CHAPTER 8

DOMESTIC RELATIONS

Key to the preservation of American Indian cultures and traditions is the ability and authority of Indian nations to adopt laws consistent with Indian culture for the adjudication of domestic relations, which largely include marriage and divorce, child custody and welfare, adoptions, inheritance and devise, and other related subject areas. It is in this realm, more so than virtually all other areas of law, that Indian nations have complete discretion to adopt their own laws and be ruled by them.

In *Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605 (Mich. 1889), a nineteenth-century Michigan Supreme Court case immortalized by Robert Traver's novel *Laughing Whitefish* (1965), the court upheld the inheritance rights of the child of a technically polygamous marriage between two Chippewa Indians in the Upper Peninsula of Michigan. The court wrote that "we had no more right to control [tribal] domestic usages than those of Turkey or India." Taking judicial notice "that among these Indians polygamous marriages have always been recognized as valid," the court identified a conundrum: "We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usages are so regarded. There is no middle ground which can be taken, so long as our own laws are not binding on the tribes."

Times have changed. Most, if not all, Indian tribes no longer recognize polygamous marriages and Indian people tend to utilize the divorce laws as much as non-Indian people. The Upper Peninsula is no longer on the fringes of the American frontier. Moreover, the laws of states often do apply to Indians and sometimes even Indian tribes. It remains settled black-letter law, however, that Indian tribes retain plenary and exclusive inherent authority over "domestic relations among tribal members." FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §4.01[2] [c], at 215 (Nell Jessup Newton ed., 2005) (citing *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976); *United States v. Quiver*, 241 U.S. 602 (1916)). The fact that tribes control their own domestic relations well into the modern era of federal-state-tribal relations is a function of the sui generis character of federal Indian law.

A. MARRIAGE

In re Validation of Marriage of Francisco

Navajo Nation Supreme Court, No. A-CV-15-88, 6 Navajo Rep. 134, 16 Indian L. Rep. 6113, 1989.NANN.0000013 (August 2, 1989)

Before Tso, Chief Justice, Bluehouse and Austin, Associate Justices.
The opinion of the court was delivered by: Bluehouse, Associate Justice. . . .

I.

This is a marriage validation case in which the Appellant, Loretta Francisco, appealed the July 20, 1988 decision of the Window Rock District Court denying validation of her common-law marriage.

Oliver Chaca and Loretta Francisco cohabitated as man and wife between approximately October 1978 and August 7, 1987 in Window Rock, Arizona. Chaca worked in Peach Springs, Arizona. Francisco, an enrolled member of the Navajo Tribe, and Chaca, a Hopi, combined their earnings, acquired personal property in both of their names, and accumulated debts in both of their names. The public knew of the parties' relationship. Chaca often introduced himself and Francisco as husband and wife, and visited Francisco at her place of employment. No children were born to the couple. Sometime in June 1987, they talked about marrying each other, but they did not obtain a marriage license, marry according to Arizona state law, or participate in a traditional Navajo wedding ceremony.

On August 7, 1987, Chaca died as the result of an automobile accident. . . . Francisco cannot collect any portion of the life insurance proceeds unless her common-law marriage is validated.

The Window Rock District Court applied 9 N.T.C. §2 to the parties' relationship and ruled that the statute means that Navajos can validly contract marriage with non-Navajos only in compliance with applicable state or foreign law. . . . The district court refused to validate the parties' marriage because they failed to contract it according to Arizona law.

II.

The subject of marriage within the Navajo Nation is perplexing because of the outdated and confusing laws found in Title 9 of the Navajo Tribal Code. Consequently, the Navajo courts are faced with the difficult task of reconciling the Navajo Tribal Council's intent with the parties' expectations in recovering veterans' and other benefits. *See, e.g., In re Marriage of Daw*, 1 Nav. R. 1 (1969). The lack of a coherent Navajo domestic relations code has caused Navajo courts to mingle common-law marriage with traditional Navajo marriage. . . . However, these two kinds of marriages differ substantially. A common-law marriage is "not solemnized in the ordinary way (*i.e.* non-ceremonial) but created by an agreement to marry followed by cohabitation. . . . Such marriage requires a positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital

duties and obligations. . . . Such marriages are invalid in many states." . . . This type of marriage is a product of Anglo practice that is unknown and unrecognized in traditional Navajo society.

By contrast, contracting a traditional Navajo marriage has been described as follows:

1) The parties to the proposed marriage shall have met and agreed to marry.
2) The parents of the man shall ask the parents of the women for her hand in marriage.
3) The bride and bridegroom then eat cornmeal mush out of the sacred basket.
4) Those assembled in the hogan then give advice for a happy marriage to the bride and groom.
5) Gifts may or may not be exchanged.

Navajo Tribal Council Resolution CJ-2-40 (June 3, 1940).

"Traditional Navajo society places great importance upon the institution of marriage. A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the 'Holy People.' This blessing ensures that the marriage will be stable, in harmony, and perpetual." *Navajo Nation v. Murphy*, 6 Nav. R. 10, 13 (1988). Under traditional Navajo thought, unmarried couples who live together act immorally because they are said to steal each other. Thus, in traditional Navajo society the Navajo people did not approve of or recognize common-law marriages. . . .

After partaking in the traditional Navajo wedding ceremony, some couples do not obtain marriage licenses because, traditionally, the performance of the ceremony completely validates the union. Unfortunately, Navajos without marriage licenses often face problems, such as difficulty in acquiring Social Security and military benefits for their dependents. *See, e.g., Daw*, 1 Nav. R. at 1. . . .

A common-law marriage is invalid for reasons other than a defect in the ceremony because Title 9 states that Navajos can marry only in three ways: state, church, and tribal custom. 9 N.T.C. §§4(a)-4(b), 61. A common-law marriage is not recognized by Title 9. . . .

. . . Judicial recognition of common-law marriage is not necessary to protect those who participate in Navajo tribal custom marriages now that the cut-off date has been abolished. . . .

. . . The Navajo Tribal Council legislated this requirement: "In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws." 7 N.T.C. §204(a) (1985). For this reason, and because domestic relations is at the core of Navajo sovereignty, this Court is obligated to apply Navajo custom. "Navajo customs and traditions have the force of law." *In re Estate of Belone*, 5 Nav. R. 161, 165 (1987).

Navajo custom does not recognize common-law marriages, regardless of whether one or both spouses are Navajos. *See* R. Locke, The Book of the Navajo 20-23 (1976). Navajo tradition and custom do not recognize common-law

marriage; therefore, this Court overrules all prior rulings that Navajo courts can validate unlicensed marriages in which no Navajo traditional ceremony occurred. For the same reason, this Court will not construe any section of Title 9 of the Navajo Tribal Code as authorizing judicial validation of common-law marriages. To enhance Navajo sovereignty, preserve Navajo marriage tradition, and protect those who adhere to it, Navajo courts will validate unlicensed Navajo traditional marriages between Navajos. For these reasons, the district court's refusal to validate the alleged common-law marriage between Chaca and Francisco is affirmed.

III.

As a sovereign Indian nation that is constantly developing, the Navajo Nation must be forever cautious about state or foreign law infringing on Navajo Nation sovereignty. The Navajo Nation must control and develop its own legal system because "the concept of justice has its source in the fabric of each individual society. The concept of justice, what it means for any group of people, cannot be separated from the total beliefs, ideas, and customs of that group of people." T. Tso, Chief Justice's Annual Report, Judicial Branch of the Navajo Nation Annual Rep. 1 (1988). Navajo life centers around the home, traditionally a hogan. *Id.* The Navajo Nation, within the four sacred mountains, is the Tribe's hogan and source of strength and wisdom. *Id.* Navajo "oral history contains no stories of leaders or assistance coming from outside." *Id.* Instead, Navajo tribal history reveals "that Navajos know best how to provide for Navajos." *Id.*

"Implicit in the Treaty of 1868 is the understanding that the internal affairs of the Navajo people are within the exclusive jurisdiction of the Navajo Nation government." *Billie v. Abbott*, 6 Nav. R. 66, 68-69 (1988) (citing *Williams v. Lee*, 358 U.S. 217, 221-22 (1959)). "The sovereignty retained by an Indian tribe includes 'the power of regulating [its] internal and social relations.' " *Id.* at 69 (quoting *United States v. Kagama*, 118 U.S. 375, 381-382 (1886)). "Navajo domestic relations is the core of the tribe's 'internal and social relations.' " *Id.* (quoting *Fisher v. District Court*, 424 U.S. 382 (1976)). Thus, "Navajo code law and Navajo common law regulate the domestic relations . . . of Navajos living in Navajo Indian Country." *Id.* at 67.

By saying that "[m]arriages between Navajos and non-Navajos may be validly contracted only by the parties' complying with applicable state or foreign law," 9 N.T.C. §2 allows outside law to govern domestic relations within Navajo jurisdiction. Such needless relinquishment of sovereignty hurts the Navajo Nation. The Navajo people have always governed their marriage practices, whether the marriage is mixed or not, and must continue to do so to preserve sovereignty. Regulation of marriages, an integral part of the Navajo Nation's right to govern its territory and protect its citizens, should be free from the reach of state and foreign law. The Navajo Nation must regulate all domestic relations within its jurisdiction if sovereignty has any meaning. Even the United States government found that local laws best govern domestic relations in most instances. . . . Enacted in 1957, 9 N.T.C. §2 has outlived its usefulness.

This Court recommends that the Navajo Tribal Council amend Title 9 of the Navajo Tribal Code so that it reflects Navajo regulation and control of domestic relations within Navajo territorial jurisdiction.

Affirmed.

NOTES

1. In *Naize v. Naize*, 24 Indian L. Rep. 6152 (Navajo Nation 1997), the court reaffirmed prior holdings authorizing the Navajo judiciary to award spousal maintenance payments in divorce cases even without an authorizing statute from the tribal legislature:

> At the outset, we establish that the Navajo Nation courts, serving as courts of equity, have the general authority to award alimony, particularly in cases where a divorced spouse is "not able to provide for her [or his] own maintenance and that of her [or his] remaining minor children without some sort of financial aid from" the former spouse. . . . This power exists independent of any Navajo Nation statute on the subject and is justified by the Navajo People's traditional teachings admonishing not to "throw one's family away." Public policy also supports the courts' exercise of this power. The general lack of economic and employment opportunities on the Navajo Nation, the Nation's lack of a well educated and skilled labor force, and the Nation's high divorce rate, which leaves children dependent on one spouse or relatives, all underlie the many requests to the courts for spousal maintenance. . . .
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> The Navajo People's segmentary lineage system (clanship system) is the foundation of Navajo Nation domestic relations law. The system itself is law. Traditional Navajo society is matrilineal and matrilocal, which obligates a man upon marriage to move to his wife's residence. The property the couple bring to the marriage mingle and through their joint labors create a stable and permanent home for themselves and their children. The wife's immediate and extended family benefit directly and indirectly, in numerous ways, from the marriage.
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> If the marriage does not survive, customary law directs the man to leave with his personal possessions (including his horse and riding gear, clothes, and religious items) and the rest of the marital property stays with the wife and children at their residence for their support and maintenance. Whatever gains the marital property generate goes to support the wife and children and to a lesser extent the wife's close relatives. This longstanding customary law is akin to modern spousal maintenance. Therefore, we conclude that Navajo common law gives the Navajo Nation courts' authority to award spousal maintenance in appropriate cases even in the absence of statutory law on the subject. Our laws require our courts to apply Navajo common law equally to both spouses when addressing spousal maintenance issues.

