

In the Southwest Intertribal Court of Appeals for the Santa Clara Tribal Court

PAUL WRIGHT, JR.,

Defendant-Appellant,

v.

PUEBLO OF SANTA CLARA,

Plaintiff-Appellee.

**SWITCA No. 00-017-SCPC
SCPTC No. CR-00-163**

Appeal filed December 17, 2000

Appeal from the Santa Clara Tribal Court,
Dennis Silva, Presiding Judge

Appellate Judge: Stephen Wall

UNPUBLISHED ADVISORY OPINION¹

SUMMARY

The appellate judge recommended that the tribal court's guilty verdict on a charge of Persons Under the Influence of Intoxicating Liquor or Drugs be reversed due to the lack of sufficient evidence to determine guilt. Probable cause for the arrest was based on the Santa Clara police officers' observations. Even though the officers administered a breathalyzer test, the tribal code is silent about such tests, so the tribal council would have to legislate on this topic for such evidence to be used. Without the breathalyzer evidence, the tribal court had to rely solely on the officers' statements to determine guilt,

¹Santa Clara Pueblo Tribal Council Resolution 99-25, §4(a) (9/30/99) authorizes SWITCA to act as the Pueblo's Appellate Court. §4(d) grants SWITCA full appellate jurisdiction to dispose of appeals in accordance with Santa Clara law and otherwise in such manner as appears to be appropriate to the rendering of a just result. §6 provides that the appellate decisions shall be published in this Reporter. However, due to a belatedly discovered procedural error, several appeals resulted not in decisions but instead in advisory opinions, which was the correct process under the superseded Santa Clara Pueblo Tribal Council Resolutions 93-23 (6/25/93) and 94-14 (4/6/94). In order to address the error in a transparent manner, SWITCA seeks to harmonize §§4(d) and 6 of Resolution 99-25 with its inherent judicial power to perform its functions by publishing the captions and summaries of the advisory opinions in this revised volume. The unpublished advisory opinions may not be cited as precedent. SWITCA regrets the error.

but the statements were insufficient to find guilt beyond a reasonable doubt. It must be assumed that the Pueblo of Santa Clara does not recognize the inadmissibility of an uncounseled plea in a prior case to increase a sentence because that issue has not been resolved either by council action or by tribal court decision.

January 6, 2005

KEVIN NARANJO,

Defendant-Appellant,

v.

PUEBLO OF SANTA CLARA,

Plaintiff-Appellee.

**SWITCA No. 00-018-SCPC
SCPTC No. CR 00-029**

Appeal filed February 25, 2000

Appeal from the Santa Clara Tribal Court,
Dennis Silva, Presiding Judge

Appellate Judge: Stephen Wall

UNPUBLISHED ADVISORY OPINION

SUMMARY

The appellate judge recommended that the case be remanded to the trial court to determine if the officer who arrested the appellant for driving while intoxicated and reckless driving had a tribal or federal commission. If the officer had no authority to make the arrest, the case should be dismissed, but if the officer was properly commissioned, then the sentencing order should be enforced. The transcript of the sentencing hearing shows that the appellant understood the consequences of a no-contest plea. Although the tribal code requires that an arraignment officer read the police report, there is no evidence that the appellant was treated unfairly or was prejudiced by the lack of an arraignment officer.

December 23, 2004

In the Southwest Intertribal Court of Appeals for the Zuni Tribal Court

VICTORIA BUFFALO,

Petitioner-Appellee,

v.

NATHANIEL TAFOYA,

Respondent-Appellant,

and

THE PUEBLO OF SANTA CLARA,

Intervenor-Appellant.

SWITCA No. 01 002-SCPC

SCPTC No. DV 98-218

Appeal filed August 31, 2000 by Appellant Tafoya

Appeal filed October 16, 2000 by Appellant

Pueblo of Santa Clara

Appeal from the Santa Clara Tribal Court,
Dennis Silva, Presiding Judge

Appellate Judge: Stephen Wall

UNPUBLISHED ADVISORY OPINION

SUMMARY

The appellate judge recommended that this case be remanded to tribal court for review of child custody and child support issues, including independent assessments of the children's psychological state and home conditions. It is also recommended that the tribal court's denial of intervention by the Pueblo of Santa Clara be affirmed because intervention is not authorized by the tribal code, the denial of the motion does not impede the Pueblo's right to protect its children, and intervention would constitute a waiver of sovereign immunity. The tribal court's decision must be based on the best interest of the child, regardless of the parents' membership status. The case cannot be transferred to Children's Court because its jurisdiction does not cover custody issues resulting from divorce or separation.

January 5, 2005

JONATHAN QUAM,

Appellant,

v.

PUEBLO OF ZUNI,

Appellee.

SWITCA NO. 01-004-ZTC

ZTC NO. CR-CC-2001-3228

Appeal filed March 22, 2001

Appeal from the Zuni Tribal Court
Albert Banteah, Jr., Judge

Appellate Judges: Elizabeth C. Callard,
Roman J. Duran, and Neil T. Flores

OPINION

SUMMARY

Tribal court issued a judgment and sentence finding Appellant guilty of intoxication, simple assault, and domestic violence. The appellate court found that the evidence was sufficient to support the guilty verdict. The trial court's decision is affirmed, and the case is remanded for proceedings to implement the judgment of conviction and impose the sentence.

THIS MATTER COMES BEFORE THE SOUTHWEST INTERTRIBAL COURT OF APPEALS from the Zuni Pueblo court and arises out of criminal complaints filed against the Appellant, Jonathan Quam. Mr. Quam was convicted at trial of the offenses of intoxication, simple assault, and domestic violence on February 23, 2001, and he has exercised his right to appeal those convictions. Mr. Quam filed a Notice of Appeal in accordance with law. Mr. Quam also filed a motion for stay of judgment in the lower court, which was granted. This Court has received the Brief for Appeals Board filed by Mr. Quam on February 5, 2004, and the Reply Brief of Appellee Pueblo of Zuni filed on April 8, 2004. The record has been reviewed by the appellate panel, which convened to review the case. The panel has reviewed the record and the law and finds that the lower court did not err in convicting the Appellant of the offenses charged. Accordingly, this Court affirms the rulings of the lower court and remands the case for such further proceedings as may be necessary.

In the Southwest Intertribal Court of Appeals for the Zuni Tribal Court

I. Background

The Appellant, Mr. Quam, was convicted of intoxication, simple assault, and domestic violence on February 23, 2001. Mr. Quam was acquitted of endangering the welfare of a child on that same date. Mr. Quam was fined \$35.00, \$125.00, and \$50.00 on the convictions of intoxication, simple assault, and domestic violence respectively. In addition Mr. Quam was referred to a treatment program. Mr. Quam has appealed his convictions and imposition of the sentence has been stayed by order of the trial court dated March 2, 2001.

II. Arguments of the Parties on Appeal

Mr. Quam argues that the trial court failed to consider inconsistencies between the written reports and the testimony, the lack of physical evidence of bodily injury to the victim, the failure of arresting officers to administer a field sobriety or breath test to determine the Defendant's level of intoxication, and the allegation that the arresting officer lacked probable cause to arrest. In addition, Mr. Quam argues that the arrest of both himself and the alleged victim negates the crime.

The Pueblo of Zuni (hereafter "the Pueblo") argues that the trial court findings are amply supported by the evidence, that the arrest of the Defendant was based on probable cause, that evidence of physical injury to the victim and/or medical evidence are not required to support a conviction for domestic violence, that the arrest of the alleged victim of an assault does not negate the culpability and conviction of the defendant for assault, and that medical evidence offered by the defendant was properly excluded by the trial court.

III. Legal Analysis

The question for this Court is whether the evidence, taken as a whole, supports the convictions entered by the trial court. This Court finds that the evidence in the record is sufficient to support the trial court's findings that Mr. Quam is guilty of the offenses charged.

The trial court judge, during a trial to the court, is the sole adjudicator in making decisions on the credibility of the witnesses and the weight given to evidence presented at trial. *See Matter of Laurie R.*, 760 P.2d 1295 (N.M. Ct. App., 1988) (An appellate court will not substitute its judgment for that of the trial court. It is for the trier of fact to weigh the evidence, determine credibility of witnesses, reconcile inconsistent or contradictory statements of witnesses and determine where the truth lies.); *see also State v. Bankert*, 875 P.2d 370 (N.M. 1994) (The test is whether substantial evidence exists to support a verdict of guilt beyond a reasonable doubt when the reviewing court

views the evidence in the light most favorable to upholding the verdict.).

Clearly, Mr. Quam would have preferred that the trial court judge weigh the evidence differently than he did. The trial court did not clearly err, however, in believing and giving weight to evidence of Mr. Quam's guilt. There was testimony that Mr. Quam was observed assaulting his wife and intoxicated. Nothing in the record would support a finding by this Court that such evidence was incredible as a matter of law. The fact that there may be some inconsistencies, the fact that the victim was also arrested, and the fact that there was no medical evidence of injury to the victim are not determinative, given the record before the trial court. In addition, the trial court judge's decision to exclude medical evidence offered by Mr. Quam was proper because the evidence offered was hearsay and was not subject to any exception to the hearsay rule.

IV. Conclusion

For the foregoing reasons, this Court finds that the lower court committed no error in entering judgment of conviction against Mr. Quam for intoxication, simple assault, and domestic violence. The decision of the lower Court is affirmed, and this matter is remanded to the lower court for further proceedings to implement the judgment of conviction and impose sentence.

IT IS SO ORDERED.

February 16, 2005

In the Southwest Intertribal Court of Appeals for the Santa Clara Tribal Court

**SANTA CLARA SENIOR CITIZEN'S
ORGANIZATION,**

Plaintiff-Appellant,

v.

RUBY SINGER,

Defendant-Appellee.

**SWITCA No. 01-010-SCPC
SCPTC No. CV-97-023**

Appeal filed May 30, 2001

Appeal from the Santa Clara Tribal Court,
Allan R. Toledo, Judge Pro Tem

Appellate Judge: Stephen Wall

UNPUBLISHED ADVISORY OPINION

SUMMARY

The appellate judge recommended that the tribal court's dismissal of the complaint for theft, embezzlement, and fraud be affirmed because the elements of those offenses were not found in this case. The appellee's actions did not violate any rule or regulation of the senior citizen's organization, which had no formal structure.

January 20, 2005

ANTHONY O. LUCIO,

Appellant,

v.

PUEBLO OF ZUNI,

Appellee.

**SWITCA NO.03-003-ZTC
ZTC NO. CR 02-1524**

Appeal filed February 25, 2003

Appeal from the Zuni Tribal Court
Albert Banteah, Jr., Judge

Appellate Judges: Elizabeth C. Callard,
Roman J. Duran, and Neil T. Flores

OPINION

SUMMARY

Tribal court issued judgment and sentence finding Appellant guilty of driving under the influence of intoxicating liquor or drugs. The appellate court found that the evidence was sufficient to support the guilty verdict. The tribal court's decision is affirmed, and the case is remanded for proceedings to implement the portion of the sentence that was stayed.

THIS MATTER COMES BEFORE THE SOUTHWEST INTERTRIBAL COURT OF APPEALS from the Zuni Pueblo court and arises out of criminal complaints filed against the Appellant, Anthony O. Lucio. Mr. Lucio was convicted at trial of the offense of driving under the influence of intoxicating liquor or drugs, and he has exercised his right to appeal. Mr. Lucio filed a Notice of Appeal in accordance with law. Mr. Lucio also filed a Motion for Stay of Judgment in the lower court. The Motion for Stay of Judgment was denied in part and granted in part. That portion of the lower court's judgment imposing a fine of \$300.00 was stayed, and Mr. Lucio's driving privileges were restored to him pending the outcome of this appeal. All other aspects of the sentence were to be performed by the Appellant as ordered, including public service, screening for and completion of alcohol treatment, and attendance at a victims' impact panel. This Court has received the brief of the Appellant and the Reply Brief of Respondent Pueblo of Zuni. The record has been reviewed by the appellate panel, which convened to review the case. The panel has reviewed the record and the law and finds that the lower court did not err in convicting the Appellant of the offense charged. Accordingly, this Court affirms the rulings of the lower court and remands the case for further proceedings.

I. Background

The Appellant, Mr. Lucio, was convicted of driving under the influence of intoxicating liquor or drugs. The evidence establishes that Mr. Lucio was stopped by Officer LeBoeuf on the request of Officer Kaskalla, who had seen Mr. Lucio parked in his car at night in an undeveloped area known to Officer Kaskalla to be frequented by drinkers and drug users during the night time. Initially, Officer Kaskalla's attention was focused on another vehicle, but when Officer Kaskalla turned on his emergency lights Mr. Lucio started his vehicle and proceeded to drive away at a rate of speed that was too fast for the road conditions. Officer Kaskalla attempted to attract Mr. Lucio's attention and get him to stop, but Mr. Lucio proceeded to leave the area. Ultimately, Officer LeBoeuf stopped Mr. Lucio's vehicle

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on Officer Kaskalla's request.

