petitioners are also worried that tribal court judges are not trained lawyers and would be overwhelmed by legalese. This argument, however, does not support the policy of disallowing attorneys in tribal courts but argues for the need for participants to have an attorney that will not offend or insult the judges to their case's detriment. It is doubtful that an attorney that does not adapt to the tribal court setting would achieve successful outcomes for their clients.

Finally, the petitioners believe that notice of a tribunal hearing represents minimal due process and because the respondents had notice, due process was satisfied in this case. This argument fails on its face. First, there is no evidence in the record that Ms. Stearman was ever notified of any hearings nor is it clear how should could have arranged participation at the hearings conducted while she was incarcerated without the help of an appointed attorney.

Furthermore, mere notice cannot be enough to satisfy due process. Notice of a hearing that does not allow for any other procedural safe guards to protect the fundamental rights of parents is not due process. "[P]ersons faced with forced

dissolution of their parental rights have a more critical need for procedural protections"[16] and minimal due process requires more than mere notice. This Court does not need to determine that an attorney is crucial to all considerations of due process issues in tribal courts, but taken on the whole, in this case, under these facts, it is enough to determine that Mr. Parks and Ms. Stearman did not receive due process when the Minto Tribal Court irrevocably terminated their parental rights.

Ms. Stearman adopts and incorporates the arguments of the State on this issue. [SOA Br. 50-55]

IV. The Minto Tribal Court did not provide Parks or Stearman with adequate notice that their attorney would be able to make arguments only by submitting them in writing beforehand.

The petitioners seek to rely on the apparent Minto Tribal Court procedure that requires attorneys to submit any arguments in writing prior to trial. [Pet. Br. 42] Yet, the lack of detailed written available Minto Tribal Court rules and procedures negates this argument. It is not clear from the record that the respondents had knowledge of this alleged rule. The Tribal Court cannot hold the respondents to formal rules and strict procedure in some instances but expect the parties to simultaneously adhere to the informal and traditional practices

[16] Santosky v. Kramer, 455 U.S. 745, 753 (1982).

of the Tribal Court in other instances. The Tribal Court cannot have its cake and eat too. Due process requires uniformity and equality when applying any standards or procedures.

Additionally, allowing only written prior arguments does not correct due process violations of not allowing the respondents attorney to participate at the trial. Any trial setting can be traumatic and overwhelming to participants. Participants that risk losing the rights to their child will be even more emotional and incapable of following the ins and outs of the trial. A non-emotionally involved participant on the respondent's side will aid the respondent in responding to testimony or accusations. In this particular case, this need was greater due to Mr. Parks and Ms. Stearman's lack of prior knowledge that their attorney could not speak for them and that they would have to be prepared to argue their case as well as testify.

Ms. Stearman adopts and incorporates the arguments of the State on this issue. [SOA Br. 56-61]

V. The question of jurisdiction and prejudice is not relevant to whether the Full Faith and Credit should be given the Minto Tribal Court in this case.

The State argues that the finding of prejudice is not part of the full faith and credit analysis, and Ms. Stearmans adopts

this argument and incorporates it in this brief by reference. [SOA Br. 61]

Despite the question of jurisdiction and prejudice not being relevant, it should be noted, that under a State of Alaska initiated Children in Need of Aid case currently open, Ms. Stearman has not had her parental rights terminated as pertains to her younger children. She has worked with the Office of Children Services case plan and is in good position to not have her parental rights terminated when given the benefit of due process under Alaska's Children in Need of Aid laws and the Indian Child Welfare Act.

VI. The failure to exhaust remedies does not undermine the parents' claims and would have been futile due to the lack of due process afforded in the Minto Tribal Court.

Exhaustion of tribal remedies is not strictly required in order for the respondents in cases such as this one.[17] The Minto Tribal Court used a combination of formal and informal rules in conducting this trial. The formal rules were not strictly followed while the informal rules were strictly followed. The record is unclear as to whether the formal adoption of Minto Tribal Court rules completed or even started prior to the conclusion of the tribal court trial in this case. [Exc. 799-802]. These rules, however, do not permit new evidence—despite

[17] John v. Baker II, 30 P.3d 68, 74 (Alaska 2011)

lack of recorded transcript—, do not grant an appeal as a matter or right, and allows only a "brief statement" in support of the appeal [Exc. 799-802]. The record is further unclear as to when the respondents were told they had the option to ask for an appeal. Appellate judges are chosen after an appeal has been filed but the Minto Appeallte Court Rules does not elaborate on who or how the judges are chosen. [Exc. 799-802]

The Minto Tribal Court refused to allow the respondents to have the help of their attorney during the trial and refused to allow the trial to be recorded.[Exc. 1074] Mr. Parks requested that he be allowed to record the trial and that request was denied for unfathomable reasons. The lack of an attorney and more importantly the lack of a record would make an appeal futile. Due to the lack of a recorded transcript, it is presumed that any appeal would have been de novo, with the same informal rules and procedures used at the trial level. Thus, an appeal would have merely delayed the eventual civil suit in this matter as it would have repeated the same due process violations all over again.

