

Appellate Court
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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**

IN THE MATTER OF: A.P. Jr. (DOB: 9/16/2012), A.N.P. (DOB: 10/11/2014), and A.L.P. (DOB: 03/07/2016) MARIAH AND AUSTIN PIPE, APPELLANTS, vs. FORT PECK TRIBES, APPELLEE	CAUSE NO. AP # 740 ORDER REVERSING IN PART, AFFIRMING IN PART, AND REMANDING
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Appeal from the Fort Peck Tribal Court, Imogene Lilley, Presiding Judge.

Appellant appeared by and through Tribal Public Defender, Terry Boyd

Appellee appeared by and through Tribal Prosecutors, Lafon Copenhaver and David Murgudich.

Before Smith, Chief Justice and Shanley, Associate Justice

BACKGROUND

¶1 On March 7, 2016, BIA Social Services received a referral on Appellants, Mariah and Austin Pipe due to their youngest child A.P. (D.O.B. 3/7/16) testing

positive for methamphetamine at birth due to prenatal exposure. BIA Social Services substantiated the allegations and filed a Petition with the Tribal Court to remove all three minor children from the home and place them into Protective Custody. The Petition was subsequently granted and the children were declared wards of the court with custody granted to Social Services to place the children in the least restrictive setting.

¶2 On April 20, 2016, Mariah and Austin Pipe Sr. were referred to Fort Peck Family Healing to Wellness Court ("Wellness Court"). At the time, Mariah Pipe did not have any pending criminal charges but Austin Pipe Sr. did have criminal charges which were also being addressed by the Wellness Court. The Appellants were accepted into Wellness Court and a Joint Motion to Transfer the family court case into the Wellness Court was signed by the Public Defender, on behalf of Appellants, the Tribal Prosecutor, and Judge Lilley. The Wellness Court Team entered into a contract with the Appellants wherein the Appellants would attend court weekly and engage in treatment services in order to address Mr. Pipe's criminal charges and reunite their family.

¶3 On January 31, 2017, Appellants filed a Motion to Vacate Review Hearings in Family Court on the basis that the transfer to Wellness Court relieved the Family Court of jurisdiction. The Tribes initial response filed on February 7, 2017 indicated that the Tribes agreed with Appellants' position that the Family Court lacked jurisdiction. A Review Hearing subsequently was held on February 15, 2017 for Appellants' Family Court case. At that hearing, Judge Lilley orally issued an Order

concluding that the Family Court no longer had jurisdiction and the case should be handled in Wellness Court.

¶4 Contrary to the Oral Order conceding a lack of Jurisdiction, however, the Family Court held a permanency hearing in the Appellants' family court case on March 7, 2017. Notice of the permanency hearing was not provided to the Appellants and they did not appear. The Permanency Hearing Order, which is the basis for this appeal, indicates the Family Court has exclusive jurisdiction pursuant to 9 CCOJ § 101. The Order also states that the parents were given an opportunity to be heard at the permanency hearing. The Permanency Order determined that the children remained at risk for being abused and/or neglected and therefore determined they should be designated "youth in need of care" according to Tribal Law. It also found that they were eligible for Title IV-E status pursuant to the agreement between the Fort Peck Tribes and Montana Department of Health and Human Services, Child and Family Services, and the Bureau of Indian Affairs. The Family Court awarded custody to BIA with instruction to place the children in the least restrictive setting and authorized BIA to share confidential information with all professionals involved with the family.

¶5 Appellants' filed a notice of appeal on March 16, 2017. Oral arguments were heard on this matter July 17, 2017.

STATEMENT OF JURISDICTION

¶6 The Fort Peck Appellate Court may review final orders from the Fort Peck Tribal Court. 2 CCOJ §202. Although a Permanency Order does not dispose of a child welfare matter, it is considered a final order for purposes of appeal.

STANDARD OF REVIEW

¶7 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 issues raised in the matter are all questions of law and reviewed de novo.