Officer LeBoeuf observed Mr. Lucio to be unresponsive and to have bloodshot eyes. Officer LeBoeuf also observed a strong odor of an intoxicating liquor to be coming from the vehicle. Mr. Lucio admitted to having "three beers." Officer LeBoeuf administered field sobriety tests to Mr. Lucio, which Mr. Lucio failed. After considering all of his observations, Officer LeBoeuf concluded that Mr. Lucio was driving his vehicle while under the influence of alcohol at the time of the stop. Mr. Lucio refused to take a breath test after he was read the implied consent act.

At trial Mr. Lucio attempted to argue to the Court that Officer LeBoeuf lacked probable cause to arrest him. The court refused to hear Mr. Lucio's argument because the Zuni Rules of Criminal Procedure, Rule 11(B) (2), required that suppression motions based on lack of probable cause be filed at least five days prior to trial.

II. Arguments of the Parties on Appeal

Mr. Lucio argues that Officer LeBoeuf lacked reasonable suspicion to justify stopping Mr. Lucio's vehicle; that Officer LeBoeuf lacked probable cause to arrest Mr. Lucio; and that there was insufficient evidence presented at trial to support the trial court's finding that Mr. Lucio was incapable of safely operating a motor vehicle.

The Pueblo of Zuni (hereafter "the Pueblo") argues that Mr. Lucio's behavior in leaving the secluded area where he was first observed gave Officer Kaskalla reasonable suspicion to believe that Mr. Lucio was involved in criminal activity and that Officer LeBoeuf was entitled to rely on the observations of Officer Kaskalla to stop Mr. Lucio's vehicle under the fellow officer rule. The Pueblo of Zuni then argues that Officer LeBoeuf's observations at the time of the stop established probable cause for Mr. Lucio's arrest. In addition, the Pueblo argues that Rule 11(B)(2) of the Zuni Rules of Criminal Procedure required Mr. Lucio to raise the issues of lack of reasonable suspicion and/or probable cause prior to trial. The Pueblo contends the trial court did not err in refusing to allow Mr. Lucio to argue those issues at the time of trial. Finally, the Pueblo argues that the evidence presented at trial was sufficient to support Mr. Lucio's conviction.

III. Legal Analysis

The Zuni Rules of Criminal Procedure provide at Rule 11(B) (2) as follows:

Defenses and objections based on defects in the institution of the prosecution of the complaint

other than that it fails to show jurisdiction in the court or fails to charge an offense may be raised on motion only before trial or such shall be deemed waived, unless the court for good cause shown grants relief of such waiver.

Rule 11(B)(3) provides that "such motions shall be made in writing and filed with the court at least five (5) business days before the day set for trial.

The trial court acted within its discretion under Rule 11(B) of the Zuni Rules of Criminal Procedure in refusing to hear the Mr. Lucio's argument that the officers lacked reasonable suspicion to stop his vehicle and probable cause to support his arrest. Since the trial court had determined that it would not hear suppression issues raised for the first time at the trial, the only issue before the Court was whether Mr. Lucio was guilty of the offense charged, not whether he should have been stopped or arrested.

The evidence in the record is sufficient to support the trial court's finding that Mr. Lucio was guilty of driving while under the influence of intoxicating liquor. Mr. Lucio was observed driving by Officer LeBoeuf when he stopped the vehicle. Mr. Lucio admitted consuming alcohol prior to the stop, and then Mr. Lucio failed the field sobriety tests administered by Officer LeBoeuf. In addition, Mr. Lucio was unresponsive at times and was observed by Officer LeBoeuf to have bloodshot eyes. An odor of alcohol was coming from the vehicle when Mr. Lucio was stopped by Officer LeBoeuf, and Officer Kaskalla observed Mr. Lucio driving too fast for conditions when he abruptly left the secluded area where he was first observed. Finally, Mr. Lucio's refusal to take a breath test, after he was read the implied consent act, is probative of his guilt.

The trial court judge was the sole judge of the credibility of the witnesses and was entitled to determine what the weight should be attributed to the evidence. *See Matter of Laurie R.*, 760 P.2d 1295 (N.M. Ct. App. 1988) (An appellate court will not substitute its judgment for that of the trial court. It is for the trier of fact to weigh the evidence, determine credibility of witnesses, reconcile inconsistent or contradictory statements of witnesses and determine where the truth lies.). The question to be answered by this court is whether there is sufficient evidence in the record to support the findings of the trial court judge. The record is sufficient in this case to support the lower court's finding that Mr. Lucio was guilty of the offense charged. *See State v. Bankert*, 875 P.2d 370 (N.M. 1994) (The test is whether substantial evidence exists to support a verdict of guilt beyond a reasonable doubt when the reviewing court views the evidence in the light most favorable to upholding the verdict.).

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IV. Conclusion

For the foregoing reasons, this Court finds that the lower court committed no error in entering judgment of conviction against Mr. Lucio and imposing sentence. The decision of the lower Court is affirmed, and this matter is remanded to the lower court for further proceedings to implement that portion of Mr. Lucio's sentence that was stayed.

IT IS SO ORDERED.

February 16, 2005

**IN THE MATTER OF THE ESTATE OF
RUDELL HUSTITO, DOD MAY 6, 2002**

ANDERS HUSTITO, et al.,

Appellants,

v.

YVETTE HUSTITO,

Appellee.

**SWITCA No. 03-004-ZTC
Zuni No. PB-2002-0009**

Appeal filed February 25, 2003

Appeal from the Zuni Tribal Court
Albert Banteah, Jr., Judge

Appellate Judges: Elizabeth C. Callard,
Roman J. Duran, and Neil T. Flores

ORDER

SUMMARY

The appellate court remanded this civil probate action to the trial court with instructions because the evidence presented was inadequate to enable the trial court to decide the issues raised in this case. Therefore, the trial court's December 30, 2002 Order was set aside. After holding a hearing at which the parties shall be allowed to present evidence, the trial court shall make the necessary determinations outlined in this opinion.

THIS MATTER COMES BEFORE THE SOUTHWEST
INTERTRIBAL COURT OF APPEALS from the Zuni

Tribal Court for the Pueblo of Zuni (hereafter "the Trial Court") and arises out of a civil probate action. Anders Hustito, Sylvia Hustito, Herbert Hustito, and Beverly Hustito (hereafter "the Appellants") challenge the order of the Trial Court issued December 30, 2002, which awards certain property listed as an asset of the estate of Ruddell Hustito to Yvette Hustito, Ruddell Hustito's daughter (hereafter "the Appellee").

On August 7, 2002, the Appellee filed an Application for Summary Administration of the Estate of Ruddell Hustito (hereafter "the Estate"). The property in question (hereafter "the Property") was identified as an asset of the Estate subject to probate in this case. The Property is a home, which the Appellee identified as belonging to the decedent, her father Ruddell Hustito. On September 9, 2002, the Trial Court issued an Order for Summary Administration, awarding the Property to the Appellee; however, after receiving the affidavits of Andres Hustito, Sylvia Hustito², and Beverly Hustito, the Trial Court set aside the Order for Summary Administration and scheduled a hearing. Ultimately, after considering the evidence, the Trial Court issued its Order of December 30, 2002, awarding the Property to the Appellee. It is the Trial Court's Order of December 30, 2002, awarding the Property to the Appellee that is the subject of this appeal.

The record in this case has been reviewed by the appellate panel, which convened to deliberate. The panel has considered the record and the law and finds that the evidence presented to the Trial Court was inadequate to enable the Trial Court to decide the issues raised in this case. Accordingly, this Court remands the case to the Trial Court, with instructions.

I. Background

The record establishes that the Property was originally purchased by Jason Hustito, pursuant to a Mutual Help Ownership Agreement. Jason Hustito was married to Lorraine Hustito. Jason Hustito passed away on January 8, 1990, and Lorraine Hustito passed on August 10, 1993. On March 28, 1996, the Zuni Tribal Court issued an order in the probate action pertaining to the estates of Jason and Lorraine Hustito, case number CV-P-96-03, finding that the Property had been paid off pursuant to the requirements of

² In various documents in the record, Sylvia Hustito's name is spelled differently, including the spelling "Silvila" used in the Affidavit requesting that the Trial Court reopen the probate after issuing its Order for Summary Administration. The Brief in Support of Appeal uses the spelling "Sylvia". There does not seem to be any dispute that all spellings refer to the same person, although this matter should be clarified by the Trial Court on remand.

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the Mutual Help Ownership Agreement with the Zuni Housing Authority (hereafter “ZHA”). The Property was awarded to Beverly Hustito, daughter of Jason and Lorraine Hustito by order of the Zuni Tribal Court dated March 28, 1996. The order of March 28, 1996, contained a provision requiring the ZHA “to make the necessary changes to reflect that the deed to the Mutual Help House ... is transferred to Beverly Hustito.” Consequently, as of March 28, 1996, pursuant to the order of the Zuni Tribal Court, the Property belonged to Beverly Hustito, subject to the requirement that the ZHA complete the paperwork to effect the required transfer.

The record is clear that Jason and Lorraine Hustito had paid off the Property at the time their estates were probated. The record is also clear that when the estates of Jason and Lorraine Hustito were probated in case number CV-P-96-03 the Property was awarded to Beverly Hustito, and the ZHA was ordered to prepare the necessary paperwork to complete the transfer of the Property to Beverly Hustito.

At this point, however, the record becomes unclear. The record does not establish whether the ZHA did, in fact, complete the transfer of the deed to Beverly Hustito, as ordered. This is a critical fact, which must be established in order for the Trial Court to finalize the probate of the Estate for the reasons set forth below.

The record reflects that on July 27, 2001, Beverly Hustito attempted to relinquish her interest in the Property to Ruddell Hustito.³ If, in fact, the property was properly transferred to Beverly Hustito by the ZHA, and Beverly Hustito did effectively accomplish a transfer of her interest in the property to Ruddell Hustito, then the Property *may* have been an asset of the Estate and subject to distribution in this probate action; however, if Beverly had not yet received title to the property, or if she otherwise failed to successfully transfer the property to Ruddell Hustito by her attempted relinquishment in 2001, then Ruddell Hustito did not own the Property at the time of his death and the Trial Court lacks jurisdiction to distribute it in the context of this probate action. In addition, the issue whether the Property is an asset of the Estate is further complicated by the fact that on or about August 3, 2001, apparently believing that he was the owner of the property, Ruddell Hustito executed a Successorship Designation, purporting to transfer his interest in the property to Sylvia Hustito in the event of his

³ See “Relinquishment of Old Mutual Help Project NM19-1 Unit #07”, filed with the Trial Court as an exhibit attached to the Application for Summary Administration. Note that although the approval/disapproval block is signed, neither approval nor disapproval is clearly indicated.

death.⁴ The Trial Court’s analysis of the effectiveness of the Successorship Designation focuses on whether or not Sylvia Hustito was qualified to assume obligations under a Mutual Help Ownership Agreement with the ZHA. The problem with that analysis, however, is that the Property was already paid off, and, therefore, it was no longer subject to the requirements or control of the ZHA.

Clearly, Ruddell Hustito’s Successorship Designation was ineffective if the Property was never effectively transferred to Ruddell Hustito by Beverly Hustito; however, even if Ruddell Hustito was the owner of the Property at the time of his death, the Property would not have been an asset of the Estate if the Successorship Designation was sufficient to accomplish a transfer of the property at the time of Ruddell’s death by operation of law outside of probate. It is therefore necessary for the Trial Court to determine whether Ruddell Hustito did, in fact, own the Property at the time of his death and, if he did, whether or not the Property transferred by operation of law outside of probate due to the Successorship Designation signed by Ruddell Hustito prior to his death.

II. Arguments of the Parties on Appeal

The Appellants argue that the Trial Court erred in awarding the Property to the Appellee because Ruddell Hustito executed the Successorship Designation on August 3, 2001, thereby effectively achieving a non-probate transfer of the property to Sylvia Hustito by operation of law. According to the Appellant’s argument the Property is not an asset of the estate subject to probate. In addition, the Appellant’s argue that the family intended for Ruddell Hustito to leave the property to Sylvia Hustito when he died and that the transfer to Ruddell Hustito was conditioned on the performance of that promise. The Appellants argue that the condition should be given effect by the Trial Court.

The Appellee argues that the Trial Court correctly found that Sylvia Hustito did not qualify to receive the Property, and that the Property should be transferred to the Appellee as ordered by the Trial Court on December 30, 2002, pursuant to the ZHA priorities. Further, the Appellee argues that Sylvia Hustito previously renounced her right to inherit the Property at the time of the probate of Jason and Lorraine Hustito’s estates.

III. Analysis

In its analysis the Trial Court focused on the Appellee’s argument that Sylvia Hustito might not have qualified to assume ownership of the Property under ZHA regulations; therefore, the Trial Court interpreted and followed ZHA

⁴ See Trial Court’s Order of December 30, 2002, in the record.