Naize, 24 Indian L. Rep. at 6152. The court then affirmed portions of the spousal maintenance awarded by the trial court:

> The Appellant argues that the Chinle Family Court abused its discretion when it awarded to the Appellee spousal maintenance. . . . We disagree. The Appellee's evidence in support of her request is not controverted . . . and strongly shows a need for an award of spousal maintenance.

> The Appellee is a 58 year old elderly Navajo lady who was married to the Appellant for 22 years. She is uneducated and unemployable. Poor health and illiteracy makes her a poor prospect for vocational training or other training to acquire meaningful employment skills. Her poor health prevents her from weaving rugs or raising livestock to support herself and her son. She earns no wages and chances she will acquire capital assets are nonexistent. She is in constant need of medical attention. She had two operations, cannot move freely without pain, has tuberculosis related health problems, has a foot disorder which requires special needs, and needs funds for traditional ceremonies. She contributed to the marriage, as wife, mother, and homemaker, while the Appellant worked outside the home. The parties' only child lives with her and needs her support. She needs transportation to get medical care. Under these facts, we cannot find a better applicant for an award of spousal maintenance.
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> . . . Just enough evidence to tip the scale in favor of an award of spousal maintenance is all we require. The trial court has discretion to decide on sufficient evidence and we find no abuse of discretion here. We affirm the family court's award of spousal maintenance to the Appellee.
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> The Appellant does not dispute the amount of the spousal maintenance award and we do not address it. The time period that the Appellant is obligated to make monetary payments is also not an issue. The only other matter is the family court's order that the Appellant must supply the Appellee with wood and coal for an indefinite time period. We reverse this part of the spousal maintenance award because it violates that Navajo common law rule which requires finality in Navajo divorces. Harmony in the community and in the lives of the divorced spouses should be restored quickly following a divorce. *Apache v. Republic National Life Insurance Co.*, 3 Nav. R. 250, 254 (Window Rock D. Ct. 1982). We rely on the teachings of Apache:
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> > There was a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally breaking ties so the community can soon return to normal is one which is common-sense. To permit a former spouse to keep such ties that she or he may be said to be lurking behind the hogan waiting to take a portion of the corn harvest is unthinkable, since each spouse returns to his or her own family after the divorce. Each former spouse should return home after making the break and disturb others no more. *Id.* at 254.
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> Also, it is not fair to require the Appellant to supply wood and coal for life, while he is obligated to pay spousal maintenance for only three years.

Naize, 24 Indian L. Rep. at 6153.

2. Other courts also have refused to recognize "common-law marriages" under tribal law. *E.g.*, *In re Estate of Abeyta*, 2 SWITCA 4 (Pueblo of San Juan 1991).
3. In *Husband v. Wife*, 2003.NAMP.0000002 (Mashantucket Pequot Court of Appeals 2003), the court was confronted with whether to enforce a Connecticut state court divorce decree between two tribal members. The court chose to apply the doctrine of comity as its analysis:

> In stark contrast to the Full Faith and Credit Clause as revealed in case law, VI M.P.T.L. ch. 8, §2(b) requires the tribal court, prior to enforcement of a foreign judgment, to determine whether "such judgment . . . contravene[s] the public policy of the Mashantucket Pequot Tribe." It therefore would be

wholly at odds with the language of ch. 8, §2(b) to conclude that it intends to require application of "full faith and credit" — as that term is understood under settled constitutional law — to foreign marriage dissolution judgments.

Instead, we believe, Mashantucket Law requires that foreign judgments be evaluated, and where appropriate, recognized through the far more flexible construct of "comity," where consideration of public policy considerations is permissible.

Id. at ¶¶31-32.

The court then engaged in the analysis of whether the state court divorce decree violated tribal public policy:

On the issue of public policy, we agree with the Tribe that, as a general matter, enforcement of lawful dissolution of marriage judgment from the State of Connecticut does not contravene Mashantucket public policy. (Mashantucket Pequot Tribal Nation's Br. of Amicus Curiae at 5-6) ("Tribal Court recognition of state court orders that provide for the custody, care, education, visitation and support of [Wife's] child does not, in general, contravene the public policy of the Tribe."). Our independent review of Mashantucket law confirms this understanding. Initially, we recognize, as noted supra, that the use of the term "full faith and credit" in VI M.P.T.L. ch. 1, §2(c) is strong evidence that such recognition is consistent with Mashantucket policy. *See also* V M.P.T.L. ch. 1, §3(d). . . . Furthermore, the "Purpose" section of the Family Relations Law, which is perhaps the clearest indication of Mashantucket policy on this issue, recognizes that:

> [F]amilies thrive when they receive appropriate emotional and financial support, and that the lives of children and families improve by strengthening parental responsibility for family and child support. The Tribe encourages the development of Tribal law and policies and procedures that protect and preserve the continuity of family and promote a uniform, efficient and equitable recognition and implementation of these responsibilities. VI M.P.T.L. ch. 1, §1(a).

Plainly, this provision accords substantial weight to judgments which adjudicate dissolution claims and properly and fairly place "financial support" on parents of children. This view of Mashantucket policy is confirmed by the Child Welfare Law as well, codified in Title V of the M.P.T.L. Chapter 1, §1 of that Title states in pertinent part:

> The Mashantucket Pequot Tribe finds that there is no resource more vital to its continued existence and integrity than its children. . . . The Tribe hereby declares that it is the policy of this Nation to protect the health and welfare of children and families within the Mashantucket Pequot community, to promote the security of community, and to preserve the unity of the family by enhancing the parental capacity for good child care and development and providing a continuum of services for children and families with an emphasis, whenever possible, on prevention, early intervention, and community-based solutions.

Here, tribal children are among the main beneficiaries of the judgment under consideration, which requires the payment of child support. Their welfare — obviously a paramount consideration of the Tribe — militates

> strongly for adoption of the judgment. Moreover, in this case, there is no indication — and Husband does not contend — that the division of parental financial responsibility is inequitable. Under these circumstances, we have no trouble concluding that Mashantucket policy, in general, supports recognition of a lawful Connecticut dissolution judgment, particularly since child support is involved.

Id. at ¶¶39-43.

4. The author of *Anatomy of a Murder*, Robert Traver (the pen name of former Michigan Supreme Court Justice John Voelker), also wrote a novel called *Laughing Whitefish,* based on a series of nineteenth-century Michigan Supreme Court cases culminating in *Kobogum v. Jackson Iron Co.*, 43 N.W. 602 (Mich. 1889). *See also Compo v. Jackson Iron Co.*, 12 N.W. 901 (Mich. 1882); *Compo v. Jackson Iron Co.*, 16 N.W. 295 (Mich. 1883). The *Kobogum* decision established in Michigan the general rule that state courts must defer to tribal law in cases involving the internal, domestic relations of American Indians residing within their own territory.

The underlying dispute involved an almost fantastic and contrived story. An Upper Peninsula Ojibwe man — Marji Gesick, who likely would now be a member of the Keewenaw Bay Indian Community — led a group of mining company explorers in 1845 to an area that would later be known as the Jackson Mine, the site of one of the richest veins of iron ore in the nation. Upon the "discovery," the company people in 1846 offered Mr. Gesick "twelve undivided thirty-one one hundredths parts of the interest" of the mining company that would be set up on that land. Of course, after the mining company became hugely profitable it never paid Mr. Gesick his share. After Mr. Gesick walked on in 1861 or 1862, his daughter Charlotte Kobogum brought suit to recover the amount owed in the 1880s.

The critical questions involved the defenses presented by the company. First, the company argued that Charlotte had waited too long to bring the suit, decades after the mining company had become wealthy and valuable. Second, the company argued that Mr. Gesick was a polygamist, with marriages to as many as three wives without divorcing any of them, and that Charlotte, as the issue of the second marriage, could not inure to the benefit of Mr. Gesick's bargain under the settled public policy of the State of Michigan. In 1889, the Michigan Supreme Court finally vindicated the interests of Charlotte Kobogum and her family:

> The only question remaining is whether Marji Gesick's interests passed to his descendants recognized by the Indian laws and usages. If they did, there is no doubt of the rights of these complainants. . . . The United States supreme court and the state courts have recognized as law that no state laws have any force over Indians in their tribal relations. . . . There was not, during any of the period involved in these inheritances, any law or treaty of the United States on the subject of Indian marriages, or in any way interfering with Indian usages on the subject. The testimony now in this case shows what, as matter of history, we are probably bound to know judicially, that among these Indians polygamous marriages have always been recognized as valid, and have never been confounded with such promiscuous or informal temporary intercourse as is not reckoned as marriage. While most civilized

> nations in our day very wisely discard polygamy, and it is not probably lawful anywhere among English speaking nations, yet it is a recognized and valid institution among many nations, and in no way universally unlawful. We must either hold that there can be no valid Indian marriage, or we must hold that all marriages are valid which by Indian usage are so regarded. There is no middle ground which can be taken, so long as our own laws are not binding on the tribes. They did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the constitution of the United States beyond our jurisdiction, and *we had no more right to control their domestic usages than those of Turkey or India*. The treaties made between the United States and this very tribe, which are quite numerous, all recognize heritable relations among them, and in many instances, familiar to all old residents of the country, provided for the Indian families of persons who had other families; recognizing the Indian nation as entitled to say who should share in tribal benefits. As white men cannot withdraw themselves from state law, we should have no great difficulty in determining their personal status; but Indians who were members of their tribes were not obliged or authorized to look to state laws in governing their own affairs.

Kobogum, 43 N.W. at 507-08 (emphasis added; other emphases omitted).

B. PROBATE

In re: Estate of Sampson

Mashantucket Pequot Probate Court,
No. PB 2000-100, 2002.NAMP.0000003 (January 18, 2002)

The opinion of the court was delivered by: Edward B. O'Connell, Judge

By application dated July 6, 2000, Margery M. Pinson (the "petitioner") represents that Constance L. Sampson (sometimes called the "decedent" or "testatrix") was a member of the Mashantucket Pequot Tribe who died in Mashantucket on July 1, 2000, leaving a last will and testament dated October 28, 1996. The petitioner requests that the will be admitted to probate and that letters testamentary be granted to her as the executrix of the will. Leslie Champlain and Yvette Champlain (the "respondents" or "contestants"), are grand-nieces and blood relatives of the decedent. They oppose the admission of the will on the ground that the decedent lacked testamentary capacity to make a will.

The will bequeaths specific legacies of $5,000.00 each to Evelyn Pinson, a niece of the decedent, and Virginia Diaz McConneghey, who had resided with the decedent for a number of years as a foster child. The residuary estate is devised and bequeathed to Margery M. Pinson, the decedent's sister, who survived the decedent.

The decedent was one of thirteen brothers and sisters, three of whom had predeceased her. The respondents are granddaughters of Mason Champlain, a deceased brother of the decedent. With the exception of Margery M. Pinson and Evelyn Pinson, none of the decedent's brothers and sisters are named as beneficiaries of the will, and none of their offspring are named as beneficiaries.

Asserting that the testatrix was "a greatly disturbed decedent who suffered from a constellation of psychotic problems, physical and mental limitations," to the degree that a conservator of her estate and person had to be appointed by the Groton Probate Court, the respondents contend that the testatrix lacked the testamentary capacity to make a will. The petitioner responds that the mere existence of a conservatorship does not compel the conclusion that the will is invalid, and that the testatrix was possessed of sufficient mental capacity to comprehend the effect of what she was doing when she signed the will.

Section 1 of Chapter 5 of the Mashantucket Pequot Probate Code provides:

> Any person eighteen years of age or older or an emancipated minor, and of sound mind, may dispose of his estate by will.

The corresponding Connecticut statute, Section 45a-250 of the Connecticut General Statutes similarly provides:

> Any person eighteen years of age of older, and of sound mind, may dispose of his estate by will.

