In Re Sweowat,
AP08-008, 5 CTCR 1, 36 ILR 6041
10 CCAR 01

[Appellant appeared Pro se.
Amicus Appearances by Tom Christie & Tim Woolsey, Office of Reservation Attorney, Nespelem WA.
Trial Court Case Number CV-NC-2008-28187]

Oral argument September 19, 2008. Decided April 20, 2009.
Before Justice Theresa M. Pouley, Justice Earl McGeoghegan and Justice Conrad Pascal

This matter came before the Court of Appeals on Oral Argument on September 19, 2008. Appellant appeared pro se. The Colville Confederated Tribes properly requested and was granted leave to appear and file a brief as an Amicus Curiae. The Tribes appeared and was represented by Thomas W. Christie and Timothy W. Woolsey of the Reservation Attorney's Office. Oral Arguments were held before Presiding Justice Pouley, Justice McGeoghegan and Justice Pascal.

Pouley, J., for the Panel.

SUMMARY

The facts of this case are simple and undisputed. The appellant Mitzi Jean Sweowat, petitioned the Colville Tribal Court to change her name from her married name of Sweowat to her family name of Nanamkin. Appellant is an enrolled Colville Tribal member who lives near the Yakima Indian Reservation. Appellant appeared on the Colville Reservation at the Colville Tribal Court and filed a petition for a name change. The Trial court denied the request on June 5, 2008 stating the trial court did not have jurisdiction. On June 12, a motion for reconsideration was heard and the trial court again denied the request stating that the trial court did not have jurisdiction. For the reasons stated in this opinion, this Court finds the decision of the trial court is erroneous and therefore REVERSES the decision and REMANDS this case to the trial court for proceedings consistent with this opinion.

ISSUE

The issue before this Court is: Did the trial court err in finding it did not have personal or subject matter jurisdiction over the name change of a Colville Tribal member who filed and appeared on the name change in Colville Tribal Court?

DISCUSSION

The Court reviews the findings of fact under the clearly erroneous standard and issues of law under a *de novo* review standard. *CCT v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley v. CCT, et. al.*, 2 CCAR 60, 2 CTCR 9, 22 ILR 6059 (1995); *Palmer v. Millard, et.al.*, 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996); *In re Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998). The ruling of the trial court finding it did not have jurisdiction is reviewed *de novo*. In this case, this Court finds that the Colville Trial Court has both personal and subject matter jurisdiction to change the name of the Appellant.

The trial court ruled it did not have jurisdiction to effect Appellant's name change because she did not "live" on the Colville Reservation. There are no particular statutory provisions on name changes in the Colville Tribal Code. However, the Colville Tribal Court's jurisdiction generally is quite broad.

> . . . To the greatest extent permissible by the law, the jurisdiction of the Tribal Court shall apply to all persons on lands in the North Half and on other lands where the Colville Confederated Tribes may be authorized to enforce its interest or rights and members asserting rights held by the Tribe without regard to location.

Colville Tribal Law & Order Code, § 1-1-70. In keeping with this broad scope of authority for the courts, the Law and Order Code § 1-1-431, covers not only persons residing on the Colville Reservation but also specifically states the Tribes "shall have civil jurisdiction over: (1) Any person residing or present within the Reservation . . .". The Colville Tribes clearly intended the courts to exercise jurisdiction over all persons, especially Colville Tribal members, who are not residents, but are merely "present" on the reservation.

Similarly, The Law and Order Code § 1-1-431-(a)(10) provides: "The Colville Confederated Tribes shall have civil jurisdiction over: (10) All causes of action, which involve either the Tribe, its officers, agents, employees, property, or enterprises, a member of the Tribe, a member of a federally recognized tribe, or any other matter which effects the interest or rights of the Tribe . . .". This section clearly is in keeping with the overall jurisdiction section providing for exercise of jurisdiction to the "greatest extent permissible by the law" because it authorized civil jurisdiction over "all causes of action" which involve a member of the Tribe. This Court will continue to view the jurisdiction of the Tribes broadly unless there is an express limitation on the exercise of that jurisdiction. In this case, there is no limitation expressed in the law of the tribes.

Thus, when Petitioner filed her petition for name change, filed for reconsideration, and appeared at the hearing, she did voluntarily submit herself to the jurisdiction of the Colville Tribal Court and meets the personal and subject matter jurisdiction required by Colville Tribal Law. The Trial Court erred in finding Appellant was required to be a resident of the Colville Reservation or must affect the "interest of the Tribe". This Case is REVERSED and REMANDED to the trial court.

ORDER

The decision of the trial court is REVERSED and REMANDED for proceedings consistent with this opinion.

COLVILLE TRIBAL CREDIT vs. Deidre ANTONE, et al.
AP08-011, 5 CTCR 20, 36 ILR 6087
10 CCAR 03

[David Shaw, Attorney, representing Appellant.
Victoria Minto, Attorney, representing two Appellees. Remaining appellees appeared pro se
Trial Court case number CV-CD-2006-26237]

Oral Argument heard May 15, 2009. Decided August 28, 2009.
Before Presiding Justice Dennis Nelson, Justice Gary Bass, and Justice David C. Bonga

Appeal of Summary Judgment dismissing a Complaint for Monetary Judgment and Foreclosure on Mortgaged Property. The trial court found for the appellees because there were no material issues of fact and that they were entitled to judgment as a matter of law. To wit: the BIA Probate Court had dismissed Colville Tribal Credit's (hereinafter CTC) claim against the mortgagee's estate and that CTC had failed to file a Notice of Rehearing or appeal. Reversed and remanded.

Nelson, J., Presiding Justice, for the panel.

INTRODUCTION

The relevant facts in this matter are not challenged. On November 27, 2001 CTC loaned Judith Wetan $40,765.46 at the rate of 0.0% interest. Ms. Wetan signed a promissory note secured by a Consumer Security Agreement with a 1979 Mogul mobile home as the secured property. She simultaneously signed a Mortgage also securing the loan with her 7/8 undivided interest in 35.49 acres of trust land located within the exterior boundaries of the Colville Indian Reservation.

Judith Wetan died intestate on June 11, 2003. CTC filed a claim against her estate shortly thereafter in the BIA Probate Court. On March 10, 2004, CTC notified the Court by letter that it was withdrawing its claim. Nevertheless, on April 29, 2004, the claim was denied by the Court in its Order Determining Heirs. The appellees, (hereinafter *the heirs*), inherited the mobile home and real property in which CTC claims a security interest. The real property remains in trust. The debt remains unpaid.

CTC subsequently filed a Complaint for Monetary Judgment and Foreclosure on Mortgaged Property in the trial court below. After the exchange of memoranda of law and oral arguments, the trial court granted the heirs Summary Judgment and dismissed the Complaint.

ISSUE ON APPEAL

The Notice of Appeal states five (5) grounds for the appeal. They are whether the trial court erred as a matter of law and policy that:

1) CTC may not bring a foreclosure action in Tribal Court after presenting a claim in a BIA Probate Court;
2) CTC is collaterally estopped or otherwise precluded from bringing a foreclosure action in Tribal Court after presenting a claim in the BIA Probate Court on the underlying debt and

subsequently withdrawing that claim;

3) the trial court relied in whole or in part upon a mistaken factual allegation or legal conclusion that CTC's claim had been adjudicated by the BIA Probate Court;
4) CTC had a mandatory and condition precedent duty to appeal or request re-hearing in the BIA Probate Court which it did not do: and
5) adjudication in full of a collection action in the BIA Probate Court precludes and eliminates a security interest foreclosure action in another venue.

In short, CTC contends its complaint in Tribal Court should not be precluded by the doctrines of collateral estoppel, res judicata, and failure to exhaust administrative remedies.

The heirs contend that:

1) Federal Indian probate law, not Federal Indian mortgage law, controls in the event the mortgagee dies;

2) Colville tribal law is not applicable to this action as "Congress has not delegated probate decision authority to the tribe"; and
3) that once CTC elected a remedy for collection of the debt owed by Ms. Wetan, it was estopped from pursuing an alternate remedy when denied its claim in Indian Probate Court.

STANDARD OF REVIEW

This matter concerns issues of law only. There is no dispute regarding material facts. Accordingly, the standard of review is *de novo*. *Colville Confederated Tribes v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995), *Stone v. Colville Business Council*, 5 CCAR 16, 3 CTCR 11, 26 ILR 6076 (1999).

DISCUSSION

This is a matter of first impression. It concerns issues regarding a contracted indebtedness secured by Indian owned trust lands, the probate of a tribal member who contracted such debt and died intestate, and the administration of her estate by the BIA Probate Court. Accordingly, tribal, state, and federal laws and regulations are addressed. The laws we apply are determined by CTC 1-2-11 Applicable Law which provides:

> "In all cases the Court shall apply, in the following order of priority unless superceded by a specific section of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law."

Applicable tribal law is CTC 9-1-30, Foreclosure of Real Estate Mortgages. It states:

> "The foreclosure of mortgages secured by real property interests and the execution on judgments secured by a mortgage on real property shall be conducted under procedures set out in Titles 6.17, 6.21, 6.23, and 61.12 of the Revised Code of Washington (RCW) as those sections exist on March 1, 1993, or as they may be amended; provided sections 6.17.808, 61.12.061, and 61.12.162 shall not apply and be adopted into this Chapter. The procedures to obtain a lis pendens as set out in RCW 4.28.320 shall also be available. Those provisions of the Revised Code of Washington identified in this chapter shall be incorporated into and shall become a part of this Subchapter. "

Applicable federal law is set forth in 25 U.S.C. 483(a). It states:

> (a) The individual Indian owners of any land which either is held by the United States in trust for them or is subject to a restriction against alienation imposed by the United States are authorized, subject to the approval by the Secretary of the Interior, to execute a mortgage or deed of trust to such land. Such land shall be subject to foreclosure or sale pursuant to the terms of such mortgage or deed of trust in accordance with the laws of the tribe which has jurisdiction over such land or, in the case were no tribal foreclosure law exists, in accordance with the laws of the State or Territory in which the land is located. For the purpose of any foreclosure or sale proceeding the Indian owners shall be regarded as vested with unrestricted fee simple title to the land, the United States shall not be a necessary party to the proceeding, and any conveyance of the land pursuant to the proceeding shall divest the United States of title to the land. All mortgages and deeds of trust to such land heretofore approved by the Secretary of the Interior are ratified and confirmed.

Also applicable to this matter is 43 CFR 4.250(a) which provides:

> "(a) All claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearing under Section 4.211(c) shall be filed with either the Superintendent or the Administrative Law Judge prior to the conclusion of the first hearing and if they are not so filed, they shall be forever barred."

The BIA Probate Court

The heirs contend that the federal regulations regarding probate control because all claims against the estate could only be heard in the BIA Probate Court. They also contend that when CTC filed its claim there, it elected its remedy and relinquished all others which may have been available to it.

Lastly, the heirs contend the order denying the claim was a final order and that there was no request for rehearing or appeal. Thus, CTC is estopped from pursuing other remedies despite its reservation of such remedies in the mortgage contract.

The BIA court as sole remedy: The intent of CFR 4.250(a) is clear on its face. All claims against the estate shall be filed prior to the conclusion of the first hearing or be forever barred. The heirs are correct. No further claims can be brought against the estate. But this action is not against the estate. It is against the heirs of the estate who were parties in interest[1] or in privity with the estate. In most instances, the difference between the estate and the heirs designated to receive property of the estate is not significant.

It is significant in this case, however, because CTC reserved in the Mortgage Contract the right to sue the heirs inheriting the subject property. It also reserved the right to pursue a specific remedy without relinquishing its right to pursue "any other remedy". These rights were accepted and approved by the decedent and by the Secretary of the Interior.

The question, then, is whether claims can be made outside the BIA Probate Court against heirs inheriting secured mortgaged trust property distributed by the Court which property is subject to a mortgage contract binding the heirs when it was specifically approved by the decedent and the Secretary of the Interior. The Secretary approved

[1] "Parties in interest means any presumptive or actual heir....: 43 CFR 201 Definitions

the indebtedness secured by the trust property and that the debt could be collected by any legal means available. .

25 U.S.C. 483(a), commonly known as the Indian Mortgage Act, was enacted after 43 CFR 250(a) was adopted. The statute authorizes judicial foreclosures of trust lands in tribal courts. A conflict arises, as in this instance, when a party initiates a judicial foreclosure in a tribal court without having first filed a claim in a BIA Probate Court.[2]

It is black letter law that the U.S. Code always supercedes the Code of Federal Regulations. The Code is written by elected representatives. The regulations are written by appointed members of the executive branch. Regulations are promulgated to specific statutes and cannot conflict with those statutes or go beyond their purpose.

The Supreme Court has confirmed that where the law is clear, "that is the end of the matter, for the court, as well as the agency, must give effect tot he unambiguously expressed intent of Congress." Chevron U.S.A. Inc., v Natural Resources Defense Council, 467 U.S. 837 at 842-843 (1984),

In addition, a reviewing court must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such .... magnitude to an administrative agency. Cf. MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 512 U. S. 218, 231. Pp. 8-10. We think it unlikely Congress would require enforcement of debts secured by trust lands to be brought first to a BIA Probate Court and then referred to courts of other jurisdictions for resolution. Such a procedure would be unwieldy, uneconomical, and a waste of judicial resources.

Tribal Court

The heirs argue that CTC's claim is barred by the doctrines of collateral estoppel, res judicata, and failure to exhaust administrative remedies.

Collateral estoppel

The doctrine of collateral estoppel prevents a subsequent action from prosecution if the following elements are present: "1) identical issues; 2) a final judgment on the merits, 3) the party against whom the decision on the issue is asserted must have been a party to, or in privity with a party to, the prior litigation; and 4) the application of the doctrine must not impose a hardship on the party
against whom the doctrine is being applied." *Shoemaker v. Bremerton*, 109 Wash.2d 504, 507, 745 P.2d 858 (1987).

The issues before the BIA Probate Court and the Tribal Court were identical. In addition, the heirs against whom the decision on the issue is asserted were in privity to a party in the BIA Probate Court. There was, however, no final judgment entered by that court on the merits of CTC's claim. Furthermore, to collaterally estop CTC from pursuing judicial enforcement of the mortgage contract would impose an undue hardship on it.

CTC's claim in Tribal Court is not precluded by collateral estoppel.

Res judicata

To establish res judicata, courts determine (1) whether a final judgment on the merits was rendered in a prior action between the same parties; and (2) if the prior and present actions involve (a) the same subject matter; (b)

[2] The language of 43 CFR 250(a) bars all claims against the estate of an Indian which are not filed in a BIA Probate Court.

the same cause of action; (c) the same persons and parties; and (d) the same quality of the persons for or against whom the claim is made. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 410, 54 P.3d 687 (2002).

The prior and present actions involve the same subject matter, the same cause of action, the same persons and parties, and the same quality of the persons for whom or against the claim is made (the heirs were in privity with the estate). The only additional element needed to establish res judicata is whether the BIA Probate Court entered its judgment on the merits of the claim before it. It did not.

It follows that CTC's claim in Tribal Court is not precluded by res judicata.

Failure to exhaust administrative remedies

We agree with the trial court that the Probate court order denying CTC's claim was ambiguous at best. A request for re-hearing may or may not have determined whether the claim was denied or dismissed. The distinction, however, is of little significance as CTC's complaint was not heard on its merits. CTC did not have its day in court.

The situation is analogous to those where the doctrines of collateral estoppel and res judicata are considered. To arrive at a final, irreversible decision without a hearing on the merits should be avoided whenever possible. Denying CTC a hearing on the merits of its claim would provide a windfall to the heirs that would harm CTC and, ultimately, the Tribes and their members. No legal principal should ever be applied to work injustice. See *Henderson v. Bardahl International Corporation,* 72 Wash.2d 109, 431 P.2d 961 (1967).

It is significant that CTC, in its mortgage contract with Ms. Wetan, reserved its remedies for collection of the indebtedness. The heirs argue that CTC is bound by the remedy it elected when it filed its claim in the BIA Probate Court. This argument would have more weight if the claim had actually been heard.

Congress has not delegated probate decision authority to the Tribes

The heirs also argue Congress has not delegated probate decision authority to the Colville Confederated Tribes. This argument is specious. CTC is not seeking relief through an action in probate. Its action is based upon contract law, the Indian Mortgage Act, and Chapter 9.1 Mortgages, Deeds of Trust and Real Estate Contracts of the Colville Law and Order Code.

Secured creditor need not participate in probate proceedings

It is settled law that a secured creditor such as CTC need not participate in BIA probate proceedings when seeking to foreclose on secured trust property owned by an Indian decedent. . In 1958, a Solicitor's Memorandum stated "A properly secured creditor need not present a claim (*in the BIA Probate Court*) since he may be paid by means of foreclosure or other methods prescribed in the lending agreement". Emphasis added. *Acting Solicitor's Memorandum (Indian Affairs) to Examiner Montgomery*, A-58-1104.9a (April 14, 1958.

We are not aware of any legal authority determining that statement invalid. To the contrary, IBIA cases have agreed with the statement or considered it in deciding a matter. See, *Estate of Ecoffey*, 5 IBIA 85 (04/16/1976) and *Estate of Elsie White Wesley*, 13 IBIA 326 (11/15/1985).

CONCLUSION

Accordingly, the Summary Judgment dismissing a Complaint for Monetary Judgment and Foreclosure on Mortgaged Property is VACATED and the case is REMANDED for proceedings consistent with the foregoing.

IT IS SO ORDERED:

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Russell BOYD, Appellee.

Case No. AP09-007-IA, 5 CTCR 21, 36 ILR 6099

10 CCAR 8

[Jonnie Bray, Office of Prosecuting Attorney, for Appellant.
Leone Reinbold, for Appellee.
Trial Court Case number CR-2009-32208]

Decided October 22, 2009
Before Chief Justice Anita Dupris, Justice David C. Bonga and Justice Dennis L. Nelson

Nelson, AJ, for the Panel

Appellant, Colville Confederated Tribes, filed an interlocutory appeal on August 3, 2009, challenging the actions of the trial court judge as so far departing from the accepted and usual course of judicial proceedings as to call for review by the Court of Appeals. COACR 7-A(c).

Appellee Russell Boyd, contends there is an insufficient written order upon which to appeal and that the issue is moot because there is either an inadequate remedy or that any error was harmless as the prosecution has not been prejudiced.

After a review of the record and law we find the Trial Court did err in hearing the matter before the tribal Prosecutor's Office officially filed a complaint, thereby infringing on prosecutorial discretion. We grant the appeal and, because of the unusual nature of the appeal, we give the Trial Court instructions for future application to similar cases.

INTRODUCTION

Russell Boyd was arrested on July 16, 2009, for allegedly tampering with a witness. On motion of his attorney he was brought before a trial court judge on July 17 to consider his release from custody. Neither a citation nor a complaint had been filed at the time of the hearing nor had a case number been assigned.

The prosecutor objected to a hearing being held without a complaint having been filed, citing insufficient time to review the officers reports to consider what charge(s) should be filed. The trial court judge allegedly commented that she was concerned the defendant was sitting in jail without charges having been filed.

The court, after hearing the comments of the attorneys and officers, determined there was no probable cause for Appellee to have been arrested, that he should be released, and that the Appellant should file charges prior to Appellee's arraignment.

The trial court judge then issued an Order Setting Requirements and Notice of Court Appearance. The undated order released Appellee on his personal recognizance with conditions imposed. The order also set a time and date for his arraignment.

STANDARD OF REVIEW

Appellant contends the trial court abused its discretion and committed errors of law. Mixed questions of fact and law require a "de novo" review of the trial court actions. *Colville Confederated Tribes v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6059 (1995).

DISCUSSION

We begin with examining how criminal cases come into being and how they are dealt with *ab initio* until arraignment.

All criminal actions begin with either a citation or a complaint. *Colville Law and Order Code, §§ 2-1-30 and 2-1-72(a).*

A citation is issued by a police officer when arrest and detention are not warranted for the offense(s) alleged to have been committed. A citation contains:

(1) The name and address of the alleged offender, date of birth and sex, a description of the offense(s) charged, the date the citation was issued, and the signature of the citing officer.

(2) To secure his release, the offender must promise to appear in Court; and

(3) The time and date the offender is to appear in court to hear the charges against him and post bail, which shall not be less than seventy two (72) hours after the date of the citation or more than fifteen (15) days after the date of the citation. *Law and Order Code, § 2-1-71.* Citations are often supplanted by a complaint.

A complaint contains:

(1) The name of the Court;
(2) The title of the action and the name of the offense charged;
(3) The name of the person charged; and
(4) The offense charged, in the language of the statute, together with a statement as to the time, place, property, and person involved to enable the defendant to understand the nature of the offense charged. *Law and Order Code, § 2-1-30(b).*

A defendant who has been arrested is brought before the court "as soon as reasonably possible after arrest,

but no more than seventy two (72) hours later. " *Law and Order Code, § 2-1-100.* The initial appearance of a defendant in the Colville Tribal Court is the arraignment.

The purpose of the arraignment is to inform the defendant of the charges against him and of his rights under the law. *Law and Order Code, §§ 2-1-100 and 2-1-101.*

MR. BOYD'S INITIAL APPEARANCE

On July 16, 2009, tribal police believed they had probable cause for Mr. Boyd to be charged with Tampering with a Witness.[3] CTC 3-1-138. He was not issued a citation. He was arrested and taken to the holding facility at Nespelem.