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regulations establishing the priority for successorship if there is no designated successor to the Mutual Help Ownership Agreement, or if the designated successor fails to qualify, in awarding the Property to the Appellee. What this analysis misses is the fact that because the Property was paid off, and title should have been transferred to Beverly Hustito outright, pursuant to the Zuni Tribal Court's order of March 28, 1996, ZHA regulations controlling successorship to the Mutual Help Ownership Agreement to purchase the home were probably no longer applicable to the Property. Once the ZHA transferred title to Beverly Hustito as ordered, the ZHA no longer had authority with respect to the Property.

Consequently, the threshold issue that the Trial Court must resolve is whether the ZHA did in fact complete the transfer of the property to Beverly Hustito, as required by the order of the Zuni Tribal Court, issued March 28, 1996.

If that transfer has been accomplished, and Beverly Hustito had title to the Property at the time she attempted to relinquish her interest in the Property to Ruddell Hustito, then the question becomes whether Beverly Hustito's attempt to relinquish her interest in the Property to Ruddell Hustito, using ZHA authority forms applicable to relinquishment of an interest in a Mutual Home Ownership Agreement, was effective to transfer the Property to Ruddell Hustito.

If that transfer has not been accomplished, then it must be completed by the ZHA forthwith, in order to give effect to the Zuni Tribal Court's order of March 28, 1996. When the transfer of title to Beverly Hustito is complete, the Trial Court must then determine whether Beverly Hustito's attempt to relinquish her interest in the Property to Ruddell Hustito should be given retroactive effect.

If the Trial Court finds that Beverly Hustito did not effectively transfer title of the Property to Ruddell Hustito, then the Property currently belongs to Beverly Hustito, who may dispose of it as she wishes outside of this probate action. Under such circumstances the Trial Court must find that the Property is not an asset of the Estate.

If the Trial Court finds that Beverly Hustito did effectively transfer title of the Property to Ruddell Hustito, then the Trial Court must proceed further with its analysis as set forth below.

If the Trial Court finds that Beverly Hustito effectively transferred title of the Property to Ruddell Hustito, then the next question becomes whether Ruddell Hustito created an effective instrument requiring a non-probate transfer of the Property to Sylvia Hustito when he signed the Successorship Designation at the ZHA. The Trial

Court must consider the fact that the property was already paid for when Ruddell Hustito executed the Successorship Designation on ZHA forms intended to apply to the designation of a successor for a Mutual Help Ownership Agreement to purchase a home. The Trial Court must also consider applicable law establishing the requirements for an effective instrument to achieve a non-probate transfer when the owner of property dies.

If the Trial Court finds that Ruddell Hustito did, in fact and in accordance with applicable law, create an effective instrument requiring the non-probate transfer of the Property to Sylvia Hustito at the time of his death, then the Trial Court must find that the Property is not an asset of the Estate of Ruddell Hustito and is not subject to probate in this action. The Property will pass to Sylvia Hustito outside of probate.

If the Trial Court finds that Ruddell Hustito failed to create an effective instrument requiring the non-probate transfer of the Property to Sylvia Hustito at the time of his death, then the Trial Court must distribute the Property to the heirs of Ruddell Hustito in accordance with the law of intestate succession, not the criterion for selecting a successor to a Mutual Home Ownership Agreement to purchase a home as established by the ZHA regulations.

With respect to the other issues raised by the parties, it is not necessary for this Court to make any rulings at this time.

IV. Conclusion

For the foregoing reasons, this Court finds the Trial Court's Order dated December 30, 2002, shall be and is hereby set aside. This matter shall be and is hereby remanded to the Trial Court for the taking of further evidence. After holding a hearing at which the parties shall be permitted to present evidence on the issues raised herein, the Trial Court shall make the necessary determinations as outlined above.

IT IS SO ORDERED.

August 16, 2005

In the Southwest Intertribal Court of Appeals for the Santa Clara Tribal Court

JANICE HERRERA,
Respondent-Appellant,

v.

JOSEPH ABEYTA III,
Petitioner-Appellee.

SWITCA No. 03-008-SCPC
SCPTC No. DV-02-052

Appeal filed October 17, 2003

Appeal from the Santa Clara Tribal Court,
Joseph Naranjo, Presiding Judge

Appellate Judge: Stephen Wall

UNPUBLISHED ADVISORY OPINION

SUMMARY

The appellate judge recommended that the tribal court decision finding the appellant in contempt of court for violating the terms of an oral order be reversed due to a denial of her right to due process. Because the order was oral, its specific terms are unknown, so it does not give appellant notice of the terms under which her actions could be considered criminal. In addition, the trial court did not provide a written order that domesticated an order of protection entered by the Second Judicial District of the State of New Mexico, thereby denying appellant due process by failing to notify her that her actions were restricted by state law rather than tribal law.

January 20, 2005

L.E. As Guardian and Next Friend of P.K., a Minor,
Plaintiff-Appellant,

v.

ZUNI PUBLIC SCHOOL DISTRICT, and WELLS MAHKEE, JR., Individually and in his Official Capacity,

Defendant-Appellee.

SWITCA No. 03-010-ZTC
ZTC No. CL-2000-0004

Appeal filed November 21, 2003

Appeal from the Zuni Tribal Court
Sharon M. Begay, Judge

Appellate Judges: Elizabeth C. Callard,
Roman J. Duran, and Neil T. Flores

OPINION

SUMMARY

In civil action arising out of an illegal sexual relationship between high school teacher and minor student, the appellate court affirmed the tribal court's approval of a traditional settlement and of appellant's motion to dismiss the public school district that was an agency of the State of New Mexico. The tribal court complied with the Zuni Rules of Civil Procedure in dismissing appellant's claims against the district. The appellate court overruled the tribal court's order granting the district's later motions to alter, amend, or set aside the traditional settlement and to dismiss for lack of jurisdiction because as a previously dismissed non-party to the case, the district lacked standing to file the motions. The case was remanded to the tribal court.

THIS MATTER COMES BEFORE THE SOUTHWEST INTERTRIBAL COURT OF APPEALS from the Zuni Pueblo court and arises out of a civil action. P.K., a minor, filed her Complaint for Money Damages and Declaratory and Injunctive Relief through L.E., her guardian and next friend,⁵ against the Zuni Public School District (hereafter "the District") and Wells Mahkee, Jr., (hereafter "Mahkee") individually and in his official

⁵ L.E. was dismissed as a plaintiff by the Tribal Court by order dated March 7, 2003, finding that P.K. was the real party in interest.

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capacity, in the Zuni Tribal Court for the Pueblo of Zuni (hereafter “the Tribal Court”) on May 25, 2000.

Mahkee entered into traditional settlement negotiations with P.K. and, pursuant to those negotiations, the Offer of Settlement and Apology of Defendant Wells Mahkee, Jr., to Plaintiff [P.K.] was submitted to the Tribal Court on April 17, 2003. Plaintiff [P.K.’s] Acceptance of Settlement and Apology of Defendant Wells Mahkee, Jr., was filed with the Tribal Court on April 21, 2003. On April 24, 2003, the Tribal Court issued its Order of Settlement Between Plaintiff [P.K.] and Defendant Wells Mahkee, Jr., and Dismissal of Claim. Subsequently, on May 6, 2003, P.K. filed her Motion to Dismiss Defendant Zuni Public School District Pursuant to Rule 17(a), and on that same day the Tribal Court issued its Order of Voluntary Dismissal of Defendant Zuni Public School District. Thereafter, on May 13, 2005, the District filed its Motion to Alter, Amend, or Set Aside Order of Settlement Between Plaintiff [P.K.] and Defendant Wells Mahkee, Jr., and Dismissal of Claim, which was followed on May 15, 2003, by the District’s Renewed Motion to Dismiss for Absence of Jurisdiction.

On August 11, 2003, the Tribal Court issued its Order Granting Renewed Motion to Dismiss, which dismissed all of P.K.’s claims against both defendants. The Notice of Appeal was subsequently filed on August 29, 2003, by P.K. On August 29, 2003, P.K. also filed the Plaintiffs-Appellants’ Brief-in-Chief. The District filed its Brief in Response on October 28, 2003. Although oral argument was requested by the P.K., this Court denied oral argument pursuant to its discretionary authority under SWITCARA #29(b).

The record in this case has been reviewed by the appellate panel, which convened to deliberate. The panel has considered the record and the law and finds that the Tribal Court did not err in approving the traditional settlement of P.K. and Mahkee; nor did the Tribal Court err in dismissing the District on P.K.’s Motion to Dismiss Defendant Zuni Public School District Pursuant to Rule 17(a). Consequently, this Court finds that the District was without standing to pursue its Motion to Alter, Amend, or Set Aside Order of Settlement Between Plaintiff [P.K.] and Defendant Wells Mahkee, Jr., and Dismissal of Claim or its Renewed Motion to Dismiss for Absence of Jurisdiction. Accordingly, this Court affirms the decision of the Tribal Court in part, overrules the decision of the Tribal Court in part, and remands the case to the Tribal Court.

I. Background

P.K.’s Complaint for Money Damages and Declaratory and Injunctive Relief alleges that P.K. was injured by the

actions of Mahkee and the District when Mahkee, a teacher at the Zuni High School, developed an inappropriate and illegal sexual relationship with P.K. P.K. alleged that the District failed to protect P.K. from Mahkee’s actions, which P.K. alleged Mahkee committed within the scope of his employment with the District. P.K. pursued claims against Mahkee and the District for the infliction of emotional distress on P.K., for breach of custodial and supervisory duty by the District, for the failure of the District to supervise Mahkee, for the District’s improper hiring of Mahkee, for the District’s improper retention of Mahkee, and for the District’s failure to properly train Mahkee. Mahkee was named as a defendant in the complaint both individually and in his official capacity, although P.K. alleges that all Mahkee’s actions with respect to her claims were performed within the scope of his employment with the District.

On the request of the District⁶, the parties entered into traditional settlement negotiations with P.K. Although those negotiations were initially unsuccessful, the Offer of Settlement and Apology of Defendant Wells Mahkee, Jr., to Plaintiff [P.K.] was submitted to the Tribal Court on April 17, 2003. Plaintiff [P.K.’s] Acceptance of Settlement and Apology of Defendant Wells Mahkee, Jr., was filed with the Tribal Court on April 21, 2003. On April 24, 2003, the Tribal Court issued its Order of Settlement Between Plaintiff [P.K.] and Defendant Wells Mahkee, Jr., and Dismissal of Claim. Subsequently, on May 6, 2003, P.K. filed her Motion to Dismiss Defendant Zuni Public School District Pursuant to Rule 17(a), and on that same day the Tribal Court issued its Order of Voluntary Dismissal of Defendant Zuni Public School District.

Thereafter, on May 13, 2005, the District filed its Motion to Alter, Amend, or Set Aside Order of Settlement Between Plaintiff [P.K.] and Defendant Wells Mahkee, Jr., and Dismissal of Claim. On May 15, 2003, the District filed its Renewed Motion to Dismiss for Absence of Jurisdiction.

On August 11, 2003, the Tribal Court issued its Order Granting Renewed Motion to Dismiss. The Notice of Appeal was subsequently filed on August 29, 2003, by P.K.

II. Arguments of the Parties on Appeal

In the Plaintiffs-Appellant’s Brief-in-Chief, P.K. argues (a) that the Tribal Court had exclusive jurisdiction over P.K.’s claims against Mahkee and (b) that the District’s Motion to Alter, Amend, or Set Aside Order of Settlement Between Plaintiff [P.K.] and Defendant Wells Mahkee, Jr., and Dismissal of Claim and the District’s Renewed Motion to Dismiss for Absence of Jurisdiction were rendered moot by the Tribal Court’s Order of Voluntary Dismissal of

⁶ See Order of the Tribal Court dated March 7, 2003.

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Defendant Zuni Public School District, which left the District without standing to participate further in this case.

The District argues that the Tribal Court did not possess jurisdiction over the District with respect to P.K.'s claim, because the District is an agency of the state of New Mexico and, as such, has not waived its sovereign immunity. In addition, the District argues that the Tribal Court's Order Granting Renewed Motion to Dismiss rejected an attempt by P.K. to obtain a judgment against the District by negotiating a secret settlement with Mahkee that purported to bind the District.

III. Analysis

It is not necessary to determine whether the Tribal Court has exclusive jurisdiction over P.K.'s claims against Mahkee, as asserted by P.K. It is sufficient if the Tribal Court possesses concurrent jurisdiction to adjudicate those claims. Whether the Tribal Court's jurisdiction over Mahkee was found to be exclusive or concurrent with the jurisdiction of another court is irrelevant. If the Tribal Court properly dismissed P.K.'s claims against the District, then P.K.'s claims against Mahkee stand alone.