This Court recognized the importance of recordings in protecting both parties in criminal cases almost 30 years ago.[18] Now, with most phones having the ability to record audio and other recording devices being inexpensive, it is inexcusable for

[18] Stephan v State, 711 P.2d 1156, 1161 (Alaska 1985).

any court not to record official proceedings. "The Concept of due process is not static; among other things, it must change to keep pace with new technological developments."[19] The lack of a recorded transcript, especially in light of the other relaxed procedures, should be all that is needed to determine that tribal proceedings lack sufficient due process.

Ms. Stearman adopts and incorporates the arguments of the State on this issue. [SOA Br. 64-66]

VII. The issue of jurisdiction was not fully and fairly litigated in the Minto Tribal Court.

The Minto Tribal Court never addressed the numerous objections made by the respondents as to jurisdictional issues. [Exc. 84-87, 95, 111, 102-106, 120-124, 144-47, 167-71, 248-252] An issue cannot be fully and fairly litigated that was repeatedly ignored every time Mr. Parks raised the issue. The Petitioners argue that the parents "could have requested that the case be transferred to state court." [Pet. Br. 24] Yet Mr. Parks objected to the Tribe's assertion of jurisdiction multiple times, both early in the proceedings and at the final hearing. [Exc .111, 195-196, 248-249, 293]. Petitioners' arguments imply that respondents should have used specific formal words to indicate that he wanted to transfer the case to state court.

[19] Stephan v State, 711 P.2d 1156, 1161 (Alaska 1985).

Petitioners would have us believe that if Mr. Parks or Ms. Stearman had only asked to have to court transferred instead of objecting to jurisdiction of the tribe, this case would have been sent to state court years ago. Not only is this assertion highly unlikely, it places yet another unfair burden on parents in tribal termination cases to adhere to strict formal rules while the court does not have to follow strict rules but can rely on oral tradition and informal rules. Forcing parents to use magic legal words to get the case transferred is an argument in favor of requiring attorneys be appointed to aid parents through the complex legal world of tribal courts.

Ms. Stearman adopts and incorporates the arguments of the State on this issue. [SOA Br. 66-69]

VIII. This case should be remanded to the superior court for further proceedings.

This Court does not have to determine what level of due process in a tribal court will warrant full faith and credit being giving by Alaska Courts. This Court only needs to determine, that under the facts of this case, the parental rights of Mr. Parks and Ms. Stearman were terminated without due process and the Minto Tribal Court's termination ruling should not be given full faith and credit. Due Process requires more than was afforded Mr. Parks and Ms. Stearman in this case. Tribal Courts do not need to have all the trappings of the legal

system to be accorded full faith and credit in parental termination proceedings, but the numerous problems with the Minto Tribal Court in this case should prevent full faith and credit being given.

This case should be remanded to the Superior Court for all further proceedings. This Court can avoid setting bright line tests for all future tribal court termination hearings, by simply determining that in this case, the tribal court failed to offer the minimum amount of due process required in a hearing as serious and consequential as parental rights.

The Superior Court has proceeded appropriately in this case. The child is currently in a safe living environment. Ms. Stearman currently has scheduled visitations with the child and is working with the Simmonds and case workers on ensuring the safety and wellbeing of her child. The parties are currently litigating whether Mr. Parks may continue with visitations with the child.

Ms. Stearman adopts and incorporates the arguments of the State on this issue. [SOA Br. 69-70]

CONCLUSION

> It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. We do not inquire whether leaving a child with his parents is "in the best interest of the child." It sometimes is not; he would be better off raised by someone else. But parents have their rights, no less than children do.

> This father wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.[20]

In this case, the parents' due process rights were repeatedly violated when: they were given 2 minutes to state their case, no ability to cross-examine witnesses, no notice of the witnesses presented against them, no prior knowledge of the standard to be used, not told they could use magic words to have the case transferred to state court. Mr. Parks asked to have the proceeding recorded or to use his own recording device, but was denied.

The court does not have to decide the subject matter or personal jurisdictional issues because the minimal due process required was not met. Full faith and credit should not be given. The court need not decide the other issues. Alaska's unique makeup does not lend itself to bright line rules regarding who has subject matter and personal jurisdiction in cases involving tribal courts. The specific facts and situations of each case will determine subject matter jurisdiction. The Minto Tribal court could have provided more due process safe guards without damaging its traditions or the more relaxed nature of tribal courts. As this Court said in Tanana: "We therefore do not need to address the varied hypothetical

[20] Couple v. Baby Girl, 12-399, Justice Scalia, dissenting, advance sheets.

situations posited by the State as creating difficult jurisdictional questions—we leave those for later determinations under specific factual circumstances"[21]

[21] State v. Native Village of Tanana, 249 P.3d 734, 752 (Alaska 2011).