On July 17, on motion of his counsel, he was brought before a tribal court judge to consider his release from custody. A complaint had not been filed nor had a case number been assigned. We have no recording of the hearing because of an equipment malfunction. [4]

Motions and Bail Hearing

At the Motions and Bail hearing the prosecutor objected to going forward without a complaint, arguing that the Tribes could hold the defendant for seventy two (72) hours or less without the filing of a complaint. The trial court judge allegedly replied that she was concerned that Mr. Boyd had been sitting in jail for twenty-four hours without a complaint having been filed.

A complaint does not magically appear when a defendant is arrested. Immediately following the arrest and transport of the defendant to a holding facility, the officer prepares his written report of the circumstances surrounding the event. There may be a need to obtain additional statements from brother officers and witnesses. Evidence may need to be tagged and inventoried. Once this process is completed, the documents are forwarded to the prosecutor's office for determination of charges and preparation of a complaint. All this takes time.

The Business Council has determined that sufficient time from arrest to arraignment should require no more than seventy two hours. A complaint must be filed within that time or the defendant shall be released from custody. While it is inconvenient for a defendant to remain in jail any longer than necessary, it is not illegal to hold him for a time not exceeding seventy two hours. *See Williams v. CCT*, 6 CCAR 45 at pp 46-47, 3 CTCR 46 (2002).

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[3] Mr. Boyd had dealt with tribal police before. On May 8, 2009, he was charged with Battery Domestic Violence for allegedly battering his wife. The complaint was dismissed on August 10, 2009.

[4] Without a recording we are compelled to rely on the written materials of the parties. None of the filings with this Court have been certified or notarized.

We have previously discussed the separate roles and responsibilities of the Trial Court and the Prosecutor's Office. *See CCT v. Laramie,* 4 CCAR 22 at p23, 2 CTCR 49, 24 ILR 6181 (1997), and *Sonnenberg v. Colville Tribal Court,* 5 CCAR 9 at p16, 3 CTCR 9, 26 ILR 6073 (1999). It is important that the tribal judge maintain his or her objectivity at all times, and respect the roles others have in the cases that come before the judges. The judge, as a tribal leader, must not appear to take sides nor appear to rule based on his or her emotions without regard to what the law is in the case.

The trial court judge acted inappropriately by hearing a motion for release without a complaint having been filed or case number assigned. A defendant may be held without a charging document being filed for a time not to exceed seventy two hours. In this instance, the trial court judge should have waited until a complaint had been filed and a case number assigned.

Probable Cause

Appellee's spokesman, Leone Reinbold, argued for Mr. Boyd's immediate release stating that he had been arrested without probable cause as the arresting officer relied on the word of a brother officer when making the arrest. Ms. Reinhold contended that an officer can only make an arrest when a crime is committed in his presence or under the authority of an arrest warrant.

CCT § 2-1-33 Arrests states: "No police officer shall arrest any person for any offense defined in this Code or by federal law, except when the offense shall occur in the presence of the arresting officer or he shall have probable cause to believe that the person arrested has committed the offense, or he shall have a warrant commanding him to apprehend the person."

Our record is devoid of the facts surrounding the arrest of Mr. Boyd so we make no determination whether there was probable cause for his arrest. It may help the trial court judge, however, to study the following definition: "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been or is being committed." *State v. Gluck,* 83 Wash. 2d 424, 426-27, 518 P.2d 703 (1974). This includes relying on the words of a fellow officer. See State v. *Alvarado,* 56 Wash. App. 454, 783 P.2d 1106 (1989).

After hearing the comments of those present, the trial court judge determined that Mr. Boyd had been arrested without probable cause. There is nothing in the record to show how the trial court judge arrived at that conclusion. She then ordered him released upon his own recognizance subject to conditions. She also ordered him to appear for arraignment on July 22 after directing the prosecutor to file a complaint.

This is an unusual way to proceed. The trial court finds no probable cause that the defendant committed a crime, but orders him to be arraigned on a complaint the prosecutor is to file. The cart is before the horse. In order for a person to be arrested, an officer must reasonably believe a crime has been committed. *i.e*. probable cause. In

order for a complaint to be filed a prosecutor must believe beyond a reasonable doubt that the defendant is guilty. A court cannot find guilt beyond a reasonable doubt unless probable cause has been determined. How is a prosecutor to convince the court that he or she believes a defendant guilty beyond a reasonable doubt when the trial court judge has already determined there was no probable cause for the arrest of the defendant?

It is not unusual for a judge to determine that no probable cause exists and a defendant is ordered released after the prosecutor has filed a complaint. That is the end of the matter unless the prosecutor deems an appeal necessary. For a judge to find no probable cause and then order the defendant arraigned on a complaint arising from the same circumstances indicates a lack of understanding of the workings of a criminal prosecution. We find the trial court judge erred in prematurely ruling there was no probable cause.

The Trial Court Judge Departed From Accepted Standards

Mr. Boyd contends the issues before this court are moot as our ruling "will have no impact on this case" because the Tribes can file charges in the underlying matter for three years from the date of the offense. Pg. 3, Appellee's Brief.[5] The issues, as noted directly above, are not moot. Further proceedings in this matter with the same trial court judge present the conundrum we discussed above. How can a trial court judge preside over further proceedings in a criminal matter after she has found no probable cause exists? In our opinion, it is not possible.

Appellant aptly points out that, by its rulings, the trial court erroneously circumvented the procedural laws of the Tribes. *See, CCT v. George*, 6 CCAR 54, 56, 3 CTCR 52, 29 ILR 6087 (2002). The trial court judge overstepped the boundaries between judicial and prosecutorial discretion, which we have long-recognized in this Court. *See*, *Mellon v. CCT*, 8 CCAR 1, 10, 4 CTCR 17, 32 ILR 6021 (2005); *CCT v. Laramie*, 4 CCAR 22, 2 CTCR 66, 24 ILR 6181 (1997); and *Sonnenberg v. Colville Tribal Court*, 5 CCAR 9, 16, 3 CTCR 9, 26 ILR 6073 (1999).

We find the trial court "so far departed from the accepted and usual course of judicial proceedings as to call for review by the COA." COACR 7-A, subsection c. We find this matter is properly before us.

CONCLUSION

The lack of knowledge of the law exhibited by the trial court judge is greatly disturbing to this panel. We cannot "unring" the bell. At most we can direct the removal of the trial court judge from further participation in this matter in that her participation so far has evinced a lack of fairness and objectivity towards Appellant. We also counsel the trial court's Chief Judge to make sure the judges are familiar with relevant procedural and substantive rules of law that apply to the cases before them. This assures a minimum standard of due process. What we have in this case is a blatant disregard for such procedures and laws.

[5] Appellee's brief was totally lacking in relevant laws and authorities for us to review. Appellee treated the brief as an opportunity to give us a position paper on what his spokesman's opinion is in this matter, thereby rendering the brief non-responsive. It was also inaccurate in places, *e.g.* it stated there was no written order when in fact there was one. How else would the police have released Appellee? We counsel Appellee's spokesman to take these matters a little more seriously, and study and review the nature of briefs, both in the Court Rules and in the laws. By not giving us relevant authorities to review she has ignored settled, relevant case law.

Accordingly, IT IS ORDERED:

1. Associate Judge Sheilah Cleveland shall recuse herself from further participation in this matter;

2. The trial court's finding there was no probable cause is VACATED. Should a complaint be filed in this matter, the issue of probable cause shall be considered should it be raised upon motion of counsel; and

3. The Chief Judge is counseled to require the judges she supervises to know the procedural and substantive laws of the Tribes in order to ensure no further blatant deviations from standard law occur as what happened in this case.

Rose ZAVALA, Appellant,

vs.

Don MILSTEAD and Geneva JOSEPH, Appellees.

Case No. AP09-008, 5 CTCR 22, 36 ILR6101

10 CCAR 14

[Mark J. Carroll, Omak, appearing for Appellant.
Appellees appeared pro se.
Trial Case Number CV-CU-2007-27417]

Decided October 14, 2009
Before Chief Justice Anita Dupris, Justice Gary Bass and Justice Howard E. Stewart

Dupris, CJ

SUMMARY

On July 16, 2009 Appellant, Rose Zavala, filed an appeal of an Order from Custody Trial dated July 7, 2009. Subsequent to the custody hearing the trial court judge entered written findings of fact and conclusions of law, dated August 20, 2009. On August 19, 2009 the trial court denied Appellant's request for a stay of judgment pending the outcome of her appeal. The trial court judge entered written Findings of Fact, Conclusions of Law, Order Denying Stay on August 21, 2009 (hereinafter Order). Appellant appeals the denial of the stay under COACR 9(d).

We find the trial court erred in its legal conclusions but find the errors were harmless, and there is good cause to affirm the denial of the stay pending the outcome of the appeal.

DISCUSSION

A. A Stay is Mandated Under CTC § 1-1-285

A review of the findings of fact in the Order is not an easy task. We have little direction of what facts were found. The findings are more of a record of what evidence and arguments were presented to the trial court instead of how the trial court analyzed and weighed the evidence, thereby coming to a final, relevant fact[6]. What we have to review, then, is a judicial summary of the evidence and arguments presented at the custody hearing from which we must determine the facts *de novo* since, in essence, no reviewable relevant facts are provided by the trial court in its findings.

The question before us is whether the trial court erred in its interpretation of the law regarding the denial of

[6] For example, Finding of Fact #1(a) states Mr. Milstead [Appellee herein] "claimed he did not receive notice of this Motion Hearing...." Is the court finding that Mr. Milstead claimed he had no notice, or is the court finding that Mr. Milstead did not receive the notice? Another example is Finding of Fact 5: "Rose Zavala, through counsel, wanted to know if Don Milstead was opposing the motion to stay..." This gives a picture of the dialogue in court, but it does not reveal a relevant finding of fact for us to review on the legal issue presented to us.

the stay herein. Questions of law are reviewed *de novo*. *Colville Confederated Tribes vs. Naff,* 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al. v. Colville Confederated Tribes,* 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al.,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024 (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.,* 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998). The trial court entered six (6) Conclusions of Law in the Order.[7] For purposes of our review under COACR 9(a) we review Conclusion #3.

Conclusion #3 sets out three (3) separate legal conclusions: (1) the trial court has discretion whether to grant a stay under CTC §§ 1-2-78 and 5-5-60[8]; (2) the court is allowed to apply the "best interest" test in this case in making its decision; and (3) CTC § 1-1-285[9] only applies to criminal appeals. The trial court' legal conclusions on which statutes to rely on to deny the appeal, and its interpretation of CTC § 1-1-285 are erroneous.

CTC § 1-2-78 clearly states (1) a request for a stay must be in writing to the trial court; and (2) the trial court has discretion whether to require a bond. It does not, on its face, give discretion to the trial court to grant or deny a stay. When the language is plain on its face a court cannot infer another meaning. *See* CTC § 1-1-7(b) (words shall be given their plain meaning).

Although the trial court is granted discretion to grant or deny a stay under CTC § 5-5-60, by its plain language, this statute only applies to the chapter on Domestic and Family Violence Code. We have nothing in the record to show the immediate cause of action was brought under Chapter 5-5[10]. All the petitions and relevant orders we have reviewed show that it is a custody action, which is brought under CTC § 5-1-120 *et seq.* (Child Custody). CTC § 5-5-60 clearly states it applies to stays requested under Chapter 5-5, thereby eliminating its use in this case.

The trial court erroneously concluded, as a matter of law, that CTC § 1-1-285 only applies to criminal cases. Tribal lawmakers have been very specific when making exceptions to stay requests upon the filing of an appeal. We have already identified CTC § 5-5-60 as one exception. Another is Chapter 5-2, Juveniles. CTC § 5-2-413 provides that a decree or disposition of a hearing entered under this Chapter shall not be stayed by an

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[7] Conclusions #2, 4, and 5 have findings of fact incorporated in them. #2: "Don Milstead did not receive notice of the hearing..."; #4: this Conclusion lists in detail the types of care Mr. Milstead has provided the minor; and #5:"Rose Zavala refused to release the minor's clothes...." These Conclusions contain legal conclusions in them, too.

[8] 1-2-78, Stay Pending Appeal; Bonds: If a party is granted an appeal, that party must then, in writing, request a stay of judgment pending the outcome of the appellate procedure. At that time, the appellant must also make provisions for a bond, which is discretionary with the Court.

5-5-60, Stays: The trial court shall have discretion in determining whether to grant a stay of any or all provisions of its orders under this chapter [referring to Chapter 5-5, Domestic and Family Violence Code] with the exception that provisions aimed at protecting victims shall not be stayed. The trail court shall provide written findings and conclusions in support of its decision on granting or denying a request for a stay.

[9] 1-1-285, Stay of Execution: Unless otherwise provided for by this Chapter, [referring to Chapter 1-1, Preliminary Provisions/Administration of Tribal Court] in any case where a party has perfected his right of appeal as established by this Code or by Rules of Court, a stay of execution of judgment shall be granted and the sentence shall not be carried out unless and until affirmed by the Appellate Court without good cause to the contrary as determined by the Appellate Court.

[10] The trial court heard allegations on abuse in Appellant's home, but made no specific findings of such abuse, *i.e.* a statement that such abuse did or did not happen. As we stated earlier, the court's findings are more of a summary of the evidence presented; they do not show us how the trial court analyzed and weighed the evidence, thereby deciding what was a relevant fact.

appeal.

CTC § 1-1-285 is found in the Code's chapter on Preliminary Provisions/ Administration of Court. Specifically it is in the section on appeals. Chapter 1-1 has language referring to its application to both civil and criminal cases. *Eg.* CTC § 1-1-251 (Fees), CTC § 1-1-402 (Civil Contempt), and CTC § 1-1-403 (Criminal Contempt). Chapter 1-2, Rules of Court, refer to both civil and criminal cases, sometimes generally and sometimes with specificity. CTC § 1-2-77 states any party has a right to appeal under the appeals provisions of Chapter 1-1.

In the case of ambiguities in reading code sections, we are instructed to construe the Code as a whole, and to give effect to all of its parts in a logical and consistent manner. CTC § 1-1-7(d). It would not be logical to limit CTC § 1-1-285, a general provision, to criminal cases without there being an equal counterpart for civil cases. In construing the Code as a whole, it is logical to recognize that CTC §1-1-285 covers all cases before the trial court. The specific language regarding sentencing within CTC § 1-1-285 applies when the case is criminal; all relevant portions of this section still apply to the civil cases.

The plain language of CTC § 1-1-285 says the trial court shall issue a stay where it is shown the party requesting it has perfected his right to an appeal. There is no discretion on the part of the trial court unless specifically granted, as in CTC §§ 5-5-60 and 5-2-413. The discretion to affirm or overturn the denial of a stay based on good cause rests with the Court of Appeals. *Carson v. CCT*, 5 CCAR 28, 30, 3 CTCR 26, 27 ILR 6153 (2000).

We hold the trial court erred in limiting CTC § 1-1-285 to criminal cases and overturn this decision.

B. Good Cause Exists To Affirm the Denial of the Stay

We can appreciate the hesitancy of the trial court to grant a stay in cases in which it appears to the trial judge that harm may beset a party. Logic dictates that the trial judges should have the discretion to determine whether to grant a stay in civil cases potentially involving the safety of children. We are not legislators, however, and to recognize the trial court's discretion would mean amending the relevant code sections. This is a job for our Council to address. Although it is a more involved procedure, such parties can be protected under the current laws and procedures. That is, the party opposing the stay can ask for an immediate review at the appellate level[11].

After a review of the record, and a *de novo* review of the summary of the evidence presented in the trial court's findings of fact, both in the Custody Order and the Order Denying Stay we find that good cause is shown to deny the stay, and the trial court's denial is harmless error. Even reading the findings in a light most favorable to Appellant, we find there is a *prima facie* showing that it would be disruptive to move the minor from his father's home pending the appeal. This Court has the discretion to find good cause to deny a stay; we so find in this case.

We hold the trial court erred in exercising discretion to deny the stay, and that it was a harmless error in that we would have denied the stay based on the *prima facie* showing of good cause that it should be denied, and the denial should be affirmed.

It is SO ORDERED.

[11] If the trial court disagreed with the stay it could make the effectiveness of the stay begin after a time certain, write specific findings of fact and conclusions of law why the stay should have been denied and then direct the opposing party to the Court of Appeals for a review under CTC § 1-1-285.

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Shalesa Edwards, Appellant,

vs.

Sarah Bercier, Appellee

Case No. AP09-009, 5 CTCR 23, 37 ILR 6009

10 CCAR 18

[Appellant appeared pro se.
Appellee appeared pro se.
Trial Court case number CV-CR-2009-29112]

Hearing held November 29, 2009. Decided December 2, 2009.
Before Chief Justice Anita Dupris, Justice David C. Bonga and Justice Conrad Pascal

Dupris, CJ, for the Panel

This matter came before the Court of Appeals for an Initial Hearing on November 20, 2009. Shalesa Edwards, Appellant, appeared by telephone and without a spokesman. Sarah Bercier, Appellee, appeared in person and without a spokesman. The Court, after reviewing the record and recordings of the Trial Court's hearings on May 11, 2009 and July 13, 2009, and after reviewing the laws that apply in this case, found that the orders entered on July 13, 2009 should be vacated and a new hearing be held before the Trial Court. The reasons for these decisions are set out below.

DISCUSSION

Court of Appeals Court Rule (COACR) 12 states when an appeal is filed we are to hold an Initial Hearing. At the Initial Hearing we are to decide whether (1) there is a legal reason to grant an appeal; or (2) whether the case should be sent back to the Trial Court immediately for a new hearing; or (3) whether there are no legal issues we can decide and the appeal should be dismissed. In making our decision in this matter we listened to the recordings of the hearings of May 11, 2009 and July 13, 2009. We reviewed the documents in the Trial Court file regarding the request for a restraining order, as well as the Notice of Appeal filed in our Court. Finally, we studied what laws apply to this case, both those found in the Law and Order Code and those in our case law.

Appellant asked for the appeal on two grounds:

1) "Irregularity on the proceedings of the court, jury, or party, or any order of the Court, or abuse of discretion, by which a party was prevented from having a fair trial;" and
2) "That substantial justice has not been done."[12]

Appellant stated she was not given an opportunity to present her side of the action, including witnesses and documents; she feels it was improper for the judge to reopen the case without a written request to do so after the judge dismissed it when Appellee did not appear; and the judge would say things Appellant did not understand and

[12] Appellant made a check mark besides these two Grounds of Appeal on the forms provided by the Court of Appeals. These Grounds of Appeal are taken from the Law and Order Code, § 1-1-282 and incorporated into our Court Rules.

would not explain them to her. In sum, Appellant made sufficient arguments in her Notice of Appeal that raise questions on whether she was given due process at the hearing on July 13, 2009.

STANDARD OF REVIEW

The question of whether Appellant was given due process is a legal question. For this reason we will look at everything in the trial court file and records *de novo*[13]. *De novo* means that we will look at everything the trial court looked at as if it were the first time, independent from what the trial judge decided. When we look at the documents filed and the testimony given in the case we will make our own decision whether the judge conducted the hearing properly and made the correct legal decision.

PROCEDURAL DUE PROCESS

All hearings before the Trial Court must meet standards of procedural due process. Basic standards of procedural due process include: the right to adequate notice of what issue the court is going to decide and when; the opportunity to present evidence, either documents or testimony or both, for your side; and the opportunity to testify on your own behalf. *See Gallaher v. Foster*, 6 CCAR 48, 3 CTCR 50, 29 ILR 6079 (2002) and the Colville Tribal Law and Order Code §1-5-2(h).

Our review of the hearings show the judge conducted the hearing in a manner that violated Appellant's right to procedural due process. First, all of the motions the judge ruled on were stated on record by the judge and not specifically asked for by either one of the parties. For example, when Appellee did not appear on time for the July 13, 2009 hearing (which will be just called "hearing" from now on in this opinion), the judge said: "Do you want me to dismiss this case because she failed to appear?....Are you requesting that the case be dismissed?" (at 1:07:39 to 1:09:33 of the recording). When Appellee appeared after the judge signed the dismissal order, the judge told Appellee she was going to let her make an argument to reopen the case. Finally, the judge asked if the parties wanted this hearing to be the final one without having to go to a trial. No one made these motions; the judge raised them on her own.

A judge is to conduct hearings objectively and fairly[14]. This includes conducting the hearing without looking like she is taking one side or the other. Even if the judge hasn't taken one side or the other, if it looks like she is, this violates procedural due process. In the hearing, after she read the whole complaint filed by Appellee, word-for-word into the record, the judge asked Appellee if she had anything else to add. The judge used the majority of the remaining time in the hearing asking Appellee questions. She only asked Appellant two (2) questions. By asking all of the questions it appeared that the judge was acting more as an advocate than as the judge. While we understand that having two *pro se* litigants in court may be challenging, it is imperative that the judge let the litigants

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[13] CASE LAW: *De novo* review means we look at everything the Trial Judge had to review when she made her decision, and not at any new information. The test is whether there [is] a reasonable basis for the Judge's ruling, based on the facts and law before her and not whether we [would] have held differently under the same circumstances. *Marchand v. CCT*, 8 CCAR 43, 4 CTCR 26 (2006).

[14] Colville Tribal Rules of Judicial Conduct 1.4.01(d) states: A judicial officer shall maintain order in his Court. He shall not interfere in the proceedings except where necessary to protect the rights of the parties. *A judicial officer shall not take an advocate's role.* A judicial officer shall rely only on those procedures prescribed by the laws and customs of the Tribe. *Emphasis added.*

A trial court judge should refrain from orchestrating the trial. *CCT v. Swan*, 7 CCAR 37, 4 CTCR 12, 31 ILR 6025 (2003).

present their own cases, with minimal interference. The better practice would have been to first ask Appellant to show any good reason why the temporary order shouldn't be made permanent, then allow her to present her own evidence in her own way. Next, Appellee would have been given a chance to respond with her own evidence, in her own way.

