

FILED

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**Fort Peck Tribal Court
of Appeals**

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

<p>ANDREONA CORONA, Appellant</p> <p>v.</p> <p>FORT PECK TRIBES, Appellees</p> <p>And Concerning:</p> <p>In the Interest of K.C. (DOB 12/18/13), A.C.(DOB 3/8/15), (, K.B. (DOB 10/14/12), and K.B. (DOB 12/12/09)</p> <p>Minor Indian Children</p>	<p>APPEAL NO. 776, 794, 796, 800</p> <p>ORDER REMANDING TO TRIBAL COURT</p>
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Appeal from the Fort Peck Tribal Court, Imogene Lilley, Presiding Judge.
Appellant Andreona Corona, appearing by and through Advocate Terry Boyd
Appellee Fort Peck Tribes, appearing by LaFon Copenhaver, Tribal Prosecutor.
Before E. Shanley, Chief Justice; B. Desmond, Associate Justice; and B.J. Jones,
Associate Justice.

BACKGROUND

¶ 1 This Matter comes before the Fort Peck Court of Appeals (FPCOA) on a Petition for Review filed by Appellant on September 19, 2018. Appellant further filed appeals of subsequent Orders in this matter in Appellate cases #794, #796, and #800. All appeals are in regard to the same children and same lower court case, F18-06-141. It is unclear why separate appeals were created for the same lower court matter rather than including the subsequent filings under the same case. Nevertheless, for purposes of judicial efficiency and the length of time this case has been pending in the Appellate Court, we will consolidate all appeals.

¶ 2 Appellant Corona's children were removed from her and placed in protective custody on June 6, 2018 by BIA Social Services. An Emergency Petition was filed by the Tribal Prosecutor on June 8, 2018. On June 11, 2018 an Initial Hearing was held. Neither parent was served notice of the hearing and both failed to appear. The Tribal Court found probable cause to continue custody and rescheduled the initial hearing to attempt to serve the parents. The Tribal Court held a new hearing on June 21, 2018 in which the Mother was present, but the fathers failed to appear. The mother was advised of her rights and denied the allegations. A Fact Finding Hearing was scheduled for August 30, 2018.

¶ 3 During the Fact Finding Hearing, the Tribal Court admitted testimonial evidence of a BIA Social Worker about the children's statements over the objection of Appellant, who submits the statements are hearsay. The Tribal Court also admitted a video of a forensic interview of one of the children, which the Tribal Court acknowledged was incomplete as it was missing 12 minutes of the conversation. Fact Finding Hearing

Order, p.4. The Court concluded the video should be admitted pursuant to FRE 803(b). During testimony, the Social Worker admitted that the child changed his story several times after the recording had ended. Another social worker testified that she believed the child's testimony was manipulated and during a break in the interview, the child actually crawled out a back window and ran away.

¶ 4 After hearing all of the evidence, the Court concluded that the tribe had met its burden to show by clear and convincing evidence that the children were neglected, abused and/or dependent and ordered that the children be declared wards of the Tribal Court with legal care and custody granted to BIA Social Services to act in their best interests.

¶ 5 Appellant submits that the testimony and video were hearsay and should not have been admitted. She further argues that the incomplete video was improperly admitted. Lastly, Appellant claims that the Tribes failed to meet their burden by clear and convincing evidence to show that the children were neglected. In response, the Tribe argues that there was clear and convincing evidence admitted into Court including Appellant's own sworn testimony that she doused her boyfriend with a flammable substance with the intent to light him on fire and she took prescription medication for grief which made her so drowsy she was unable to respond to her children's behavioral problems.

¶ 6 Subsequently, Appellant filed a motion to vacate BIA care and supervision and dismiss the case. She also raised the issue that BIA was failing to abide by their obligation to keep her case information confidential and had failed to file a valid service treatment agreement. Appellant does acknowledge that BIA Social Services entered

into a valid service treatment agreement with her on December 10, 2018, but claims it was reversible error to not file the agreement with the Court.

¶ 7 In Appeal #796, Appellant raised the issue at the Tribal Court that BIA Social Service's decision to place one of her children in California did not meet the definition of the least restrictive placement and was contrary to their obligation to provide active efforts because Appellant was unable to maintain frequent visitation with her child.

¶ 8 Appellant raises an additional issue in Appeal # 800 in regard to the placement of her child in California with a relative. She argues that BIA Social Services was recommending termination of her parental rights to this child and permanent placement with her relative in California. Appellant submits that this recommendation is contrary to the Montana DHHS Child Family Services caseworker who recommended a continued plan of reunification with her other children. The findings of the Tribal Court in the Permanency Order conclude that Appellant completed the majority of the requirements in her service treatment agreement. For that reason, Appellant submits that BIA Social Service's recommendation for permanency is contrary to the best interests of the children and their obligation to provide active efforts for reunification.

