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FORT PECK
TRIBAL COURT OF APPEALS

**FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA**

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| Daniel Franklin, Appellant, Vs. Alexandria Longee Appellee. | CAUSE NO. AP #813 ORDER REVERSING AND REMANDING FOR NEW HEARING |
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Appeal from the Fort Peck Tribal Court, Imogene Lilly, Presiding Judge.
Appellant Daniel Franklin., appearing through Legal Advocate Kris Fourstar.
Appellee Alexandria Longee, appearing pro se.
Before Erin Shanley, Chief Justice and B.J. Jones, Associate Justice.

BACKGROUND

¶ 1 This matter came before the Fort Peck Court of Appeals on a Notice of Appeal filed May 3, 2021 by Appellant Franklin, requesting review of an order dated April 20, 2021 modifying a custody order between the Parties after a hearing which the Appellant failed to participate in due to his incarceration. Appellant alleges that his due process rights were violated when he was served on April 10, 2021 by certified mail for a hearing on April 14, 2021. Excluding the

date of service and the weekend, this notice was approximately two days before the hearing. Appellant claims that his common-law wife attempted to contact the Court for a continuance and was not able to obtain one. The Tribal Court found that Defendant waived his right to contest the Petition to Modify Custody when he failed to appear after being served by certified mail. Custody Order, F21-01-014, at 2. Upon filing his Petition for Review, Appellant requested the Tribal Court to stay the Order pending appeal, however the Tribal Court did not issue an Order on the matter.

¶ 2 This Court granted review of this matter on June 14th, 2021 and granted a temporary stay pending appeal. In accordance with this Court's briefing schedule, Appellant filed his brief in support of appeal on June 29, 2021. Appellee did not file a response.

STATEMENT OF JURISDICTION

¶ 3 The Fort Peck Appellate Court may review final orders from the Fort Peck Tribal Court. 2 CCOJ §202. The Custody Order issued in this matter is a final order reviewable by this Court.

STANDARD OF REVIEW

¶ 4 This Court reviews de novo all determinations of the lower court on matters of law, "but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence". *Id.* The due

process issue regarding adequate notice is a question of law and reviewed de novo.

ISSUES

¶ 5 The following issue has been raised on appeal:

- 1) Did the Tribal Court violate Appellant's right to due process under the Indian Civil Rights Act when he received notice of the hearing to modify custody four days prior to the hearing?

DISCUSSION

¶ 6 This Court has consistently emphasized the importance of providing parties adequate notice and an opportunity to be heard as cornerstones of due process. *Fort Peck Tribes v. John Morales*, APP No. 307 (Mar. 17 2000) (“Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property”)(quoting *Cary v. Piphus*, 435 U.S. 247, 259 (1978)); *In the Matter of A.P. Jr., A.N.P, and A.L.P.*, APP No. 740 (Oct 4 2017) (finding lack of notice in a child custody case a violation of due process).

¶ 7 This Court has recently held that a party cannot appeal a judgment entered against him if he failed to appear at the hearing, but rather that his remedy is to seek the lower court to vacate the order. *See In the Matter of N.C.*, APP 809 (Jul. 3 2021); *In the Matter of L.H., A.H.*, APP810 (Mar. 3 2021); *In the Matter of R.B., J.B., B.L.*, APP 797 (Jul. 23 2020). However, in this case, the

Appellant's contention is not regarding the factual basis for his failure to appear, but rather that he was denied adequate notice of the proceeding thus triggering an issue of due process.

¶ 8 In another matter, *In the Matter of L.M.D.*, APP 699 (Nov. 18 2016), the Appellant submitted that the Tribal Court violated his due process when he was served on August 26, 2015 for a hearing that was held on September 22, 2015. Appellant ultimately failed to appear for the hearing due to a prior work commitment. This Court concluded that the Appellant in that case had ample time to request a continuance of the hearing date and his failure to do so and subsequent failure to appear did not constitute an error of the court, but his alone. The case at hand is different.

¶ 9 Although incarceration should not excuse one's appearance for Court, the fact that Appellant only received four days' notification for a hearing that was taking place in another jurisdiction does not appear to be sufficient notice particularly in light of the notice required for temporary custody. The Fort Peck Tribal Code requires ten-day's notice for an initial hearing on temporary custody of a minor child, see Title 10, Chapter 3, §308, but does not expound upon the notice required to modify an existing custody order. It would be illogical that the Code would mandate at least ten-days' notice to issue a temporary order that can be contested at a permanent hearing held later, yet not require the same for a permanent modification hearing. For that reason, this Court finds that

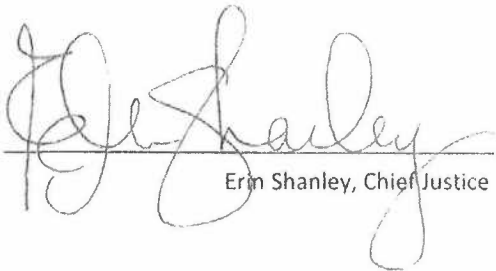
Appellant's notice was not sufficient to protect his right to due process and remands for a new hearing on the Petition to Modify Custody.

ORDER

¶ 10 For the above-mentioned reasons, this Court REVERSES the Custody Order issued in this matter and REMANDS for a new hearing on the Petition to Modify Custody, providing at least 10 days advance notice of such hearing consistent with the rights in the Tribal Code for temporary custody.

SO ORDER this 7th day of September 2021.

FORT PECK COURT OF APPEALS



Erin Shanley, Chief Justice



Associate Justice