A Show Cause Hearing is hearing in which one party, Appellant in this case, is required to go to court and tell the judge why a temporary order should not be made into a permanent order. There is nothing on the record which indicates the judge explained this to the parties. The judge never gave Appellant an opportunity to present her own statement or evidence on her own behalf regarding the legal question to be decided in a show cause hearing.

When Appellant attempted to present evidence or arguments on her own behalf the judge denied her request and said Appellant had already agreed to the permanent restraining order for five years. It is clear from Appellant's comments during the hearing she did not understand she had due process rights to present her case on why the order shouldn't be made permanent. It is clear from Appellant's comments in the hearing she did not understand what she agreed to, *i.e.* a permanent five-year restraining order against her without a further hearing on the issues raised.

CONCLUSION

COACR 12 allows us to send this matter back to the Trial Court for a new hearing without filing briefs in this court, depending on the circumstances, such as those in this case. We reviewed the record and laws and find clear violations of Appellant's procedural due process rights at the hearing of July 13, 2009. Appellant was never informed that this was her one and only shot at presenting her side (lack of notice), which precluded her from presenting evidence on her own behalf, including testifying on her own behalf (opportunity to be heard). The manner the judge conducted the hearing appeared to be more as an advocate for Appellee than as an independent decision-maker. Based on these findings we hold the orders entered on July 13, 2009 shall be VACATED and this matter REMANDED for another hearing which comports with due process.

It is so ORDERED.

Melina O'FLYNN, Appellant,

vs.

Jason FULFER, Appellee.

Case No. AP09-011, 5 CTCR 24, 37 ILR 6001

10 CCAR 21

[Appellant was not represented by counsel.
Appellee was represented by counsel, Juliana Repp.
Trial Court case number CV-CU-2008-28242]

Decided December 9, 2009.
Before Chief Justice Anita Dupris, Justice Earl McGeoghegan and Justice Conrad Pascal

Dupris, CJ

This matter came before the Court of Appeals pursuant to a filing of a Notice of Appeal by Appellant on September 21, 2009. Upon review of the record and the law, we dismiss this appeal without hearing as the trial judge was within her discretion to deny the motion for contempt and there is no appealable issue under which relief can be granted by the Court of Appeals.

SUMMARY

A Petition for Child Support and/or Support was filed by Appellant, Ms. O'Flynn, on July 30, 2008. Several hearings were held between then and September 2009 and an extensive record was created. On September 10, 2009, Appellant filed a Motion/Declaration for Show Cause re Contempt (MTCS) alleging Appellee failed to comply with the Temporary Court Order from October 2008. This motion was denied by the Trial Court on September 11, 2009. Appellant timely filed her appeal.

JURISDICTION

The Court of Appeals has jurisdiction to hear this matter pursuant to Article VIII of the Colville Tribal Constitution. When an issue is raised on a matter which the Court identifies as one where it cannot grant relief, the Court may dismiss without hearing. *Dogskin v. CFS*, 9 CCAR 01, 5 CTCR 02 (02-15-2007).

ISSUE

Did the Trial Court judge err in denying the motion for contempt?

STANDARD OF REVIEW

In prior cases we have determined that our standard of review in contempt issues is "abuse of discretion." That is, we will overturn the Trial Court's decision only if its action was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Further, a minimum review for abuse of discretion would require a

review for due process. *Sonnenberg v. Colville Tribal Court*, 5 CCAR 09, 14, 3 CTCR 09 (02-12-1999).

DISCUSSION

The Appellate Court finds that the Colville Tribal Court derives its contempt powers through the Court's inherent authority and by statutory authority found in Colville Tribal Code (CTC) sections 1.12.02 and 1.12.03. *Lezard v. CCT*, 3 CCAR 04, 05, 2 CTCR 11, 22 ILR 6135, 6 NALD 7009 (08-07-1995). This Court does not dispute the Trial Court's inherent power to impose sanctions or terms it deems appropriate at the time of a contemptuous act. *Sonnenberg v. Fry*, 4 CCAR 03, 04, 2 CTCR 36, 24 ILR 6172 (04-17-1997). The Court concludes the Trial Court has the inherent power to determine what is a contemptuous act and may act accordingly. *In Re Welfare of A. children*, 3 CCAR 53, 2 CTCR 22, 24 ILR 6019 (06-21-1996).

This Court cannot substitute its judgment for the Trial Court's. In making a determination whether the Trial Court abused its discretion, either in its findings or in its conclusions of law or both, we review to see if the Trial Court's decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Sonnenberg v. Colville Tribal Court, Id. at 15.*

In the instant case, the Trial Court has created a huge record. There have been many show cause hearings, the first lasting three (3) days. Motions have been filed by both parties. Temporary custody has changed and various conditions have been imposed.[15] Several witnesses have testified and evidence has been gathered and reviewed. After each hearing, a temporary order has been entered, at least five (5) since the October 2008 hearing. There have been at least 35 motions filed. Of those, 10 have been for contempt of court issues. Several of the motions were withdrawn or "unfiled" and the rest were not served properly so were dismissed.

The Trial Court has broad discretion in determining when to impose contempt of court. The trial judge is in a better position to determine if an act is contemptuous because they are much more familiar with the tenor of the case and the demeanor of the parties involved. There is nothing in the record which indicates that the judge's denial of the motion was manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Due process dictates that a litigant be given the opportunity to be heard. There is extensive evidence in the record that the judge was well aware of what was taking place. The judge determined that the action that this motion referred to did not raise to the level of a contemptuous act and so denied the motion From a review of the record, we did not find any basis which would show that the judge made her decision unreasonably. The judge was well within her discretionary authority to make her decision on the motion. Therefore, we hold that the judge did not err in denying the motion for contempt.

It is **THEREFORE ORDERED** that the appeal shall be denied and the matter remanded to the Trial Court for action consistent with this Order.

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[15] There has been no final order entered though. Due to the length of the litigation and the extent of the record, we would encourage the Trial Court to enter a final order to give the litigants some finality.

Christopher LEZARD, Appellant,

vs.

Christina DECONTO, Appellee.

Case No. AP09-001, 5 CTCR 25, 37 ILR 6010

10 CCAR 23

[Parties appeared pro se.
Trial Court No. CV-CU-2009-29002]

Decided December 16, 2009.
Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Conrad Pascal

Dupris, CJ

SUMMARY

On January 5, 2009 Appellant filed a Petition for Custody and Support for the minor C.L.L.[16] (hereinafter the minor) in the Trial Court. On January 5, 2009 Appellant also filed for, and was granted, temporary custody of the minor.[17] Appellee filed her own Petition for Custody and Support for the minor in the Trial Court on January 6, 2009. A Show Cause hearing on the issue of temporary orders was set for January 20, 2009.

On January 16, 2009 Appellee filed a Motion to Dismiss, which was mailed to Appellant. The several affidavits of non-party witnesses' statements to support Appellee's Motion to Dismiss were never served on Appellant. Appellee submitted them at the January 20, 2009 Show Cause Hearing.[18] The Court order entered on January 5, 2009 granted temporary custody to Appellant; a temporary restraining order against Appellee; and set a Show Cause Hearing in order to allow Appellee "... to answer to the requests as stated in the motion and affidavit on file herein." The notice portion of the January 5, 2009 Order did not inform either party that a Motion to Dismiss the underlying cause of action would be considered at the hearing on January 20, 2009.

On January 20, 2009 the Trial Court went beyond the Show Cause hearing and ruled on Appellee's Motion and Declaration to Dismiss. The Judge dismissed the underlying cause of action with prejudice; she considered the Motion to Dismiss and the submitted affidavits in her rulings. Appellee appealed, arguing violations of his due process rights. We granted appeal. For reasons stated below we find Appellant's procedural due process rights have been violated, and the judgment entered on January 20, 2009 should be vacated, and this matter remanded.

ISSUE

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16 The name of the minor is not relevant to our rulings, so it will not be used in the Opinion.

17 Appellee also asked for temporary orders on January 6, 2009, but there is no record that a trial judge ruled on her requests.

18 Appellee did not file a Brief in this case as directed; it was due July 17, 2009. All objections to the issues we are considering are deemed waived by Appellee by her non-response. *See* COACR 13 (e)(4).

Were Appellant's rights to procedural due process violated when the Trial Court went beyond the scope of the Show Cause Hearing and granted Appellee's Motion to Dismiss?

STANDARD OF REVIEW

The issue is a question of law which we review *de novo*. *Colville Confederated Tribes vs. Naff,* 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995). Where there are written findings of fact we give deference to the Trial Court, as a general rule. In this case the Trial Court Judge entered written findings of fact and conclusions of law on January 29, 2009, a full week after the time the appeal was filed in our Court. The written findings are not specific findings, *i.e.* reasoning by the Judge of what are the facts found in the case after a review of all of the evidence presented. *Zavala v. Milstead and Joseph*, 10 CCAR 14, 5 CTCR 22, __ILR ___ (2009). The written findings are more in the nature of an extensive judicial summary of the pleadings filed and the evidence and arguments presented in this case. For this reason we review the oral record *de novo*.

DISCUSSION

Basic tenets of procedural due process include adequate notice, the opportunity to be heard and present evidence on one's own behalf. The time and manner of the hearing must be meaningful. *R. L. and B. J., Minors, v. CCT Child and Family Services*, 6 CCAR 1, 3, 3 CTCR 39, 28 ILR 2863 (2001).

In this case, both parties filed separate petitions for custody and support for their son, a minor child. Appellant sought, and was granted, temporary orders *ex parte* regarding the custody of the minor as well as restraining Appellee from removing the minor pending the Show Cause hearing set on January 20, 2009.

The notice given to Appellant regarding the January 20, 2009 hearing was that the hearing would be regarding his requests for temporary custody and restraints against Appellee until a full hearing on his Petition for Custody. Appellant never received adequate notice that Appellee's Motion to Dismiss would be considered at the January 20, 2009 hearing. The facts show he did not receive a copy of the Motion to Dismiss in time to adequately prepare his statement and evidence on his own behalf. The Motion to Dismiss was filed only four (4) days before the hearing, and was mailed to Appellant.

There are very few written procedural rules for litigants to follow at the Trial Court. Regarding motions, however, the CCT Law and Order Code (CTLOC) gives some guidance which, we presume is based on procedural due process. CTLOC § 1-2-10 states motions shall be filed and served on the opposing party "...no later than five (5) days prior to the time specified for the hearing...." (emphasis added). The three (3) exceptions to the five-day rule are : (1) if court rules establish a different time; or (2) if the Court orders a different time frame; or (3) if good cause is shown. *Id.*

The Trial Court did not follow CTLOC § 1-2-10. First, Appellee's motion was not served nor filed at least five (5) days before the January 20, 2009 hearing. Second, there is nothing in the record showing Appellant had notice the January 20, 2009 hearing was going to include addressing Appellee's motion. Third, there is nothing in the findings of fact which shows any of the three (3) exceptions existed on January 20, 2009.

Parties must have reasonable notice prior to any substantive hearing to allow the parties time to prepare their respective cases. *Gallaher v. Foster, et al.,* 6 CCAR 48, 52, 3 CTCR 50, 29 ILR 6079 (07-23-2002). The Tribal Civil Rights Ordinance requires the Tribes to meet due process requirements. CTC 56.02(h). We have held over the years that due process is required and that notice and hearing are fundamental to due process. *In Re the Welfare of J.A.M., et al*, 3 CCAR 6, 7, 3 CTCR 14 (08-07-1995).

When a person is not given adequate notice of what is to be considered in a hearing, all the other procedural rights are impacted. He does not have adequate time to prepare for the hearing, and to submit evidence on his own behalf. Even if the end result appears clear to the judge, the parties have a right to present their evidence in a meaningful manner. The judge is the gatekeeper of due process. It is the Court's responsibility to ensure adequate notice is provided to every litigant, and to allow everyone who appears in Court to have his say, in his own way.

CONCLUSION

There is no issue of jurisdiction in this case. Both parties submitted to the jurisdiction of this Court in their actions at the Trial Court. Contrary to Appellant's arguments in his brief, the Trial Court did not rule there was a lack of jurisdiction. The Trial Court held this was not a convenient forum, considering the facts in this case, *i.e.*, the parties had more ties to Ilwaco, Washington than to the Colville Reservation. This may true.

The Trial Court ruled prematurely, however. Appellant did not have his full day in Court. Even though he agreed some of the information in Appellee's affidavits may be true, he was not given an adequate time to review the motion to dismiss nor the affidavits. The only notice given to the parties about the January 20, 2009 hearing was regarding whether or not Appellant's temporary custody and restraining orders should continue until the final hearing on the Petition for Custody was heard. At the minimum the Trial Court should have set the Motion to Dismiss for a separate hearing and given Appellant an opportunity to respond. The Judge could have denied the request for temporary custody and returned the minor to his mother without dismissing the matter before Appellant had an opportunity to present his side on the issue of inconvenient forum. For these reasons the Order Dismissing With Prejudice should be vacated and the matter remanded.

Finally, as a request for relief, Appellant asks that a new Judge be appointed to hear the matter. . We do not assign trial judges to cases. If a party is not satisfied with the judge assigned, then he must file a Motion and Affidavit of Prejudice with the Trial Court. If the Motion is denied, he may file a limited appeal. Rulings on requests to remove a judge from a case can be immediately appealed to the Court of Appeals without having to wait for a hearing on the other motions or petitions filed in the case. In the instant case, Appellant requested the removal of the judge directly from the Court of Appeals and not the Trial Court. The request is not ripe for review.

Clinton J. NICHOLSON & Lisa NICHOLSON-TRUE, Appellants,

vs.

John ST. PIERRE, Ricky JOSEPH, Rheta HARJO, William NICHOLSON,
and Keelee TIMENTWA, Appellees,

Case No. AP09-005, 5 CTCR 26, 37 ILR 6018

10 CCAR 26

[Appellants appeared pro se.
Appellees did not appear nor were they represented by counsel.
Trial Court Case number CV-OC-2009-29088]

Hearing held August 21, 2009. Decided January 12, 2010.
Before Justice Theresa M. Pouley, Justice Howard E. Stewart, and Justice Dennis L. Nelson

Nelson, J. for the Panel

The matter being appealed is the dismissal by the trial court of the appellant's claim against the appellees in their capacity as employees of the Bureau of Indian Affairs (hereinafter BIA). Grounds for the dismissal are that the tribal court is without jurisdiction to hear claims against BIA employees acting within the scope of their duties. We affirm and deny the appeal.

INITIAL HEARING

The purpose of an initial hearing is to determine whether a limited appeal on the law or facts is warranted; whether a new trial should be granted; or whether the appeal should be denied or dismissed. COACR 12(a)(1)(2)(3). In considering an appeal this court determines whether the trial court had jurisdiction, that is, the legal authority, to hear a matter before the court.

ISSUE

The primary issue before the Court is whether this Court has jurisdiction to hear this matter. Jurisdiction defines the powers of courts to inquire into facts, apply the law, make decisions, and declare judgment. *Police Com'r of Boston v. Municipal Court of Dorchester Dist.*, 374 Mass. 640, 374 N.W.2d 272, 285. Jurisdiction is defined in the Tribes' Law and Order Code. Section 1-1-71 states:

> The jurisdiction invoked by this Code over any person, cause of action or subject shall be exclusive and shall preempt any jurisdiction of the United States, any state, or any political subdivision thereof; ***except in those instances in which federal law provides otherwise.*** This Code does not recognize, grant or cede jurisdiction to any other political or governmental entity in which jurisdiction does not otherwise exist in law. *Emphasis added.*

Tribal courts have no legal authority to "enjoin the work of any federal agent or employees in the performance of his duties". *U.S. v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986). The court in

White Mountain Apache goes on to state:

> "The Tribe's own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers. See San Carlos, 463 U.S. at 571 ("tribes retain . . . their historical sovereignty not 'inconsistent with the overriding interests of the National Government.'") (quoting Washington v. Confederated Tribes, 447 U.S. 134, 153, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980)). The district court was accordingly correct in concluding that the Tribe was without authority to restrict federal officials in their conduct of official business on the Reservation. United States v. White Mountain Apache Tribe, 604 F. Supp. at 466; see also United States v. Blackfeet Tribe, 369 F. Supp. 562, 564-65 (D. Mont. 1973) United States v. Blackfeet Tribe, 364 F. Supp. 192, 194-94 (D. Mont. 1973). This conclusion holds regardless of the merits of the Tribe's charges that the officials were conducting their official business improperly."

It clearly follows that the trial court was without legal authority to hear the claims of the Appellants against BIA employees in the performance of their duties.

GUIDANCE

It is not unusual in Indian Country for tribal members to find complaint against the U.S. government or its employees. It is also not unusual for those tribal members to seek redress in their respective tribal courts. The panel deems it appropriate to offer instruction to those seeking such redress.

As with almost all legal matters, it is imperative to seek legal counsel. A person representing himself is almost always without the necessary knowledge or expertise to go forward with his complaint in a meaningful way.

Unfortunately, many tribal members are without resources to hire legal assistance. They may find it through publically funded legal services for the indigent or through legal services offered through law school clinics. E.g. The Indian Law Program at the University of Gonzaga School of Law.

Should a tribal member not afford or be eligible for legal assistance, he or she may pursue a claim on their own. This is ill-advised although not unknown. It takes many hours of research, most of which proves unproductive. It is also a one-sided battle. A court must deal with complete impartiality with those who come before it. The fact that one party is represented by an attorney or several attorneys and the other has none does not sway the court one way or the other. It deals with facts and the law, not who represents the parties.

Complex matters such as contract interpretations, real property issues, and testamentary interpretations are examples of cases where attorneys should be involved. The case before us in one of those. We strongly urge the Appellants to seek legal counsel should they decide to pursue their claim in an appropriate jurisdiction.

CONCLUSION

For the foregoing reasons, the appeal in this matter should be denied.

IT IS THEREFORE ORDERED THAT the appeal of Clinton J. Nicholson and Lisa D. Nicholson-True is DENIED.

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David LOUIE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP09-002/003, 5 CTCR 27, 37 ILR 6017

10 CCAR 29

[Tim Liesenfelder for Appellant.
Jonnie Bray, for Appellee.
Trial Court Case Number CR-MA-2003-26160 and CR-MA-2003-26282]

Decided January 13, 2010.
Before Chief Justice Anita Dupris, Justice Conrad Pascal and Justice Theresa M. Pouley

Dupris, CJ

PROCEDURAL HISTORY

On March 31, 2003 the Trial Court accepted Appellant's guilty plea on the charge of Possession of Paraphernalia. Sentence was not entered on that date. The Trial Court appointed a spokesman for Appellant. On August 1, 2003 the Trial Court accepted guilty pleas by Appellant for ten separate charges and ordered a Pre-Sentence Investigation Report. Appellant was represented by a spokesman and signed a written statement on guilty plea to all of the charges. He also signed a waiver of speedy disposition regarding the sentencing. The Trial Court granted him a furlough for 6 months to allow him to go to treatment, after which he was to report back to the Court for sentencing.

On May 4, 2004 the Court issued a no-bail warrant for Appellant because he had not appeared for sentencing on his guilty pleas. Appellant and his spokesman appeared in court on Sept. 14, 2007, and the Trial Court set his sentencing for Oct. 12, 2007. Appellant apparently did not appear for his scheduled sentencing. The Trial Court finally entered Judgment and Sentence on all the charges on April 29, 2009. At the April 29, 2009 sentencing Appellant filed two different written statements on guilty plea; on both he notes his statement is not voluntary and he wants to withdraw the guilty pleas. Judgment and Sentence were entered on all charges May 5, 2009. Appellant timely filed his appeal.

We held the Initial Hearing on July 21, 2009. At the Initial Hearing Appellee made an oral motion to dismiss. We reserved on Appellee's motion to dismiss and asked Appellee to file a written motion. We gave Appellant time to respond to the Motion. We also continued the hearing so we could research whether there is an issue of law regarding Appellant's alleged non-voluntary guilty pleas.

After reviewing the written record in this matter, and the applicable law, we hold the Motion to Dismiss should be granted and the Appeal dismissed, for the reasons set out below.

ISSUE

Should the Court of Appeals Dismiss the Appeal As a Matter of Law?

STANDARD OF REVIEW

We review errors of law *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes*, 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al*, 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998).

Guilty Pleas

At the Initial Hearing we inquired of Appellant how he could appeal this matter when the record indicates he entered guilty pleas in 2003 with the assistance of counsel. He stated his plea was not voluntary, and if we listened to the recordings of the hearings on the acceptance of the guilty pleas we could hear his reluctance. We reserved on the issue of whether there is an appealable issue, directed Appellee to formalize its Motion to Dismiss in writing and directed Appellant to file a response to the motion. We received the written motion of Appellee but no response from Appellant. We are not able to review the oral record of the August 1, 2003 hearing in that the recordings are no longer available. Even there is no oral record of the hearing in question, we find cause to grant the Motion to Dismiss based on the written record.

In 2003 the Trial Court accepted guilty pleas from Appellant on eleven (11) charges. In March, 2003 it doesn't appear Appellant had a spokesman on one charge (Possession of Paraphernalia). This case seems to have been combined with the guilty pleas on August 1, 2003 for the other ten charges[19] for purposes of sentencing, however. Between August 1, 2003 and the sentencing on April 29, 2009 Appellant "...appeared for Court hearings on ten different occasions where he could have raised the issue of his 'coerced' plea, but instead, Appellant chose to postpone the sentencing by means of requesting continuance and receiving two bench warrants." (Appellee's Motion to Dismiss, page 2).