ISSUES

¶8 The following issues have been raised on appeal:

- 1) Did the Tribal Court, Family Division, lack jurisdiction to conduct Review and Permanency Hearings in the Appellant Pipes' child welfare case when the case was transferred to Wellness Court on a stipulated motion filed by the Pipes and the Fort Peck Tribes and approved by the Tribal Court Judge?
- 2) Did the Family Court violate Mariah and Austin Pipe's rights to due process by failing to provide them notice of the Permanency Hearing and an opportunity to appear and participate?
- 3) Did the Family Court violate the Appellants' rights to privacy by allowing the Social Worker to testify in the child welfare case about confidential information obtained from Wellness Court?

DISCUSSION

¶9 The Fort Peck Tribal Youth Code, Title 9, Chapters 4-8 cover cases of alleged abuse, neglect or dependency. Title 9, § 101 states that "the Fort Peck Tribal Court, Youth Division shall have exclusive jurisdiction over all matters involving Indian

youth covered by this Title..." 9 CCOJ 101. Therefore the Family Court, referred to as the Youth Division in the Tribal Code, clearly has original and exclusive jurisdiction over child welfare cases, such as the one at hand, where abuse and/or neglect is alleged and the children are domiciled within the exterior boundaries of the Fort Peck Reservation.

¶10 The Wellness Court is a specialized court that creates a diversion to the normal justice system by involving many entities, including the judiciary, social workers, and service providers that work together on a multi-faceted approach to assist addicted individuals with long-term recovery. The Fort Peck Tribal Code states that one purpose and policy of the Wellness Court is, "To offer treatment to both juvenile and adult offenders who have committed a crime that is directly or indirectly related to a substance abuse or addiction issue." 10 CCOJ 1001. The Wellness Court jurisdiction is based on the Fort Peck Tribal Code 6 CCOJ § 1003, which reads:

- (a) The Wellness Court shall have jurisdiction over any case that is transferred to it by the Fort Peck Tribal Court. Upon successful completion of the Wellness Court program, or at such time when a participant of the Wellness Court becomes ineligible to continue in the program as set out in the Wellness Court policies and procedures, the Wellness Court will transfer jurisdiction of each case back to the Fort Peck Tribal Court for any final disposition.
- (b) Referrals to the Wellness Court shall be made by prosecutors, public defenders, social workers, and case managers who work within the Fort Peck tribal Court system once a criminal defendant has plead guilty to or has been convicted of at least one criminal charge where alcohol or drugs is at issue. Wellness Court referrals may be made as a part of a conditional sentence or may be made as part of a mixed or suspended sentence.

- (c) Once a referral is made to Wellness Court, the Wellness Court caseworker shall be assigned to the case to evaluate the eligibility of the individual and shall report any ineligible individuals back to the appropriate court.

¶11 The statute defining the jurisdiction of the Wellness Court clearly and explicitly indicates that participation in Wellness Courts is narrowly focused on criminal defendants who have plead guilty or been convicted of a criminal charge involving alcohol or drugs. The language of this statute creates some ambiguities however, as it gives social workers the ability to make referrals to the Wellness Court when a social worker would not necessarily be privy to a defendant's criminal case. The Statute also refers to a report being made "back to the appropriate court," which suggests that the criminal court is not the only court making referrals. 6 CCOJ § 1003(c). This jurisdictional statute is further complicated when considered together with the Wellness Court policies and procedures, which include in its mission, vision, and goals the purpose of reuniting families and protecting the best interests of children.