Because the provisions of the Mashantucket Pequot Probate Code are similar, and in many cases identical, to the Connecticut General Statutes relating to probate matters, decisions of the Connecticut courts are a "useful source of guidance" when discussing testamentary capacity. *See Schock v. Mashantucket Pequot Gaming Enterprise*, 3 Mash. 258 (1999) (federal court interpretations of Federal Rules of Civil Procedure are helpful in interpreting an identical provision in the Mashantucket Rules of Civil Procedure), citing *Mamiye v. Mashantucket Pequot Gaming Enterprise*, 2 Mash. 141,142 (1997). . . . Here, the provisions of the Mashantucket Pequot Probate Code and the Connecticut General Statutes as to who may make a will are substantially similar, and Connecticut cases on testamentary capacity are particularly useful.

The parties do not dispute the principles of law and the tests that the court must apply in determining whether the testatrix possessed sufficient testamentary capacity, summarized as follows: The burden of proving testamentary capacity is on the party claiming under the will. . . . Accordingly, "[t]he burden of proof in the instant case to establish the capacity of the testatrix to make a will rested upon the [proponent]." . . . The proponent of the will must prove the fact of testamentary capacity by a preponderance of the evidence. . . . The presumption of capacity permits the proponent to rest upon proof of some evidence of testamentary capacity, shifting to the contestants the burden of going forward with the evidence upon the issue, . . . but the ultimate burden of proving testamentary capacity remains with the proponent. . . .

There is a "well established test for testamentary capacity, i.e. that the testator have mind and memory sound enough to know and understand the business upon which he was engaged at the time of execution [of the will]." . . . Stated another way, "[t]he test which we apply is the ability of the testator at the time of the execution of the will to understand the nature and elements of the particular transaction of making a will in which he is engaged." . . .

A testatrix "may be competent to make a will though she has not mental capacity sufficient for the management or transaction of business generally[;] . . . some mental impairment could occur and still leave the testatrix with a sound mind within the definition of testamentary capacity." . . . The fact that a conservator has been appointed for the testator is among the relevant evidence that may be considered, but is not dispositive. In *Reid v. Lord*, 102 Conn. 365 (1925), "the testator had been adjudged insane and a conservator set over him, still, as the contestants of the will concede, this is not conclusive [on the question of testamentary capacity]." *Id.* at 368. "A person may harbor insane delusions and yet have testamentary capacity. A delusion can affect testamentary capacity only when it enters into and controls to some degree the making of a will." . . .

The parties do not disagree on the applicability of the above principles. They are in vigorous disagreement, however, on the issue of whether the decedent was possessed of sufficient mind and memory to know and understand what she was doing at the time she executed her will.

Mrs. Sampson died on July 1, 2000. Three years and nine months earlier, on October 28, 1996, she signed her last will and testament while a resident of Mashantucket. Attorney John Duggan, licensed to practice law and experienced in the preparation of wills and administration of estates, prepared the will and supervised its execution. He first met Ms. Sampson in 1994, when he assisted her in preparing her tax return. On this occasion, and on several other occasions in subsequent years when he helped her prepare her tax returns, he would get from her the necessary information, prepare the return, and bring it back to her for her signature. He did not recall any unusual behavior during these meetings, and found her to be a "delightful" person.

In the fall of 1994, Ms. Sampson was residing in Groton, Connecticut. Although she received considerable income as a member of the Mashantucket Pequot Tribe, it was disappearing and not accumulating. Ms. Sampson was a generous person; some recipients of her generosity may have been taking advantage of this trait. Margery Pinson, the decedent's sister, sought the assistance of Attorney Duggan in establishing a conservatorship in the Groton Probate Court. With Attorney Duggan's assistance and participation, Ms. Pinson was appointed as the decedent's conservator.

Ms. Sampson moved to the Mashantucket Pequot reservation in 1995. Physical ailments common to people of her age began to develop; she was scheduled to undergo colon surgery on October 29, 1996.

Four days earlier, on October 25, 1996, Attorney Duggan met with Ms. Sampson at Mashantucket to discuss changes to her existing will. He testified that they met for about half an hour, and discussed her then-existing will and what changes were to be made and why. He was aware that Ms. Sampson was under a conservatorship. Mr. Duggan recalled that Ms. Sampson was understandably concerned about the upcoming surgery, but did not act or speak inappropriately. Although she did not know the balance of her accounts "to the last dime," she was aware of the nature and general amount of her assets. She knew who her relatives were, and had cogent reasons for making changes in her will. Attorney Duggan also discussed with her the possibility of a living will. She did not want one, however, as she was a practicing Jehovah's

Witness, and considered that a living will would be inconsistent with her religious tenets.

After preparing the revised will, Attorney Duggan again met with Ms. Sampson on October 28, 1996 at the house of Margery Pinson, on the Mashantucket reservation. As before, he discussed with her the changes from the previous will. He recalls that she expressed no doubt or hesitation, and did not appear to be confused or uncertain about the nature of her assets, the relationships with her family members, or how she wanted her estate to be distributed. Attorney Duggan was satisfied that Ms. Sampson possessed the requisite testamentary capacity; he watched her sign the will in the presence of two witnesses, including himself, and administered the oath on the self-proving affidavit signed by the other witness.

Ms. Sampson survived her surgery, and died about three and one-half years after she executed the will, at the age of sixty-nine. Attorney Duggan met with her on several occasions after she signed the will, usually regarding her tax returns, and observed nothing that would cause him to change his opinion that she had testamentary capacity at the time she signed the will.

As in many will contests, the respondents did not have first-hand, personal knowledge of the events surrounding the preparation and execution of the will, and are not in a position to directly contradict Attorney Duggan's recollections and impressions. They did, however, submit a considerable array of circumstantial evidence, which is appropriate: "The testator's mental condition is not capable of demonstration by direct evidence. It can only be shown by proof of circumstances from which the inference of mental condition may be drawn. The circumstances pointing to mental condition usually consist of miscellaneous acts o[r] expressions which taken singly are of little value but which in the aggregate portray a pattern of behavior from which the trier (sometimes with the assistance of opinions by experts) may reach a conclusion". Folsom, Connecticut Estates, Practice, Probate Litigation, (1992) §1.5, p. 11. Evidence of the testator's acts and condition during periods of time both prior and subsequent to the date of execution of the will may be admitted "solely for such light as it may afford as to his capacity at that point of time [of execution] and diminishes in weight as time lengthens in each direction from that point." . . .

The parties submitted evidence of circumstances relating to the decedent's physical and mental condition in the form of testimony by Mr. Duggan; testimony and medical records of physicians; the record and findings of the Groton Probate Court conservatorship proceedings; testimony of Attorney Eric Janney, appointed as Ms. Sampson's attorney by the Groton Probate Court, testimony of some of Ms. Sampson's family members, including the petitioner and the respondents; and testimony of Eleanor Sudol, a home health aide employed by Interim Healthcare.

Eleanor Sudol was employed by Interim Healthcare as a home health aide and daytime companion for Ms. Sampson from 1995 until her death in July 2000. She was with Ms. Sampson several times a week during the month of October, 1996, when the will at issue was executed. She often drove Ms. Sampson to visit her sister, Margery Pinson, who Ms. Sudol described as Ms. Sampson's "favorite." Ms. Sudol testified that Ms. Sampson decided where

she wanted to go, what she wanted to eat, formed opinions of her own and could hold a coherent conversation. Ms. Sampson was aware that Ms. Pinson looked after her finances, telling Ms. Sudol that "I'm rich. Margery takes care of me." Ms. Sudol was aware that the decedent was on medications, but could recall no instances when the decedent was delusional or irrational.

Dr. Amarillys Rodriguez, employed by the Mashantucket Pequot Tribe to provide and supervise health care for tribal members, is a board certified family physician. She first met the decedent in 1992, through the decedent's sister Margery Pinson, who worked at the Mashantucket health center. At that time Ms. Sampson was living in Rhode Island. Dr. Rodriguez saw the decedent for specific medical conditions, and eventually began meeting with her about once a month for checkups. In the beginning Ms. Sampson was shy and reserved, but over the course of time began to trust and accept Dr. Rodriguez. Ms. Sampson had a number of physical problems, including diabetes, arthritis and coronary diseases. She was opinionated about her case, asking about procedures and consequences.

Dr. Rodriguez was also aware that the decedent had a history of psychiatric illnesses, including chronic depression and panic disorders. She knew about this through her review of the decedent's medical records and her own observations. Dr. Rodriguez prescribed an array of medications for the decedent's physical and mental conditions.

In October of 1993, Dr. Rodriguez admitted Ms. Sampson to Backus Hospital for heart problems. During the hospitalization, Dr. Rodriguez referred Ms. Sampson to Dr. Max Okasha, a psychiatrist, inasmuch as she was exhibiting signs of depression. He concluded that the decedent was suffering from an episode of major depression and panic disorder, and suggested a change in medication.

About a year after the Backus heart admission, in several reports to the Groton Probate Court in support of the conservatorship application, Dr. Rodriguez stated that the decedent was giving her money away, had short term memory problems and was "forgetful, redundant and sometimes doesn't understand simple instructions," particularly when she did not take her medications. Dr. Rodriguez felt that the decedent needed help in keeping track of and taking her large array of medications, and that it would assist Ms. Sampson if her sister Margery Pinson was in a position to actively monitor her finances and her care.

In August of 1995, Dr. Okasha again saw the decedent and decided to change her medication. That new medication provoked drastic changes; a few days later the decedent turned up at the emergency room in a panic and a week later was admitted to the Backus psychiatric ward in a confused, depressed, delusional and panicky state. After her medications were changed again, the decedent felt less depressed, her anxiety decreased, her panic attacks ceased, her delusions abated, and she was discharged from the hospital. Two months later, in October of 1995, Dr. Okasha noticed that the decedent was restless, pacing and rocking. He again changed her medication, and this was resolved.

After the October 1995 episode Ms. Sampson's psychiatric treatment was taken over by Dr. Alnoor Ramji, also a Norwich psychiatrist. Dr. Rodriguez felt

that Dr. Okasha was certainly competent, but that Dr. Ramji might be more understanding of issues such as Ms. Sampson's lateness for appointments. She felt that Dr. Ramji might connect better with Ms. Sampson. The contestants attribute darker motives to this change in psychiatrists, but the court accepts Dr. Rodriguez' explanation.

Dr. Ramji treated Ms. Sampson from late 1995 until her death on July 1, 2000. In 1996, he saw her in his office on ten occasions, including October 18, 1996, ten days before the execution of her will. As did Dr. Okasha, Dr. Ramji found that the decedent suffered from organic brain disorder and schizophrenia, and that she needed to be on a number of psychiatric medications to control episodes of depression and panic disorder. He also considered that she suffered from short term memory problems, and that a home health aide service was of assistance in assuring compliance with her schedule of medications.

On October 29, 1996, the day after she executed her will, Ms. Sampson was hospitalized for colon surgery. Dr. Rodriguez testified that while hospitalized during the surgery and its aftermath, Ms. Sampson had to stop taking her medications and, as a result, "decompensated." When her medications were restored, however, Ms. Sampson resumed her former mental state.

Thereafter, Ms. Sampson physically declined in health over the years until her death on July 1, 2000. During this time, Dr. Rodriguez dealt with Margery Pinson regarding Ms. Sampson's health, and occasionally talked with Virginia Diaz McConneghy. She did not speak with any other family members.