We accept these facts as a true reflection of the record .[20] Our court rules do not give us direction on what to consider when one party fails to respond to a Motion to Dismiss. COACR 13(e) allows us to accept the record submitted by Appellant if Appellee fails to submit a brief, and considers objections to be waived by the non-response. We can analogize this to a Motion to Dismiss based on substantive allegations. That is, in this case, Appellee raised valid, substantive reasons why we should not let this Appeal go forward. Appellant had notice at the Initial Hearing on July 17, 2009 that we would be considering the arguments in Appellee's Motion to Dismiss. We gave Appellant an opportunity to respond to the substantive arguments raised by Appellee, with the understanding

[19] Attempt to Elude; DUI; two counts of DWS; two counts of Reckless Driving; Disorderly Conduct; Prohibited Act (Para); Unauthorized Use of Vehicle; and Resisting Arrest.

[20] We have not been apprised of any reasons Appellant has failed to respond to the Motion to Dismiss as directed. This causes us some concern regarding his spokesman's representation. *See*, *Seymour v. CCT*, 3 CCAR 11, 2 CTCR 12, 23 ILR 6008 (1995) ("Depending on the facts of the particular case, an attorney's failure to file a brief, as ordered by the Court, calls into question the quality of the attorney's representation of the client, [and] adherence to required practice standards of attorneys....): *Gallaher v. CCT*, 5 CCAR 31, 3 CTCR 27, 27 ILR 6099 (2000) ("Not presenting favorable case law on the assumption that the appellate court will find such is not a zealous representation for one's client nor is it acceptable.), and *Amundson v. CCT*, 4 CCAR 62, 2 CTCR 68, 25 ILR 6178 (1998) (in which Court of Appeals ordered supplemental briefs when Appellee stated it was conceding each point made by Appellant; the Court of Appeals reasoned it was incumbent on both parties to provide all the relevant law, whether it supported one side or the other). We strongly urge Mr. Liesenfelder to attend to his duties in the future.

we would be ruling on the Motion. Appellant chose not to present a different record or arguments why we should not grant the Motion to Dismiss. Therefore, for purposes of Motions to Dismiss based on substantive grounds, we will consider a non-response by the other party to have waived objections to our consideration of the record proffered by the moving party.

The written statements on Appellant's guilty pleas have clear assertions that he understood the nature of his guilty pleas, made them knowingly and intelligently with assistance of counsel, and understood the consequences. We have upheld the guilty plea process at the Trial Court. In *Condon v. CCT*, 1 CCAR 70, 71, 20 ILR 6107 (1993) we found:

> From the procedure followed by the Tribal Court, we believe that the appellant was provided with an ample opportunity to make a reasoned decision whether to plead guilty and accept the sentence imposed by the Court or withdraw her plea and go to trial. Moreover, the appellant was represented by Counsel who was quite familiar with Tribal Court procedure involving negotiated pleas.

In *Amundson v. CCT*, 4 CCAR 62, 63, 2 CTCR 68, 21 ILR 6178 (1998), we found: "...the Tribes have a procedure for acceptance of guilty pleas, and that procedure complies with due process of law."

It appears from the record that after Appellant entered his several guilty pleas he was given an opportunity to forestall the sentencing phase for various reasons. He went to alcohol treatment; he had medical problems; and he just failed to appear, thereby causing the Court to issue bench warrants for him. He actively sought, and was granted several continuances. Six years later he is before the Trial Court and is told he is finally going to be sentenced. For reasons not clear in the record, he was asked sign two other statements on plea of guilty. Six years after his initial guilty pleas were accepted he disagreed; he stated he wanted to withdraw his guilty pleas and go to trial.

Appellee is correct in asserting Appellant should not be allowed to benefit from the delay between the time he first entered his guilty plea and the sentencing in that he was responsible for the delays. *See*, *CCT v. Marchand*, 9 CCAR 65, 71, 5 CTCR 17 (2008). A tenuous assertion at the Initial Hearing that Appellant really didn't want to enter the guilty pleas six years ago cannot defeat the well-developed written record in this case. Appellant was represented by an attorney at the time of his pleas; he signed a document stating his understood what he was doing, he was doing it voluntarily and he understood the consequences. Nothing in the record refutes these assertions. Appellee has supported its Motion to Dismiss.

Lack of Oral Record: August 1, 2003

As a general rule, we have held if there is no oral record, the matter should be remanded for a new hearing. *George v. George*, 1 CCAR 52, 1 CTCR 53 (1991) (In the absence of a verbatim record ..., the record is inadequate for review purposes. Basic due process concepts dictate that the only remedy for an inadequate record is reversal and remand); *Smith v. CFS, et al.*, 8 CCAR 36, 4 CTCR 24 (2005) (We would need to review the oral record of the proceeding in order to determine if there is sufficient evidence on the record to support this conclusion of law. Since there is no oral record, it must be remanded to make an oral record); and *Moon v. Moon*, 7 CCAR 03, 4 CTCR 02 (2003) (When upon review of the record it is shown that the record is incomplete and flawed, then the rule is to reverse and remand.).

Based on the well-developed written record in this case, we hold that the case herein is an exception to

having to remand. First, the written record is complete; the statements on guilty pleas are complete and have Appellant's signature. Second, the inordinate time lapse between the pleas and the sentencing was caused by Appellant. As Appellee pointed out, we strive for finality in our cases, *see*, *Tonasket v. CCT* 7 CCAR 40, 4 CTCR 13 (2004). In *CCT v. Marchand*, 9 CCAR 65, 5 CTCR 17 (2008), we found that a defendant could not reap the benefits of a long delay by causing the delay. In *Marchand*, Appellant caused the case to be delayed for almost two years, then argued his right to a speedy disposition was violated. In this case, Appellant caused the matter to be delayed almost six years, then claims he really didn't want to plead guilty. His reasoning is not credible, nor is it supported by the written record. Appellant's assertion that he was reluctant to enter guilty pleas in 2003 is self-serving and unsupported.

For the above-stated reasons we GRANT Appellee's Motion to Dismiss and DENY the appeal. We remand this matter to the Trial Court for action consistent with this Order.

Diana M. SOCULA, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP10-001, 5 CTCR 28, 37 ILR 6043

10 CCAR 33

[Appellant appeared in person and without representation.
Appellee appeared through spokesperson Jonnie Bray, Office of Prosecuting Attorney.
Trial Court Case Number IN-2009-009318]

Decided April 4, 2010.
Before Chief Justice Anita Dupris, Justice Conrad Pascal and Justice Howard E. Stewart

Dupris, J.

This matter came before the Court of Appeals (COA) pursuant to an Initial Hearing held on March 19, 2010. Appellant appeared in person and without representation. Appellee appeared through spokesperson Jonnie Bray, Office of Prosecuting Attorney.

The purpose of an Initial Hearing is to allow the appellate panel to 1) decide whether the facts and/or laws warrant a limited appeal; 2) whether a new trial should be granted; or 3) whether the appeal should be denied or dismissed. Based on the following, the Order issued by the trial court is vacated and the matter remanded for a new hearing.

SUMMARY

Appellant was issued citation number 18248 on December 7, 2009. The citation was issued for Failure to Exercise Due Care, RCW 46.61.245. The citation correctly listed her address as her present home address. Filing by the Tribal Police Department was timely. Appellant noted on the back of her copy that she wished to contest the hearing, signed the copy and filed it with the court on December 8, 2009. She did not fill in the address portion as the address on the front of the citation was correct, without any changes necessary. The copy was timely filed.

On December 31, 2009, the Court issued a Notice of Hearing, setting the hearing for February 8, 2010 at 9:00 a.m.. The Notice was sent to the address that the Court had on record in its Full Court system, which was different from Appellant's current address. The Full Court address was several years old and outdated. Consequently, Appellant did not receive notice of the contested hearing date and did not appear for it.

At the hearing, the Court found that Appellant failed to appear, and imposed a $100 judgment. Appellant filed a Motion to Reconsider. The motion was denied by the Court without a hearing and without a response from Appellee.[21] Appellant timely filed an appeal.

After reviewing the record and applicable laws, we find Appellant did not receive adequate notice, and the

[21] Appellee advised this Court that the Tribes did not receive appellant's motion for reconsideration until after the order denying the motion was filed. Appellee had no objection to the matter being remanded for a contested hearing.

judgment should be vacated and this matter remanded to the Trial Court for a hearing.

DISCUSSION

Appellant alleges she was denied due process of law because she did not receive adequate notice of her contested hearing. In order to determine what her rights are, and if any have been violated, the Court must look to the Colville Tribal Law and Order Code (CTLOC).

The instant action is a traffic infraction. CTLOC § 3.3.1[22], Provisions Incorporated, provides that the Colville Tribe will incorporate various portions of the Revised Code of Washington (RCW) as law on the Colville Reservation. RCW 46.61 covers traffic infractions. CTLOC § 3-3-1 incorporates RCW 46.61 in its entirety. CTLOC § 3-3-141[23], Infraction – What Constitutes, describes what acts are subject to designation as a civil infraction and, thus, may not be classified as a criminal offense.

The Court then looks to Chapter 2-3, which covers procedures for civil infractions. CTLOC § 2-3-3[24], Application and Procedure, says that this chapter shall apply to traffic infractions and says that CTLOC Chapter 2-2 shall govern all questions as a result of the enforcement of this chapter if questions are not covered in Chapter 2-3. Chapter 2-2 covers civil actions.

CTLOC § 2-3-41, Notice of Infraction, specifies that a notice of infraction shall serve as the civil complaint and shall satisfy all requirements under Chapter 2-2. The notice of infraction in the instant case meets all the requirements set forth for notice to the defendant.

CTLOC § 2-3-42, Response to Notice, gives the defendant fifteen (15) days in which to respond. Appellant timely filed her response requesting a contested hearing.

On December 31, 2009, the Court issued a Notice of Hearing requiring Appellant to appear for her contested hearing on February 8, 2010.[25] First we look at the Notice of Hearing and the troubling language included in it. In the section which gives defendants notice on what may occur should they fail to appear for a hearing is the bolded statement:

YOUR FAILURE TO APPEAR WITHOUT PRIOR AUTHORIZATION FROM THE COURT

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[22] The substantive provisions of the follow parts of the Revised Code of Washington as presently constituted or hereafter amended are incorporated herein as provision of this Code and shall apply to all persons subject to the jurisdiction of the Colville Tribal Court: RCW Chapter 46.04, 46.37, 46.44, 46.48, 46.61, and RCW 46.20.015, 46.52.010, 46.52.020, 46.52.030, 46.52.035, 46.652.040. *(emphasis added).*

[23] Failure to perform any act required or the performance of any act prohibited by this Chapter is designated a traffic infraction and may not be classified as a criminal offense except for the following provisions of this Chapter incorporated by reference in CTC § 3-3-1: ... *(emphasis added).*

[24] (a) Unless otherwise provided by specific language found elsewhere in this Code, this Chapter shall apply to general or traffic infraction, field bond procedure, civil offense or forfeiture action listed in this Code or regulation adopted thereunder.

(b) Unless other procedures are provided by this Chapter, the Civil Actions Chapter 2-2 of this Code shall govern all questions of procedure arising as a result of the enforcement of this Chapter. *(emphasis added).*

[25] CTLOC § 2-3-43, Hearings –Rules of Practice, states that the date of the hearing should have been within thirty (30) days of the receipt of the notice requesting the contested hearing. It should have been set and mailed within five (5) days of receipt by the Court. It appears neither of those dates were complied with in this case. We will not addressed the issue, however, since it was not raised by either party. We counsel the Trial Court to become familiar with such statutory requirements in the future as a matter of procedure.

WILL RESULT [sic] IN THE ISSUANCE OF A BENCH WARRANT FOR YOUR ARREST AND REVOCATION OF YOUR BAIL OR PERSONAL RECOGNIZANCE RELEASE, AND FORFEITURE OF ANY BOND POSTED.

CTLOC § 2-3-4(b)[26] defines infractions as a civil offense and not subject to criminal punishment. CTLOC § 3-2-41(a)(2)[27] directs that the Notice of Infraction include a statement that an infraction is not a criminal offense and imprisonment cannot be imposed as a sanction. The Trial Court has no statutory authority to include the warrant language in its Notice of Hearing for civil traffic infractions.

The civil infractions clerk filed a memo to the official court file stating she discussed with Appellant how the Notice of Hearing was sent to Appellant's old address because Appellant did not update her address with the Court and did not fill out a new address on the back of her citation. There is no statute nor court rule which requires a party to periodically update his/her address once he/she is in the Court's Full Court System.

In the State of Washington, RCW 46.20.205[28] specifies that when a person moves, he/she must notify the Washington Department of Licensing of the address change within ten days. This address is then the address of record for the State of Washington, and, by extension, for the Colville Tribe concerning driver's licenses.

In the instant case, the police officer used the information from Appellant's valid driver's license when he entered the information on the Notice of Infraction. Appellant received the Notice of Infraction, saw that the address information was correct and did not fill out the information on the back of the infraction notice believing that it was not necessary. Nothing on the form indicates that the address on the front of the form citation would not be used as the address to send subsequent notices.

Appellant was not afforded due process by the Trial Court. As we have stated before, the Trial Court must be ever vigilant in protecting the rights of litigants before it, and proceed objectively and fairly in every case, no matter how minor. One way to ensure fair application of the law it to provide uniform procedures for litigants to follow. Unfortunately the Trial Court does not have written procedural rules yet.

In this case we find the Trial Court relied on personal knowledge of Appellant, *i.e.* she had once worked in the Probation and Parole Department, to base its decision to deny a new hearing. This was even though Appellant had provided a correct address on the citation complaint. This ensured Appellant did not have adequate notice of her

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26 "Infraction" means a civil offense in which the remedy involved is a civil fine or penalty which has been pre-determined by the Business Council as provided by the subchapter "Infractions" of this Chapter. An infraction is not a crime and the punishment imposed therefore shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility of a witness or otherwise of any person convicted thereof. *(emphasis added).*

27

(a)... The content of the notice shall include the following: ... (2) A statement that an infraction is a non-criminal offense for which imprisonment cannot be imposed as a sanction.

28 (1) Whenever any person after applying for or receiving a driver's license or identicard moves from the address named in the application or in the license or identicard issued to him or her, the person what within ten days thereafter notify the department of the address change. The written notification must be in writing on a form provided by the department and must include the number of the person's driver's license. The written notification, or other means as designated by rule of the department, is the exclusive means by which the address of record maintained by the department concerning the licensee or identicard holder may be changed. ... (b) Any notice regarding the cancellation, suspension, revocation, disqualification, probation, or nonrenewal of the driver's license, commercial driver's license, driving privilege, or identicard mailed to the address of record of the licensee or identicard holder is effective nothwithstanding the licensee's or identicard holder's failure to receive the notice.

contested hearing.

We further find the Trial Court ignored procedure when Appellant filed a Motion to Reconsider. The Trial Court did not give Appellee an opportunity to respond, nor did it allow Appellant a hearing on the motion. *See* CTLOC, section 1-2-10.

Finally, because we remand for a hearing, which must be set by sending Appellant another Notice of Hearing, we find the Trial Court must develop an adequate Notice of Hearing that comports with the civil infraction laws.

Based on the foregoing, now, therefore

It is ORDERED:

1. The Order for Monetary Judgment is vacated and this matter remanded for a new contested hearing .

2. The Trial Court is directed to redraft the Notice of Hearing to comport with the CTLOC.

Kerry L. Green Sr., Appellant,

vs.

Kelly L. Green/Gossett,, Appellee.

Case No. AP10-013, 5 CTCR 29, 38 ILR 6022

10 CCAR 37

[Appellant, appeared personally and without counsel.
Appellee, appeared personally and represented by Mark J. Carroll, Omak WA.
Case No. CV-DI-2010-33221]

Hearing January 21, 2011. Decision February 8, 2011.
Before Chief Justice Anita Dupris, Justice Gary F. Bass, and Justice Earl L. McGeoghegan

Dupris, CJ

SUMMARY

On August 17, 2010 Kelly L. Green, Appellee herein, filed in the Colville Tribal Court for a dissolution of her marriage to Kerry L. Green, Sr., Appellant herein. On her Petition for Dissolution of Marriage Appellee indicated neither she nor Appellant were members of the Colville Tribes, but that she was a descendant. The Trial Judge heard the Petition on November 2, 2010, and entered an "Order From Dissolution Hearing," (Order) signed November 4, 2010. The Order included, *inter alia*, maintenance payments from Appellant to Appellee for six (6) months, starting in December, 2010. The Order did not contain any findings of fact or conclusions of law, and did not address whether the Trial Court had jurisdiction to hear the matter. Appellant filed a timely appeal on the issue of maintenance, alleging Appellee had already remarried.

This Court finds that a requisite to subject matter jurisdiction is that one of the parties to a dissolution in the Colville Tribal Court must be a member of the Colville Tribes. Subject matter jurisdiction cannot be consented to or waived by the parties. Based on the reasoning below we find the Order From Dissolution Hearing dated November 4, 2010 should be vacated and the matter remanded for a dismissal for lack of jurisdiction.

STANDARD OF REVIEW

The issue of subject matter jurisdiction is a question of law, subject to a review *de novo*. We review findings of fact under the clearly erroneous standard, and errors of law *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes*, 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al*, 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998).

Both the Trial Court and this Court should first always assess each case for personal and subject matter jurisdiction. Personal jurisdiction can be consented to or waived by a party at any time. Whereas subject matter jurisdiction cannot. A challenge to subject matter jurisdiction can be made at any time. Subject matter jurisdiction goes to the heart of the powers of a court to decide a case. *Seymour v. CCT*, 6 CCAR 5, 3 CTCR 40 (2001). It is

within the inherent powers of this Court to review subject matter jurisdiction *sua sponte*.

ISSUE

Did the Trial Court have subject matter jurisdiction over a dissolution of a marriage when neither party is an enrolled member of the Tribes?

DISCUSSION

Dissolutions, also referred to as divorces, are statutory in nature. That is, a marriage is recognized as a contract between the marrying couple and the State or Tribe under whose authority the marriage is granted. As such, the statute governing the marriage contracts usually governs the dissolutions of the contract. The Tribes' Domestic Relations Code, Chapter 5, provides for the statutory authority for the Trial Court to perform marriages and to grant dissolutions of marriage. The Tribes' Domestic Relations Code does not restrict dissolutions to only marriages performed under the Code; it allows for dissolutions of any marriage recognized in any jurisdiction. CTC § 5-1-101. It just requires one of the parties to be an enrolled member of the Tribes. *Id*. This restriction goes to subject matter jurisdiction.

Our Constitution provides that it is the Colville Business Council's responsibility to set out the jurisdiction of the Courts of the Tribes by statute. Constitution of the Confederated Tribes of the Colville Reservation (Constitution), Article VIII, Section 1. It further provides that is the duty of the Courts of the Tribes to interpret and enforce the laws as adopted by the Tribes. *Id.* Unless we were to find that the requirement that one party to a dissolution has to be an enrolled tribal member violated the Constitution or Laws of the Tribes, we are bound to enforce this requirement. Appellee asserts that the requirement of membership in the Tribes before a dissolution can be granted violates her due process and equal protection rights. We don't agree.

At the Initial Hearing on January 21, 2011, Appellee argued that reading the Code as a whole, and in particular the Domestic Relations Chapter, the Tribes allows non-Indians, including descendants to file other civil family matter cases in the Tribal Court. She gave as examples the custody sections,[29] guardianships,[30] paternity actions,[31]and child support.[32] She asserts that to exclude this class of litigants, *i.e.* non-Indians and descendants, from dissolutions violates their rights to due process and equal protection, by denying them access to the Tribal Court.

We have long upheld the rights of litigants to equal protection and due process in our Courts, as guaranteed by our Tribal Civil Rights Act, CTC § 1-5-2(h). *See*, *Gallaher v. Foster*, 6 CCAR 48, 3 CCTR 50 (2002); *R.L. and B.J. v. CCT CFS*, 6 CCAR 1, 3 CCTR 39 (2001); and *Finley v. CTSC*, 8 CCAR 38, 4 CCTR 25 (2006). We cannot find a violation of either in the circumstances of this case. It is true the Tribes has restricted who may file for dissolutions in the Tribal Court, but such restriction does not offend due process or equal protection. The tribal

[29] CTC § 5-1-120

[30] CTC § 5-1-160

[31] CTC § 5-1-205

[32] CTC § 5-1-240 *et seq*

legislatures have made a decision to limit the sovereignty it wishes to exercise over non-tribal members, no matter who their families are. It is up to the tribal Council to change this law, not the Courts.

The statute is clear and unambiguous on its face. Statutory construction begins by looking at the statute's language, giving words their plain meaning, and proceeding to extrinsic interpretive aids only when the statute contains unclear or ambiguous language. CTC § 1-1-7(b) (providing that words given plain and generally understood meaning). The Constitutional responsibility of the tribal legislatures to decide what jurisdiction it wishes the Tribes to exercise is clear and unambiguous. *See* Constitution, *id*.

In the matters of domestic relations, the Tribes has restricted its subject matter jurisdiction over marriages, both in granting them and dissolving or annulling them, to only cases in which one party is a member of the Tribes. CTC § 5-1-32 (b) (one of the persons getting married under the Code must be an enrolled Colville tribal member); and CTC § 5-1-101 (one of the parties to a dissolution or annulment action must be an enrolled Colville tribal member). There was no subject matter jurisdiction over the dissolution in this case. We so hold.