Rule 17(a) of the Zuni Rules of Civil Procedure provides as follows:

Voluntary Dismissal. Prior to the responsive pleading of a party against whom a claim has been made or motion to dismiss or for summary judgment on such claim, the party making the claim may file a notice of dismissal, and his claim shall be deemed dismissed without prejudice. In all other circumstances a party may move the Court to dismiss his own claim, and the Court shall do so either with or without prejudice as is just and proper given the stage of the proceedings, provided, however, if a cross claim or counterclaim has been filed against the moving party, the Judge shall dismiss the claim only with the consent of the adverse party or only if it appears that the other party can prosecute his claim independently without undue additional hardship.

Although a responsive pleading had been filed by the District at the time P.K. filed her Motion to Dismiss Defendant Zuni Public School District Pursuant to Rule 17(a) on May 6, 2003,⁷ the District's Answer contained no cross claim or counterclaim. Under ZRCP 17(a), voluntary dismissal on the motion of the claimant is mandatory when no cross claim or counterclaim has been filed. Since a responsive pleading had been filed by the

District at the time P.K. moved for dismissal, however, dismissal was not automatically without prejudice. Although the Tribal Court had no discretion to refuse to dismiss P.K.'s claim against the District, the Tribal Court was required to determine whether the dismissal of P.K.'s claim against the District was to be with or without prejudice. The Order of Voluntary Dismissal of Defendant Zuni Public School District specifies that such dismissal was without prejudice; therefore, the Tribal Court complied with the Zuni Rules of Civil Procedure in dismissing P.K.'s claims against the District.

The District has not claimed, either before the Tribal Court or on appeal that the Tribal Court should have dismissed with prejudice rather than without. Because this Court does not find plain error in the Tribal Court's decision to dismiss without prejudice, this Court will not address on appeal an issue that was not raised by the parties. This Court finds that the Tribal Court's Order of Voluntary Dismissal of Defendant Zuni Public School District should be affirmed.

The Tribal Court's Order of Voluntary Dismissal of Defendant Zuni Public School District was issued on May 6, 2003. From that point on, the District was without standing to participate in the case by filing its Renewed Motion to Dismiss for Absence of Jurisdiction. In fact, on May 15, 2005, when the District filed its Renewed Motion to Dismiss for Absence of Jurisdiction, the Tribal Court was not attempting to exercise jurisdiction with respect to the District. Nonetheless, the Tribal Court entered its Order Granting Renewed Motion to Dismiss on August 11, 2003.

The Tribal Court erred in issuing its Order Granting Renewed Motion to Dismiss. The Tribal Court should not have attempted to address the issue of Tribal Court jurisdiction over the District when the District was no longer a party to the case. The District, having been dismissed from the case, lacked standing to file the motion, as P.K. was not asserting a claim against the District before the Tribal Court at that time, and the Tribal Court was not attempting to assert jurisdiction with respect to the District.

The difficulty in this case, and the obvious concern of the District, is the potential impact the Tribal Court's findings with respect to settlement of Mahkee's claims may have on the District. Specifically, it appears that the District is concerned that P.K. may attempt or is attempting to collect the judgment against Mahkee from the District's insurance carrier. For purposes of this Court's analysis, however, it is critical to emphasize that P.K. is not attempting to collect anything from the District through an exercise of the jurisdiction of the Tribal Court for the Pueblo of Zuni. If, in fact, P.K. attempts to enforce her settlement with Mahkee against the District by invoking the jurisdiction of

⁷ The District filed its Answer on June 14, 2000.

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any court, it will be up to the court litigating the issue to determine whether the settlement between P.K. and Mahkee is binding on the District. That question is not, however, before this Court, as such an attempt has not been made by P.K. in the context of the case filed in the Tribal Court.

The District complains that the settlement between Mahkee and P.K. was ultimately achieved without the benefit of Mahkee’s attorney participating in the negotiations; however, the Court notes that Rule 14(d) of the Zuni Rules of Civil Procedure does not contemplate and, in fact, prohibits the participation of attorneys in traditional settlement proceedings. Further, the District does not have standing to complain that Mahkee may have entered into settlement negotiations without benefit of counsel, and Mahkee has not raised the issue.⁸

Finally, in making its argument that the Tribal Court cannot assert jurisdiction over either the District or Mahkee, acting in his official capacity, the District cites cases pertaining to the exercise of Tribal Court jurisdiction over non-Indians. The District ignores the significant factor that Mahkee is a member and resident of the Zuni Pueblo, and Mahkee does not complain of the Tribal Court’s assertion of jurisdiction with respect to P.K.’s claims against him. Again, although the District may have justifiable concerns about the potential impact of the Tribal Court’s Order of Settlement Between Plaintiff [P.K.] and Defendant Wells Mahkee, Jr., and Dismissal of Claim, if P.K. attempts to enforce that order against the District, the District will have to argue the issue whether that order is binding on the District when the District was not a participant in the settlement negotiations to the court in which P.K. attempts to enforce such a claim.

IV. Conclusion

For the foregoing reasons, this Court finds that the Tribal Court committed no error in entering the Order of Voluntary Dismissal of Defendant Zuni Public School District. The Order of Voluntary Dismissal of Defendant Zuni Public School District shall be and is hereby affirmed. The Tribal Court did err, however, in issuing its Order Granting Renewed Motion to Dismiss on August 11, 2003. That order shall be and is hereby set aside. The case is remanded to the Tribal Court.

IT IS SO ORDERED.

May 27, 2005

⁸ Mahkee was represented by independent counsel and not counsel for the District from August 19, 2002, when John S. Stiff entered his appearance on behalf of Mahkee.

KELLI A. TAFOYA,

Defendant-Appellant,

v.

PUEBLO OF SANTA CLARA,

Plaintiff-Appellee.

**SWITCA No. 04-001-SCPC
SCPTC No. CR 03-440**

Appeal filed December 29, 2004

Appeal from the Santa Clara Tribal Court,
Joseph Naranjo, Judge

Appellate Judge: Stephen Wall

UNPUBLISHED ADVISORY OPINION

SUMMARY

The appellate judge recommended (1) that the trial court’s decision be affirmed on the charges of Disobedience to Lawful Orders of the Court, Assault and Battery, Disorderly Conduct and Resisting Arrest because there was probable cause and evidence for the arrest; (2) that the trial court’s decision be reversed on the charges of Persons Under the Influence of Intoxicating Liquor or Drugs because the appellate court had no authority under tribal law to use blood alcohol content to establish intoxication; and (3) that the trial court’s decision be reversed on the charges of Reckless Driving and Recklessly Endangering Another Person because the prosecution failed to meet its burden of proof.

January 26, 2005

In the Southwest Intertribal Court of Appeals for the Southern Ute Tribal Court

SOUTHERN UTE INDIAN TRIBE,

Plaintiff-Appellant,

v.

IN THE INTEREST OF BABY BOY WEAVER,

Defendant-Appellee.

**SWITCA No. 04-003-SUTC
SUTC No. 02-DN-133**

Appeal filed May 3, 2004

Appeal from the Southern Ute Tribal Court
Elizabeth C. Callard, Judge

Appellate Judge: Melissa L. Tatum

ORDER GRANTING MOTION TO DISMISS

This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of dispute regarding the possible change of placement for a minor child. The Tribe's Social Services Division appealed the trial court's decision prohibiting the Division from moving the child without prior court permission.

This Court agreed to hear the case and set a briefing schedule. The Petitioner-Appellant has filed a motion to dismiss, stating that the issue that was the basis for the appeal is now moot. The Court grants the motion to dismiss.

IT IS SO ORDERED.

January 18, 2005

MILDRED NARANJO,

Appellant,

v.

**PUEBLO OF SANTA CLARA
HOUSING AUTHORITY,**

Appellee.

**SWITCA No. 04-004-SCPC
SCPTC No. CR 03-039**

Appeal filed March 26, 2004

Appeal from the Santa Clara Tribal Court,
Joseph Naranjo, Chief Judge

Appellate Judge: Stephen Wall

OPINION

SUMMARY

Tribal court order involving violations of a Mutual Help and Occupancy Agreement pertaining to a home was null and void because there was no applicable tribal common law nor ordinance that authorized the judge to issue the order. Rights to equity, responsibility for restitution, and procedures for eviction and forcible entry and detainer are some of the tribal code provisions needed as a basis for landlord-tenant law. No further causes of action for eviction shall be filed in the tribal court until the Pueblo passes an ordinance regulating landlord-tenant relations and foreclosures on the reservation.

The Pueblo is bound by the Indian Civil Rights Act as it applies to tribal housing programs, so compliance with this statute is an important aspect of the regulation of Indian housing. Part of complying with the ICRA is to legislate the proper procedures for the tribal court to act on a request by the housing authority without violating the homebuyer's rights. Until the tribal council passes an ordinance identifying the rights and responsibilities of the homeowner and the procedures for eviction, the tribal court has no law to apply to such cases, so any eviction decision would be a violation of the homebuyer's rights under the ICRA.

The Appellant is a homebuyer who had signed a Mutual Help and Occupancy Agreement with the Appellee, Santa Clara Pueblo Housing Authority which administers various housing programs for the Pueblo of Santa Clara. The

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Appellee had brought an action against the Appellant in the Santa Clara Tribal Court in an effort to get the Appellant to vacate the house identified in the Mutual Help and Occupancy Agreement due to violations of the agreement.

This matter is an appeal from the order issued by Judge Naranjo on 15 March 2004. However, in order to adequately review the 15 March order, it will be necessary to review, in part, the original order upon which the 15 March order rests. The 10 February 2003 order was issued by Judge Naranjo upon the filing of a complaint for Forcible Entry and Detainer by the Appellee. Judge Naranjo found that there was a breach in the agreement between the Appellant-Homebuyer and the Appellee-Housing Authority, that both parties agreed that the delinquent payments amounted to \$17,429.97 and that the Appellant was not working and was incapable of making regular payments. Judge Naranjo awarded a judgment of \$17,429.97 against the Appellant and ordered the lease agreement to be reinstated. The Appellant was to make payments of \$75 per week and, *inter alia*, any breach of the order by the Appellant would result in immediate termination of the lease and a Warrant of Removal would be issued. The Appellant failed to make the payments as ordered by Judge Naranjo and the Appellee filed a motion for a Warrant of Removal Judgment and Writ of Execution. Judge Naranjo issued the Writs on 15 March 2004. The Appellant appealed the issuance of the Writs. Appellant was without benefit of legal counsel during both hearings and did not have counsel to assist in her appeal until after the Santa Clara Tribal Council certified SWITCA as having jurisdiction to hear the appeal.

This matter was originally reviewed on appeal in January of 2005 and SWITCA submitted recommendations to the Santa Clara Tribal Council based in the question of whether SWITCA had jurisdiction in this matter. When delegating its appellate authority to SWITCA, the Santa Clara Tribal Council reserved jurisdiction over real property matters for itself. Since this matter was a housing case and, therefore, a real property matter, there was a question of whether SWITCA had jurisdiction to hear this appeal. On 26 July 2005, the Santa Clara Tribal Council responded that SWITCA does have jurisdiction to hear this appeal. Once it was determined that SWITCA had jurisdiction, the Appellant filed to amend the appeal. The motion to amend the appeal was granted and both parties were ordered to brief the following issues:

1. Whether the Santa Clara Tribal Code authorizes the use of the remedy of forcible entry and detainer.

2. Whether the Appellee Santa Clara Pueblo Housing Authority was authorized to seek eviction.
3. Whether the Appellee Santa Clara Pueblo Housing Authority is barred from seeking eviction by the doctrine of laches or other equitable or statutory remedy.
4. Whether the Appellee Santa Clara Pueblo Housing Authority provided sufficient evidence to accurately determine the amount of delinquency.

Both Appellant and Appellee submitted their response to these questions. The Appellee correctly identified that the Appellant has misconstrued the nature of the March 2004 order. The Appellant had attempted to state that the Appellee was prevented, by the application of laches, from filing the motion that led to the 15 March 2004 order due to the time delays and the existence of a payment agreement. However the Appellee correctly pointed out that the motion was filed to enforce the 10 February 2003 order and therefore was not bound by laches or other equitable remedies. The Appellant also wanted the Court make a determination of the sufficiency of the evidence used to determine the amount of the arrearages the Appellee says the Appellant owes. Since findings of the 10 February 2003 hearing were concurred to in writing by the Appellant, including the amount of the arrearages, she is estopped from raising that issue in this appeal.

I

The question that the Court sought to answer through the first two questions (*supra*) is whether the Court had the authority to issue the order of 10 February 2003, upon which the order of 15 March 2004 rests. At first blush it would appear that the Tribal Court was merely enforcing a previous order when the 15 March order was issued. However, if the original order was flawed, then the order for its enforcement would be flawed as well.

The Appellee points to the ordinance creating the Santa Clara Pueblo Housing Authority as granting the Tribal Court the necessary authority to hear the eviction case and enter its order. The section the Appellee relies on is:

Article 8, Section 1(f) - the Tribal Courts shall have jurisdiction to hear and determine an action for eviction of a tenant or homebuyer. The Tribal government hereby declares the powers of the Tribal Court shall be vigorously utilized to enforce eviction of a tenant or homebuyer for nonpayment or other contract violations.