Ms. Margery Pinson is the sister of the decedent and the major beneficiary of her estate and the named executrix. She testified that until the last years of her life, the decedent was poor and had few material possessions. She worked hard, often as a cleaning person in the homes of the well to do. While in Rhode Island, the decedent raised a foster child, Virginia Diaz McConneghey, under the auspices of the Rhode Island child welfare authorities. Ms. Pinson testified that she and her sister were a part of a large family, consisting of thirteen siblings, and that she and her sister were especially close: "Since we were children, Constance and I took care of each other." When living in Rhode Island, the decedent would stay with Ms. Pinson when Ms. Pinson's husband worked the night shift.

Ms. Pinson testified that the decedent, who was childless, was fearful that she would be put in a nursing home in her old age. Ms. Pinson promised her that this would not happen. Eventually, the decedent was the only one of her generation of siblings remaining in Rhode Island. She wanted to come and live on the Mashantucket reservation, but there were no openings at the time. The next best housing alternative at that time was the apartment in Groton, and the decedent lived there until she moved to the reservation.

Ms. Pinson recalled that the decedent knew she had money from the Tribe, but was good-hearted and prone to give it away, prompting Ms. Pinson to request the Groton conservatorship. The decedent knew she was getting money from the Tribe, and occasionally asked Ms. Pinson if she could see her checkbook and bankbook.

Ms. Pinson recalled that the decedent talked to her and her sister Mertice on the phone, and occasionally received visitors, but most of her other brothers and

sisters and relatives did not pay much attention to her. Ms. Pinson would visit the decedent, or the decedent would visit her, every day when they were on the reservation. Before that, she would visit the decedent once a week when she was in Groton. They took trips together to vacation and tourist spots, such as Amish country and Bar Harbor. Ms. Pinson, who was present when the decedent signed her will, considered that Ms. Sampson was of sound mind at that time.

Renee Everett, a niece of the decedent, testified that she knew the decedent all her life, and that Ms. Sampson lived with her parents when Ms. Everett was younger. She also visited Ms. Sampson when she lived in Groton. She knew her aunt had psychological problems, often acting in a "childish" or temperamental manner, but did not consider that her aunt was "nuts."

Diedre Champlain, another niece of the decedent and a sister of Ms. Everett, also testified. She recalled visiting with her aunt in Rhode Island during her youth, and visiting with her once while the decedent lived in Groton. On one occasion she observed the decedent at the Mashantucket pharmacy acting inappropriately, on her hands and knees and rocking profusely. She reported this behavior to another niece at the pharmacy, Evelyn Pinson. This incident took place in 1993 or 1994, about two years before the execution of the will. Like Ms. Everett, Diedre Champlain saw the decedent out at tribal functions, but did not converse with her on those occasions other than say "hello," as an aide would do most of the talking. On cross-examination she agreed that Margery Pinson and Evelyn Pinson had a closer relationship with the decedent than did other members of the family.

Attorney Eric Janney was Ms. Sampson's court-appointed attorney during the Groton Probate Court conservatorship proceeding. He recalled that he was concerned with the decedent's ability to handle her financial affairs, and recommended that a conservator be appointed. Although she would get confused from time to time, she was clear about her illnesses in her one conversation with him. Attorney Janney considered that Ms. Sampson comprehended the effect of the conservatorship proceedings, and understood that her finances would be handled by her sister Margery.

Three expert witnesses, Dr. Rodriguez, Dr. Okasha and Dr. Ramji testified regarding the decedent's testamentary capacity.

Dr. Rodriguez, whose practice included geriatrics, considered that the decedent's short-term memory "wasn't perfect." The decedent did, however, remember the names of her brothers and sisters, and could recollect events in her childhood and adulthood. She had psychological problems, as evidenced by her records from Rhode Island mental health professionals and Dr. Rodriguez' own observations. She was afflicted with organic brain syndrome, schizophrenia and depression, but Dr. Rodriguez felt that the effects of these illnesses could be alleviated by medications, to the extent that Ms. Sampson was aware of her assets, her family and what she wanted to do with her money. Dr. Rodriguez acknowledged that Ms. Sampson took a large number of prescriptions, up to fourteen in a day, but felt that the drugs did not result in an unsound mind. Rather, it was when the decedent did not take her medications, or when the medications were changed, that resulted in disruptions and inappropriate behavior. She felt that, inasmuch

as Ms. Sampson had sufficient funds to afford it, home health aides were useful in assuring that she kept to her schedule of medications.

Dr. Rodriguez saw the decedent on October 29, 1996, one day after she executed the will, when she met with the decedent at Lawrence & Memorial Hospital on the day of her colon surgery. Dr. Rodriguez testified that Ms. Sampson was alert, cooperative and understood what was happening. She was nervous, as are most people who face major surgery, but was not sad or crying or depressed. She understood and was aware of her assets in a general sense; she knew who were the members of her family; she remembered who did things for her over the years. In the view of Dr. Rodriguez, Ms. Sampson was of sound mind, capable of understanding what she was doing when she signed a document, such as her will on October 28, 1996, and the consent for surgery on the next day. Dr. Rodriguez based this conclusion on her medical training, her treatment of Ms. Sampson since 1993 and her conversation with Ms. Sampson on October 29, 1996, the day after she signed the will.

Dr. Ramji began treating the decedent in November of 1995, when he took over her psychiatric care from Dr. Okasha. He reported that despite having a "long and significant psychiatric history," she was "quite capable of distinguishing between right and wrong and to make appropriate decisions regarding her medical care" as evidenced by her discussing with him the pros and cons of moving from Groton to the reservation to be near Margery Pinson, "who she was very close to and in whom she had a lot of confidence and trust." Dr. Ramji was aware that the decedent was receiving assistance from home health care aides, but in his opinion that did not mean she was of unsound mind; it was more a matter of her being able to afford and take advantage of this type of service.

Dr. Ramji found the decedent to be "quite alert, verbal" over the course of his treatment. He considered that "her depression and psychosis were very well controlled by her medications," and that in 1996 her condition was "stable" except when her medications were stopped because of the colon surgery. After that surgery she "was stabilized quickly and returned to her former self."

Dr. Ramji saw the decedent in October 1996, the month that the will was executed. Based on his training, experience and treatment of the decedent, he was of the opinion that at the time she signed her will she was of sound mind, alert, oriented as to time and place and able to exercise good judgment. In his opinion, her medications worked well for her, and her depression was not so severe that it interfered with her soundness of mind.

Dr. Okasha first treated the decedent in October of 1993 upon a referral from Dr. Rodriguez. He also saw the decedent on several occasions during the next two years when she was in crisis, resulting in hospitalizations until her mental condition could be stabilized. He described the symptoms and behavior of the decedent during these crises, such as short term memory loss and disorientation as to time and place. He concluded that the decedent suffered from organic brain syndrome and schizophrenia. Although there were periods of time that the decedent's condition was acute, Dr. Okasha did not consider that she needed to be institutionalized. In his report and testimony, Dr. Okasha described generally the various and typical aspects and effects of these illnesses. He also observed that with medication the decedent could

function on a day-to-day basis with assistance, but if she stopped taking medication her mental condition would deteriorate, and she would become confused and destabilized.

Dr. Okasha stopped treating the decedent in November of 1995. He did not opine regarding her soundness of mind on October 28, 1996, the date of the execution of her will.

Conclusion

Constance Sampson had a hard and difficult life. For most of it, she was poor; she did not have many material possessions. She had to work for what she had, often as a housecleaner for those who were better off than her. In her earlier years she was exposed to some of the harsh and unpleasant aspects of life in our society, but also participated in beneficial and joyful activities, to the point where she raised a foster child for the better part of a decade. She was not without the skills necessary to navigate through the vicissitudes of daily life.

Mentally, Ms. Sampson had her ups and downs, beginning when she was younger and lived in Rhode Island. All the physicians who testified agreed that she suffered from chronic brain syndrome, schizophrenia and depression. These physicians also agreed, however, that the effects of these illnesses can be ameliorated and controlled by medications. The task of this court is to determine whether these illnesses, when combined with the physical problems which began to beset her during her later years, created such a deficient state of mind and memory that she did not know and understand what she was doing when she signed her will.

The will itself provides no evidence of a mind that has lost its moorings. The primary beneficiary is Margery Pinson, the decedent's sister and lifelong friend. She frequently visited Ms. Pinson when they were both living in Rhode Island. Ms. Pinson was the conservator of her estate, an appointment endorsed by Attorney Janney. Ms. Pinson spoke or visited with the decedent every day when the decedent moved to Mashantucket. She would take the decedent on trips that were both special (e.g. vacations) and mundane (e.g. visits to doctors' offices). The close relationship between them was apparent to Elenor Sudol, who described Ms. Pinson as the decedent's "favorite." None of the decedent's other surviving siblings (all of whom were omitted from her will) objected to the admission of the will. In these circumstances Ms. Pinson can be fairly regarded as the natural object of the decedent's bounty. The dispositive terms of Ms. Sampson's will, which leaves the bulk of her estate to her close sister, are not evidence of a deranged mind.

Evidence of the testatrix' acts and condition at periods of time near the date of execution of the will is particularly useful when compared to evidence in points of time further removed from the date of execution, which "diminishes in weight as time lengthens [from the date of execution]." . . . Attorney Duggan discussed the terms of the will with the decedent several days before the execution of the will, when she gave him cogent reasons for her testamentary scheme. Her mind was capable of grasping the distinction between a testamentary will and a living will; she objected to the latter because of her religious beliefs. This is not evidence of a wandering mind; rather, it is evidence of a mind that can understand the concepts behind a living will. At

the will execution itself, Mr. Duggan, who was aware of and had participated in the Groton conservatorship proceedings and as a result was alert to the issue of testamentary capacity, discerned no confusion or uncertainty on the part of the decedent, and was satisfied that she possessed the requisite testamentary capacity.

Dr. Rodriguez, who had cared for the decedent since 1992 and was aware of both the physical and mental aspects of her condition, saw the decedent the day after she signed the will. Dr. Rodriguez, who was aware [of] the necessity of discerning the decedent's mental condition because of the requirement that she sign a consent to surgery on that day, found that she was alert and comprehending of what was going on. Dr. Rodriguez, who had opportunities to observe the decedent on occasions both good and bad, saw that the decedent was not depressed or sad on that day. She was confident that the decedent was aware of the general nature of her assets, and that she knew who were the members of the family. Dr. Rodriguez knew that the decedent's mental state could deteriorate when she did not take her medications, but she saw no evidence of mental impairment on the day after the decedent signed her will.

Dr. Ramji saw the decedent a few weeks before she signed the will. He knew that she had a "long and significant" psychiatric history, but in his opinion that was not in itself evidence of an unsound mind. He considered that her mental illnesses "were very well controlled by her medications." These prescriptions did not dull her mind or reduce her to a catatonic state. Dr. Ramji felt that the decedent, when medicated, was "quite capable" of distinguishing right from wrong and making appropriate decisions. Dr. Ramji, who treated the decedent before, during and after the period of time when the will was executed, was of the opinion that at the time she signed the will the decedent was alert, oriented as to time and place, and able to exercise good judgment.

Dr. Okasha, who had treated the decedent earlier than Dr. Ramji, last saw the decedent almost a year before the will was signed. He saw her on occasions when her mental problems were acute. Even then, he did not find that she needed to be institutionalized. He did not opine regarding the decedent's soundness of mind on the date her will was signed. He did agree, however, that with medication she could function on a day-to-day basis.

For the reasons set forth above, and taking into account the testimony of all the witnesses, including family members, attorneys and medical experts, and exhibits submitted into evidence, the court finds that at the time the testatrix executed her will, she had mind and memory sound enough to know and understand the business upon which she was engaged. She may not have possessed the mental capacity to manage all aspects of her affairs, but her mind and memory were not so impaired that she did not know what she was doing when she executed her will. On that day, she knew who were the members of her family; she knew the general nature of her assets; she was capable of making appropriate decisions; she did not have any insane delusions that entered into and controlled the making of her will.