¶12 The Wellness Court Mission Statement, defined in the Policy and Procedure Manual states:

The Family Healing to Wellness Court will effectively use community resources to rebuild healthy families and communities for future generations through our commitment to providing education, treatment, and resources to our members, and by strengthening our values and traditions. P. 5

¶13 Furthermore, the Policies and Procedures indicate that the rationale behind the Wellness Court is to, "...foster a collaborative approach to justice, advocate early

intervention and treatment...protect the best interests of the child...and to help the parent(s) address issues of substance abuse and dependence to provide a safe and nurturing environment for the child. P. 6. Similarly, Goal 3 of the Wellness Court is defined as, "The re-unification of families with their children, in a safe and alcohol and drug free environment." P. 6.

¶14 The Wellness Court clearly promotes reunification of families. Nevertheless, for reasons that will be further analyzed below, transferring child welfare cases to the Wellness Court is problematic in light of recognized rights and contrary to the express language found in the Fort Peck Tribal Code. However, that does not mean that parents who have been accepted into Wellness Court based on a companion criminal case should not have their compliance with Wellness Court services be counted towards requirements imposed by any agreed to reunification plan with social services. If parents engage in services through Wellness Court, the mission and goal of reuniting families is still met when these service satisfy the identified reunification conditions, without the necessity of officially transferring jurisdiction from Family Court to Wellness Court.

¶15 The Fort Peck Tribal Code recognizes the importance of due process in several section, including in the Interlocutory Appeals Rule which allows review of due process violations under the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301(a)(8). CCOJ Appendix3, Rule 6. As stated by this Court many times before, notice and an opportunity to be heard are cornerstones of due process. Fort Peck Tribes vs. John Morales, App No. 307 (Mar. 17, 2000). In *Morales*, this Court stated

...At a minimum, this duty requires that all parties have 'notice' when their liberty or property is at risk *and* an opportunity to make their own claims or defense. Thus, we agree with the principle set forth in *Twining v. New Jersey*, 211 U.S. 78, 111 (1908) which holds that notice and a reasonable opportunity to be heard to present one's claim or defense have been fundamental conditions prescribed in all systems of law by civilized countries. We also subscribe to the notion that, "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," *Carey v. Piphus*, 435 U.S. 247, 259 (1978). In essence, the 'concept of due process exists to protect individuals against arbitrary action by their government'. *Berry v. Arapahoe & Shoshone Tribes* (1976, DC Wyo.) 420 F. Supp. 934." Morales at ¶ 7.

¶16 Clearly, the loss of custody of one's own children falls into the category of recognized rights to which ones is entitled to due process of the law. In the case at hand, there has been no documentary evidence, nor have the Tribe Tribes alleged, that the Appellants were provided notice of the Permanency Hearing and had an opportunity to participate. Given an absence of notice and an opportunity to be heard when their children's custody was at issue, this Court concludes the Family Court violated Appellants' due process rights in connection with the Permanency Hearing.

¶17 The Appellants further argue that their confidentiality was violated by BIA social workers when they shared information in Family Court derived from Wellness Court. The Appellants cite 6 CCOJ § 1004, which reads:

The Wellness Court shall *not* be a court of record. Any information obtained, used or disclosed by a member of the Wellness Court Team, including the participant, while the participant is under the jurisdiction of the Wellness Court shall not be used as evidence against the participant in any other proceeding in the Fort Peck Tribal Court or any other court in any other jurisdiction. All Wellness Court records are privileged and confidential and shall not be disclosed except to the members of the Wellness Court

Team. The Rules of Evidence adopted by the Fort Peck Tribes shall not apply in any Wellness Court proceedings.

¶18 When a criminal defendant is accepted into Wellness Court, based on the statutory criteria, they must sign a waiver. This waiver allows all staff working on their behalf to share confidential information. The issues becomes whether this information can be freely shared beyond the Wellness Court system.