STATEMENT OF JURISDICTION

¶ 9 The Fort Peck Appellate Court reviews final orders from the Fort Peck Tribal Court. 2 CCOJ §202. The FPCOA reviews interlocutory appeals from a final order of the Tribal Court which involves an issue of law consistent with a violation of due process adversely affecting the outcome of a trial on the merits. Appendix 3, FPCOA Rules of Proc. Rule 6. Issues regarding admissibility of evidence will be reviewed under an abuse of discretion standard.

STANDARD OF REVIEW

¶ 10 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. 2 CCOJ §202.

ISSUES

- ¶ 11 The Fort Peck Court of Appeals considers the following issues:
1. Whether the Tribal Court abused its discretion when it allowed a BIA Social Worker to testify about the children's statements which were made out of court?
 2. Whether the Tribal Court abused its discretion in admitting an incomplete video of one of the children's forensic interview, which did not include the entire conversation with the child?
 3. Whether the Tribal Court violated Appellant's right to due process by failing to set a hearing on her motion to dismiss?
 4. Whether the Tribal Court erred in concluding BIA Social Services made active efforts towards reunification when the social worker placed one child away from the others in California and did not set up regular visits with the parent or other children?
 5. Whether the Tribal Court made sufficient findings to conclude BIA Social Services was acting in the best interest of the children by recommending a permanency plan of termination of parental rights for one child while the MT DHHS Child and Family Services caseworker recommended a permanency plan of reunification for all other children?

DISCUSSION

1. **The Tribal Court did not abuse its discretion by allowing the BIA Social Worker to testify about the children's statements which were made out of court.**

¶ 12 The Tribal Court follows the Federal Rules of Evidence. 6 CCOJ §510. Youth Court proceedings regarding abused, neglected, abandoned or dependent youth pursuant to Title 9 of the FPCCOJ are considered civil actions. Generally, rules of evidence are relaxed for these matters. In both Initial Hearings and Fact Finding Hearings involving allegations of abuse and neglect the Tribal Code states that the hearings shall be conducted informally. 9 CCOJ §§503, 505.

¶ 13 Under Montana law, hearsay evidence of statements made by the affected child are admissible at abuse and neglect proceedings according to the Montana Rules of Evidence. MCA 41-3-432, MCA 41-3-437. Although the Fort Peck Comprehensive Code of Justice allows the Tribal Court, in its discretion, to be guided by State law in making its decisions, it also states that the Court shall not subject any party to the laws of the state or direct any party to use the procedures and services of any State. 8 CCOJ §501(d).

¶ 14 The Tribal Court's discretion in regard to the admissibility of statements generally depend upon finding particular guarantees of reliability and trustworthiness. Most jurisdictions balance reliability and trustworthiness with the public policy interest of protecting children from the trauma that may result from in-court testimony. Given the informality of these proceedings, the Tribe's compelling interest to protect the psychological well-being of children is sufficiently important to outweigh the requirement

for in-court testimony if it can be shown that the evidence was reliable. The Tribal Court is in the best position to hear the evidence and determine its trustworthiness.

¶ 15 Therefore, the Tribal Court did not abuse its discretion in allowing the social worker to testify about the child's out of court statements.

2. The Tribal Court did not abuse its discretion by admitting the incomplete video of one of the children's forensic interview, which did not include the entire conversation with the child.

¶ 16 Like the hearsay statements, the Court has discretion in an informal children's court hearing to admit evidence. In regard to the video, the Social Worker did provide testimony to lay foundation for the video's authentication. The problem, however, is that the video was missing 12 minutes of discussion between the interviewer and the child. Testimony during the fact finding hearing revealed that the 12 minutes of discussion that was *not* admitted into evidence contained statements from the child that contradicted his original statements. Furthermore, a different social worker testified that she believed the child's statements were coerced by BIA. However, in considering whether or not to admit the video, the Tribal Court allowed testimony in regard to these statements. Because the Tribal Court is in the best position to hear testimony and determine the reliability of the evidence, the FPCOA will not disturb the Court's findings unless there is clear error. However, when there is an objection to the admission of evidence, the Tribal Court should clearly indicate on the record the basis for the ruling determining the evidence is deemed trustworthy and admitted or indicate the purpose for which the evidence is admitted.

¶ 17 Given the other evidence in the record, including witnesses' testimony, Appellant's admissions, the police reports, and drug tests, the Court had sufficient evidence to find clear and convincing evidence that the children were neglected.

3. The Tribal Court did not violate Appellant's right to due process by failing to set a hearing on her motion to dismiss.