The proponent has met her burden of proving that the testatrix had testamentary capacity on October 28, 1996. Her will executed on that date is hereby admitted to probate. Upon the submission and approval of a final accounting, distribution will be made in accordance with the terms of the will.

NOTES

1. In an older work, one scholar described the Hopi rules of inheritance in relation to personal property:

> On a woman's death all her property is customarily inherited by her daughters. If the latter are still young at her death, the property will be held in trust for them by the husband or maternal relatives (usually the latter) until they grow older. The trustees may use this property, cultivate the land, use the peach crop, or live in the house, if they so desire, during their period of trusteeship. In regard to the man, his personal goods, stock and sheep are customarily inherited by his sisters, brothers, and clanspeople generally, the widow, sons and daughters ordinarily inheriting none at all. A conflicting, or possibly a newer, pattern allows the man, but not the woman, some testamentary choice and it is clear that today children inherit as well as the close clan connections; that is, there is a tendency to allow members of the bilateral kin group to share in the disposal of the goods. In this way a man may bequeath personally owned peach orchards to his children. I was informed also that not unusually a man leaves his property to the child of the person who took care of him in his old age, clan affiliation, seniority and sex of the beneficiary giving away before the principle that reward should go to the individual who looks after the aged. I do not know whether this custom applies also to women, but it may be noted that Dr. Parsons reports the same custom applying at Laguna for both parents and is inclined to think that "the principle of inheritance in return for service may be, if not applied to houses, then to other property, an underlying and ancient Pueblo principle."

Ernest Beaglehole, *Ownership and Inheritance in an American Indian Tribe*, 20 Iowa L. Rev. 304, 307 (1935). Beaglehole also described the Hopi customs for inheritance of real property:

> The general rule governing the inheritance of land is that it descends within the lineage in the female line. Fields are inherited, that is, by the family connection within the clan. If a man is working in addition to his wife's clan lands, land belonging to his own clan, this land returns at death to his maternal family; his children may arrange to work this land in turn but it is clearly understood that the title to the land remains with the father's clan. The custom in regard to individually owned waste land is given above. The inheritance of this land by the deceased's own children probably represents a newer pattern and is not characteristic of older Hopi practice.
>
> With the extinction of a clan, the rule seems to be for a linked clan to take over the lands of the deceased clan and for originally separated lands to be merged together. One informant insisted, however, that the children of the clan and not a linked clan would inherit the land. At Mishongnovi the Kachina clan is represented by several surviving men. When they die the linked Parrot clan will take over Kachina land. Parrot clan is represented by four or five men and two women past child-bearing age, and will likewise soon die out. A Parrot woman remarked that since there is no pre-existing linkage to dictate which of the other Mishongnovi clans should absorb Parrot Kachina land, this land will ultimately go out of cultivation. It would not be right for an unrelated clan to use the land, nor could an individual cultivate it in his own right. In this case however it is likely that children of Parrot clan

> will cultivate if they need land or else one of two patterns reported on First Mesa may be followed. A survivor may choose an unrelated girl to live in the maternal house and inherit the clan fields or else the family which by chance ceremonial tie or by fictitious or remote relationship takes up residence in the house of the extinct clan will inherit also the clan fields. A final method suggested by an informant was that the family which takes care of the clan survivor in his old age and in whose house he dies has the right to inherit house and land in return for services rendered.

Id. at 324-15.

2. The lack of wills that would allow for the orderly devise of federal trust land holdings by American Indian people in the last century and longer has contributed to the extraordinary problem of fractionated heirships. Douglas Nash and Cecelia Burke described the history of this issue:

> The General Allotment Act, also known as the Dawes Act, was passed by Congress in 1887. The Act had two primary goals: to eliminate tribal culture by assimilation of Indians into the expanding European-American culture and to open reservation lands to non-Indian ownership. . . .
>
> Between 1770 and 1890, treaties between Indian tribes and the United States were a key tool in securing vast territories of land from tribes — lands to be settled by non-Indians. Through treaties, tribes typically ceded significant portions of their lands, and the federal government agreed that the retained lands would serve as a reservation and homeland for the tribes forever. For example, a treaty with the Cherokee stated:
>
> > [T]he purpose of the treaty is to secure the Cherokee] a permanent home . . . which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever — a home that shall never, in all future time, be embarrassed by having extended around it the lines, or placed over it the jurisdiction of a Territory or State, nor be pressed upon by the extension, in any way, of any of the limits of any existing Territory or State. [Treaty with the Western Cherokee, May 6, 1828, 7 Stat. 311.]
>
> These reserved lands (reservations), like aboriginal lands, were held by Indian title, meaning Indians had the right to use and occupy the lands subject to the sovereign's plenary power to extinguish Indian title at will. By the time of the General Allotment Act, reservation lands comprised only remnants of the original tribal land bases.
>
> The Allotment Act authorized the president to arbitrarily select those reservations to be allotted. Once a reservation was selected, a census was taken of its tribal inhabitants; the land was surveyed and partitioned into "allotments" — parcels of land between eighty and one hundred sixty acres. Beneficial title to these allotments were then assigned to individual Indians, with legal title held in trust by the United States for a period of twenty-five years. After that time, it was expected that the Indian owner would be "civilized" and "competent enough" to manage his own affairs and the government would issue a fee patent for his allotment. Upon receipt of the fee patent, the allottee would become subject to the laws of the state where his property was situated. . . .
>
> For those individual Indians retaining ownership, the General Allotment Act failed them in two ways. First, the Act failed to recognize the cultural resistance to individual land ownership. The concept of individual ownership

of land was foreign to many Indian people, making the allotment process meaningless, and the legislators viewed tribal communal living as needy since the indigenous ideas of wealth contrasted and disagreed with Western ideas of wealth. Furthermore, farming was considered "women's work" among many tribes. Most were not inclined to abandon established tribal values and structures in favor of new and foreign concepts of individual ownership.

Second, the Act ultimately contained a device that would render Indian allotments fractionated beyond any practical use or economic value. Section five of the General Allotment Act provides that the law of descent and partition in force in the state or territory where such lands are situated shall apply thereto after patents have been executed and delivered. This means that state laws of intestate succession would apply to the allotments held in trust, regardless of testacy — Indian people could not pass title to their trust allotments by a will. The typical result of applying state laws of intestate succession to an ownership interest in an allotment is that the decedent's heirs inherit undivided interests in the original allotment. When they die, their heirs inherit the interests and the process continues over generations until the original allotment has many, sometimes hundreds and even thousands, of owners of undivided interests.

The result is what has been come to be described as the "fractionation of Indian lands," and examples of it abound. By 1985, one 160-acre allotment made in 1887 had 312 heirs each holding a fractional interest. The largest interest held was 2.5 percent and the smallest interest was 0.00005625 percent, producing a yearly income of less than a penny. Another allotment was valued at $22,000 in 2003 but only produced $2,000 in annual income. Although it had 505 co-owners of undivided interests, the common denominator required to calculate fractional interests had grown to 220,670,049,600,000. If the tract could have been sold for its estimated value, the smallest interest would have been entitled to $0.00001824. One owner in this fractionated tract would earn $1.00 — every 32,880 years. The Bureau of Indian Affairs estimated the administrative cost to manage this tract to be $42,800.

In response to the negative effects of the General Allotment and Burke Acts, John Collier, then Commissioner of Indian Affairs, developed a proposal that would change United States Indian policy and declare the Dawes Act a catastrophe. Instead of granting Indians the "dignity of private property," Collier reported that allotment "has cut down Indian land holdings from 138,000,000 [the acres Indians owned when the Dawes Act was passed in 1887] to 47,000,000 [the acres they had left in 1934]." Two-thirds of the tribal reservation land base had been lost. Furthermore, allotment had "rendered whole tribes landless. It ha[d] thrown more than a hundred thousand Indians virtually into the breadline . . . [and] put the Indian allotted lands into a hopelessly checkerboarded condition.

Douglas R. Nash & Cecelia E. Burke, *The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act*, 5 Seattle J. Soc. Just. 121, 124-28 (2006).

Indian tribes have been adopting tribal probate codes to help alleviate this problem:

> Tribal probate codes may include rules of intestate succession, other provisions that are consistent with federal law and policies set forth in section 102 of the Indian Land Consolidation Act ("ILCA") Amendments of 2000. . . .

> A definition of spouse could recognize marriages by custom or tradition of a tribe. The inheritance rights of children adopted out might be provided for. Special provisions might also be made to protect family heirlooms and artifacts. Careful consideration should be given to a tribe's customs, interests and desires and steps taken to insure those are addressed to the fullest extent possible in its probate code.
>
> A tribal probate code may not prohibit the testamentary devise of an interest in trust or restricted land to a lineal descendent of the original allottee or to an Indian who is not a member of the Indian tribe with jurisdiction over such interest unless the code allows eligible devisees to renounce their interests, the opportunity for a devisee who is the spouse or lineal descendent of a testator to reserve a life estate without regard to waste and payment of fair market value to the devisee.
>
> A tribe may adopt rules of intestate succession that differ from the federal rules and which will govern the descent and distribution of trust land subject to its jurisdiction. Tribal probate codes that are intended to govern the descent and distribution of trust or restricted land must be approved by the Secretary of the Interior before they become effective. Tribes do not have the authority to probate trust property interests, even with an approved code, but their tribal code will be applied in the federal probate process.

Douglas Nash & Cecelia Burke, *Passing Title to Tribal Lands: Existing Federal and Emerging Tribal Probate Codes*, 50 ADVOCATE, May 2007, at 26, 27.

3. As the history of Indian lands explains, the modern probate of trust land rights usually serves to exclude non-Indians from inheritance. The Oneida Nation of Wisconsin, for example, has adopted a statute allowing for the inheritance of trust land rights only by tribal members:

> Non-members of the Oneida Tribe and non-citizens of the United States cannot acquire Trust Land through inheritance. Where interests are specifically devised to individuals ineligible to inherit, the following options are provided: (A) Sale of interest to the Oneida Tribe or an eligible heir for its fair market value. (B) Acquire a life estate in the property if an eligible spouse.

In re Estate of Summers, 2002.NAOW.0000095, at ¶15 (Oneida Appeals Commission 2002) (quoting Article 9-2 of Real Property Law). In *Summers*, a child who otherwise would have inherited trust lands was excluded on the basis that he was a Lakota Indian, not Oneida. *See id.* at ¶14 ("Article 9-9 of Real Property Law disposes of real property assets entirely to the surviving spouse Rebecca M. Browneyes-Summers. The surviving spouse of Anderson R. Summers Jr., is a Lakota Sioux Indian and therefore her inheritance is restricted by Article 9-2 of Real Property Law.").

4. In *In re Estate of Komaquaptewa*, 4 Am. Tribal Law 432 (Hopi Tribe Appellate Court 2002), the court held that the tribal courts had jurisdiction to hear probate and inheritance matters where the village government, which normally had jurisdiction, refused to decide the matter:

> It is well settled that probate matters are left to the individual Villages pursuant to the Hopi Constitution. Article III, Section 2 of the Constitution and By-Laws of the Hopi Tribe reserves to the separate villages jurisdiction to

regulate village members' inheritance of property. The Hopi Constitution, tribal ordinances and resolutions are devoid of procedure when a village declines or refuses to exert this authority. Therefore, this Court must examine the sources of power enabling the Tribal Court to address inheritance matters when a village refuses to do so.