¶19 A primary reason the Family Court would encourage parents involved in Family Court, whom also have criminal charges, to participate in Wellness Court is because of the availability of wrap-around services for the family. Nothing in the tribal code would prohibit the Family Court from urging parents with criminal charges to enter the Wellness Court to benefit from services which could further the reunification process. However, the Family Court Judge can only return the children to the care of a parent or guardians from whom they were removed when there is sufficient evidence showing that it is in the children's best interest to do so. In order to evaluate the best interest and safety issues in connection with a child's placement, it would be necessary for the court to be informed of what services are being offered to the parent(s) or guardian(s) through Wellness Court and whether the parent(s) or guardian(s) are actively and successfully utilizing those services. Although the Appellants suggest that this issue could be remedied by allowing child welfare cases to be heard within the Wellness Court, there are various reasons why this Court disagrees with that position in light of privacy recognized rights in abuse and neglect situations.

¶20 The Fort Peck Comprehensive Code of Justice mandates confidentiality in all Family Court cases. Title 9, Section 309 and 507 state:

In all proceedings held pursuant to this Title,

- (a) The hearings shall be conducted in closed and private chambers;
- (b) The names of any youth involved shall not be published; and
- (c) A record of all proceedings shall be made and preserved with the Court. All Court records concerning youth under this Title, including social, medical, and psychological reports, shall be kept confidential and shall be open for inspection only upon Court order ...

¶21 When the Appellants entered into Wellness Court they signed a waiver consenting to share their confidential information with the Wellness Court Team and professionals with whom they receive services. This waiver, however, is very limited given that:

[a]ny information obtained, used or disclosed by a member of the Wellness Court Team, including the participant, while the participant is under the jurisdiction of the Wellness Court shall not be used as evidence against the participant in any other proceeding in the Fort Peck Tribal Court or any other court in any other jurisdiction.
6 CCOJ §1004.

¶22 In addition, the Appellants did not, and cannot, waive the confidentiality of their children, nor the confidentiality of other parties to the youth protective custody proceedings. Sharing information about their children; a non-offending parent who is not a Wellness Court participant; or anyone else who may be involved in a child welfare case would be a violation of the law and is one primary reason why child welfare cases cannot be held within the confines of the Wellness Court. In addition to the prohibition against sharing confidential information associated with a child welfare matter with the Wellness Court, a non-offending parent or even an offending

parent who has not been accepted into Wellness Court would still retain the due process right to be notified and have an opportunity to participate in a child welfare case involving his/her child(ren). Transferring child welfare cases to Wellness Court, without the involvement of all necessary parties violates their recognized due process rights, as well as the children's confidentiality.

¶23 Contrary to the Wellness Court, which is not a court of record, 6 CCOJ §1004, hearings regarding the welfare of children must be recorded and preserved. 9 CCOJ 309(c). The importance of preserving a recording in this matter is to ensure a parties' rights to appeal. It is also important to ensure that the Court and service providers are meeting their obligation to children under all applicable laws; that appropriate standards of evidence are being complied with when evaluating the information provided; and statutorily imposed time frames are being complied with when addressing the child welfare matter. Any type of meaningful review would be impossible to achieve without a record of the proceedings, which directly implicates fundamental due process requirements.

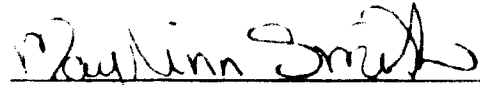
ORDER

¶24 Based on the foregoing analysis, this Court REVERSES the lower court's verbal order conceding a lack of jurisdiction over the abuse and neglect matter and AFFIRMS the lower court's finding that it had original and exclusive jurisdiction to conduct a permanency hearing. However, due to a lack of notice to Appellants, this Court hereby VACATES the Permanency Order issued on March 9, 2017 and REMANDS this matter to the Family Court for a new hearing consistent with this opinion and due process requirements.

SO ORDER this 4th day of October 2017.

FORT PECK COURT OF APPEALS

BY

A handwritten signature in cursive script, appearing to read "Maylinn Smith", written over a horizontal line.

Maylinn Smith, Chief Justice

A handwritten signature in cursive script, appearing to read "Erin Shanley", written over a horizontal line.

Erin Shanley, Associate Justice