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Additionally, the Appellee cites Article V, Sec. 3(k) which authorizes the SCPHA to terminate a lease agreement when a homebuyer has violated the terms of the agreement and is authorized to bring action for eviction against such homebuyer. According to the Appellee, these two sections of the ordinance grant the necessary authority for an eviction case to proceed.

However establishing subject matter does not, in itself, create a cause of action. There is no tribal common law that would apply in this matter. Tribal cultural law, which applies to most other real property issues, acknowledges certain responsibilities in real property transactions; but those transactions are beyond the scope of this appeal since the rights held by the parties in this case are not defined by tradition, but by a written agreement that was created through political and economic decisions of the Pueblo. Thus any remedy to be applied in the Tribal Court must be legislatively established through tribal ordinance. The Santa Clara Tribal Code is silent on matters of real property. There are no procedures in the code for forcible entry and detainer, eviction, other landlord-tenant relations or foreclosure in the Tribal Code.

II

There are a number of provisions in the Santa Clara Tribal Code relating to the rights of debtors in relation to their consumer debt and the Pueblo has established procedures for repossession occurring on the Santa Clara Indian Reservation. This leads one to believe that the Pueblo is concerned about fairness and protection for their consumers. The basic premise in consumer rights legislation is that consumers have some rights in the goods purchased on credit. Indeed, Section 59.3(3) Santa Clara Tribal Code, recognizes that in cases in which the consumer has equity in an item such that the balance is \$300 or less, that item is not subject to repossession provided that an agreement for payment is reached. By creating that exception, the Pueblo is recognizing that persons have rights to items that they have bought on credit. Once those rights are recognized, then it is important to have procedures to address the extent of those rights and to ensure that any taking of the property is based in procedures that are known and followed. For consumer goods, the Pueblo has provided those procedures.

When a person has entered into a contract or agreement to purchase a house and has made payments against the purchase price of the house, a right is created in the form of equity. Any attempt to modify or take away the equity right must be done in a way that meets standards of due process. The Pueblo of Santa Clara has recognized this right and has passed the procedures that guarantee due

process for cases involving consumer goods, but has not yet done so for real property.

III

Procedures are necessary to define the nature of the homebuyer’s equity rights, but there are other rights and responsibilities that also need to be defined. Judge Naranjo ordered restitution in the amount of \$17,429.97. Since the MHOA does not authorize restitution and the tribal code is silent on any real property issues, where is the authority for such an order? Rights to equity, responsibility for restitution, procedures for eviction, and, if necessary, forcible entry and detainer are just a few of the tribal code provisions needed as a basis for landlord-tenant law.

The Pueblo of Santa Clara is bound by the Indian Civil Rights Act as it applies to tribal housing programs. There are a number of direct references to compliance with the Indian Civil Rights Act (ICRA) in Federal Indian housing regulations [24 CFR 905.446(b), 24 CFR1000.12] and in the Mutual Help Occupancy Agreement [9.2, 11.6]. Thus we must conclude that compliance with the ICRA is an important aspect of regulation of Indian housing. Part of complying with the ICRA is having the proper procedures in place for the Tribal Court to act upon a request by the Housing Authority without violating the homebuyer’s rights. Until the Santa Clara Tribal Council passes an ordinance identifying the respective rights and responsibilities of the homeowner and the procedures for eviction, the Santa Clara Tribal Court does not have any law to apply to eviction cases and any decision by the Tribal Court to evict would be violation of the homebuyer’s rights under the Indian Civil Rights Act.

Therefore, the order in this matter issued on 10 February 2003 is declared null and void and no further causes of action for eviction shall be filed in the Santa Clara Tribal Court until the Pueblo of Santa Clara passes an ordinance regulating landlord-tenant relations and foreclosures on the Santa Clara Indian Reservation.

IT IS SO ORDERED.

December 5, 2005

In the Southwest Intertribal Court of Appeals for the Santa Clara Tribal Court

JOSETTE L. PINO,
Defendant-Appellant,

v.

PUEBLO OF SANTA CLARA,
Plaintiff-Appellee.

SWITCA No. 04-006-SCPC
SCPTC No. CR 03-287

Appeal filed July 13, 2004

Appeal from the Santa Clara Tribal Court,
Joseph G. Naranjo, Judge

Appellate Judge: Stephen Wall

UNPUBLISHED ADVISORY OPINION

SUMMARY

Trial court guilty verdict was affirmed on charges of public drunkenness and disorderly conduct, but was dismissed on charge of disobedience to lawful orders of the court. Probable cause for the public drunkenness charge was established by third-party call summoning officer to scene, whereupon the officer observed that the appellant was intoxicated. Appellant disobeyed an order from the arresting officer, but that order fell outside the scope of code section establishing an offense for disobeying an order of the tribal council or tribal court, or any judge or officer thereof.

February 7, 2005

DONNA GUTIERREZ,
Petitioner-Appellant,

v.

MARIE A. TAFOYA
Respondent-Appellee.

SWITCA No. 004-007-SCPC
SCPC No. CV-04-095

Appeal filed November 13, 2009

Appeal from the Santa Clara Tribal Court
H. Paul Tsosie, Chief Judge

Appellate Judge: Jonathan Tsosie

This case is published at 21 SWITCA REP. 5 (2010).

DANNY BURBANK,

Appellant,

v.

PUEBLO OF SANTA CLARA,
Appellee.

SWITCA No. 04-009-SCPC
SCPTC No. CR 04-173

Appeal filed September 8, 2004

Appeal from the Santa Clara Tribal Court,
Joseph Naranjo, Chief Judge

Appellate Judge: Stephen Wall

UNPUBLISHED ADVISORY OPINION

SUMMARY

The appellate judge recommended that the decision of the trial court be affirmed because the appeal appeared to be based more on appellant's inability or lack of desire to comprehend the nature of the legal process than on any error by the Santa Clara Tribal Court. A review of the lower court record indicated no error.

January 18, 2005

In the Southwest Intertribal Court of Appeals for the Southern Ute Tribal Court

MELODY GUTIERREZ,

Defendant-Appellant,

v.

PUEBLO OF SANTA CLARA,

Plaintiff-Appellee.

**SWITCA No. 04-010-SCPC
SCPTC No. CR 04-163**

Appeal filed July 7, 2004

Appeal from the Santa Clara Tribal Court,
Joseph G. Naranjo, Judge

Appellate Judge: Stephen Wall

UNPUBLISHED ADVISORY OPINION

SUMMARY

Appellant's guilty plea to charge of person under the influence of intoxicating liquor or drugs was affirmed because the tribal court made no reversible errors. There was no evidence of manipulation or trickery to get appellant to make a particular plea, and her other bases for appeal likewise had no merit.

January 25, 2005

RONALD W. YELLOWBIRD, PRO SE,

Appellant,

v.

STANLEY WILLIAMS AND MICHAEL WILLIAMS,

Appellees,

and

RODERICK WILLIAMS,

Third-Party Appellee,

and

SOUTHERN UTE INDIAN TRIBE,

Intervener Appellee.

**SWITCA No. 04-011-SUTC
SUTC No. 04-CV-83**

Appeal filed September 28, 2004

Appeal from the Southern Ute Tribal Court
Elizabeth C. Callard, Judge

Appellate Judge: Melissa L. Tatum

OPINION

SUMMARY

In a civil case concerning a land assignment, appellate court affirmed tribal court's ruling that pro se appellant must vacate property that he had no right to occupy. Although the appellant disagreed with the ruling, he did not present any reasoned arguments to support his disagreement nor any legal grounds to reverse the ruling. The tribal court did not plainly err or reach a decision unsupported by the facts.

This matter comes before the Southwest Intertribal Court of Appeals from the Southern Ute Tribal Court, and arises out of a civil case regarding land assignments. The lower court found that Yellowbird had no right to occupy the property and ordered him to remove himself from the property. Yellowbird filed a notice of appeal with this Court. Yellowbird is representing himself in this case, and his notice of appeal listed a number of challenges to the trial court's orders, most of which are factual disagreements

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with the lower court's conclusions. On January 18, 2005, this Court accepted jurisdiction and issued an order establishing a schedule for filing briefs.

After this Court accepted jurisdiction, the parties filed a flurry of pleadings. Because Yellowbird is representing himself, these pleadings often do not conform to the usual format. Appellees have seized on these procedural discrepancies to urge this Court to dismiss the appeal. One of the strengths of the tribal court system is that, generally speaking, tribal courts focus on achieving substantive due process, and not elevating the strictures of legal procedures above fairness to the parties and "doing justice" in each individual case.

But due process cuts both ways, and the Court must be fair to all parties in the litigation. Appellees have a right to be heard and an opportunity to respond to Appellant's arguments. To that end, this Court will first summarize the pleadings and papers filed with this Court as part of this appeal. The Court will then turn its attention to addressing the alleged errors in the lower court's decisions.

I. Background

The following pleadings have been filed in this case since the Court issued its Jurisdiction and Scheduling Order:

February 22, 2005 - Yellowbird filed a motion requesting that this Court remand the case to the Southern Ute Tribal Council. In his motion, Yellowbird took issue with the form of the Southern Ute Tribal government; argued that the trial court erred in allowing a counter-complaint to be filed; argued that the trial court erred in granting the motion to quash subpoenas; took issue with how tribal monies were spent; argued that the trial court's conclusions were in error; and argued that the Tribe's actions contravened tradition.

February 25, 2005 - Yellowbird filed a supplemental statement taking issue with the argument that only tribal members may receive land assignments.

February 28, 2005 - Yellowbird filed a statement waiving his opening brief and reserving the right to reply to any brief submitted by appellee.

March 8, 2005 - Southern Ute filed a motion to dismiss the appeal, arguing that Yellowbird had not filed a proper opening brief and that he requested relief that this Court does not have the authority to grant. The Tribe's motion also argues that the papers filed by Yellowbird do not contain any support for Yellowbird's contention that the trial court erred.

March 11, 2005 - Stanley Williams filed a motion to

dismiss the appeal, arguing that Yellowbird did not follow SWITCA rules regarding the filing of briefs and that there is no basis for remanding the case to the Tribal Council.

April 7, 2005 - Yellowbird filed a closing brief, arguing that the Tribe violated the federal trust responsibility; again took issue with the way the Tribe spent its money; contended that the trial court erred in concluding that Yellowbird did not have a right to the land in question; continued to reiterate his arguments raised in prior pleadings; and concluded with a list of requests including returning him to his home, not being required to pay rent, and other related requests.

April 15, 2005 - Yellowbird filed a motion to stay for judgment and injunction pending appeal.

May 2, 2005 - Williams filed a response opposing Yellowbird's April 15 motion.

II. Analysis

This Court has carefully read all the documents filed in this case. A thorough review of those materials clearly shows that Yellowbird believed the trial court reached the wrong decision. But nowhere has Yellowbird presented any reasoned arguments to support that belief or any legal grounds for reversing the trial court's decision. It is not simply enough to allege that the trial court erred. It is the duty of appellant to point to specific errors and explain why, as a matter of law, the trial court made a mistake.

Given that Yellowbird is acting as his own attorney, this Court has reviewed the decision below to determine if the lower court plainly erred or reached a decision unsupported by the facts. This Court finds no such error. Yellowbird's disagreement with the trial court's decision does not make the decision wrong as a matter of law.

Accordingly, this Court hereby affirms the decision of the trial court. In light of that decision, all other pending motions are now moot.

IT IS SO ORDERED.

August 22, 2005

In the Southwest Intertribal Court of Appeals for the Santa Clara Tribal Court

SANTA CLARA PUEBLO HOUSING AUTHORITY,

Defendant-Appellant,

v.

MARIANNE NARANJO,

Plaintiff-Appellee.

**SWITCA No. 04-012-SCPC
SCPTC Nos. CV 92-0086 / CV-93-086**

Appeal filed October 4, 2004

Appeal from the Santa Clara Tribal Court,
Frank Demolli, Judge *Pro Tem*

Appellate Judge: Stephen Wall

OPINION

SUMMARY

In dispute over money owed on a house, the appellate court affirmed the tribal court's order that resolved the dispute because the matter was properly before the tribal court and there was nothing in the record to indicate that the judge abused his discretion. Most if not all of the problems in this long-pending case were due to appellant's lack of due diligence.

The Plaintiff-Appellee entered into an agreement with the Defendant-Appellant's predecessor to participate in a Housing and Urban Development (HUD) funded housing program. The original Mutual Help and Occupancy Agreement was signed on March 1, 1977. In 1988 there was a fire in the house and apparently there was some confusion as to who would pay for the damages caused by the fire and whether the Appellee had to pay the rental payment on the house while the house was unoccupied for repairs. Those repairs apparently took several months and the Appellee did not make her house payments while she was out of the house. In 1989 the Appellee filed a grievance in relation to the repairs for the fire damage and the payment arrearages.