¶ 18 The Rules of Civil Procedure require that after a party files a motion they must file a brief supporting the motion within five (5) days. The opposing party then has ten (10) days to answer. FPTC R. Civ. Pro. R. 7, App. 2. Failure to file the briefs within the prescribed time may subject the party to a summary ruling and may also indicate the parties' admission that the motion lacks merit. After receiving briefs the Tribal Court can take the matter under advisement or, in its discretion, schedule a hearing upon the request of a party. *Id.* Although the Court has discretion to rule on a motion without a hearing, we have previously held that the Court should only do so when there are no genuine issues of material fact presented or the parties are clearly not entitled to relief. *In the Matter of AK*, App No. 695 (September 28, 2016).

¶ 19 The Appellant's right to procedural due process requires that she have an opportunity to be heard and present her claim on the motions unless the Court considers the motion and concludes she is clearly not entitled to relief. *In the Matter of AK*, App No. 695 (September 28, 2016). If the Court determines the motion is without merit and a hearing is not warranted, it should reduce its decision to writing and inform the parties that it has considered the submitted arguments and determined Appellant is not entitled to relief. We remand to the lower court to provide an order clarifying the Court's ruling on the motions submitted.

4. The issue whether the Tribal Court made sufficient findings to support its conclusion that BIA Social Services made active efforts towards reunification when the social worker placed one child away from the others in California is moot.

¶ 20 The Tribal Code defines active efforts as, “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite a child with his or her family.” 9 CCOJ § 506-C(b). Examples of active efforts are contained in 9 CCOJ § 506-C(c). Reunification with the child’s family is clearly the desirable goal when it can be achieved safely. Furthermore, it is also essential for a social worker to use active efforts to keep the siblings together. Generally, it would not be in the best interests of children to separate them and permanently place one child out-of-home while working to reunify the other siblings with their parent(s). The decision to approve a permanency plan for only some children of a family, but not all, should be one that is thoroughly justified by the social worker and documented in the findings and conclusions of the Court. That decision was not sufficiently supported in this matter, however the issue is now moot.

¶ 21 Under 9 CCOJ 506-C(d), the social worker shall document all active efforts in the Report to Court and the Court “shall weigh the testimony of the Social Worker in conjunction with the documented active efforts to determine by clear and convincing evidence that all active efforts have been addressed before finding the case should be considered to have met a sufficient burden of moving forward with permanency planning.” The Tribal Court’s findings do not adequately document the active efforts made by the social worker towards reunification in regard to placing the child in California and recommending a permanent placement there. Specifically, it is not clear from the record if there was not a lesser restrictive placement option that

would have been more conducive to reunification efforts and allowed for parental and sibling visitation. Mootness of this issue is primarily due to the FPCOA's delay in issuing an opinion in regard to this matter. However, there is a potential remedy at the trial court level for the mother to regain custody of her child upon successful completion of her case plan which would be proven through reunification of the other children because her parental rights were not terminated and the custody order provided this as an option for the parent(s).

5. The issue of whether the Tribal Court abused its discretion in concluding it was in the best interest of the children to approve the BIA Social Worker's permanency plan of permanent placement for one child while the MT DPHHS Child and Family Services caseworker recommended a permanency plan of reunification for all other children is now moot.

¶ 22 The Fort Peck Comprehensive Code of Justice sets out the best interest of the child factors for the Court's consideration in Title X, § 304-C. Although the factors listed in that section are intended to assist the Court in determining custody in family court proceedings, many of the factors are relevant to determining the best interest of the child under Title IX as well. Clearly, it is in the best interests of a child to maintain contact and preferably placement with their parent if it can be done with the assurance of their safety and well-being. It is also in the best interest of children to keep siblings together.

¶ 23 In this matter, the recommendation for permanent placement of one child in California appears to be contrary to the permanency plan recommendation to reunify the other children with their mother. The findings to justify approving these seemingly

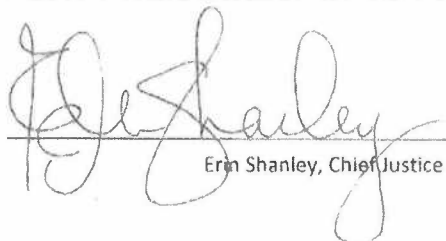
contradictory plans should be documented to support the Tribal Court's conclusion. For this reason, we remand to the Tribal Court for further findings in support of its decision.


ORDER

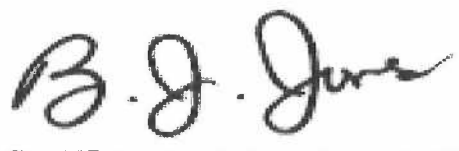
ORDERED, ADJUDGED, AND DECREED this matter is remanded to the Court below to issue additional findings and orders consistent with this opinion.

SO ORDERED the 6th day of January 2020.

FORT PECK COURT OF APPEALS


Erin Shanley, Chief Justice


Brenda Desmond, Associate Justice


Associate Justice