CONCLUSION

In the recent past we have had to examine Trial Court orders for irregularities brought about because the Judge did not appear to know or understand basic tenets of the law. *See*, *eg. CCT v. Boyd*, 10 CCAR 08, 5 CTCR 21 (2009) (Judge failed to follow statutory laws regarding criminal cases); *In Re the Name Change of Sweowat*, 10 CCAR 01, 5 CTCR 19 (2009) (Trial Court failed to apply tenets of personal jurisdiction); and *Edwards v. Bercier*, 10 CCAR 18, 5 CTCR 23 (2009) (irregular method of conducting hearing).

It is our Constitutional duty to review Trial Court hearings and orders for such irregularities. In this case, however, the consequences go beyond what we are able to correct at this level. Knowledge of when the Court has both subject matter and personal jurisdiction is basic to every case before the Court. Jurisdiction should be the first issue addressed in every hearing. There are no findings of fact or conclusions of law on the issue of jurisdiction.[33] If the Trial Court Judge had reviewed the law and the Petition, she would have known at the outset of the case that the Trial Court did not have subject matter jurisdiction.

The unfortunate consequence in this case is that one party, relying on the Order of the Trial Court, entered into another marriage. We cannot fix this; we can only recognize that the error lies solely with the Judge who did not follow the law in granting the dissolution.

We hold the Trial Court did not have subject matter jurisdiction to grant a dissolution in this case, and the Order dated November 4, 2010.

Based on the foregoing, now, therefore

It is ORDERED that the Trial Court's Order dated November 4, 2010 is VACATED and this matter is REMANDED to the Trial Court for an Order Dismissing the case for lack of subject matter jurisdiction.

[33] It is further noted that there are no findings or orders regarding the children of the marriage, no orders regarding the parties' property and debts, and no Decree issued as required by the statute, too. CTC § 5-1-105.

Dorothy CAMARENA, Appellant,

vs.

Leah JACKSON & Joseph REDTHUNDER, Appellees.

Case No. AP10-007, 5 CTCR 30

10 CCAR 40

[Appellant appeared pro se.
Appellees appeared pro se.
Trial Court Case Number CV-CU-2009-29294]

Hearing held October 15, 2010. Decided December 2, 2010.
Before Justice Dennis L. Nelson, Justice Conrad Pascal and Presiding Justice Theresa M. Pouley

This matter came before the Court of Appeals (COA) pursuant to an Initial Hearing held on October 15, 2010. Appellant and Appellees all appeared personally and without representation. Before Justice Dennis Nelson, Justice Conrad Pascal and Presiding Justice Theresa M. Pouley.

Pouley, J.

SUMMARY

This matter comes before the COA from a custody action before the Trial Court. Appellant, Dorothy Camarena, is the mother of Joseph Redthunder, appellee, and the grandmother of the three minors in this action. Joseph Redthunder and Leah Jackson, appellees, are the parents of the minors and are currently living off-reservation. Ms. Camarena, Mr. Redthunder and the minors are all enrolled Colville tribal members. Ms. Jackson is an enrolled Nez Perce tribal member.

In November 2009, Appellant filed a petition for custody of her grandchildren. She was granted temporary custody of the three children in December 2009. In March 2010, the Trial Court continued the temporary custody of the minor children with the grandmother and allowed the appointment of a GAL if the parties posted a $600 fee ($200 each for Ms. Camarena, Ms. Jackson and Mr. Redthunder)[34]. The Trial Court also granted the grandmother the minors' per capitas and one-half of their 181-D monies. At the hearing on June 2, 2010, the Trial Court ordered a home study to be done on Ms. Jackson. The home study was submitted to the Court on June 15, 2010 and included both parents in their Spokane home. Ms. Camarena had submitted a home study completed on her. At the June 30, 2010 hearing, after hearing testimony and reviewing the record, the Court awarded permanent custody back with the parents, with the grandmother receiving weekend visitation to transition the children back with their parents. The Court further awarded the minors' per capitas and one-half of the 181-D monies to the parents. Appellant timely filed her appeal alleging misconduct.

[34] There is no record that the money was posted and a GAL appointed.

DISCUSSION

At the Initial Hearing the Appellate Panel shall decide (1) whether the facts and/or laws as presented warrant a limited appeal on issues of law and/or of fact; (2) whether a new trial should be granted; or (3) whether the appeal should be denied or dismissed. After a lengthy discussion with the parties and a review of the record, the Appellate Panel finds insufficient grounds to go forward with this appeal on the basis that the Appellant has failed to state a claim for which relief can be granted.

The COA is aware that when parties represent themselves in court, they may not have sufficient legal experience to easily maneuver through the morass that is the court system. However, the COA still has an obligation to make sure that the cases that come before it have a valid reason for being there. A person who disagrees with a decision must show that an error has been made and that the COA can grant relief because of that error. The party must also make sure that he/she has exhausted all remedies at the trial court before petitioning the COA to hear his/her appeal, i.e. that the case is ripe for appeal.

In the instant case, Appellant alleges that (1) she has had no contact with her grandchildren since the June 30, 2010 hearing; (2) the appellees changed their contact phone numbers and have not supplied the numbers to her; (3) a house key for her residence was to have been surrendered to her and it has not been; (4) the order directed her to relinquish her child restraint seat to the appellees, even though it was her own personal property; (5) she was not given tax exemptions for the children in lieu of her receiving their per capitas and 181-D monies; (6) the Court did not seriously consider her mental health concerns about both appellees and she was not allowed to review the evaluations submitted to the Court; and (7) concerns that the home study that was done was done off-reservation and did not take into account the appellees prior residence which was where the children were initially removed from.

When the COA asked about the relief that Appellant was seeking, she did not offer sufficient information as to exactly what she wanted and/or how the COA could remedy the trial court's decision. She stated several times that even if the COA found that the trial court erred, Appellant stated she was not seeking a different outcome. She only wants what was ordered to be enforced.

[1] It is clear that Appellant wants to have visitation with her grandchildren. This was ordered by the Court, but due to a lack of contact information, she has been unable to arrange visitation. She also alleges that the appellees have spoken against her to the children and the children have allegedly stated that they do not wish to have visitation with their grandmother. Appellant stated that she has not moved the trial court for enforcement of the visitation order. Appellant appears to feel that the trial court did not "listen" to her then and would not listen to her now. She also appears to be unfamiliar with how to accomplish enforcement of a court order. Enforcement of trial court orders are more properly before the court in which the orders have been issued and not before the COA.

[2] Appellant wants to have phone numbers for the parents so that she can contact them to arrange for visitation. This wasn't in the Order. This is an issue that properly should be addressed at the trial court. Appellant has admitted that she has not sought help from the trial court in addressing enforcement of its decision. The COA cannot make a ruling on any issue that has not been fully litigated at the trial court[35].

[35] Court of Appeals Court Rule 5.c states that the COA will not entertain issues on appeal that have not been fully developed and ruled on by the Trial Court. We hold that the issue of Appellant's indigency has not been properly developed at the Trial Court and we will not rule on it. *Gorr/Stensgar v. CCT*, 6 CCAR 39, 3 CTCR 47, 29 ILR 6073 (06-28-2002). The Court of Appeals grants the Motion to Dismiss on the grounds that the issue in this matter has not been fully developed and argued before the Juvenile Court. *Jerry v. CFS*, 7 CCAR 01, 4 CTCR 01, 30 ILR 6159 (01-15-2003).

[3] Appellant wants her house key returned. Again, this issue was not addressed in any Order nor did it appear to have been raised in any motion or petition to the trial court.

[4] The next issue is the child restraint seats. Appellant alleges they were ordered to be surrendered to the appellees, but Appellant asserts that the seats are her own personal property. Appellant stated that she thought it was improper for the Court to order surrender of property to someone else that was properly hers. However a review of the June 30, 2010 order shows that the child restraint seats were not ordered to be surrendered to the Appellees. In fact, they were addressed in a prior order, the March 2010 order. That Order stated that in the best interests and safety of the children, the grandmother was to allow the seats to be used for visitation transport, if needed. The seats were to then be returned to the grandmother, along with the minors, at the conclusion of the visitation.

[5] Appellant wants some compensation for the time she had custody of her grandchildren. This issue was not included in the Order. Appellant included this request for compensation in her original petition, filed November 16, 2009. She was granted the per capita and half of the 181-D monies, but apparently did not receive any funds during the time she had her grandchildren (no per capita was given in December, but the 181-D money was distributed in April). The issue of the Spring 2010 181-D monies would be more appropriately handled at the trial court.

[6] Appellant wants the Court to extend mental health treatment to the appellees because of her concern about their alcohol abuse and prior suicide attempts. She feels that the trial court did not seriously address the mental health and alcohol concerns that she has. However, evaluations were ordered for the parents and they were partially completed. Appellant was not allowed to review the evaluations (possible privacy concerns by the trial court). The Court reviewed the evaluations and determined that disclosure to the Appellant was not necessary. The trial court was satisfied that there existed no cause to order treatment of either parent.

[7] Appellant voiced her concern that the Colville Tribe funded a home study on a non-Colville Indian off the reservation. Appellant also feels that the home study was not properly done. The study was done on the appellees' new residence, not on the residence where the children were removed from in November 2009. Appellant appears to rely on a police report made by the Spokane Police/Spokane County Sheriff on an incident that happened on 11-23-2008. The report noted that the home appeared to be filthy and disgusting. No action was taken by the Police, however, and the matter dropped. A subsequent home evaluation reported no subsequent issues with cleanliness. The trial court has discretion to use home studies to ensure the best interests and safety of children appearing before it. It would seem more logical to have a Colville Tribal case worker do a home study on Colville tribal children, even off reservation, rather than have a potential non-tribal entity try to do the same evaluation. If it is the question of funding, that would be more properly brought before the administrative powers rather than the judiciary.

CONCLUSION

The COA recognizes that this was a family in need of assistance. The grandmother had some very real concerns about the care and safety of her grandchildren. She asked the court system to intercede and it did. The trial court removed the children and put the parents on notice that they needed to address some issues before the children would be returned to them. The parents appeared to have adequately addressed those issues and the trial court returned the children to them. However, the grandmother does not feel confident that those issues were adequately addressed and resolved. The COA reviews the actions and decisions of the trial court and determines if the trial court

made any mistakes in interpreting the law as applied to the facts of the case[36]. Unless there is a clear abuse of discretion, this Court will not overturn a decision of the Trial Court. A review for abuse of discretion violation requires that the Court of Appeals must find the Trial Court's actions were manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *Jack v. CCT,* 6 CCAR 11, 3 CTCR 41 (02-14-2002). The COA does not take testimony nor issue rulings just because it may not agree with the decision of the trial court[37]. Appellant needs to exhaust her remedies at the trial court. The issues discussed are not ripe for appeal at this time. In the interests of judicial economy, the COA is remanding this case back to the trial court for action so that the issues raised may be properly litigated and decided in the forum which is more appropriate to resolve these issues.

Based on the foregoing, it is Ordered that:

1. This case is dismissed as being not ripe for appeal;
2. The COA will not review the oral record of the June 30, 2010 hearing; and
3. This case is remanded to the Trial Court for action consistent with this Order.

[36] This appellate court can only consider those matters in the record from the Trial Court in determining whether the Trial Court judge abused his discretion. *CCT Credit v. Gua,* 5 CCAR 23, 3 CTCR 23 (07-01-1999).

[37] We cannot substitute what we would have ordered in lieu of what the trial judge ordered just because we may have ruled differently. *Watt v. CCT,* 4 CCAR 48, 2 CTCR 43, 25 ILR 6027, 8 NALD 7001 (01-21-1998),

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COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Blanche DOGSKIN, Appellee.

Case No. AP10-011, 5 CTCR 31, 38 ILR 6021, 38 ILR 6021

10 CCAR 45

[Appellant appeared through Melissa Simonsen, Office of Prosecuting Attorney.
Appellee appeared through Daryl Rodrigues, Office of Public Defender.
Trial Court Case No. CR-2010-33118]

Decided February 2, 2011.

Before Justice David C. Bonga, Justice Dennis L. Nelson, and Chief Justice Anita Dupris

Dupris, CJ

This matter came before the Court of Appeals (COA) pursuant to an Initial Hearing held on November 19, 2010. At that hearing the COA directed the COA Court Clerk to obtain copies of the oral record of two hearings from the Trial Court, September 9, 2010 and October 28, 2010. The COA Clerk made a request to the Trial Court and the Trial Court Administrator responded that because of a technical error no recording was made of either hearing.

It is established precedent that when an oral record of a hearing is not available, the COA is unable to perform a meaningful review of the record and that matter should be referred back to the Trial Court to make a new record. Basic due process concepts dictate that the general remedy for an inadequate record is reversal and remand for a trial *de novo* in order to give the Trial Court an opportunity to make a reviewable record. See, *George v. George,* 1 CCAR 52, 1 CTCR 53 (1991) (we cannot make an adequate ruling on Appeal when there is an inadequate Trial record. The recourse is to remand the matter for a new hearing); *Smith v. CFS, et al.,* 8 CCAR 36, 4 CTCR 24 (2005) (Without an adequate recording, the COA cannot make an informed decision on alleged errors made during the proceeding.); and *Misiaszek v. Desautel,* AP 10-006 (unpublished, Dec. 2010).

This is the second appeal within a month that has been remanded because a technical error at the trial level caused the oral record to not be recorded.[38] This Court cannot emphasis enough the importance of preserving the Trial Court record for appeal purposes. At a minimum the Trial Court should have procedures in place, and consistently follow them, to ensure a recording is being made each time a hearing is held. This would eliminate the expense of having to retry cases in the future because of a lack of a record.

Remanding this matter will also allow the Trial Court and the parties to address some procedural concerns that were identified at the Initial Hearing. One concern was an alleged lack of notice of the briefing schedule being given to the parties. On the day of the trial, the Appellee/Defendant made a Motion in Limine regarding a video recording in the custody of the Police Department that was allegedly erased. The Trial Judge reserved ruling on the

[38] *Misiaszek v. Desautel, supra*, an unpublished opinion in which a civil trial was not recorded, and the Appellant raised issues of fact. The case was remanded for a new trial.

motion, entering an oral order (not formalized in writing) directing the parties to file briefs on the issue.

Appellee/Defendant filed a written Motion to Dismiss and his brief, but allegedly did not serve the written motion and brief on the Appellant/Plaintiff. There is conflicting evidence in the file whether Appellant/Plaintiff was given notice of the hearing on Appellee/Defendant's Motion to Dismiss.

In order to minimize future confusion, a judge should always follow up important decisions with a written order, especially oral declarations like briefing schedules and the setting of oral argument hearings. The written order should summarize the issues discussed and the decision rendered.

Also of concern was the alleged lack of service of a brief on a party. While we are not ruling that this lack of service actually took place, we do want to remind the litigants, and the court, that notice is one very basic part of due process. Whenever any document is filed in court, notice of that document must be served on the opposing party, with a few exceptions. None of the documents in this case appear to qualify as an exception to the notice requirement.

The judge is the gatekeeper of due process. It is the Court's responsibility to ensure adequate notice is provided to every litigant, and to allow everyone who appears in Court to have his say, in his own way. *Lezard v. DeConto,* 10 CCAR 23, 5 CTCR 25 (2009). It is the judge's duty to ask, and be answered, as to whether filed documents have been served on the opposing party. Parties must have reasonable notice prior to any substantive hearing to allow the parties time to prepare their respective cases. *Gallaher v. Foster, et al.,* 6 CCAR 48, 3 CTCR 50 (07/23/2002).[39]

Based on the opinion herein, now, therefore

It is ORDERED that the Order of the Trial Court entered on October 28, 2010, is VACATED, and the matter REMANDED to the Trial Court for a new hearing.

[39] Finally, the Motion In Limine was made before one judge, who reserved ruling and requested briefing. The final ruling and the decision on the Motion to Dismiss was made by a different judge. This is a potential irregularity already addressed in *In re A.S., L.S., Appellant,* 3 CCAR 10, 3 CTCR 15 (1995), and *In re S.S., 8 CCAR 36, 4 CTCR 24 (2005).* We will not address it herein since the matter is remanded for a new hearing because there is no record of the hearing.

Maurice CIRCLE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP11-004, 5 CTCR 32, 38 ILR 6027

10 CCAR 47

[Appellant appeared through counsel, Daryl Rodrigues, Office of Public Defender.
Appellee appeared through counsel, Melissa Simonsen, Office of Prosecuting Attorney.
Trial Court Case No. CR-2010-33160]

Hearing held March 21, 2011. Decided March 29, 2011.
Before Chief Justice Anita Dupris, Justice David C. Bonga and Justice Dennis L. Nelson

Dupris, CJ

This matter came before the Court of Appeals for an Initial Hearing on March 21, 2011. Appellant was represented by Daryl Rodrigues, Office of Public Defender. Appellee was represented by Melissa Simonsen, Office of Public Defender.

SUMMARY

The Appellant entered a guilty plea to Battery with a Domestic Violence enhancement on January 14, 2011. Both the Appellant and the Appellee joined in a recommendation that Appellant receive credit for five (5) days already served as part of the sentence. The Trial Court entered an Order on January 14, 2011 stating credit for time served is not permitted in domestic violence cases. The Court did not enter findings and legal conclusions for this Order. The ruling was timely appealed. After a review of the record and applicable law we find Appellant's equal protection rights were violated by the Trial Court's ruling. We found further, that as a guideline, the Trial Court should refer to Washington RCW § 9.94A.505(6) as guidance when addressing credit for time served issues. We reverse and remand.

ISSUE

Did the Trial Court err in denying credit for jail time already served based solely on the fact that the crime charged was a domestic violence case?

STANDARD OF REVIEW

The issue is a question of law, subject to a review *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes*, 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al*, 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998).

DISCUSSION

The Trial Court specifically restricted credit for jail time served in cases where there is a domestic violence enhancement under CTC §5-5-54. There are no specific findings for this ruling in the record. A review of the pleadings filed at the Trial Court and herein show that both parties requested the credit for jail time already served. Both at the trial level and here, the parties assert that to deny the credit would violate Appellant's rights to equal protection as guaranteed by CTC §1-5-2(h)[40] which states:

> The Confederated Tribes of the Colville Reservation in exercising powers of self-government shall not: ....(h) Deny 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....

We have interpreted equal protection under CTC §1-5-2(h) as meaning that people should be treated the same under similar circumstances. *CCT v. LaCourse,* 1 CCAR 2, 1 CTCR 5 (1982). It appears from the record that Appellant accrued five (5) days in jail for being unable to post a bond or bail on the charges against him herein. Although the Trial Court did not enter specific findings why the credit was not allowed, the judge did enter an order stating credit would not be given in cases in which domestic violence was involved in the case. No other reason was given, so we must assume this is the basis for the denial.

If Appellant had been able to post bail, he would not have accrued the five days in jail unrelated to his ultimate sentence. According to both parties, other defendants whose charges are not domestic-violence related are given credit for any time served when unable to post bail or bond. It is clear that defendants who cannot afford to post bail or bond and are charged with offenses with a domestic violence enhancement are being treated different from all other defendants. This disparate treatment violates tenets of equal protection.

Finally, as a guidance for the Trial Court, we adopt the reasoning in Washington law which allows the Trial Court to deny credit for time served if the time being served is not directly related to the offense for which the defendant is being sentenced. *See* RCW 9.94A.505(6). This would not be a violation of equal protection.

It is ORDERED:

The Judgment and Sentence entered on January 14, 2011, is REVERSED IN PART in that Appellant, Maurice D. Circle, shall be granted credit for the five (5) days already served, provided that the five (5) days served are directly related to the offense charged in this case. We REMAND for a hearing to determine whether the defendant was being held on charges not related to the instant offense for the five (5) days he is requesting credit for. If the five (5) days are directly related to the instant charge, the Trial Court shall enter an Amended Judgment and Sentence conforming with the decisions herein.

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[40] Appellant also cites the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 *et seq.* as authority. We review under the tribal law which is complete, thereby making a review under the federal statute unnecessary. Tribal law should always be the primary law cited and relied on in cases in our Courts. Other laws are used as guidance only in the absence of the tribal law.

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Amber LATIMER, Appellant,

vs.

Donald J. FERGUSON, Sr., Appellee.

Case No. AP11-001, 5 CTCR 33, 38 ILR 6028

10 CCAR 50

[Appellant and Appellee appeared in person and without counsel.
Trial Court Case No. CV-CU-2009-29331]

Hearing held March 18, 2011. Decided March 29, 2011.
Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Dennis L. Nelson

Dupris, CJ

This matter came before the Court of Appeals (COA) for an Initial Hearing on March 18, 2011. Appellant appeared in person and without counsel. Appellee appeared in person and without counsel.

At the Initial Hearing the COA may decide: 1) whether the facts and/or laws as presented warrant a limited appeal on issues of law and/or fact; 2) whether a new trial should be granted; or 3) whether the appeal should be dismissed or denied[41]. Upon a review of this matter, the COA finds sufficient grounds to grant the appeal and remand for a new hearing.

SUMMARY

On December 14, 2009, Mr. Ferguson filed a Petition for Custody and/or Support. A Summons was issued and an Answer filed by Ms. Latimer. On December 13, 2010, Mr. Ferguson filed a Motion and Affidavit Requesting Emergency Restraining Orders and/or Temporary Order(s) and Order to Show Cause. The Court issued an Order to Show Cause; Restraining Order; Temporary Order(s) which gave notice to the parties that a show cause hearing would be held on December 28, 2010. A temporary custody hearing was held on December 28, 2010. Although she had sufficient notice Ms. Latimer failed to appear for this hearing. After hearing testimony from Mr. Ferguson, the Trial Court granted sole, permanent custody to Mr. Ferguson, ordered per capitas and 181-D monies be given to Mr. Ferguson and restrained Ms. Latimer from removing the children from Mr. Ferguson. Appellant timely filed an appeal.