The grievance hearing was scheduled with Earl Waites assigned as the hearing officer. On October 28, 1991, Mr. Waites made his decision recommending that the Appellee was to receive priority consideration for the repairs to her house, that the Appellee was to forego all of her claims against the Appellant for consequential damages, that the Appellant was to forego all of its claims

against the Appellee, the Appellant was to suspend its collection efforts on the arrearages pending approval of the recommendations made by Mr. Waites, and that the Appellee was to begin making regular monthly payments. The recommendations also recognized that the decision of HUD would constitute the final administrative action in this matter. HUD rejected the recommendations by Mr. Waites. Sometime later this matter was taken to the Santa Clara Tribal Court and the recommendations made by Mr. Waites were adopted and put into court order by Judge Silva in April of 1993. The Appellant appealed decision to the Santa Clara Tribal Council (then acting as Court of Appeals) on January 20, 1994. The Santa Clara Tribal Council provided the Appellee with its decision on April 29, 1996. The decision was both parties would be given one last chance to negotiate a resolution. If the parties did not make a good faith effort, the Appeals Court was to terminate the original Mutual Help and Occupancy Agreement. The appellate decision indicated that both sides were required to make a good faith effort to resolve the matter. The Appellate Court also asked the parties to provide documentation of the outcome of the resolution so the Appeals Court could finalize the decision in the matter.

On December 19, 2003, the Appellee filed a petition for conveyance of deed, declaratory and injunctive relief, and an offset of delinquency balance. The matter came before Judge Demolli on February 27, 2004. Judge Demolli ordered that the Appellee pay the Appellant six hundred and fifty dollars (\$650) and for the Appellant to deliver to the Appellee the deed to the house in question upon receipt of the six hundred and fifty dollars (\$650). The basis for coming to the amount of six hundred and fifty dollars (\$650) was that the agreed upon difference between the Appellant's claims and the Appellee's claims was between five hundred (\$500) and thirteen hundred dollars (\$1300), the equity that the Appellee had in the house and the fact that this matter has gone on for so long. The Appellee was given one year to pay the \$650. The Appellants appealed the decision of Judge Demolli stating that the Santa Clara Tribal Court lacks jurisdiction to overturn a decision of the Santa Clara Appellate Court, that the lower court judge failed to provide the parties with a hearing on the merits, and that the Appellant was denied the opportunity to present their evidence in the case or rebut the evidence that the lower court judge had in his possession which was unknown to the Appellant. The Appellee filed a motion to deny the appeal based on the jurisdictional restriction which prevents the Southwest Intertribal Court of Appeals (SWITCA) from hearing land cases from Santa Clara Pueblo.

On 28 February 2005, SWITCA entered a decision in this matter which was contingent upon a finding by the Tribal Council that SWITCA had jurisdiction in this matter. The Appellee had asserted that since this matter involved real

In the Southwest Intertribal Court of Appeals for the Ak-Chin Indian Community Court

property, the matter was outside of the jurisdiction delegated to SWITCA by the Santa Clara Tribal Council. On 26 July 2005, the court clerk for SWITCA received a letter from the Governor of Santa Clara Pueblo addressed to Judge Wall. The letter clarified the jurisdictional grant to SWITCA indicating that the Santa Clara Tribal Court and SWITCA had jurisdiction to decide matters that involved use, possession and disposition of houses that are under the jurisdiction of the Santa Clara Housing Authority.

The Appellant asserts that the Tribal Court lacked jurisdiction to render a decision on February 27, 2004 because the Tribal Court could not overrule the decision that the Santa Clara Tribal Appeals Court made on April 29, 1996. However there are two issues that must be addressed in order to determine whether the Tribal Court had jurisdiction to enter the decision from the February 27, 2004 hearing. First is the issue of whether the 1994 appeal was properly before the Santa Clara Tribal Appeals Court and second was whether the decision of the Santa Clara Appeals Court constituted *res judicata*. If appeal heard on April 29, 1996 was properly before the Court of Appeals and the decision was *res judicata* then the Tribal Court was without jurisdiction to conduct the hearing on February 27, 2004. On the first issue, the record shows that the appeal was filed nine (9) months after the decision by Judge Silva that incorporated the findings of Mr. Waites. The Santa Clara Tribal Code is clear that appeals must be filed within ten (10) days of the final judgment. Thus the appeal was not properly before the Santa Clara Tribal Appeals Court. Secondly, the decision that was rendered by the Santa Clara Tribal Appeals Court on April 29, 1996 was not *res judicata*. A close reading of the decision shows that the parties had 30 days to work out an agreement and then “the Appeals Court can make a decision if either side does not make a good faith effort to take care of this matter.” There is nothing in the record that indicates that the Appellant or the Appellee made an agreement or requested the Appeals Court to make a final decision in this matter due to lack of a good faith effort by either party to resolve the matter within a reasonable time after the 30-day time frame established by the Appeals Court. For these two reasons, the Santa Clara Tribal Appeals Court decision made on April 29, 1996 does not provide *res judicata* and the subsequent actions of the Santa Clara Tribal Court were within its jurisdictional authority.

The Appellant asserts that they were not given an opportunity to present their evidence or rebut evidence that was apparently held by the Court in this matter. While the Appellant was not given a chance to present their evidence, neither was the Appellee. This case has an extensive record and the essential facts of the case are agreed upon. The difference between the parties’ positions lies only in

how the law and accounting should be applied to determine the amount of monies owed by the Appellee and to what degree payments made by the Appellee can offset what the Appellant states is owed. The resolution of these issues is within the discretion of the Tribal Court judge. There is nothing in either the audio recording of the February 27, 2004 hearing or the written record of the case that indicates Judge Demolli abused his discretion in his assessment of the differences in the amounts claimed by either party. The frustration of the tribal judge at the length of time this case has been pending was apparent in the written opinion and in the recording of the hearing. Judge Demolli made his decision as a matter of justice and fairness and as an effort to resolve this matter which has needlessly dragged on for years. There is nothing to indicate an abuse of discretion in Judge Demolli’s decision.

It appears that most if not all of the problems with this case have been the result of the lack of due diligence on the part of the Appellant. The Appellant was nine (9) months late filing the appeal of Judge Silva’s decision of April 1993. Then the Appellant had the opportunity to file a request for the Santa Clara Tribal Appeals Court to terminate the Appellee’s Mutual Help and Occupancy Agreement for a lack of good faith effort in May of 1996 but failed to do so.

Since this matter was properly before Judge Demolli for the February 27, 2004 hearing and there is nothing that indicates that Judge Demolli abused his discretion in that hearing, the decision of the Tribal Court is **AFFIRMED**.

August 31, 2005

DAVID PETERS, SR.,

Plaintiff-Appellant,

v.

AK-CHIN INDIAN COMMUNITY,

Defendant-Appellee.

**SWITCA No. 04-013-ACTC
ACTC No. CR-04-408-051**

Appeal filed October 7, 2004

Appeal from the Ak-Chin Indian Community Court
Scott F. Sulley, Judge *Pro Tem*

Appellate Judge: Roman J. Duran

ORDER DISMISSING APPEAL

In the Southwest Intertribal Court of Appeals for the Ak-Chin Indian Community Court

SUMMARY

Appeal dismissed for lack of jurisdiction because Appellant failed to comply with the Southwest Intertribal Court of Appeals rule of appellate procedure for filing a notice of appeal.

THIS MATTER comes before the Southwest Intertribal Court of Appeals pursuant to Resolution Number A-74-99 of the Ak-Chin Indian Community Council, November 3, 1999, the Southwest Intertribal Court of Appeals rules, and the Court's inherent authority to manage its business. Upon review of the record, the Court concludes that the appeal must be dismissed because appellant, David F. Peters, Sr., hereafter appellant, has failed to meet the minimum requirements in the filing of an appeal.

PROCEDURAL REQUIREMENTS

Pursuant to the Southwest Intertribal Court of Appeals, Rules of Appellate Procedure, Rule 11 (e), the minimum requirements for filing a Notice of Appeal are:

1. the names, titles, addresses, and telephone numbers of the parties taking the appeal and their counsel unless the lower court determines that including the address or telephone number of any person would place that person in physical jeopardy;
2. the name of the court rendering the adverse ruling and the date the ruling was rendered;
3. a concise statement of the adverse ruling or alleged errors made by the lower court;
4. the nature of relief being sought; and,
5. a concise statement of the reasons for reversal and modification.

Appellant filed his appeal as follows:

“Comes now Renay Peters and submits the above-entitled Notice of Appeal before the Ak-Chin Indian Community Court.

The Defendant was sentenced on September 24, 2004 at 11:00 A.M. On August 12, 2004 the Defendant had a bench trial at which time he was convicted of Unlawful Use of a Weapon, Kidnapping, Threatening or Intimidating and Assault.

The basis for the filing of the above notice of appeal is as follows;

1. The trial court error in the finding of guilt on all counts.
2. The trial court allowed a pre-trial motion at

the time of trial.

3. The evidence was not properly secured and should have been not allowed.
4. In each of the counts the Prosecutors office failed to establish its standard of proof beyond a reasonable doubt.”

DISCUSSION

As a pre-requisite for this Court to take Jurisdiction of an appeal, the minimum statutory requirements must be met and adhered to, as this Court has stated in *Baker v. Southern Ute Indian Tribe*, 5 SWITCA REP. 1, 2 (1993); *Archuleta v. Archuleta*, 9 SWITCA REP. 27, 28 (1998); and *Twist, Jr. & Twist v. Conners*, 12 SWITCA REP. 7 (2001).

It is clear that the Appellant has met requirements #1, #2, and #3 of Rule 11(e). However, requirements #4 and #5 have not been met and this Court is not in any position to guess the Appellant's reasons for reversing and modifying the lower court's decision or granting any specific relief when it is not clearly requested. Furthermore, appellant was represented by counsel in the filing of his appeal and it is understood that counsel has a higher duty and obligation to comply and strictly adhere to court rules of procedure, whereas *pro se* litigants generally have some latitude but must also comply with the minimum statutory requirements when filing an appeal. See *Pichette v. Northwest Collections, Inc.*, Indian Law Reporter, 22 ILR 6051, 6052 (April 1995).

THEREFORE, IT IS THE ORDER OF THE COURT THAT THIS MATTER SHOULD BE AND HEREBY IS DISMISSED.

October 18, 2005

In the Southwest Intertribal Court of Appeals for the Santa Clara Tribal Court

GREG AGUILAR,

Defendant-Appellant,

v.

PUEBLO OF SANTA CLARA,

Complainant-Appellee.

**SWITCA No. 05-001-SCPC
SCPTC No. TR-04-159/TR-04-160**

Appeal filed January 21, 2005

Appeal from the Santa Clara Tribal Court,
Dennis Silva, Judge

Appellate Judge: Stephen Wall

OPINION

SUMMARY

Appeal dismissed for lack of jurisdiction because Appellant failed to comply with the Santa Clara Pueblo rule of appellate procedure for filing a notice of appeal.

On 13 May 2004, the Appellant was ticketed for allowing a child to be in the lap of the front-seat passenger rather than in the proper child restraints and for driving on a suspended driver's license. The appeals notice alleges that the Defendant-Appellant had attempted to take care of the tickets on 17 May 2004, soon after the tickets were issued, but that the Court did not have a record of the tickets. The Appellant alleges a second contact with the Court in June to take care of the tickets. At that time he asked the Court to contact him when the tickets were posted so he could come in. On 28 October 2004, the Appellant was in Court on a different matter when the Presiding Judge held him over after court and told him that the Clerk had asked the Judge to take care of the matter. The Judge assigned fines totaling \$164.00 and \$50.00 in court fees. The Appellant feels that he did not get to present his side of the matter. An appeal was made to the Tribal Council on 8 November 2004. The appeal was turned down and a letter to that effect sent to the Appellant on 24 November 2004 telling him that the appeal was within the jurisdiction of SWITCA. The Appellant attempted to file an appeal with SWITCA on 2 December 2004 which was rejected by the Santa Clara Tribal Court Clerk based on improper process. The perfected appeal was properly filed with the Santa Clara

Tribal Court Clerk on 6 December 2004. The appeal was forwarded to SWITCA on 21 January 2005.

There are two issues on the appeal. One, was whether the appeal was timely and, if the appeal was filed in a timely manner, the second issue is whether the Defendant was denied due process in the 28 October 2004 hearing.

The time frame for filing the appeal is ten (10) days as defined by the Santa Clara Tribal Code, Sec. 16.4, and the SWITCA establishes a fifteen-day (15) time limit for filing an appeal, unless the tribal code provides otherwise. In this case, the Santa Clara Tribal Code does provide otherwise: it provides for a ten-day (10) limitation. The Appellant did file an appeal within ten days; however that appeal was made to the Tribal Council which has limited the matters over which it exercises appellate jurisdiction. This case does not fall within the appellate jurisdiction of the Santa Clara Tribal Council. The Appellant did not file the appeal with SWITCA until December 6. The prior attempts to file are counted against the ten-day limit because the Appellant had the responsibility to ascertain the proper format and appellate court for his appeal. **Therefore, the appeal is not properly before the SWITCA and SWITCA does not have the jurisdiction to hear this matter.**

February 7, 2005

TEWA CONSTRUCTION, STEPHEN BACA, Owner

Plaintiff-Appellant,

v.