The Tribal Court has jurisdiction over "[t]he ownership, use or possession of any real or personal property within the Reservation." Hopi Ordinance 21, §1.7.1(d)(3). Moreover, subsection (a) of Tribal Ordinance 21 states that [T]he Hopi Tribal Court shall have jurisdiction over all civil actions where there are sufficient contacts with the Hopi Indian Reservation upon which to base the exercise of jurisdiction, consistent with the constitution and laws of the Hopi Tribe and the United States. This section authorizes the broadest exercise of jurisdiction consistent with these limitations. Hopi Ordinance 21, §1.7.1(a). This section of Ordinance 21 expresses the Tribal Council's intent to authorize the Hopi Tribal Court to exercise the broadest jurisdiction consistent with the constitution and laws of the Hopi Tribe and the United States. *Village of Mishongnovi v. Humevestewa*, 11, No. 96AP000008 (Hopi 11/20/1998). Read in its entirety, Ordinance 21 grants the Tribal Court broad jurisdiction over property located on the Hopi reservation, its use and ownership.

If the Tribal Court did not exercise jurisdiction after a village declined its right to decide a member's probate claim, village members would be left without a tribal forum in which to assert their property rights. Hopi tribal members would be unable to raise factual and legal matters affecting their cultural and legal interests in property, leading to a violation of substantial rights and leaving aggrieved parties to contest probate matters in non-tribal judicial forums. Moreover, Hopi tribal and village customs and traditions would not receive the same consideration in a non-tribal forum and the results could be devastating to Hopi parties, the Tribe and the Villages. Therefore, this Court finds as a matter of law and public policy that the tribal court has jurisdiction to decide inheritance matters when a village declines to or avoids its responsibility to do so.

Estate of Komaquaptewa, 4 Am. Tribal Law at 441-43.

C. CHILDREN

1. CHILD CUSTODY

Polingyouma v. Laban

Hopi Tribe Appellate Court, No. AP-006-95, 1997.NAHT.0000018
(March 28, 1997)

Before Sekaquaptewa, Chief Justice, and Abbey, Justice.

Factual and Procedural Background

Appellant Barbara Polingyouma and Appellee Vernon Laban are both members of the Hopi Tribe. They were married in Flagstaff in 1988, shortly after the birth of their daughter, Chelsey. They returned to Hopi in late 1991 or

early 1992 and lived in Kykotsmovi in a residence belonging to Appellee's parents. Chelsey began attending Hopi Day School. She was six years old when this action commenced.

In May 1994, Appellee filed for divorce and requested sole custody of Chelsey. . . .

After three days of testimony concluding on June 29, the trial court found both parents fit and ordered joint custody of Chelsey with alternating six month periods of physical custody during which the non-custodial parent would have visitation rights every other weekend. Appellee was given the first period of physical custody of Chelsey, from July 1, 1995 through January 1, 1996.

Appellant filed a motion for Stay of Execution of the custody order and Notice of Appeal on July 18, 1995. Appellee responded to the motion and Appellant moved to strike the response.

Oral arguments were held March 28, 1995 before Chief Justice Sekaquaptewa and Justice Abbey.

Issues Presented on Appeal

Essentially, appellant argues that the trial court erred in not giving sufficient consideration to custom in rendering the child custody order. Specifically, she claims that the trial court failed to consider customs at all and therefore erred as a matter of law. In addition, she pleads customary law directly to the Appellate court. Under Appellant's view of custom this Court should recognize a presumption of physical custody with the mother because a Hopi child belongs to the mother's clan and the mother's family has special customary duties relating to the child's religious and ceremonial upbringing.

Finally, she argues that the trial court applied Arizona law incorrectly by devising a joint physical custody arrangement that is not in the best interests of the child.

Standard of Review

Errors of law as well as any decisions made by the trial court as to definition or use of custom, culture or tradition are reviewed de novo. *Hopi Indian Credit Association v. Thomas*, CIV-020-84, AP-001-84.

Discussion

I. The Trial Court Considered Custom

Appellant's first claim, that the trial court failed to consider custom, must fail. The trial court's custody order, D-013-94, states explicitly that it considered custom. In the very first sentence the trial court acknowledges "having taken into consideration Hopi tradition and custom." Thus Appellant's claim that the trial court failed to consider custom altogether is refuted by the record.

II. Pleading Custom

Even though the Appellant cannot show here that the trial court failed to consider custom, she pleads custom directly to this court. Appellant's implicit

claim is that the trial court applied customary law improperly if it applied it at all. We would require a trial transcript in order to determine whether custom was propounded at trial and whether it was properly considered. However, Appellant has not supplied a transcript with this appeal. Consequently, the record here is devoid of evidence of custom, except for appellant's assertions on appeal.

While this Court may take judicial notice of custom, the legal interpretation of custom should be resolved at the trial court level. *Id. Hopi Indian Credit Association* explains the process for introducing custom at trial. A party who intends to raise an issue of unwritten custom, tradition or culture must give notice to the trial court and to the other party. *Id.* In addition, the party seeking to introduce custom into the legal resolution[m]ust plead custom with sufficient evidence so as to establish the existence of the custom and show how it is relevant to the issue before the court. *Id.*

Lacking a trial transcript, we proceed cautiously here. While we cannot analyze the introduction of custom at the trial level under the Hopi Indian Credit Association standards, we may still take judicial notice of custom.

III. Hopi Custom and Childbearing

This Court is prepared to take judicial notice of three aspects of Hopi custom concerning children. Under traditional Hopi practice, a child is born into her mother's clan, lives with the mother's household and receives ceremonial training from the mother's household.

IV. Consistency of the Custody Order with Custom

The existence of custom relating to a child's involvement with the mother's household does not end the inquiry here. The traditional practice needs to be tested for relevancy to this particular dispute over physical custody in the context of modern Hopi life. Here we hold that the customs we judicially notice today are relevant to child custody arrangements because they impose specific requirements for the child's presence in the mother's household.

However, the relevancy of custom does not necessarily invalidate the custody arrangements ordered by the trial court. Appellant's entire argument is based on the presumption that Chelsey would reside in Flagstaff during the period of her father's physical custody. The trial court order clearly requires that both parents assure that Chelsey remain enrolled at Hopi Day School, requiring her physical presence at Hopi for the entire academic year and minimizing the type of disruption to Chelsey's life that Appellant purportedly seeks to avoid with this appeal. Furthermore, the oral arguments and Appellee's answering brief confirm Appellee's willingness to relocate to Hopi if the Court finds that to be in Chelsey's best interests. No evidence in the record suggests that the trial court order conflicts with the custom as we have recognized it above.

V. State Law Claims Need not be Considered

We need not reach Appellant's remaining claim that the trial court misinterpreted Arizona law by allowing "divided" physical custody, because state

law does not control here. Under *Tribe v. Mahkewa*, AP-003-93 (1996), "[t]he Trial Court [has] discretion to apply federal law, state law, a combination of both, or neither. . . . Under Resolution H-12-76, federal and state laws are persuasive, not mandatory, authorities."

Order of the Court

The trial court order with respect to its award of joint custody to Appellant and Appellee is AFFIRMED. The question of whether the alternating six-month periods of physical custody violates custom is REMANDED to the trial court for proceedings consistent with this opinion.

The trial court may consider evidence of custom such as a ceremonial calendar submitted by the mother or mother's clan designee in order to determine if the physical custody arrangement is consistent with customary duties. The trial court, in its discretion, may modify the order with respect to the physical custody arrangements to accommodate legitimate customary obligations sufficiently substantiated.

NOTES

1. In *Goldtooth v. Goldtooth*, 3 Navajo Rep. 223 (Window Rock D. Ct. 1982), the court searched in many different legal authorities for a viable rule to apply in a child custody case in which one parent was Navajo and one parent was Hopi:

> The court, being confronted with a situation where both parents are fit and proper custodians, must wrestle with a way of reaching a decision. In the past two of the children have been with their mother and three of the children, ranging in age from one to five, have been with the father. This would seem to provide the court with a means of deciding the matter through split child custody. Apparently the court can do this, but there are dangers in such a plan.
>
> > Although authority can be found for the proposition that divided custody is generally to be avoided, it seems preferable to decide the question by reference to the consequences for the child in each case. The danger for the child is that shuttling between parents and divided control will cause him to feel insecure or confused. There is also the risk that each parent will use his own period of custody to destroy the child's affection for the other parent. On the other hand it is highly desirable for the child to know and have affection for both parents. And the natural desire of the parents to have more than momentary contact with his child must not be overlooked. Homer H. Clark, Jr., *The Law of Domestic Relations in the United States*, 590 (1968 Ed.).
>
> There is a general caution against split or divided child custody. "Another issue that sometimes arises is whether siblings should be placed in the custody of one parent or should be separated. Courts usually say that the children should not be separated unless their welfare very clearly requires such a course, and this seems the best solution." *Id.*, at 586-587.
>
> It is obvious this court may have to consider either an all-or-nothing alternative of giving custody to one parent or take a look to see whether

split custody is justified. In any event the court must seek to serve the interests of the children as being above the interests of the adults here, and given the finding of this court that the plaintiff and the defendant are professional people with the interests of their children at heart, perhaps joint custody would be an approach in this case. . . .

Since the plaintiff frequently went to the Tuba City area for family purposes while following his profession in Phoenix, it appears that the logistics for joint custody may be present. The court finds the parents here to be loving and just nice people, and hopefully the necessary attitudes are there as well.

There is another aspect which this court considers in seeking a basis for its decision. We must not overlook the advantages of referring to Navajo culture and tradition, as is mandated by 7 NTC Sec. 204. One precedent for the use of custom and tradition is that found in *Deer v. Okpik*, a child custody decision of the Family Division of the Superior Court of Quebec. (1980) 4 Canadian Native Law Reporter 93 (Cour Supérieure de Québec, division de la famille, 1980). In that case a Caugnawaga Mohawk father sought the custody of his three-year-old son as against his Koactac Inuit (Eskimo) wife. After the child was born the couple lived together for eleven months, and then the mother returned to her home with the child. The mother was then employed as a translator, working various places, and the child was left to live with his maternal grandparents. That arrangement gave the child Inuit cultural surroundings. While the father was separated from the child and the mother was working in various places, the little boy — Sunchild — lived with his grandparents, who considered him as their own child. *Id.*, 94. The mother, without legal formalities, gave Sunchild to his grandparents in adoption in accordance with the tradition, custom and ways of the Inuit. *Id.* Under that custom, the court found there was no abandonment of the child by the mother. *Id.* The court also found Sunchild had been totally integrated into his grandparents' Inuit culture *Id.*, 95. While recognizing the natural law rights of the parents, the court held, in reasoning adopted by this court, that the dominant principle to guide the court is always that the interests of the child are the principal factor to be considered. *Id.*, 96. The court saw that there had been an adoption in accordance with Inuit custom and that the child was integrated into the Inuit community. To look to an award to either natural parent would be to disrupt the child's integration into the Inuit culture. While the court concluded that the parents could not be blamed for their conduct, it found that the best interests of the child required that he remain with his Inuit grandparents. The court also found that ancestral customs and traditions must be preserved under the law and that the decision of the court was in harmony with the Inuit customs and traditions presented to it. *Id.*, 97. Based on those findings the court granted the mother the legal custody of the child, gave his physical custody to the grandparents and gave the father visitation rights for three months during the summer. *Id.*

Deer v. Okpik, a case from the French civil law jurisdiction of Quebec, is cited for its excellent reasoning and its recognition of the fact 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 children's place in 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. . . .

[I]n a divorce the children must be given continuing and full contact not only with their parents but with their extended families, because every member of the family depends upon the others. The court must consider the "family perspective" and look [to]providing "continuity and mutuality of family relationships" in spite of a divorce. . . . The reality is that a divorce changes the form of relationship of family members but it does not end the family. . . . Therefore there are two recommendations of the Committee on the Family, Group for the Advancement of Psychiatry which this court will adopt:

1. The court's determination should aim at providing the child with an ongoing relationship with as many members of his or her family of origin as possible.
2. In determining parental competence, the court should seriously consider the comparative willingness of the two contestants to provide the child with access to the other parent, to siblings, grandparents, and other relatives.