STANDARD OF REVIEW

The issue is a question of law, subject to a review *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes*, 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al*, 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve

[41] Court of Appeals Court Rule (COACR) 12.

issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998).

DISCUSSION

A basic tenant of due process is that adequate notice of any hearing be given to all parties to the action. In this matter, the parties were given notice that a temporary custody hearing would take place on December 28, 2010. Appellant agrees that she received proper notice but failed to appear. She alleges that she suffers from "social anxiety" and was assured by Mr. Ferguson that he would be seeking joint custody at the hearing. In fact, the Trial Court found Ms. Latimer in default and awarded sole, permanent custody to Mr. Ferguson. No subsequent hearings were scheduled.

In *George v. George*, 1 CCAR 52, 1 CTCR 53 (1991), we determined that the Tribal Law and Order Code gave inadequate notice to litigants of requirements for permanent custody hearings. We directed the Trial Court to notify the parties when permanent custody hearings are set that it is their one and only opportunity to call witnesses and present their arguments as to each person's qualifications to be a fit parent. This language was to be included in notices sent to the litigants. This was not done in this case. The Trial Court scheduled a temporary custody hearing and then turned it into a permanent custody hearing, without notice to the Appellant. We find that the Trial Court erred in changing what was scheduled as a temporary custody hearing into a permanent custody hearing without proper notice to both the parties.[42]

It is ORDERED that:

1. The Order granting permanent, sole custody entered by the Trial Court on December 28, 2010, is REVERSED.

2. This case is REMANDED to the Trial Court for a temporary custody hearing. A permanent custody hearing will only be held after proper notice of the hearing is given to both parties using the parameters specified in *George v. George, supra*.

[42] We also note that we could not tell if all of the factors required to be considered in a custody hearing were even addressed. *See* CTC §5-1-121. The Trial Court is encouraged to make specific findings and conclusions in its next order.

Franklin LAMBERT, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. Ap11-006, 5 CTCR 34, 38 ILR 6028

10 CCAR 52

[Appellant appeared through counsel Daryl Rodrigues, Office of Public Defender.
Appellee appeared through counsel Melissa Simonsen, Office of Prosecuting Attorney.
Trial Court Case No. CR-2009-32146]

Hearing held March 18, 2011. Decided March 29, 2011.
Before: Chief Justice Anita Dupris, Justice Earl L. McGeoghegan and Justice Gary F. Bass

Bass, J.

SUMMARY

The Appellant, Franklin Lambert, was sentenced on July 31, 2009 to 360 days in jail, with 180 days suspended. He was ordered in the Judgment and Sentence to serve 90 days in jail, and 90 days to be served on electronic home monitoring (EHM). He was placed on EHM for ten (10) days beginning on January 21, 2010, ending on February 4, 2010. He was then placed on EHM for 80 days beginning on February 16, 2010 and ending on May 7, 2010. He thereby served 90 days on EHM. There were a series of petitions and motions with regard to the actions taken by the Trial Court, the exact nature of which are not pertinent herein and will not be discussed. The Trial Court, in an Order dated January 26, 2011, denied Appellant credit for the 90 days EHM he had completed, based on his failure to pay for the EHN. That is the determinative issue of this appeal. The Appellant was never notified that failure to pay for the EHM would result in loss of credit for the EHM he served. The Court finds that further briefing and argument is not necessary, and that immediate action is necessary to prevent Appellant's serving jail time he would not have to serve if he is given credit for the 90 days EHM he served. For reasons further elucidated later in this opinion, the Court finds Appellant's due process right to notice has been violated, and the remedy is that Appellant shall be given credit for the EhM he has completed.

ISSUE

Was Appellant's procedural due process right to notice violated by the failure to give notice that failure to pay for EHM would result in loss of credit for the EHM he served?

STANDARD OF REVIEW

The issue is a question of law which we review *de novo*. *Colville Confederated Tribes v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995).

DISCUSSION

One of the basic tenants of procedural due process is adequate notice. This Court over the years has held that due process is required, and that notice is fundamental to due process. *In Re the Welfare of J.A.M., et al.,* 3 CCAR 06, 07, 3 CTCR 14 (08-07-1995). The Colville Tribal Civil Rights Ordinance mandates affording litigants due process. *CTC 56.02.(h).* It is especially critical in criminal cases such as this, when failure to give notice of the consequences of non-action, i.e. not paying for EHM, will result in losing credit for time spent on EHM, and may result in Appellant spending time in jail rather than on EHM. Time spent on EHM reduced the amount of jail time possible, as days spent on EHM count against the maximum jail time. If notice is given that failure to pay will result in loss of credit for EHM served, there is a natural incentive to comply, and will result in more compliance by payment, which is what is desired by the Trial Court. So not only is notice required by due process, but it is the best practice to attain what the Court desires, payment for EHM. Failure to give notice that failure to pay for EHM violates due process, and the remedy is to give credit for the days spent on EHM, even though not paid for the Appellant. The remedy, if the Tribes sees fit, is to seek a judgment against Appellant for the costs of EHM, and collect on the same.

CONCLUSION

Appellant's due process right to notice has been violated. The decision of the Trial Court denying credit for time spend on EHM must be reversed and Appellant given credit for the days spent on EHM.

It is hereby ORDERED as follows: The decision of the Trial Court denying credit for the EHM Appellant has served is reversed. Appellant shall be given credit for the EHM he has already served and the case is remanded to the Trial Court for immediate action giving Appellant such credit.

Nancy CAMPBELL, Appellant,

vs.

Vera BEST, Appellee.

Case No. AP11-007, 5 CTCR 35, 38 ILR 6047

10 CCAR 54

[Parties appeared in person and without counsel.
Trial Court Case No. CV-CU-2006-26384]

Hearing held April 15, 2011. Decided May 16, 2011.
Before Chief Justice Anita Dupris, Justice Earl L. McGeoghegan and Justice Theresa M. Pouley

Dupris, Chief Justice, for the Panel

SUMMARY

This matter came before the Court of Appeals (COA) for an Initial Hearing on April 15, 2011. Appellant, Nancy Campbell, (Appellant) and Appellee, Vera Best, (Appellee) both appeared in person and without counsel. This Court reviewed the record and applicable law and found cause to vacate the Order Dismissing the case, and remand the matter to the Trial Court.[43] We note there are procedural irregularities in the Trial Court's case which evince due process violations. For the reasons below, we vacate and remand.

FACTS

Appellant alleged in her Notice of Appeal that she did not receive timely notice of the hearing scheduled for January 25, 2011. The Order of Dismissal was filed with the Trial Court on February 23, 2011; this is the Order being appealed.

This case was initially opened in 2006 by Appellee, who filed for custody of the three minor children of Nancy Campbell and Robert Parisien. An Order awarding temporary custody to Appellee was entered by the Trial Court in November 2006.

On August 31, 2010 a new custody petition was filed by Appellee. Allegedly the Trial Court told her that a new petition was necessary, though the Trial Court used the same case number for both petitions. A status hearing was held on September 8, 2010. Temporary custody was extended and a new status hearing set for December 7, 2010.

Appellant filed an answer to the second petition on September 16, 2010. At the same time she also filed for a temporary restraining order and request for a show cause hearing to be set. The Trial Court denied Appellant's motion for emergency custody.

Prior to the December 7, 2010 status hearing, Appellant requested, and was granted, a continuance of the hearing. The new hearing was set for January 25, 2011 by an Order issued on December 14, 2010.

Appellant failed to appear for the January 25, 2011 hearing. On the record, the Court continued the

[43] COACR 12: At the Initial Hearing, the COA shall decide: 1) Whether the fact and/or laws as presented warrant a limited appeal on issues of law and/or of fact; or 2) Whether a new trial should be granted; or 3) Whether the appeal should be denied or dismissed.

temporary custody status of the children and ordered a new status hearing date to be set. The Clerk noted on the In-Court Record that after the hearing, and off the record, the Judge found that Appellant was the moving party, and had failed to appear for the hearing. The Trial Court dismissed the case without prejudice because Appellant failed to appear for the status hearing. Appellant timely filed her appeal, alleging she did not receive notice of the January 25, 2011 hearing.

None of the hearings to date have been on the Petition for Custody filed by Appellee, Vera Best. There have not been any hearings on the merits of the Petition and Answer filed yet, although the case was initiated in 2006.

ISSUE

Did the Trial Court err in dismissing a case when Appellant, who is not the petitioner in the case, fails to appear for a status hearing which was continued at her request?

DISCUSSION

In this case, the parties are both pro se litigants. At best, they have a limited knowledge of the legal procedures for moving a case forward. This case has been languishing in the Tribal Court system for approximately five years. While it is normally up to a petitioner to move the case forward, it is also incumbent upon the Court to ensure the timely disposition of custody cases. The Code gives custody cases priority on the civil docket. *See* CTC §5-1-125(a). In *Carden v. CIHA*, 7 CCAR 22, 4 CTCR 08 (2003), we held:

> When the Trial Court holds a civil case in abeyance, without a final order, and on conditions, it puts itself in a position to have to monitor a civil case between private parties beyond the time frame considered by statute. It does not give finality to the case.

A review of the status hearings indicated more of a dependency-type case than a private custody case. It would be more economic to set a hearing on the Petition and Answer in such cases rather than continually monitor how the parties are handling the temporary custody of the children involved. *See* Rules of Conduct 1.4.01(e) ("A judicial officer shall dispose promptly of the business of his Court.")

The Order entered on January 25, 2011, indicated that the case was being dismissed because Ms. Campbell failed to appear for her motion hearing. However, a review of the Trial Court case file does not show an outstanding motion for that hearing. The only prior motion filed by Appellant was the motion for an emergency temporary restraining order filed in September, 2010. The Trial Court denied this motion on September 16, 2010. The hearing set on January 25, 2011 was for a status hearing, initiated on the Court's own request. Further, nothing in the notice that was provided[44] in the Order setting the January 25, 2011 status hearing gave notice to either party that if they did not appear the case would be dismissed. In *Lezard v. DeConto*, 10 CCAR 23, 5 CTCR 25, 37 ILR 6010 (12-16-2009), we held:

> When a person is not given adequate notice of what is to be considered in a hearing, all other procedural rights are impacted. He does not have adequate time to prepare for the hearing, and to submit evidence on his own behalf. Even if the end result appears clear to the judge, the parties

[44] Appellant states she did not receive notice of the hearing set on January 25, 2011, which was the initial basis for her Appeal. The procedural problems in the case, along with our rulings on them, make a consideration of whether she received such notice or not moot, so we will not address the issue.

have a right to present their evidence in a meaningful manner. The judge is the gatekeeper of due process. It is the Court's responsibility to ensure adequate notice is provided to every litigant, and to allow everyone who appears in Court to have his say in his own way.

The Court further confused the case by dismissing the entire case because Appellant failed to appear for what the Court called a motion hearing. Appellant was not the Petitioner, and the Petitioner did not request a dismissal of the case.[45] Procedurally, even if it were a motion hearing, unless the motion is a specific request to dismiss, a dismissal of the whole case, *sua sponte*, for failing to appear for the motion hearing is not the usual remedy.

In conclusion, several procedural errors in the case exist, such as: failure to give adequate notice of what is going to take place at the hearing, as well as what would be the consequences if a party did not appear; setting status hearings which appear to be dependency-type hearings in a private custody matter, thereby prolonging the case unnecessarily; and dismissing the case *sua sponte* because the Respondent failed to appear for a hearing, without even consulting the Petitioner, who did appear. Due process was not provided for the parties herein because of the procedural errors. We so hold.

Based on the foregoing, now, therefore

It is ORDERED that the Order of February 23, 2011, which is directly related to the hearing on January 25, 2011, which dismissed the case, is REVERSED and the case REMANDED to the Trial Court for further actions consistent with this Opinion Order.

Because the parties are *pro se*, with little if no legal training, we would strongly counsel the Trial Court to move this case towards a permanent custody hearing, with adequate notice as required in *George v. George*, 1 CCAR 52, 1 CTCR 53 (1991), and *Lezard v. DeConto, supra*.

[45] In fact, Appellee/Petitioner, who did appear for the January 25, 2011 hearing, stated at the Initial Hearing that she did not want the Trial Court to dismiss the case. She did not have input in the Trial Court's decision to do so.

Kerry Lowell Green, Sr., Appellant
vs.
Kelly Louise Green/Gossett, Appellee.
AP10-013, 5 CTCR 36, 38 ILR 6049
10 CCAR 57

[Appellant was not represented by a spokesman.
Appellee was represented by Mark J. Carroll.
Trial Court Case No. CV-DI-2010-33221]

Decided June 29, 2011.
Before Chief Justice Anita Dupris, Justice Gary F. Bass and Justice Earl L. McGeoghegan

Dupris, CJ

This matter comes before the Court of Appeals (COA) upon two motions filed by Appellee. The first is a Motion for Reconsideration filed on February 23, 2011. The second is a Motion to Allow the Appellee to file a reply brief. We will discuss the second motion first.

Motion and Declaration for Permission to File a Reply Brief

Appellee filed her Motion for Reconsideration on February 23, 2011. Since the underlying issue before the COA was one of potentially significant importance to the Tribes, the COA invited the Colville Confederated Tribes to file an amicus brief. The Appellant was also invited to file a response brief. The briefing order did not set any additional briefing. The COA reviewed the arguments and decided that a reply brief would not enhance or influence the arguments already made, therefore, the Motion and Declaration for Permission to File a Reply Brief is denied.

Motion to Reconsider standards:

The Tribes argue the Motion to Reconsider does not meet any normal standards, and should be denied on that ground. Appellant did not have an opportunity to respond to this argument. A review of COACR 17 states that a party who disagrees with our final decision may file a Motion to Reconsider. Subsection (1) states the motion and affidavit must be accompanied by a brief "...which states with particularity, the points of law which the moving party contends the COA overlooked, misapprehended or wrongly decided." We find that COACR is clear on its face and allows for motions for reconsideration to be generously reviewed. At this time, the COA will not adopt any of the standards the Tribes has suggested.

Motion for Reconsideration and Supporting Declaration

Appellant argues the Dissolution Code violates her equal protection rights as defined as "generally that people should be treated the same under similar circumstances." *CCT v. LaCourse*, 1 CCAR 2, 5, 1 CTCR 5 (1982). Appellant analogizes that if a tribal member married a non-Indian, that couple is allowed to get a dissolution in tribal court, whereas, as here, where two non-Indians are involved, they are not afforded the protection of the dissolution code. This argument by itself, unsupported by any legal authorities, cannot sustain a finding that Appellee's equal

protection rights were violated.

The Tribes filed an amicus in which it points out that the Tribes has chosen its own limits on the applicability of its dissolution laws. The Tribes first asserts that classification by race, *i.e.* tribal member Indian versus non-Indian, does not violate equal protection because the distinction is political, and not racial. *See, Morton v. Mancari*, 417 U.S. 535 (1974). The Tribes further point to the tribal underpinnings of the laws which make them distinct and different from their counterparts in other jurisdictions. The tribal underpinnings, customs and traditions, guide the Business Council in its decision-making process when enacting laws for the Tribes. So guided, the tribal lawmakers have decided to limit its civil jurisdiction over non-Indians. This is their Constitutional right.

We acknowledge what has happened here, *i.e.* the Trial Court erroneously entering a Dissolution Order, has had serious consequences for the parties. However, the parties are not without recourse. They can seek a dissolution in a state court that has jurisdiction to enter a dissolution between two non-Indian people. Nothing has been presented to us to show that we erred in our first decision in finding no subject matter jurisdiction. We so hold.

CONCLUSION:

The Motion for Reconsideration should be denied in that Appellant's equal protection rights have not been violated. Classification by race in this instance does not violate equal protection because the distinction is political, and not racial. The Motion and Declaration for Permission to File a Reply Brief should be denied. The Opinion Order Vacating Judgment and Remanding For Dismissal is affirmed. This case will be remanded to the Trial Court for action pursuant to this Order.

It is so ORDERED.

Rose ZAVALA, Appellant,

vs.

Don MILSTEAD, Geneva JOSEPH, and Geraldine DEBROSKY, Appellees.

AP09-008, 5 CTCR 38, 38 ILR 6059

10 CCAR 58

[Appellant appeared through spokesperson Mark J. Carroll.
Appellee appeared pro se and without representation.]

Decision made on the briefs without oral argument.

Before Chief Justice Anita Dupris, Justice Gary F. Bass and Justice Howard E. Stewart[46]

Dupris, CJ

[46] Justice Stewart participated in the deliberation and decision of the panel but passed away prior to the drafting of this opinion.

SUMMARY

A temporary custody petition was filed in this matter by a maternal great-aunt[47] of the minor child, M.M. on December 13, 2007. She alleged the minor child was being physically abused by the mother's boyfriend, FJ. The Tribes' Children's Services got involved. On October14, 2008, the child's maternal grandmother, Geneva Joseph, filed a request for a restraining order against FJ on the minor's behalf, alleging FJ was getting out of jail soon and would pose a threat to the child.

On May 26, 2009, the child's father, Donald Milstead, Appellee herein, filed a Custody Petition, naming the mother, Rose Zavala, Appellant herein, and both Geneva Joseph and the great-aunt as Respondents. Neither Ms. Joseph or the great-aunt have participated in the appellate proceedings, and will not be considered as parties in interest in this opinion.

On July 7, 2009, the Trial Court held the hearing on Appellee's petition. The maternal grandmother and Appellee appeared. Appellant did not appear nor contact the Court that she would not appear. The Trial Court received evidence on the petition and awarded permanent custody of the child to his father, the appellee, with restricted visitation by the mother, Appellant. She appealed.

Based on the following opinion, we found sufficient evidence to support the Trial Court's decision; further, we found no due process violation regarding Appellant's non-appearance, and we affirm the Trial Court.

ISSUES

1) Does the evidence support the Court's decision to grant custody to the father, Appellee herein?
2) Were Appellant's due process rights violated because she did not participate in the hearing in which custody was decided?

STANDARD OF REVIEW

Normally we review findings of fact under the clearly erroneous standard, and errors of law *de novo*. *Colville Confederated Tribes vs. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995). The second issue regarding an alleged due process violation will be reviewed *de novo*. As for the first issue, in an earlier ruling in this case we found that we would review the findings of fact *de novo*, too. We stated:

> We have little direction of what facts were found. The findings are more of a record of what evidence and arguments were presented to the trial court instead of how the trial court analyzed and weighed the evidence, thereby coming to a final, relevant fact. What we have to review, then, is a judicial summary of the evidence and arguments presented at the custody hearing from which we must determine the facts *de novo* since, in essence, no reviewable facts are provided by the trial court in its findings.

Zavala v. Milstead, 10 CCAR 14, 5 CTCR 22, 36 ILR 6101 (2009) (footnote omitted).

DISCUSSION

I. Does the evidence support the Court's decision to grant custody to the father, Appellee herein?

[47] It appears the maternal great-aunt did not participate as a party in the rest of the proceedings, and has not appeared in the Appeal. For the purposes of the Appeal she will not be included in the opinion.

1) Review of the Findings of Fact and Conclusions of Law

The Trial Court entered over sixty Findings of Fact.[48] We reviewed these "findings," or what we term judicial summaries of the evidence presented at the hearing, against the requirements of CTC § 5-1-121, Child Custody — Relevant Factors in Awarding Custody. This Code provision states that the Trial Court is to first consider the best interests of the child, and secondly traditions and custom. It requires the Trial Court to consider all relevant factors, including six (6) specific factors, in making its decision. CTC § 5-1-120.[49] We also review whether the Trial Court had personal and subject matter jurisdiction.

2) Jurisdiction and Notice

There are three petitioners in this matter: the maternal grandmother, who is a member of the Colville Tribes and resides on the Reservation; the mother, who is a member of the Colville Tribes and resides on the Reservation; and the father, who is a non-Indian residing off the Reservation in Oregon. The child is a member of the Colville Tribes, and, at the initiation of the action by the maternal great-aunt, resided on the Reservation. The only non-tribal member is the father. He filed his own petition for custody, thereby consenting to the jurisdiction of the Court. CTC §§ 1-430 and 1-1-431. The Trial Court had personal jurisdiction over all the parties. Further, the Court has subject matter jurisdiction over the case. CTC § 2-2-1.

All parties except Appellant appeared for the custody hearing. The Court found on record that all parties, including Appellant, received notice. Although the Judge did not put this finding in writing, the uncontroverted evidence indicates Appellant's mother, one of the Petitioner's herein, testified she left her car for Appellant specifically so Appellant could drive to the hearing, and that Appellant did know about the hearing. We find adequate notice was provided.

3) Six Factors to Consider in Awarding Custody

The minimum evidence needed to prove the allegations in the Petition rests on the six factors to be included in any review by the Court. The evidence presented at the custody hearing was uncontroverted. The following is a summation of the evidence reviewed by this Court.

(a) Wishes of parents regarding visitation: Appellant has denied Appellee visitation over the last year. She has turned her phone services off, has no transportation, and is not easily accessible. There is nothing in the evidence regarding what visitation parameters Appellee wants regarding visitation between the child and his mother. There is sufficient evidence to show Appellant makes it difficult for Appellee to initiate any visitation rights with the child.