**S&S JOINT VENTURE, RON H. STANDIFERED
and ALAN DEKE NOFTSKER, Owners,**

Respondents-Appellees.

**SWITCA No. 05-002-SCPC
SCPTC No. CV 04-544**

Appeal filed January 21, 2005

Appeal from the Santa Clara Tribal Court,
Joseph Naranjo, Chief Judge

Appellate Judge: Stephen Wall

OPINION

In the Southwest Intertribal Court of Appeals for Kaibab-Paiute Tribal Court

SUMMARY

Petition for rehearing denied because the appellant failed to comply with the Southwest Intertribal Court of Appeals rule of appellate procedure for filing such petitions.

I

The Appellant-Respondent has filed a motion to rehear the appeal, SWITCA No. 05-002-SCPC, on which the decision was rendered on May 31, 2005. The Appellant-Respondent indicated that he was acting without assistance of counsel, although his attorney had advised him that he had 30 days to file the petition for rehearing. The motion for rehearing was filed on June 29, 2005. The Appellant-Respondent also characterized the appellate decision as advisory.

II

The Appellant is acting without assistance of counsel, and for that reason, there must be a liberal reading and application of the rules of the SWITCA. However, there are a number of rules that govern a Petition for Rehearing that must be adhered to regardless of whether the party is represented by counsel or not. First is the timeframe in which the petition must be filed. According to SWITCARE Rule 35 (2001), the petition for rehearing must be filed within fifteen (15) days. Second the petition is to be filed with the lower court clerk who will transmit the case to the SWITCA clerk. Third, the petition must include points of law the Petitioner feels that the Appellate Court overlooked or misunderstood and arguments on each point.

III

The Petitioner filed his request on June 29, 2005, twenty-nine (29) days after the appellate decision was rendered. This is clearly outside of the timeframe allowed for by the SWITCA Rules. In addition, the Petitioner simply included, as his brief, the original brief that was filed with the appeal. There was no attempt to identify those points that the Appellate Court had overlooked or misunderstood.

The Petition for Rehearing is hereby **DENIED**.

July 5, 2005

QUENTIN ALAN HILL,

Plaintiff-Appellant,

v.

CHARLEY BULLETT,

Defendant-Appellee.

**SWITCA No. 05-003-KPTC
KPTC No. 2004-CV-1001-FA**

Appeal filed February 4, 2005

Appeal from the Kaibab-Paiute Tribal Court
Mitch Kalaulia, Judge

Appellate Judges: Sharon M. Begay,
Bethany Berger and Petra E. Rogers

OPINION

SUMMARY

In civil case alleging false accusations, appellate court affirmed tribal court's decision that civil procedure rule did not require the court to award the full amount requested by appellant, and that tribal court could consider appellee's post-default letter and other relevant evidence in determining whether to award a default judgment. There was insufficient evidence that the court was biased against appellant. Case was remanded to the tribal court to give appellant an opportunity to rebut appellee's letter, and to give tribal court the opportunity to either justify the amount of its monetary award to appellant or to award an amount that is supported by the evidence. On remand, tribal court should consider whether the award was a penalty for contempt of court, whether such penalty is allowed under tribal rules of procedure, and if so, whether a \$1,500 penalty was excessive in this case.

The court clerk's apparent entry of default sua sponte raises the question whether a default judgment serves the interests of justice because it prevents a full hearing on the merits, which is a particularly strong preference in communities in which the parties will have continued interactions. Failing to fully air differences may produce future conflicts and resentment, which is why some other tribal courts award default judgments only in extreme situations, especially when the defaulting party is acting pro se and may not understand the consequences of his actions.

In the Southwest Intertribal Court of Appeals for Kaibab-Paiute Tribal Court

THIS MATTER COMES BEFORE THE SOUTHWEST INTERTRIBAL COURT OF APPEALS from the Kaibab Band of Paiute Indian tribal court and arises out of a criminal case that was partially settled through a plea agreement. The lower court awarded Petitioner one thousand six hundred and eighty dollars (\$1,680.00) on his Complaint for False Accusations that arose from allegations made by Respondent in a prior criminal case. Petitioner requested an award of \$6,160.00.

Petitioner-Appellant Quentin Alan Hill appealed the lower court decision's awarding him \$1,680.00 in his claim against Appellee-Respondent Charley Bullets. Mr. Hill makes three claims on appeal: first, that the court erred in applying Rule 26 (c) (2) of the Kaibab Rules of Civil Procedure by awarding him, by default, an amount that was lower than the amount he requested in his Complaint; second, that it was improper for the court to consider a letter filed by the Respondent after the entry of default; and third, that the trial judge was prejudiced against him in making the award.

We affirm the court's decision that Rule 26(c) did not require it to award the full amount requested by the Petitioner, and that it could take into account the letter along with other relevant evidence in determining whether there were sufficient facts to award a default judgment. Further, we do not find sufficient evidence that the court was biased against Mr. Hill. We find, however, that the court did not sufficiently clarify or justify its award, and that Mr. Hill should be given an opportunity to rebut the statements made in the Respondent's letter. We therefore remand to the trial court to give Mr. Hill this opportunity, and to clarify the basis for its award and enter an award justified by the allegations for which the court determines there is sufficient evidence.

I. Background

In the criminal case, Mr. Hill was arrested on the basis of complaints made by Mr. Bullets and charged with two counts of Contributing to the Delinquency of a Minor (B misdemeanors), Theft of Property (A misdemeanor), Terroristic Threat (A misdemeanor), Kidnapping (A misdemeanor) and Intoxication (B misdemeanor). He posted a bond of \$3,400.00, and incurred costs of \$2,500.00 to hire an attorney. Petitioner entered into a plea agreement in the criminal case on the advice of his attorney, pleading guilty to Intoxication and Contributing to the Delinquency of a Minor. The other charges were dismissed by agreement. The court accepted the plea agreement and sentenced the Petitioner to time served, a fine of \$250.00, and community service.

The Petitioner filed a civil Complaint for False Accusations against Respondent on October 25, 2004, alleging that Mr. Bullets made false allegations of kidnapping, theft and terroristic threat against him. He requested that the Respondent pay him \$2,500.00 in attorney fees, \$3,400.00 in bail posted and \$160.00 for two days of lost wages, a total of \$6,160.00, which he claimed were the result of these allegations. A summons was issued on the same date to the Respondent.

Respondent did not answer the complaint. The tribal court clerk filed an Entry of Default on November 23, 2004, approximately a week after the answer was due. A hearing was scheduled for December 16, 2004 for Petitioner to present evidence on damages. Respondent was provided with notice of the hearing, but there is no evidence that he received notice of the purpose of the hearing, or that default had been entered against him. Respondent failed to appear, and the Petitioner failed to present evidence in support of his claim. Respondent had mailed a letter to the court on December 13, 2004, explaining that he would not be able to attend the hearing. Mr. Bullets was unrepresented, and the letter did not indicate an understanding that he had failed to timely answer the complaint, or that default had been entered against him, but rather was more in the form of an answer to the charges made in the complaint. The letter, however, was not filed with the court until December 17, 2004 the day after the hearing. Another hearing was set for December 28, 2004. Again, notice was provided to Mr. Bullets, but again the notice failed to state the purpose of the hearing. Mr. Bullets again did not appear at the hearing.

At the hearing on December 28, 2004 the court entered its Order and Judgment awarding Mr. Hill \$80.00 for one day of lost wages, \$100.00 to be waived from his fine because of a computation error, and \$1,500.00 for damages from the underlying charges against him, for a total of \$1,680.00.

II. Analysis

On appeal, the Appellant alleges that the lower court erred in failing to award him the full amount requested in his complaint, that the court erred in considering a letter submitted by the Respondent after the hearing, and that the decision was the result of judicial bias.

The Petitioner cites Rules 26(c) and 27(a) of the Kaibab Paiute Rules of Procedure to support his argument that the judge should have awarded him the full amount requested in his claim for relief. Rule 26(c) states, "A judgment by default shall not be different in kind from, nor exceed in amount, that specifically prayed for in the demand for judgment." The trial judge was correct in holding that the Rule requires only that the award not be of a different nature (e.g., money damages if only injunctive relief was

In the Southwest Intertribal Court of Appeals for Kaibab-Paiute Tribal Court

requested) and not more than the amount requested in the complaint. (Slip. Op. 2). This is designed to ensure that defaulting parties are not caught unaware of the relief awarded against them, and have sufficient notice of the maximum danger of defaulting. The rule does not, as the Appellant suggests, prevent the court from awarding less than the amount prayed for by the Appellant.

Appellant also suggests that the court erred in scheduling a hearing and considering the letter submitted by the Respondent in determining the relief granted, arguing that judgment should have been entered under Rule 27(a), which covers situations in which the clerk may enter default, and provides that judgment by default can be granted without providing further notice to the defaulting party. However, under the Kaibab Band of Paiute Tribal Code Rule 27(b), judgment by default may only be entered by the clerk when the “party’s claim against the opposing party is for a sum of money which is or can by computation be made certain.” While the Kaibab Paiute tribal court has not interpreted the term “sum certain” other courts have given the identical phrase its common sense interpretation. The “sum certain” requirement is not satisfied simply by requesting a specific amount of damages in one’s complaint. A “sum certain” instead requires that there be no disagreement on the amount to which the plaintiff would be entitled if the claim is successful. It includes for example, demands for payment on an account balance already agreed to by the parties, *Monte Produce, Inc. v. Delgado*, 126 Ariz. 320, 321-322 (Ariz. App. 1980), or a demand for payment on a past due promissory note. The trial judge was entirely correct that a claim of this kind, for damages arising from alleged false allegations, was “not for a sum of money that can be made certain” (Slip Op. 2) and therefore must be considered under Rule 27(b) rather than Rule 27(a).

Rule 27(b) further provides that where the amount is not one for a sum certain, “judgment by default can be entered only by the Court upon receipt of whatever evidence the Court deems necessary to establish the claim.” These words suggest that entry of default does not automatically mean that the defaulting party is guilty of the claim. Rather, the court must determine whether the evidence presented establishes guilt, and if so, what damages are warranted. After entry of default, the trial court may decline to enter a default judgment if it appears that the evidence does not warrant it, that the defaulting party’s delinquency is not sufficient to justify a default judgment, that the party seeking default will be prejudiced, or that given the nature of the case, a default judgment will not serve the interests of justice. See Wright, Miller & Kane, Federal Practice and Procedure § 2685; see also *Bermudez v. Reid*, 733 F.2d 18 (2d Cir. 1984) (error to enter default judgment in prisoner habeas case without determining whether prisoner’s claim was supported by

the evidence); *Gallegos v. Franklin*, 89 N.M. 118, 122, 547 P.2d 1160, (N.M. Ct. App. 1976) (a court may, in its discretion, enter a default judgment on liability; but if the court desires to determine compensatory or punitive damages, a hearing is necessary in which both sides are permitted to offer evidence). The trial court, therefore, correctly held that this authorizes the court to “take into consideration relevant evidence to establish the fair, equitable and just amount to be awarded.” The court eloquently stated the reason for this power: “To do otherwise would open the floodgates of civil lawsuits for undeterminable money amounts in the hopes that the respondent will default.” Particularly in cases such as this one, in which the parties are unrepresented, and the risk of successful claims of false allegations by default might deter individuals from reporting crimes to the police, the court must ensure that even in case of default, meritless claims are not rewarded.

In this case, the court recognized that the evidence was conflicting. As the court noted, although Mr. Hill alleged that his attorney fees, bail bond, and time missed from work were due to false allegations made against him by Mr. Bullets, he in fact pleaded guilty to two of the charges made against him in a court of law, and the other charges were not proved false, but instead were “dismissed by agreement.” *Kaibab Paiute Tribe v. Hill*, Docket No. 2004 CRM 0804 (Oct. 12, 2004). In reaching the award based on these facts, however, the court’s judgment is deficient. The court did not give any reasoning to support its determination that \$1680.00 was an appropriate amount to award. Indeed, the court’s statement that there was “no evidence that the claims made against the Petitioner by the Respondent were false” would suggest that no award was justified.

Mr. Hill also complains that the trial court took into consideration the letter submitted by Mr. Bullets, which was filed after the first hearing. As discussed above, even after the entry of default, the trial court had discretion to consider the evidence it deemed relevant in determining whether a default judgment should be entered, and the amount of that default judgment. The court therefore had discretion to consider the letter. It may, however, have erred in not providing Mr. Hill with an opportunity to respond to the letter. Mr. Hill apparently only learned of the letter from Mr. Bullets when he went to court on December 28, 2004, after the court had decided on the award, and had no opportunity to respond to the claims Mr. Bullets made in the letter. Justice demands that Mr. Hill be given an opportunity to respond to all evidence considered by the court in making its determination.