The court has sought a basis for its decision and finds it in Navajo custom and tradition, reinforced by modern principles of child psychology. This family is in an excellent position to be maintained in harmony, notwithstanding the sorrow of divorce, and I hold that the best interests of these children require an award of joint custody to their parents.

Since we have here a Navajo father and a Hopi mother, a little should be said about the concept of joint custody as it appears to the court. The court will not follow the tragic precedent of the Navajo-Hopi Joint Use Area by failing to set guidelines for joint custody or arbitrarily dividing the children among the parents with no concern for those children. This court will enforce the children's rights in custody and it will only incidentally provide for the rights of the parents, where they are in harmony with those of the children. This court feels family ties and strengths should be enforced.

One problem in defining the conditions of joint custody is that the "law is incapable of effectively managing, except in a very gross sense, as delicate a relationship as that between parent and child." Goldstein, Freud, Solnit, *Beyond the Best Interests of the Child*, 8 (1973). . . .

Therefore the thrust of the court's order will be [to] require the parents here to devise a plan for submission to the court which will maintain strong family ties and full access to the children and among the children.

Goldtooth, 3 Navajo Rep. at 224-27.

2. In *Eberhard v. Eberhard*, 24 Indian L. Rep. 6059 (Cheyenne River Sioux Tribal Court of Appeals 1997), the court held in an opinion by Justice Robert Clinton that the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. §1738A applies to tribal courts, concluding that "Indian tribes are states or territories within the meaning of the 28 U.S.C. §1738A(b)(8) and

therefore constitute a 'State' as defined in that Act." In *Eberhard*, the appellate panel affirmed a trial court order deferring to an earlier-in-time divorce filing and order between tribal members in the courts of the State of California, holding that the PKPA required the tribal courts to find that California courts were the "home court" for purposes of adjudicating the divorce and child custody issues. *See id.* at 6059. Chief Justice Frank Pommersheim concurred, but added that other courts were likely to find that Congress did not intend for Indian tribes to be considered "states" under the Act, as one court already had by the time of the decision. *See id.* at 6068 (Pommersheim, C.J., concurring) (citing *Desjarlait v. Desjarlait*, 379 N.W.2d 139 (Minn. App. 1985).

That statute requires that "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify . . . any [child] custody determination made consistently with the provisions of the section by a court of another State." 28 U.S.C. §1738A(a). "State" is defined to include "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States. . . ." 28 U.S.C. §1738A(b)(8).

Professor Robert Laurence criticized the *Eberhard* panel's decision first as not including a due respect for the application of relevant tribal law:

> Having found that the court below had jurisdiction over Shawn Eberhard, and therefore over his divorce, and over Shawn's daughter, and therefore over her custody, the court turned its attention to the reception that the tribal trial court should give to the California custody decree. The court wrote:
>
> > The preliminary question[] for this court, therefore, is whether Indian tribes and their reservations are within the phrase "State" or "a territory or possession of the United States," as used in the statutory definition of State found in the PKPA.
>
> I would have thought that the preliminary question for the court would have been whether the California decree was entitled to respect and enforcement under Cheyenne River Sioux tribal law. However, and surprisingly, the Cheyenne River Sioux Court of Appeals saw the issues before it as almost entirely involving federal and state, not tribal, law.
>
> There is, in fact, relatively little tribal law in *Eberhard*. The court closed its opinion with a few words in the Lakota language, and early on announced a Cheyenne River Sioux rule regarding the residency of children whose parents are married but have different residences, but the great bulk of the case concerned federal and state law, to wit, the Parental Kidnapping Prevention Act, the more general full faith and credit statute found in 28 U.S.C. §1738, and California's version of the Uniform Child Custody Jurisdiction Act. The court constructed its opinion around these off-reservation rules, notwithstanding the fact that the application of the first to tribes is problematic at best, the second is not directly relevant to the case at hand, and the third is definitely not the law of the Cheyenne River Sioux tribe.

Robert Laurence, *Full Faith and Credit in Tribal Courts: An Essay on Tribal Sovereignty, Cross-Boundary Reciprocity and the Unlikely Case of* Eberhard v.

Eberhard, 28 N.M. L. Rev. 19, 29-30 (1998). Laurence secondly criticized the court for not recognizing that the federal statute was an infringement of tribal sovereignty:

> There are about a dozen ways in which the Cheyenne River Sioux Court of Appeals could have avoided the conclusion that the PKPA applies to Indian tribes. These avoidance devices . . . range from the straightforward ("[t]he statute does not mention Indian tribes") to the subtle ("[t]he legislative history shows that Congress intended one part of the original bill to apply to Indians and another part not to") to the majestic ("Congress does not have the power to require an Indian tribe to recognize the judgments of states").
>
> The court's rejection of all of these federal-law avoidance devices was shaped by one consideration: the court's insistence, in the face of the Tribe's opposition, that the PKPA, in particular, and federal "full faith and credit" legislation in general, are not infringements on tribal sovereignty. . . .
>
> [W]e see the non-disingenuous part of the court of appeals' argument: It does enhance tribal sovereignty for California and the other states to recognize Cheyenne River Sioux decrees and, even if done non-consensually, for Congress to require states to do so could be viewed as an enhancement of tribal sovereignty. Of course, by the nature of the judicial process, the Cheyenne River Sioux Court of Appeals can never technically "hold" that California has a federal obligation to enforce its tribal judgments, but it can say so strongly in dicta, as it did in *Eberhard*.
>
> *Eberhard*, then, is the court's attempt at a quid pro quo "bargain" with the state of California, and by implication with the rest of the states. . . .
>
> . . . I think the court needs to give careful consideration to the question of whether full faith and credit is the quid pro quo deal for which the Tribe should aim. The upside of reciprocity . . . is that tribal judgments and decrees will be recognized off-reservation. The downside is that off-reservation judgments and decrees must be recognized on-reservation.

Id. at 32-33, 35-37.

2. CHILD SUPPORT

In the Interest of A.A.M.B.

Southwest Intertribal Court of Appeals for the Southern Ute Indian Tribe, No. 92-005-SUTC, 4 SWITCA 1 (January 7, 1993)

Lui-Frank, Judge

This case has been appealed on the question of whether a father whose relationship to a child is established by court order can be held liable for past support of the child. . . . The state has filed suit under an assignment of rights executed by the child's guardian, who receives Aid to Families with Dependent Children (AFDC). . . .

We hold that the . . . parents remain responsible for support of their children under . . . the Southern Ute Indian Tribal Code, even when they no longer have custody of the children, and the legal custodian/guardian also has a duty of support.

The trial court ruled that past decisions of the court established that child support cannot be imposed retroactively after determination of paternity in the absence of legislative authority. *L.K. v. M.E.T.*, 17 ILR 6005, 6007 (S. Ute Tr. Ct. 1989); *R.L.W. v. G.N.B.*, 18 ILR 6048, 6049 (S. Ute Tr. Ct. 1991). . . .

L.K. v. M.E.T., 17 ILR 6005, 6006-7 (S. Ute Tr. Ct. 1989), was a paternity action brought by the La Plata County Child Support Enforcement Unit in a Uniform Reciprocal Enforcement of Support Act case for the State of California. The father in that case was a member of a federally recognized Indian tribe, residing on the Southern Ute Indian Reservation. He stipulated to paternity of the child, who resided in California. The trial court established paternity and awarded child support, but denied past child support. The court interpreted the relevant code provisions as establishing that because a father whose paternity has not been established has no rights to a child, he has no duty of support. . . .

R.L.W. v. G.N.B., 18 ILR 6048 (S. Ute Tr. Ct. 1991), involved contested paternity claims on two children and admissions to paternity on two other children. The question of past child support was decided in the same way as *L.K. v. M.E.T.*, *supra*. The facts of the case were illustrative of instances where ". . . an individual may in fact not know with any degree of certainty that he is the parent of the child, up until the point paternity is medically established. . . ." *Id.*, 6049. Therefore, the court held requiring a father in that instance to reimburse AFDC payments would be unjust. . . .

We hold that nothing in the Southern Ute Indian Tribal Code prevents the suit by any party supporting a child to obtain retroactive child support from a parent. Indeed, the code allows suits for child support. . . .

We reverse the order regarding retroactive child support and remand to the trial court to determine the amount of money expended by the state and what Mr. Williams must pay, in addition to current support. . . .

NOTES

1. In *Watson v. Watson*, 2010 WL 363057 (Navajo Nation Supreme Court 2010), the court reversed its own precedent, *Yazzie v. Yazzie*, 7 Navajo Rep. 203 (Navajo Nation Supreme Court 1996), in holding that the Navajo courts have discretion to award reasonable interest on child support arrearages.
2. Indian nations with successful and lucrative gaming operations often pay individual tribal members a periodic per capita revenue distribution, rendering some tribal members wealthy. In *Cypress v. Jumper*, 990 So. 2d 576 (Fla. App. 2008), the court held that some Florida Seminole members were so wealthy so as to obviate the need for child support. For criticism of that decision, *see* Marcia A. Zug, *Dangerous Gamble: Child Support, Casino Dividends, and the Fate of the Indian Family*, 36 Wm. Mitchell L. Rev. 738 (2010).

   Most Indian nations will garnish per capita payments to cover child support costs. *E.g.*, *Fort McDowell Yavapai Nation v. Haynes*, 4 Am. Tribal Law 217 (Fort McDowell Yavapai Nation Supreme Court 2003); *Bradley v. Bradley*, 2001 WL 36239694 (Eastern Band Cherokee Supreme Court 2001); *In re Raphael*, 1998 WL 35289050 (Grand Traverse Band of Ottawa and Chippewa Indians Tribal Court 1998).

3. Indian nations also struggle with the federal mandate requiring cross-border recognition of child support judgments; largely, the struggle is with enforcing the mandate against state courts. *See generally* Danelle J. Daugherty, *Children Are Sacred: Looking beyond Best Interests of the Child to Establish Effective Tribal-State Cooperative Child Support Advocacy Agreements in South Dakota*, 47 S.D. L. Rev. 282 (2002).
4. Tribal courts will reject efforts to force compliance with state law if tribal law on the question is applicable. *E.g.*, *Vigil v. Vigil*, 6 SWITCA 3 (Southwest Intertribal Court of Appeals for the Southern Ute Tribe 1995).

3. CHILD WELFARE

In the Matter of a Minor Child (L.J.Y. v. T.T.)

Southwest Intertribal Court of Appeals for the Fort Mojave Tribe, No. 97-002-FMTC, 8 SWITCA 4 (March 3, 1997)

Appellate Panel: Rodgers, M. Juan, Flores

This is an appeal from a final judgment of the trial court removing the minor child from the custody of its mother, appellant L.Y.J., and granting custody of the child to his paternal grandparents, Mr. and Mrs. A.T. This Court concludes . . . that the procedures used by the trial court removed the child from his mother's custody without due process of law, violating the Indian Civil Rights Act. The court below erroneously applied tribal law. . . . However, because the facts in the record below do suggest that the Fort Mojave Indian Tribe Social Services office may have information that would support a petition of child neglect by the mother, it is in the best interests of the minor child that the order in this case be stayed to allow for a petition to be filed and a new proceeding to be properly heard. . . .

Proceedings Below

L.J.Y. and T.T. are the natural parents of the minor child. T.T and the minor child are enrolled members of the Fort Mojave Tribe. L.Y.J. is a member of one of the Colorado River Indian Tribes and now resides on the Colorado River Indian Tribes Reservation. . . .