(b) Wishes of child regarding custodian and visitation: There is no specific evidence of the wishes of the

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[48] Although the Trial Court designated only 37 findings, several of them had long paragraphs with many facts alleged in them. For example, finding #10 had twelve paragraphs summarizing Appellee's testimony, and then twenty-four (24) alphabetized paragraphs setting out what the school reports entered into evidence said about the minor's behavior and attendance.

[49] (a) The wishes of the child; (b) The wishes of the child's parent or parents as to visitation privileges; (c) The interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may significantly affect the child's best interests; (d) The child's adjustment to his or her home, school, and community; (e) The mental and physical health of all individuals involved; and (I) The Indian heritage of the child.

child; however, the evidence shows the child is afraid of Appellant's boyfriend, who has been physically abusive to both the child and his mother. Further, the evidence shows the child is calmer and happier with his father, and is in a safer environment.

(c) Interaction with others: Appellant continues a relationship with FJ, who is physically and mentally abusive of both the child and Appellant. There is no evidence of other children in Appellant's home. The child interacts well with his paternal grandparents; gets along with Appellee's significant other; and has a half-sibling he interacts with when with Appellee. The maternal grandmother, one of the petitioner's at the trial level, testified she turned FJ in when he abused the child, and she is available to provide a home for the child if Appellant did not get custody.

(d) Child's adjustment to home, school, and community: The Court made extensive summaries of the child's ongoing problems in school while with his mother and her abusive boyfriend. The evidence further shows that the child is doing well in school with Appellee, and has adjusted to life with Appellee. Appellee is never behind in rent, always has food, has a driver's license, car and insurance.

(e) Mental and physical health of all involved: Appellant is in a violent relationship with FJ; there is no evidence specifically regarding her mental or physical health in the judicial summaries. Appellee testified he was diagnosed as borderline bi-polar and takes medication for this condition. He further testified he will continue the child's mental health counseling.

(f) Indian heritage of Child: The child, Appellant, and Appellant's mother are members of the Tribes. No other evidence was submitted on how their cultural ties were maintained. Appellee, a non-Indian, testified he would maintain the child's cultural education. He goes to local pow wows and events at Chemawa Indian School, and would continue to go, and take the child with him.

Our review of the evidence supports the Trial Court's decision that awarding custody to Appellee is in the best interests of the minor child. We affirm.

II. Were Appellant's due process rights violated because she did not participate in the hearing in which custody was decided?

The short answer is no. Due process guarantees a party the right to participate, it does not mandate that the Court never have a hearing unless and until a party avails himself of the opportunity to participate. The Court found on record that Appellant did receive notice. Further, Appellant's mother testified she lent her car to Appellant so that she could attend the hearing. Appellant's position is that the Court should have, at a minimum, called Appellant to see why she wasn't there. This argument is not based on any law or other legal authority. The only case Appellant cited in support of her position is *Miles v. Chinle Family Court*, 7 American Tribal Law 608 (Navajo 2008). Even if we were persuaded to follow Navajo case law, which we aren't at this time, *Miles* is not opposite to the holdings herein. As Appellant points out, it says the Court shouldn't remove a child without the opportunity for a parent to respond to the petition. Appellant had an opportunity to respond. She chose not to take the opportunity. She did not exercise her right to participate and cannot now put the onus on the Trial Court to ensure her participation. We find Appellant did not sustain her burden on this argument.

Based on the foregoing, now therefore,

It is ORDERED that the Trial Court Order of August 20, 2009, awarding custody of the minor child herein

to Appellee, Don Milstead, is AFFIRMED and the appeal regarding due process violations is DENIED and hereby DISMISSED. This matter is remanded to the Trial Court for Orders in conformance with our decision.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Melvin MEUSY and Jason THOMAS, Appellants.

Case No. 96-19071 and 96-19202 to 19205, 5 CTCR 39, 38 ILR 6053

10 CCAR 62

[Lin Sonnenberg, CCT Office of Prosecuting Attorney, Appellant & Appellee;
Jeffery Rasmussen, CCT Office of Public Defender, Appellee & Appellant.
Trial Court case numbers: 96-19071 and 96-19202 to 19205]

Oral argument heard August 13, 1997. Decided September 15, 2011.
Before Chief Justice Anita Dupris, Justice Elizabeth Fry and Justice Wanda L. Miles

Dupris, C.J.

INTRODUCTION

This is a very old appeal. Without excuses, it has had a sporadic history. The opinion has been written, lost, rewritten, revised, and put at the bottom of a pile for a very long time. When it first came before the panel, the two other justices did their parts. Neither of them are on the Court of Appeals anymore; they each did provide a section of the opinion as well as input in the final decision. Their written parts are incorporated without change into this opinion.

The issues before the Court included a review of the doctrine of separation of powers, which had to that time not been discussed in an appellate opinion. We have since addressed arguments regarding separation of powers in at least two other cases, but only summarily, and only recognizing its existence in our laws. *See CCT v. Clark*, 4 CCAR 53, 2 CTCR 45, 25 ILR 6066 (1998) (the Trial Court did not violate separation of powers by clarifying the elements of assault); and *In re L.S.-L and R.S.-L, minors, v. CCT et al.*, 5 CCAR 46, ftnte 39, 3 CTCR 33, 28 ILR 6109 (2001) (noting that absent legal authority to the contrary, the Colville Business Council did not violate the doctrine of separation of powers by enacting a statute regarding reviewing affidavits of prejudice against a judge). We have learned a lot over the past years, so some of the opinion I originally drafted regarding the history of the doctrine of separation of powers isn't really relevant to our case law anymore. I am providing a shorter version than was in the original opinion once written then lost.

SUMMARY

In *CCT v. Tatshama*, 95-18422 (Col. Tr. Ct., 1996), the Chief Judge of the Trial Court held, *sua sponte*, the Trial Court did not have legal authority to grant deferred prosecutions, even though it had been a long-standing practice to do so. She held that deferred prosecutions were "creatures of statute." In response to this decision, the

Colville Business Council (CBC) enacted Resolution 1996-313,[50] Deferred Prosecution of Criminal Charges.[51] The Tribes, acting under Section 2, filed for a deferred prosecution for Mr. Meusy, designated Appellee herein, although his interests are the same as the Appellant, *i.e.* he wanted a deferred prosecution, too.[52]

In her opinion denying the deferred prosecution dated August 2, 1996, the Chief Judge held, *sua sponte,*[53] that Section 2 violated the principles of separation of powers mandated by the Colville Tribal Constitution. Amendment X (now Article VIII). The judge ruled this Section "flatly dictates" she grant a deferred prosecution offered by the Tribes, with no guidelines and no discretion., in violation of the Constitution. The Tribes appealed..

For reasons stated in the following opinion we find (1) a cultural basis for the applicability of the doctrine of separation of powers; (2) the deferred prosecution law enacted by the CBC does not violate the Constitution; and (3) as a general rule, with few exceptions, a judge should not address legal issues *sua sponte*, and not give the parties an opportunity to brief the issues. We reverse and remand for dismissal.

ISSUES

1. What is the applicability of doctrine of separation of powers to the Tribes?
2. Did the Court overstep its Constitutional responsibilities by overturning Section 2 of the deferred prosecution law *sua sponte*?
3. Did the CBC overstep its Constitutional responsibilities by enacting the court-limiting language in its deferred prosecution law?

STANDARD OF REVIEW

We review errors of law *de novo*. *Colville Confederated Tribes vs. Naff,* 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Wiley, et al v. Colville Confederated Tribes,* 2 CCAR 60, 2 CTCR 09, 22 ILR 6059 (1995); *Palmer v. Millard, et al,* 3 CCAR 27, 2 CTCR 14, 23 ILR 6094 (1996) (Because the Tribal Court dismissed the case

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[50] Now codified as CTC, Section 2-1-105.

[51] Resolution 19996-313 states:

"WHEREAS, it is in the interest of the Tribes to provide rehabilitative and/or traditional alternatives to the prosecution of alleged criminal offenders; WHEREAS the Public Safety Committee finds that deferred prosecutions are a means to fulfill such alternatives; WHEREAS, it is the recommendation of the Public Safety Committee of the Colville Business Council that a new section will be added to Title 2 of the Tribal Law and Order Code as follows: Section 1. In any motion for deferred prosecution, the defendant must: a) waive his/her right to a trial within 60/90 days; b) stipulate to the truth of the police report; c) agree to pay the current court costs; and d) agree with the other terms and conditions included in the proposed order of deferred prosecution. Section 2. The Court shall grant a motion for a deferred prosecution when presented by the Tribes. Section 3. Unless the court finds that it is not in the interests of justice, the court shall grant a motion for a deferred prosecution when presented by a defendant in any case where the defendant has no known criminal conviction in any jurisdiction for the preceding ten years and the current crime(s) charged does/do not include: a) serious injury or threat thereof; or b) sexual assault or threat thereof; or c) sale of [*sic*] delivery of a controlled substance. Section 4. If at the end of the period of deferred prosecution, the court finds that the defendant has complied with the requirements and conditions of the order of deferred prosecution, the charge(s) shall be dismissed with prejudice and expunged from the defendant's criminal record."

[52] Initially two other defendants filed an appeal regarding the new deferred prosecution law. Their cases were dismissed in that they were brought under Section 3 of the Resolution. *See CCT v. Meusy et al,* 4 CCAR 37 (1997).

[53] She cited to *CCT v. LaCourse*, 1 CCAR 2, 1 CTCR 05 (1982) as authority to act *sua sponte.* Interestingly enough, she was one of the appellate judges on the panel deciding this case.

below as a matter of law, we review the matter *de novo*.); *Pouley v. CCT*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024, (1997) (The Appellate Court engages in *de novo* review of assignments or errors which involve issues of law); *In Re The Welfare of R.S.P.V.*, 4 CCAR 68, 3 CTCR 07, 26 ILR 6039 (1998). All of the issues are issues of law, and will be reviewed *de novo*.

DISCUSSION

A) WHAT IS THE APPLICABILITY OF DOCTRINE OF SEPARATION OF POWERS TO THE TRIBES?

We are asked to rule on whether the Trial Court was correct in holding a tribal law, *sua sponte*, unenforceable as violating the doctrine of separation of powers. The question of the applicability of the doctrine in our Courts is one of first impression. Our research has shown us that, generally speaking, tribal courts and tribes have not really defined what this doctrine means in their own jurisdictions. Rather, they seem to bootstrap themselves to the long history of the doctrine in relation to its development in the state and federal tricameral governments without accounting for their own histories. We define the doctrine within its cultural context for the first time. In order to do so, we set out a brief examination of the roots of the doctrine within the federal system.[54]

Historical Perspective: Federal

The doctrine of separation of powers (doctrine) has long and venerable roots in our federal legal history. The doctrine emerged in the seventeenth century as an anti-monarchical theme, a negative view of the government, ruled by kings and queens in England. John Locke, the English political theorist first espoused the doctrine in his *Second Treatise of Government*, at a time when there were no judges as we know them today. (Thomas Sargentich, "The Courts, the Legislature, and the Executive, Separate *and* Equal? Foundations of Separations of Power," Judicature, Vol. 87, p 209 *et seq.* (2004).) He spoke of a separation of powers between the legislative and executive:

> It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making law to have also in their hands the power to executed them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage." *Id.* at p 209.

At the time Locke wrote of separating the powers of the legislative and executive arms of the government the judicial powers were held by the House of Lords; it took another century for the independent judiciary theory to evolve. Montesquieu, a French political theorist, first posited a theory of an independent judiciary in the eighteenth century in his *Spirit of the Laws*; he stated the judiciary "is to be wholly independent of the clashes of interests in the State." He also affirmed the need for a separate legislative and executive powers, and wrote of a need for checks and balances for all three branches. *Id*. at 210.

The notion of separation of powers and checks and balances was adopted by the U.S. through the urging of,

[54] For expediency's sake we will not dwell on the parallel history for the state governments. Such a discussion would not add anymore relevancy to the doctrine's history.

among others, James Madison. In the *Federalist* No. 51 he stated: "...in actual governing there must be 'auxiliary precautions' of 'supplying, by opposite and rival interests, the defect of better motives.' And so you need checks and balances by one branch on another in order to have the protection of liberty." at p210.

The U.S. Constitution recognizes three separate, equal branches of government and sets out the specific responsibilities of each branch. This has long been recognized by the US Supreme Court. The doctrine has been refined by federal case law and statutory law over the past centuries, evolving to reflect the expectations and needs of the national society. It is an accepted legal standard in federal law. For a good summary of the doctrine's applicability to the federal government, see *Buckley et al. v. Valeo*, 424 US 1, pp 120-124 (1976).

The federal caselaw as well legal scholars also recognize that the doctrine does not set the three branches, executive, legislative, and judicial, apart in absolute isolation from each other. Rather, the relationship among the three branches is complementary. *See U.S. v. Nixon*, 418 U.S. 683, 707, 94 S.Ct. 3090, 3107, 41 L.Ed.2d 1039 (1974).

Historical Perspective: Tribes

We have recognized in our opinions over the years that our Courts are westernized. That is, we have adopted, for the most part, the trappings and procedures of the dominant societies courts in the federal and state system. For example, in *Sonnenberg v. Colville Tribal Court*, 5 CCAR 9, 3 CTCR 09, 26 ILR 6073 (1999) we stated " ...the Tribal Court system as it exists has attenuated roots in the Tribes culture, and a very short history in the expectations others have for it to be like its federal and state counterparts.... In our court system the cultural approach has been eroded and largely replaced by the non-Indian court system."

What hasn't been examined yet is how our Courts have developed, and what their relationship is to the CBC. Unlike the federal and state governments, our Tribes is bicameral. That is, the CBC has the Constitutional responsibilities for the executive and legislative functions found in the federal system to rest in the President and the Congress separately. By a constitutional amendment passed in 1991, our Courts now comprise a separate judicial branch of the government. Constitution, Article VIII (Amendment X).

In looking for the history of our Courts, I have reviewed old resolutions, newspaper articles, and other references to the history of the growth of our government as a whole. The roots of decision-making for the benefit of our communities go back farther than the Courts established on our Reservation over the decades. We were taught by our elders that decision-makers were the leaders of the several tribes that make up our confederation. There were leaders to make decisions about different facets of society: fishing, women's issues, disputes between members, and so on. From these roots come the foundation of our tribal judges' responsibilities to the communities in their decision-making. On these traditions are built the responsibilities of our tribal judiciary to enforce and interpret our laws. Our laws give deference to our primary law: custom and tradition.

We know from personal anecdotes that CFR Courts existed on our Reservation even before our tribal courts were established, but I have not found anything written about them in my research. In 1937, after once being rejected by the tribal members, the members voted to accept the terms of establishing their government under the Indian Reorganization Act of 1934 (IRA). The IRA required the Tribes, *inter alia*, to establish a Constitution. In an old document entitled "Human Resources Survey, A Field Report of the Bureau of Indian Affairs," dated June 1959 it reports an account of the passage of the IRA (referring to the Indian Reorganization Act of 1934) government on our Reservation. No where in the report is there mention of a court system being established after the passage of the Constitution, but we know that it was included in the Constitution. It was not designated as a separate branch of

the government, however; the powers of the Court were derived from the legislative powers of the CBC.

A Resolution from 1946 (1946-T49) authorizes the Superintendent and the Chief Clerk to disburse all moneys for prisoners' costs, jurymen, and witnesses and any other expenses related to Law and Order on the reservation.

The earliest reference to the formal establishment of a Tribal Court after the establishment of an IRA government is found in Resolution 1952-46:

> "WHEREAS, in the interest of the general welfare of the Confederated Tribes of the Colville Reservation, Washington, it is deemed necessary to establish a Court to be known as the Colville Tribal Court, ... NOW, THEREFORE BE IT HEREBY RESOLVED, that the Colville Tribal Court be and is hereby established...."

This resolution was signed by Albert Orr, Chairman of the Colville Executive Committee. We also know from our history that Albert Orr was also the first IRA Court Judge.

The Law and Order Code enacted in 1952 enumerated the powers of the Court; established forty-six crimes; and established the duties of the Indian police. Appeals from trial court decisions were to be handled by all of the trial judges who did not sit on the initial trial. The 1952 Code limited the Court's jurisdiction to concurrent with the Federal and State Courts, and not exclusive. [Section 1. Jurisdiction] The Court was directed "... to order delivery to the proper authorities of the State or Federal Government or of any other tribe or reservation for prosecution, any offender, where such authorities consent to exercise jurisdiction lawfully vested in them over the said offender." [*Id.*]

Under the 1952 Code the judges were appointed by the Commissioner of Indian Affairs. The Business Council was to exercise more control over appointments and salaries of the judges when the judges were paid by tribal funds. In January 1956, a 1954 Code was formally adopted after the Council made the revisions suggested by the Assistant Secretary of the Interior.

The late 1950's and the 1960's brought about Relocation and Termination issues for our Tribes. In 1963-65 the decision was made, pursuant to PL-280, to consent to State jurisdiction, and the law and order functions were turned over to the State. On January 29, 1965 Washington took over these functions, and the Council passed Resolution 1965-53, which decreased the Tribal budget by all monies authorized for tribal police and court expenses. In effect, the Police Department and the Court were shut down.

The CBC repudiated Resolution 1965-53 in 1972 and reassumed law and order functions on the Reservation. After winning a battle with the counties over jurisdiction, the CBC asserted jurisdiction once again in 1975. Albert Orr was Chief Judge once more. A Law and Order Code was enacted in 1972. In 1979 another Code was enacted. The sections of the Code regarding judges changed little from the 1952 Code. The major change was that the Council, and not the BIA, became responsible for appointing the judges and justices.

From its first formal inception, established under the powers of the CBC in the early 1940's, the Court was not separate from the Council under the Constitution. It was what is referred to as a legislative court. In 1990 the tribal membership approved a Constitutional establishment of the Court system as a separate branch of government under Amendment X. It reads:

> **Created Article VIII — Judiciary:**
>
> Section 1: There shall be established by the Business Council of the Confederated Tribes of the Colville Reservation a separate branch of government consisting of the Colville Tribal Court of

> Appeals, the Colville Tribal Court, and such additional Courts as the Business Council may determine appropriate. It shall be the duty of all Courts established under this section to interpret and enforce the laws of the Confederated Tribes of the Colville Reservation adopted by the governing body of the Tribes.

Our Courts were established to look like federal and state courts. We have judges, prosecutors, public defenders, probation officers, and a jail. The statutes and caselaw, however, give deference to incorporating our culture into this westernized system. We are presented with a question now of whether, because we are like our western counterparts, we should recognize the doctrine of separation of powers. We find that the doctrine has cultural support in our governmental system.

In *Smith v. CCT*, 4 CCAR 58, 2 CTCR 67, 25 ILR 2566 (1998) we held:

> We believe that incorporating our customs into our written law is very important. It is what will set us apart from the state and federal courts. Our courts must approach this carefully, however. Customs and traditions are viable, living doctrines that grow with the community and the time. They are not static, frozen in the past of tepees and buckskin clothing.
>
> A good analysis of the applicability of custom and tradition in a case must be able to trace a current practice back to its roots in our society. It will not necessarily have the same complexion, but it should have the same foundation. Our customs and traditions define our uniqueness not only from the non-Indian society, but from other Indian tribes, too. To define a custom or tradition in our current Tribal Court system is an important task which should not be taken lightly by the courts or the parties.

Further, we have found that judges, like the Councilmen, are tribal leaders. *See Sonnenberg, supra*, in which we said:

> "The judge is a tribal leader, who must make day-to-day decisions for the good of the whole community, while at the same time maintaining the integrity of the case for those individuals before him... Traditionally, when a tribal leader made a decision, it was followed because of the respect and trust the tribal community had for him."

Before we relied on federal law to establish our government we were tribes who were lead by leaders chosen by the members of the several tribes. Tradition teaches us that a leader is a servant of the society he serves. Leaders are taught to give rather than try to control what may be perceived as their power to tell others what to do. Leadership, we were taught, is a responsibility as opposed to a power. We had leaders for different aspects of the communities: we had salmon leaders, leaders to settle disputes, leaders who dealt with women issues, and so forth.

Another hallmark of our early leaders, which is said to carry over to today, was that of listening and letting all who wished to have input for the issues to be decided an opportunity to be heard fully before a decision was made. If, as a member of the community, one leader discussed an issue to be decided by another leader, it was not seen as an encroachment on that leaders responsibilities.

From these cultural roots we may extrapolate a recognition of separate leadership duties, an opportunity to participate in decision-making by all of the community, and a responsibility of the leaders to decide. These attributes

are not unlike separation of powers. We viewed it more as a separation of responsibilities, but contemporarily it leads us down the same path. For these reasons, there is a cultural basis for the doctrine in our Courts. We so hold.

B) DID THE COURT OVERSTEP ITS CONSTITUTIONAL RESPONSIBILITIES BY OVERTURNING SECTION 2 OF THE DEFERRED PROSECUTION LAW *SUA SPONTE*?[55]

The Trial Court determined *CCT v. LaCourse, supra*, gave the Court the power to address issues *sua sponte*. The authority to so act is "consistent with the function that tribal courts perform in preserving and furthering tribal sovereignty and independence." *id*. The Court of Appeals in *LaCourse* relied on CTC, Section 1.5.05[56] which states:

> When jurisdiction is vested in the court, all the means necessary to carry (it) into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding is not specified in this code, any suitable process or mode of proceeding may be adopted which appears most conformable to the spirit of tribal law.

The Trial Court interpreted this provision as giving the tribal court authority to determine whether an ordinance violates a defendant's rights.

The court in *LaCourse* went further to say, "In this case the trial judge adopted a mode of proceeding consistent with the spirit of the tribal law in reviewing the validity of an ordinance, although neither party had raised the issue." The Trial Court's decision to review, *sua sponte*, the validity of the Tribes' disorderly conduct statute was clearly within its power, the Court of Appeals held.

It should be noted the Trial Court here ruled CTC, section 1.5.05 was not sufficient for the Trial Court to develop a deferred prosecution process. *See Timentwa, supra.* Since this ruling had a negative connotation to this section, the Trial Court should not now be able to justify its authority and power to address the issue *sua sponte* solely relying on *LaCourse,* since in *LaCourse* the Court relied on CTC Section 1.5.05 to assert its authority and power to review the statute *sua sponte.*

We now review the ruling in *LaCourse* again to decide whether its ruling on *sua sponte* is a correct one. Based on the following we hold it is not, and overrule the decision. It is generally accepted that a court has the authority to raise an issue of the constitutionality of a statute when the statute interferes with the doctrine of separation of powers. We look for guidance to our sister Courts in the federal and state systems who have had a longer history in discussing this issue. The majority rule of the state courts is that a trial court has no standing, *sua sponte,* to attack the constitutionality of a statute when neither party to the litigation has lodged a constitutional challenge. *See, eg., DeVane v. DeVane*, 581 A.2d 264 (R.I. 1990) ("It is clear and imperative that a trial [judge], in exercise of his or her judicial authority, not resolve a constitutional issue unless and until such issue is actually raised by the parties to the controversy and a necessity for such a decision is clear and imperative.)

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[55] This section was drafted by Justice Wanda Miles; she has since passed away.

[56] Now section 1-1-145.

The U.S. Supreme Court held, "Never anticipate a question of Constitutional law in advance of the necessity of deciding it; and never formulate a rule of Constitutional law broader than is required by the precise facts to which it is to be applied." *U.S. v. Raines*, 392 US 12, 21 (1960).

One problem that arose in this case at the trial level was that none of the parties was allowed to research the issue the Judge decided was of constitutional portions. They were not allowed to brief the issue, and they were not allowed to argue the matter to the court before the Judge made her decision. This denied them due process.

The majority rule is that *sua sponte* rulings are not favored. The Trial Court relied on CTC 1.5.05 to give her the authority to raise the issue of constitutionality *sua sponte*; a statute, interestingly enough she refused to use to recognize a long practice of the Court to allow deferred prosecutions in the first place. Reliance on this statute is misplaced. CTC 1.5.05 allows the Court to create a procedure where no statutory one exists. Here, the Court created a law, i.e. that the statute allows *sua sponte* reviews. Based on the above, we hold that the portion of *CCT v. LaCourse*, *supra*, that states a judge may raise a legal issue *sua sponte* is overruled. The better rule is that of *U.S. v. Raines*, *supra*, and we so adopt it.

C) DID THE CBC OVERSTEP ITS CONSTITUTIONAL RESPONSIBILITIES BY ENACTING THE COURT-LIMITING LANGUAGE IN ITS DEFERRED PROSECUTION LAW?[57]

This issue brings squarely into review what are the parameters of the CBC's legislative powers or responsibilities, as well as prosecutorial discretion. The Constitution provides that the CBC has the responsibility to enact laws to protect the health and welfare of the Tribes. Constitution, Section V. The Law and Order Code was enacted under such powers. CTC, section 1-1-1. It is the Court's constitutional responsibility to enforce and interpret these laws. Constitution, Article VIII.

The language in question here is Section 2 of Resolution 1996-313, which states the Court shall grant deferred prosecutions presented by the prosecutor's office. The Trial Court takes issue with the fact that there are no guidelines for the Court to follow, and no allowance for discretion in interpreting this section of the statute.

There is no question it is the CBC's responsibility to enact laws. When a law is challenged we first look at our principles of statutory construction. We are directed that "any other issues of construction shall be handled in accordance with generally accepted principles of construction giving due regard for the underlying principles and purposes of this code." CTC, section 1-1-7(h). The majority rule of other state and federal jurisdictions, to which we look for guidance, is that a statute is presumed constitutional, and it is the party who is challenging its responsibility to show it is unconstitutional, beyond a reasonable doubt. *See State v. Thorne*, 129 Wn.2d 736 (1996).

This raises the problem with this issue. In order to assert the CBC overstepped its bounds in passing the statute, an injured party must allege the unconstitutionality of it. There is no injured party here. The Judge is not a party; the Court is not a party. It appears the judge took the matter personally by reviewing the statute *sua sponte*. As we stated earlier, the general rule is a judge is not to raise constitutional issue *sua sponte*. The statute is not vague on

[57] The substantive research on this issue, as well as substantive reasoning was developed by Justice Elizabeth Fry who is no longer on the Court of Appeals Bench.

its face. It is not ambiguous. It is within the responsibilities of the CBC to pass the statute. We so hold.

This issue raises another one. That is, the responsibility of the CBC to provide for prosecutorial discretion. Section 2 recognizes the long-standing doctrine of prosecutorial discretion. We have upheld this doctrine several times since the filing of this appeal so long ago. *See, eg. CCT v Boyd*, 10 CCAR 8, 5 CTCR 21, 36 ILR 6099 (2009) (The trial court judge overstepped the boundaries between judicial and prosecutorial discretion, which we have long-recognized in this Court. See, *Mellon v. CCT*, 8 CCAR 1, 10, 4 CTCR 17, 32 ILR 6021 (2005); *CCT v. Laramie*, 4 CCAR 22, 2 CTCR 66, 24 ILR 6181 (1997); and *Sonnenberg v. Colville Tribal Court*, 5 CCAR 9, 16, 3 CTCR 9, 26 ILR 6073 (1999).)[58]

CONCLUSION

This case is long over-due. The Court holds that the doctrine of separation of powers, when looked at as a designation of responsibilities of the different leaders of the Tribes, is a viable doctrine in our Courts. We find that Judges should not, as a general rule, overturn laws duly enacted by the CBC, *sua sponte,* thereby overturning that part of *CCT v. LaCourse* which states otherwise. Finally, the CBC did not overstep its bounds in enacting the deferred prosecution statute.

Based on the foregoing, we REVERSE and REMAND for an order dismissing the criminal charges herein against Appellant Melvin Meusy and Appellee Jason Thomas.

It is SO ORDERED.

58

The Court offers an erroneous analogy in its opinion, stating to require the Court to accept all proffered deferred prosecutions of the prosecutor is like requiring the Court to accept all plea bargains. Both would wrongfully restrain the Court similarly from exercising its discretion. The prosecutor, under his constitutional responsibilities derived from the CBC, has discretion who to prosecute. When a plea bargain is offered to the Court, the prosecutor has already exercised his discretion and brings the matter to the Court for its resolution under the law. That is the difference.

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David DESAUTEL and Crystal OLNEY, Appellants,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP11-011 and AP11-009, 5 CTCR 40

10 CCAR 72

[Daryl Rodrigues, Office of Public Defender, for Appellants.
Melissa Simonsen & Curtis Slatina, Office of Prosecuting Attorney, for Appellees.
Trial Court Case Nos. CR-2011-33542, CR-2010-33525]

Argued July 15, 2011. Decided November 28, 2011.

Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Dennis L. Nelson

These matters came before the Court of Appeals (COA) for review of two Tribal Court orders, one entered on March 15, 2011 (Olney) and the second entered April 5, 2011 (Desautel). Appellants were represented by Daryl Rodrigues, Office of Public Defender at Oral Argument. Appellee was represented by Melissa Simonsen and Curtis Slatina, Office of Prosecuting Attorney.

Oral Arguments were held on July 15, 2011 before Chief Justice Anita Dupris, Justice David C. Bonga and Justice Dennis L. Nelson.

Dupris, CJ

SUMMARY

Defendant/Appellant Olney (Olney) was charged by criminal complaint on December 14, 2010. On the same day she was appointed services of the Public Defender's Office. The Order Appointing Public Defender included imposition of a $75.00 attorney fee. Olney went to trial on March 15, 2011. After the Prosecution's case in chief, Olney moved for a directed verdict. The motion was granted and an Order Dismissing the case entered, with the provision that the case would not be dismissed until the $75 fee was paid. Olney timely filed a Notice of Appeal, citing several issues. This opinion will only discuss and decide the issue of attorney fees. The other issues will be decided in a separate order.

Defendant/Appellant Desautel (Desautel) was charged by criminal complaint on December 27, 2010. That same day, the Public Defender's Office was appointed to represent Desautel. The Order Appointing Public Defender included imposition of a $200.00 attorney fee. Appellant went to trial, was found not guilty by a jury, and an Order Dismissing Case was entered on April 5, 2011. The Order included a provision that the case would not be dismissed until the $200.00 was paid by the Defendant/Appellant. Defendant/Appellant timely appealed.

Based on the reasoning below, we reverse the imposition of attorney fees and remand.

STANDARD OF REVIEW

The issue before this Court is a question of law, therefore we will review *de novo*. *Simmons v. CCT*, 6 CCAR 30, 3 CTCR 45, 29 ILR 6065 (2002); *Palmer v. Millard, et al.*, 3 CCAR 26, 2 CTCR 14, (1996); *Naff v. CCT*, 2 CCAR 50, 2 CTCR 8, 22 ILR 6031 (1995).

ISSUE[59]

Does the Trial Court have authority to collect attorney fees before entering a not guilty verdict?

DISCUSSION

Appellants in both of these cases argue that the requirement of attorney fees being paid before a case will be dismissed is a violation of due process. Desautel was found not guilty by a jury at trial. Olney moved for a directed verdict and the trial judge granted the motion. In both instances a dismissal order was entered with the stipulation that the dismissal was contingent on the defendant paying an attorney fee before the dismissal would be recognized.

A review of the laws of the Tribes does not reveal any statute, court rule, contract, written procedures, or case law that allows the Trial Court to impose what it calls attorney fees in criminal cases. The Colville Tribal Law and Order Code (CTLOC) does authorize the imposition of attorney fees by the Court in certain civil matters, e.g. blood correction[60] and crime victim compensation[61]. Appellees have produced no statute, contract or other written document which would authorize the Court to impose attorney fees in criminal cases.

We are urged to adopt the American Rule governing awards of attorney fees. The rule prohibits recovery of attorney's fees unless there is a specific statute empowering the court to make such an award. In *Dayton v. Farmers Ins. Group*, 14 Wash.2d 277, 280, 876 P.2d 896 (1994), the WA Supreme Court adopted the American Rule saying that a court has no authority to award attorney fees in the absence of a contract, statute, or recognized ground of equity providing for fee recovery. We agree. Without a written rule, the Court's assessment of attorney fees against a defendant may appear to be arbitrary and capricious in violation of a defendant's due process rights.

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[59] Initially there was a second issue, but the parties abandoned it when they submitted their proposed briefing schedule and statement of issues.

[60] CTLOC 8-1-207, Court Costs, Attorney Fees. If the Court rules against an appellant in any appal under this Chapter, the appellant shall pay all court costs and the *reasonable attorney fees* of the Tribes expended in defending against the appeal. If the Court rules for an appellee in any appal under this section, each party shall bear his or her own expenses - unless there is a finding that the Tribes acted in bad faith in disenrolling or refusing to enroll. *Emphasis added.*

[61] CTLOC 3-5-21, Costs in Civil Actions. The Tribal Court may access the accruing costs of the litigation against the person against whom judgment is rendered. Such costs may include the expenses of voluntary witnesses for which either part6y may be responsible under this Chapter, *attorney fees*, and any other incidental expenses or fees connected with the procedure required as the Tribal Court may direct. *Emphasis added.*

We find there is no legal authority to assess "attorney fees" on defendants who are appointed a spokesman from the public defender's office in criminal cases.

The Public Defender's Office is independent from the court system. It appears the Court asks some questions of the defendant regarding his ability to pay a fee prior to appointing the Public Defender's Office. There are no procedures in place which specifies how much an individual will pay, a time limit for payment and what will happen if payment is not made. More importantly, there is no direct correlation between the fee and the legal representation received by the defendants from the Public Defender's Office. The money is placed in the Tribes' general funds account, not the Public Defender's Office's account.

Other procedural problems exist under the current system. For instance, in both of the instant cases, the defendants were not given notice when the fees were due or what would happen if the fees weren't paid. There are no procedures for challenging the fees imposed.

Appellee argues that neither the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.* (1968), nor the Colville Tribal Civil Rights Act, CTC § 1-5-1 *et seq.*, give defendants a right to free representation by an attorney. In these cases, Desautel was questioned by the judge at arraignment and he agreed to pay the $200 attorney fee; Ms. Olney also accepted appointment of an attorney and was assessed a $75.00 attorney fee. In allowing the Court to keep a case open pending the payment of the fees, as done here, Appellee states it preserved the Court's ability to collect the fee.

This is not a case of a guaranteed right to free counsel. The Tribes has a well-established Public Defender's Office, which has been in place for longer than ten years. This is a matter of what fees the Trial Court may access a defendant under our laws. It is a question of what procedures are in place that meet due process standards when a Court assesses a fee. In these cases there are no laws that would allow the assessment of what the Tribal Court calls "attorneys fees" which are never given to a legal representative of the defendants. There are no procedures in place to allow for a fair and objective assessment of such fees, were they allowed to be assessed.

Our Court has long-held we will not award attorney fees without express authority. *See, eg., CCT v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (01-26-1995). (The defendant presented no law to support her position that the Court had any authority to award attorney fees in a Fish and Wildlife violation case.) It appears, and we so hold, that we already follow the American Rule. Attorney fees cannot be awarded without express written authority to award attorney fees, *i.e.* contract, statute , or a recognized ground of equity providing for fee recovery. The Trial Court is without authority to impose attorney fees in criminal cases in which the Public Defender's Office is appointed, and the language requiring the payment of such fees before the judgment is final should be stricken from the judgments of both defendants herein.

Based on the foregoing, we find that the Trial Court is without authority to impose attorney fees for criminal defendants without specific authorization, and we REVERSE and REMAND to the Trial Court for action consistent with this decision.

It is so ORDERED.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Crystal OLNEY, Appellee.

Case No. AP11-010, 5 CTCR 41, 38 ILR 6071

10 CCAR 75

[M. Simonsen & C. Slatina, Office of Prosecuting Attorney, appeared for Appellant.
D. Rodrigues, Office of Public Defender, appeared for Appellee.
Trial Court case number CR-2010-33525]

Oral argument held July 15, 2011. Decided November 21, 2011.

Before Chief Justice Anita Dupris, Justice Dave Bonga and Justice Dennis L. Nelson

Nelson, J.

Crystal Olney was tried before a jury on the charge of Physical Control, CTLOC 3-3-3 & 3-3-1 (which incorporates by reference RCW 46.61.504, Actual Physical Control). Ms. Olney moved for a directed verdict after the prosecution had rested its case in chief: the motion was granted and the case dismissed. Colville Confederated Tribes (CCT) did not make an exception to the order, but appeals the directed verdict. We reverse and remand for a new trial.

ISSUES

We have two issues before us:

1. Whether an appeal is precluded when a party losing a motion fails to note an objection to the ruling; and

2. Whether the trial court judge erred at law when granting the motion for a directed verdict leading to the dismissal of the case against the defendant.

FACTS

On December 11, 2011, Officer Marchand of the Colville Tribal Police located a van in a ditch off the roadway at Mile Post .5 of the Moses Meadows/Lyman Lake Road. Crystal Olney was in the middle seat of the van, the engine was not running, and the keys were found on the floor of the van.

When tribal police arrived they found the engine still warm and heard Ms. Olney ask "where have you been? I called you (a long time ago)." Ms. Olney smelled of alcohol and was given a BAC test, the result of which was .101.

She was charged with violating Colville Law and Order Code (CTLOC), Sections 3-3-3 and 3-3-1 (which incorporates by reference RCW 46.61.504, Actual Physical Control). The complaint against her acknowledged the affirmative defense allowed by Section 3-3-3 (Vehicle Safely Off Roadway).

Ms. Olney moved for a directed verdict after Officer Marchand testified to the above. The written motion alleged that Officer Marchand's testimony showed the van to be safely off the roadway and that Ms. Olney did not have physical possession of the van while under the influence of alcohol. The prosecution argued against the motion. The motion was granted and the case dismissed. The prosecution did not preserve its objection.

STANDARD OF REVIEW

Whether "an appeal is precluded where the losing party to a motion fails to note an objection to the ruling" is an issue at law. There is sound reasoning in the position that questions of law are reviewed under the non-deferential *de novo* standard." *United States v. McConney*, 726 F.2d 195 (9th Cir. 1984); *CCT v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995).

"In reviewing a trial court decision denying either a motion for a directed verdict... the appellate court applies the same standard as the trial court: that is, whether there is sufficient evidence that could support a verdict. *Stiley v. Block*, 130 Wn.2d 486, 504, 925 Pl2d 194 (1996); *Hizey v. Carpenter*, 119 Wn.2d 251, 271 830 Pl2d 646 (1992); State v. Bourne, 90 Wn. App. 963, 967-68, 954 P.2d 366 (1998)."

In other words, we review the matter de novo.

DISCUSSION

The issues before us are a matter of first impression before this court. When there is no statutory or case law applicable to an issue before this court, it may look to other jurisdictions for instruction. CTLOC 2-2-102.

1. Failure to preserve objection:

Colville Tribal Court of Appeals Court Rule (COACR) 7(a)(6) states: "Grounds for requesting a new trial or a limited appeal on issues of law and/or fact shall be limited to (an) ...Error of law occurring at trial and excepted to at any time by the party ".

Ms. Olney contends that the prosecution did not note an exception or object to the Trial Court's granting a directed verdict and dismissing the case, thus not perfecting the right to appeal. The prosecution opposed the motion at the time it was heard by the trial court judge.

This court has long adhered to the philosophy of "substance over form." Tribal courts nationwide are

faced every day with *pro se* parties or advocates/spokespersons representing them who have no formal training at law. Accordingly, tribal courts are forced to be flexible, but just, in the application of the law.

COACR 1 provides that "While these rules are specific, the Court of Appeals may allow flexibility in their application." A similar provision is set forth in the Washington State Rules of Appellate Procedure. RAP 1.2(a) states that the appellate rules of procedure "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands...."

Such was the case in *Washington v. Olson*, 126 Wash.2d 315, 893 P.2d 629 (1995). That court stated:

> "It is clear from the language of RAP 1.2(a), and the cases decided by this Court, that an appellate court may exercise its discretion to consider cases and issues on their merits. This is true despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure. This discretion, moreover, should normally be exercised unless there are compelling reasons not to do so. In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue." at P. 323

We find that the nature of the appeal is clear, that this Court is not greatly inconvenienced, and that Ms. Olney is not unduly prejudiced by allowing the appeal to proceed.

2. Whether the Trial Court judge erred when granting the motion for a directed verdict

The defendant, as noted, moved for a directed verdict after the prosecution rested its case in chief at trial. The prosecution objected, arguments were made, and the Trial Court then dismissed the charge of Actual Physical Control with prejudice.

Appellate Courts of the State of Washington have considered numerous cases regarding directed verdicts. A succinct summary of the law regarding directed verdicts in the State of Washington can be found in *Dunnell v. Department of Social and Health Services*, 118 Wash. App. 1019 (Wash. App. Div. 2, 2003). That court determined that:

> "A directed verdict is appropriate only if as a matter of law there is no substantial evidence of reasonable inference to sustain a verdict for the nonmoving party when viewing the evidence in the light most favorable to the nonmoving party. *Hisey v. Carpenter*, 119 Wn.2d 846, 830 P.2d 646 (1992); *Levy v. North Am. Co.*, 90 Wn.2d 846, 851, 586 P.2d 845 (1978). Substantial evidence means evidence that evidence would convince "an unprejudiced, thinking mind." *Hizey* 119 Wn.2d at 272 (quoting Indus. *Indem. Co. of Northwest, Inc. v. Kallevig*, 114, Wn.2d 907, 916, 792 P.2d 520 (1990). At the same time, if any justifiable evidence on which reasonable minds might reach conclusions that sustain the verdict, the question is for the jury." *Levy* at P.851."

Officer Marchand's testimony showed that Ms. Olney had a BAC reading of .101 percent; that she had been with the vehicle for some time while waiting for the police; that the engine was still warm; and that she was the sole occupant of the vehicle when it was found. Reasonable minds could infer that she had been operating the van while under the influence of alcohol and, thus, guilty of Physical Control.

The affirmative defense to the charge of Actual Physical Custody is that the vehicle was safely off the roadway. CTLOC 3-3-3. This is a question of fact. In criminal jury trials, the jury determines matters of fact. A judge may grant a motion for a directed verdict only where no reasonable inference that will sustain a jury verdict in favor of the non-moving party. *Levy, supra*.

A jury could determine that a vehicle in a ditch alongside a roadway is not "safely off" the roadway for the reason that emergency vehicles blocking or partially blocking the roadway cause other vehicles to slow down. A jury could easily infer that drivers of oncoming vehicles could cause their own accident while looking to see what has happened.

In this instance, the question whether Ms. Olney's van was safely off the roadway was a question for the jury to determine. " A trial court has no discretion in ruling on a motion for a directed verdict, but must accept as true the non-moving party's evidence and draw all favorable inferences arising from it." *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 335, 779 P.2d 249 (1939). Simply put,it is not the trial court's function to determine fact. It is the sole province of the jury.

CONCLUSION

Accordingly, the Trial Court's order dismissing the complaint herein is REVERSED. This matter is REMANDED for a new trial.