T.T. filed the petition for custody of his son on November 17, 1995. The grounds given in the petition for removing the child from the custody of its mother were "[w]elfare and safety of my child. I feel that she has caused undue hardship on myself, family, and son." What the petition did not allege, in any manner, was that the minor child was neglected, abused in any way, or otherwise in any danger of harm. . . .

This action was a dispute solely between the two parents. However, during the hearing, the trial court clearly treated the matter as if a charge of negligence had been made against L.Y.J. by the Fort Mojave Tribe. T.T. and his mother were permitted to present allegations of negligence. However, the trial court, based solely on these unsupported allegations, made a determination that there would be a child custody placement pursuant to the Indian Child Welfare Act before L.Y.J. had any opportunity to make any statement to refute the allegations. . . .

. . . An employee of the Fort Mojave Social Services Department appeared at the hearing, and made an on-the-spot recommendation for placement of the minor child with his paternal grandparents. This recommendation was followed by the court in a temporary custody order entered on that same day, although no motion for a temporary custody placement was made and no evidence was presented to support such a placement. . . .

[The trial court granted permanent custody to the grandparents on February 8, 1996. On October 3, 1996, the trial court concluded that its prior order violated tribal law, and vacated the order, only to reverse itself on October 31, 1996.]

Legal Analysis

[A.] Tribal Law Violations

To this day, the minor child remains with his paternal grandparents. It was not until L.Y.J. was in court, with no notice sufficient to allow her any opportunity to prepare a response to a petition for custody filed by the natural father of the child, that she learned, for all practical purposes, that the Fort Mojave Tribe was charging her with negligence and removing her son from her custody. . . . Those orders do not comply with the minimum requirements of due process as required by the Indian Civil Rights Act, apply the Indian Child Welfare act erroneously, and do not comply with the law of the Fort Mojave Indian Tribe. . . . Therefore, we must reverse. . . .

When a parent seeks custody of a child under the Fort Mojave Indian Tribe law and order code, the parent must file a petition. Upon a showing of good cause, the court can permit other interested parties to intervene. . . . However, in the absence of a finding of good cause, the matter is one that is strictly between the parents. . . . [A] party can seek a temporary custody order. However, the motion for a temporary custody order must be supported by "an affidavit or verified petition setting forth detailed facts supporting the requested order." . . . The affidavit or verified petition must be given to all other parties so they can file opposing affidavits. . . . The trial court "shall deny the motion unless it finds that adequate cause for hearing the motion is established in the pleadings, in which case is shall [hold a hearing]." . . . Tribal law also mandates that notice of any child custody proceedings must be given to a child's parent "who may appear, be heard, and file a responsive pleading." . . .

In this case, T.T. did not make any motion for the court for a temporary custody order. . . . Furthermore, even if the initial petition is treated as such a motion, it did not set forth any detailed facts that would support the removal of a child from the custody of the parent. . . . Even if the petition had set forth adequate facts, Fort Mojave law requires the court to look to the best interests of the child in deciding whether to enter a temporary custody order. All relevant factors may be considered, including (1) the wishes of the child's parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and inter-relationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school and community; (5) the mental and

physical health of all individuals involved. . . . [A]ppellant was denied any notice as to the actual allegations made against her, and she was denied any meaningful opportunity to respond to the unsubstantiated allegations. Therefore, the issuance of the temporary custody order did not comply with tribal law concerning custody disputes between parents of a child. . . .

Invalid Application of the Indian Child Welfare Act

The Indian Child Welfare Act is a federal law that governs child custody proceedings [under] federal law [in state courts]. . . . 25 U.S.C. §1903. It has been held not to apply to custodial actions between parents. . . . Thus, it was legally erroneous for the trial court to treat this court action as one arising under the Indian Child Welfare Act. . . . In some instances tribes have voluntarily adopted the placement preferences in the Act as their own. Here, however, the written law of the tribe has its own preferences for child custody placements pending a hearing on a petition of neglect. . . . In a proceeding between two parents, if one parent is successful in challenging the custody of the other, the successful parent is awarded custody, not the grandparents. . . .

The Indian Civil Rights Act

This federal statute prohibits an Indian tribe, when exercising the powers of self-government, from denying "to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. §1302(8). The first step in a due process analysis is to establish whether a liberty or property interest is at issue. . . . While the concepts of liberty and due process do not always have the same definition in tribal law, this liberty interest is recognized and protected in the Fort Mojave Indian Tribe Law and Order Code. [Section] 434 states:

> Before depriving any parent of the custody of his child, the court shall give due consideration to the preferred right of the parents to the custody of their children, and it shall not transfer custody to another person, unless the court finds from all the circumstances in the case that the welfare of the child or the public interest requires it.

Therefore, appellant's rights to custody of her child are recognized as fundamental liberties under the law of the Tribe, and as such appellant cannot be denied her custodial rights without due process of law.

Due process is a fancy term for fair play. . . . While this term must also be defined in light of tribal custom and law, at a minimum, due process requires notice and an opportunity to be heard. . . . [T]he question is whether, given notice, the party had a chance to understand the claims against them and present a defense to them. . . .

Appellant was denied both of these minimal requirements of due process. The petition that was served on her was a petition for custody of a child by the child's other parent. There was no motion for a temporary custody order presented to her. Thus, she was not given any notice of the nature of the action filed against her. Similarly, the court hearing held on the same day that the petition was filed did not give appellant any meaningful opportunity to be heard. . . .

Conclusion

This Court must conclude that appellant's custodial rights to her minor son, as recognized and protected by the law and order code of the Fort Mojave Indian Tribe, were grievously violated by the trial court. However, as this is a matter that also involves a minor child, and because documentation in the record suggests that the trial court or the tribal social services department may have documentation that would support at least an inquiry as to whether appellant has neglected her minor child, the court must also conclude that it is in the best interests of the minor child that the Tribe, through the tribal court or tribal social services, be given the opportunity to act to protect the child from neglect, and that the minor child not be subject to a change in custody . . . [until] the Tribe can determine whether to bring an action alleging neglect. . . .

NOTES

1. In parental termination cases, tribal courts will apply tribal law in determining the burden of proof and the findings necessary to effectuate termination. *E.g.*, *In re the K. Children*, 7 SWITCA 6 (Southwest Intertribal Court of Appeals for the Fort Mojave Indian Tribe 1996).
2. In a soon-to-be-published manuscript, Cami Fraser of Michigan Indian Legal Services, surveyed the various Michigan tribal codes on termination of parental rights, finding fairly significant differences between tribes. She notes:

> [T]he tribal codes . . . vary as to the specific grounds listed and accompanying defining language. For example, the Grand Traverse Band sets out this list as grounds for termination of parental rights: abandonment, physical injury or sexual abuse, un-rectified conditions and circumstances, failure to provide proper care, conviction of violent or sexual crime, conviction of a felony, imprisonment for more than 2 years, parental rights to a sibling terminated, or parental kidnapping. Grand Traverse Code §10.125(b); *see also In re KMC*, 1999 WL 34986349 (Grand Traverse 1999); *In re SRS*, 8 Am. Tribal Law 172 (Grand Traverse Tribal Ct. 2009); *In re AS*, 1999 WL 34986338 (Grand Traverse Tribal Ct. 1999). At the other extreme, Bay Mills [Indian Community] only permits termination of parental rights on the following grounds: abandonment, physical injury or physical or sexual abuse, 12 months in care plus noncompliance of the parent, prior termination of parental rights. Bay Mills Code §724(B).
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> The manner in which the tribal codes define the listed grounds also varies substantially. For example, the Saginaw Chippewa code defines abandonment as "when a parent leaves a child without communication or fails to support a child and there is no indication of the parent(s) willingness to assume the parental role(s) for a period exceeding six months." Saginaw Chippewa Code §2.201. Whereas the Sault Ste. Marie code defines it as "the failure of the parent to provide reasonable support and to maintain regular contact with his or her child when such failure resulted in destruction of the parental role with the child" and provides that abandonment "shall be judged according to customary practices in the Indian community." Sault Ste. Marie Code §30.302.

Cami Fraser, *Should This ICWA Case Be Transferred to Tribal Court? Issues for Parents' Attorneys to Consider and Discuss with Their Clients*, unpublished manuscript at 14-15 (Sept. 2010).

3. One commenter surveyed several tribal codes that demonstrate tribal reluctance to permanently terminate parental rights as well as tribal support for traditional adoptions:

> Some tribes have drafted creative code provisions to define children's interests that are helpful in illuminating tribal perspectives. The Zuni Code, for example, sets out standards or controlling principles that articulate children's "needs." The code recognizes "[a] child's need for love, nurturing, protection, and stability"; "[a] child's need for family"; "[a] child's need for identity and development"; and "[a] child's need for happiness." . . .
>
> . . . Maternal grandparents and aunts, in particular, often have discrete parenting functions and traditionally assumed responsibility for children when parents were unavailable. . . . [A] formal judicial decree to terminate parental rights is foreign to the culture of many tribes. In earlier times, informal arrangements took the place of formal child protection proceedings, with children in need being raised by extended family, clan members, or other persons sharing a communal bond with the children's family. . . .
>
> . . . The codes of several tribes now express a clear preference for open adoption. In some codes, that goal is accomplished by providing that some portion of parental rights will survive the adoption, and in other codes, the result is achieved by "suspending" rather than terminating parental rights. . . . Some tribes . . . view the status of parenthood more fluidly and permit adoption to rest on a suspension of parental rights. . . .
>
> Other tribal codes similarly evince a policy against the complete severance of parent-child relations. In the Sisseton-Wahpeton Sioux Tribe in South Dakota, open adoptions are described as "adoptive placements made through the Court when most, but not all parental rights have been terminated."

Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaskan Native Children: Lessons from Tribal Traditions*, 37 Cap. U. L. Rev. 239, 279-82, 284-86 (2008). *See also* Barbara Ann Atwood, Children, Tribes, and States: Adoption and Custody Conflicts over American Indian Children 144-50 (2010).

4. The Pascua Yaqui Tribal Code provides for open adoptions, and is representative of many tribal codes that do the same:

> Adoptions under this Code shall be in the nature of "open adoptions." The purpose of such open adoptions is not to permanently deprive the child of connections to, or knowledge of, the child's natural family. The purpose of adoptions shall be to give the adoptive child a permanent home. To this end, the following shall apply and be contained in all adoptive orders and decrees.
>
> A. The adoptive parents and adoptive child shall be treated under the law as if the relationship was that of a natural child and parent, except as forth herein.
>
> B. The adoptive child shall have an absolute right, absence a convincing and compelling reason to the contrary, to information and knowledge about his natural family and his tribal heritage.
>
> C. The adoptive child and members of the child's natural extended family (including parents) may have the right to reasonable visitation,

> subject to reasonable controls of the adoptive parents, unless otherwise restricted by the Court for a compelling reason.
>
> D. Adoption shall not serve to prevent an adoptive child from inheriting from a natural parent in the same manner as any other natural child. The natural parents shall not be entitled to inherit from an adoptive child in the same manner as parents would otherwise be entitled to inherit. An adoptive child shall be entitled to inherit from adoptive parents and vice versa in the same manner as if natural parents and child.

2 Pasqua Yaqui Tribal Code §15.2. For more discussion of Pascua Yaqui law, *see* Lorinda Mall, *Keeping It in the Family: The Legal and Social Evolution of ICWA in State and Tribal Jurisprudence*, in Facing the Future: The Indian Child Welfare Act at 30, at 164 (Matthew L. M. Fletcher, Wenona T. Singel, and Kathryn E. Fort eds., 2009).