In the Southwest Intertribal Court of Appeals for Nambe Tribal Court

III. Conclusion

We therefore remand to the court to either justify the amount of the award, or award an amount which is supported by the evidence. On remand, the Petitioner should be given an opportunity to prove that he is entitled to the damages he seeks and respond to the letter by Mr. Bullets. After receiving such evidence, the court has three options: it may choose to award the full amount requested by the Petitioner if it determines that the evidence supports the request; it may choose to reinstate its original award with an explanation of how the evidence justifies the award; or it may choose to award a lesser amount should it determine that the evidence warrants it. We also note that it appears that part of the court's award may be in the form of a penalty, as the Order and Judgment awards \$1,500.00 "for damages resulting from the underlying charges and Mr. Bullett's failure to respond to this hearing." On remand, the court should consider whether the award was in fact a penalty for contempt of court, whether such a penalty against a defaulting party is permitted by the Kaibab Paiute Rules of Procedure, and if so whether a penalty of \$1,500.00 is not excessive in this case.

Finally, we consider the claim that the trial judge was prejudiced against Mr. Hill in making its decision. Mr. Hill presents no evidence other than the failure to award the full amount he requested and the consideration of Mr. Bullets' letter to support this claim. The test for judicial bias may be met when it is demonstrated that the judge is "unable to hold the balance between vindicating the interest of the court and the interests of the accused." *Nichols v. Sullivan*, 867 F.2d 1250 (10th Cir. 1989). The court's decision to award less than the full amount that the Petitioner requested and its consideration of Mr. Bullets' letter are not sufficient to establish judicial bias. We note, however, that it was Judge Kalaulia that accepted Mr. Hill's guilty plea in the underlying criminal charges and on remand Judge Kalaulia should consider whether this fact improperly biases him in hearing this matter.

While this disposes of this case, we feel compelled to say a few words about the entry of default in this matter. The record does not include a motion for default by the plaintiff in this matter. Rather, it appears that the court clerk entered default sua sponte when the defendant was a week late in answering the complaint. Unlike most default rules, the Kaibab Paiute Tribal Code does not require the court to wait for a motion for entry of default. Rather it gives the trial court discretion in the matter, providing that "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, his default may be entered by the Clerk . . ." Rule 27(a). Dismissing without waiting for a motion by the parties may be a

valuable tool of the Kaibab Paiute Tribal Court in ensuring that stale cases do not forever remain on its dockets. In exercising this discretion, however, the court should consider whether default judgments serve the interests of justice. Entry of default, if not later set aside under Rule 27(c), often prevents a full hearing in which both sides can be heard on the merits of the issue. The general preference for matters to be heard on the merits is particularly strong in communities such as this one, where parties will have continued interactions with each other, and failure to fully air differences in a hearing may only lead to future conflicts and resentment. It is for this reason that other tribal courts have held that "default judgment is a remedy resorted to in extreme situations where there is a clear record of willful misconduct." *Lomayesva v. Humetewa*, No. 98-AP-00017 (Hopi 11/16/1999); see also *Billie v. Abbott*, No. A-CV-34-87 (Navajo 11/10/1988) ("[A] court should impose [default] only in the most extreme circumstances."). This is even more true where the defaulting party is unrepresented and may not understand the consequences of his actions.

This case is vacated and remanded for proceedings consistent with this opinion.

IT IS SO ORDERED.

August 26, 2005

IN THE MATTER OF A MINOR CHILD

**SWITCA No. 05-005-NTC
NTC No. JV-03-007**

Appeal filed April 20, 2005

Appeal from the Nambe Tribal Court
Marti Rodriguez, Judge

Appellate Judge: Stephen Wall

ADVISORY OPINION

SUMMARY

Tribal council of Pueblo that adheres to customary law and dispute resolution referred child custody case to appellate court under Southwest Intertribal Court of Appeals Rule of Appellate Procedure 3(c) for an advisory opinion summarizing current tribal and federal law and discussing the options available to the governing body.

Because placement of child with maternal aunt was not an involuntary placement based on allegations of abuse or neglect, continued placement need not be related to

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sufficiency of the evidence for such allegations. Tribal court judge did not abuse her discretion by considering appellant's actions as a whole when making her decisions. The lack of written tribal standards for removal of a child from a home or for reunification is irrelevant due to the voluntary placement in this case, and because the tribal court judge established written standards for reunification in a July 16, 2003 order.

Pueblo's law and order code defers to federal law when custom and tradition do not resolve a matter such as time frames to review child custody cases. The federal regulations under the Adoption and Safe Families Act (ASFA) establish such time frames as well as reunification requirements and certain required judicial determinations. Tribal court judge made the necessary determination about temporary custody on July 16, 2003.

However, other ASFA regulatory requirements were not met but must be applied on remand.

Visitation decisions fall within the tribal court's discretion, and there is nothing to indicate that the court was unreasonable in its efforts to meet the parties' visitation needs.

The appellate court has no jurisdiction to address appellant's claims that BIA Social Services has no standards for diligent investigation and other matters because the BIA is not under the jurisdiction of any tribal court.

There is no evidence in the record that the guardian ad litem's degree of participation in the court proceedings negatively impacted the appellant.

Issues concerning the structure of a tradition-based tribal court can be addressed only through the Pueblo's political and cultural processes.

Appellant does not raise legal considerations under the Indian Child Welfare Act. Rather, it is up to appellant to do all things necessary to have a meaningful relationship with his child; the tribal court cannot order that relationship to exist.

Remanded to the tribal court for rehearing and further proceedings in accordance with the ASFA in order to resolve this matter.

I

This matter has come before the Southwest Intertribal Court of Appeals (SWITCA) by way of certification by the Pueblo of Nambe Tribal Council. Authority of

SWITCA to hear this matter is found in SWITCARA 3(C) (2001) and since this matter is a certification by a tribal government, procedural requirements to establish jurisdiction are hereby waived.

This case was initiated by the mother of the Respondent (hereinafter "Child") voluntarily giving custody of the Child to her sister (hereinafter "Martinez") and the Nambe Pueblo Tribal Court issuing an Order of Temporary Placement for the Child to be placed with Martinez. A hearing on the temporary order was held on July 16, 2003 at which time the Nambe Pueblo Tribal Court ordered the temporary placement to continue and placed certain requirements on the parents of the Child, presumably for the purpose of reunification of the Child with his parents. Those conditions required the Appellant to obtain an alcohol assessment and comply with the recommendations of the screener and to report for a psychological evaluation. The father was to also complete the paperwork requirements to enroll the Child as a member of the Pueblo of Nambe. The mother was to comply with all orders from the Santa Fe Magistrate Court and to obtain a psychological evaluation. Both parents were ordered to participate in parenting classes, refrain from driving until properly licensed, obey all laws of the Pueblo of Nambe and the State of New Mexico, and to comply with recommendations of the BIA Social Services. Martinez was ordered to cooperate with BIA Social Services in matter related to the health and welfare of the Child. Visitation was also ordered.

The record indicates that the parents got off to a rocky start. Both refused to sign the BIA Client Agreement and reports show the Appellant having a spotty record for attendance and participation in required therapy and other meetings. The Appellant did sign an acknowledgment of paternity on August 26, 2003 and at the same time filed a Petition to Establish Paternity and for Sole Legal and Physical Custody of the Child. Apparently the Court took no action on the Petitions and on September 11, 2003, the Appellant, through his attorney, filed a Motion for Emergency Interim Relief and Request for Emergency Hearing. The Court set a hearing date on the Motion for Emergency Interim Relief for October 2, 2003. The record indicates that on September 22, 2003, a memo was submitted by the mother of the Child entitled "Pursuant to Our Conversation on September 22, 2003." The record is unclear as to who the conversation was with, but the memo indicates that the mother of the Child wished the Child to remain with Martinez.

The hearing was held on October 2, 2003 and since the BIA social worker was not available due to a death in the family, the matter of custody was continued until the BIA Social Services could present a report and recommendation to the Court. Some orders were made from the Bench to

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effect of arranging visitation, warning the Appellant not to drive until he has his license, and requiring the Appellant to maintain contact with BIA Social Services. On October 9, 2003, Judge Rodriguez entered an Order Setting Visitation to address visitation issues that had arisen between the parents of the Child and Martinez.

On November 11, 2003, Judge Rodriguez appointed a Guardian Ad Litem (GAL) for the Child. The record does not indicate that any party moved the Court to appoint the GAL and the record indicates that Court determined that the best interests of the child required that GAL be appointed. The GAL submitted her Entry of Appearance on January 20, 2004.

The Court set a date for a hearing to review a parenting plan and child support for April 28, 2004 but that hearing date was continued by the Court and rescheduled for May 13, 2004. On May 13, 2004, the Child's mother filed a Petition for Return of Custody to Biological Parents and Revocation of Temporary Placement Order of July 3, 2003. At this hearing, custody was not returned, but another Order for Visitation was issued, allowing for extended visitation and off-site visitation in certain circumstances.

On August 13, 2004, the BIA Social Services submitted a report and recommendations to Judge Rodriguez and a review hearing was held in which the Court found that the Appellant had still not gotten his driver's license, that the parents of the Child were living together in Santa Cruz, and that the mother of the Child had lied to the Court concerning her employment. The Court also raised the issue of baptism for the Child. The parents of the Child sought to have unsupervised visits which was denied due to violations of the order not to drink alcoholic beverages as evidenced by the ignition interlock records.

The Court set a hearing date of September 8, 2004 to address the allegations of alcohol use, domestic violence and issues related to visitation. The Appellant's legal counsel moved to withdraw as counsel on September 3 and was relieved of that duty by court order on September 7, 2004. The allegations of alcohol use and domestic violence were substantiated by the statements by the mother and father. The BIA Social Services indicated that the parents are unstable and that they recommended termination of parental rights due to the needs for a permanent placement for the Child. The Court ordered continued supervised visitation, but expanded the visitation to include grandparents.

On November 11, 2004, the Appellant filed an appeal of this matter to the Governor or Tribal Council. The appeal was based in the Appellant's perception that this matter has not been heard in a timely manner and the decisions of Judge Rodriguez were not made in the interest of

reunifying the family. The Appeals Hearing was scheduled for December 8, 2004. According to the Law and Order Code, Pueblo of Nambe, Chapter 1, Section 3, the Appellate court shall consist of the Governor of the Pueblo or other designated official. Governor Tom Talache Jr. heard the case and issued an order on December 8, 2004. The Appellate Court order, among other things, granted joint and shared custody of the Child with the Appellant and the Child's mother, ordered Martinez to return the Child to the BIA Social Services or BIA Law Enforcement.

Once the Appellate Court order was published, Martinez filed an Expedited Notice of Appeal and Expedited Motion to Stay Action Pending Appeal on December 13, 2004. On December 16, the GAL filed an Expedited Notice of Appeal, Request for Hearing on Expedited Notice of Appeal and an Expedited Motion to Stay Action Pending Appeal. The GAL alleged that she was not given notice of the Court of Appeals hearing and was unable to represent the interests of the Child. According to Chapter 1, Section 3 of the Law and Order Code for the Pueblo of Nambe, the Supreme Court will consist of the Tribal Council for the Pueblo of Nambe. On December 17, 2004, six (6) members of the Pueblo of Nambe Tribal Council signed an Order Granting Expedited Motion to Stay Action Pending Appeal. On the same day, the Appellant filed a Motion to Quash Order Granting Expedited Motion to Stay Action Pending Appeal and on the same day, the Governor, in his role as Chief Appellate Judge, quashed the order signed by the six members of the Tribal Council, apparently due to a procedural defect in the manner in which the signatures were secured.

The Supreme Court of the Pueblo of Nambe, upon its own motion, issued a Writ of Superintending Control from Supreme Court to Court of Appeals Regarding Scope of Authority. The writ was signed by eight (8) of the nine (9) members of the Tribal Council. The writ ordered that the Order to Quash issued by the Appellate Court was invalid due to lack of jurisdiction. On December 28, 2004 an Order Granting Expedited Motion to Stay Action Pending Appeal was signed by nine (9) members of the Tribal Council for the Pueblo of Nambe and filed, ordering the Child to be returned to Martinez. On the same day, Judge Rodriguez issued an order to enforce the Supreme Court decision. Then on January 13, 2005, Judge Rodriguez again issued an order outlining times and conditions for visitation.

On March 29, 2005, the Appellant filed an appeal in the Pueblo of Nambe Supreme Court alleging a number of issues and requesting that the Supreme Court make a decision on the continued placement of the Child. The issues that the Appellant raises could, if accepted, change the outcome of the Supreme Court Order of December 28,

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2004. First, the Appellant states that there is insufficient evidence of abuse or neglect to support continued placement of the child. Second, that the Tribal Court abused its discretion by not giving proper consideration to compliance, discharge reports and other evidence of progress. Third, the Pueblo does not have standards to control the Court, GAL and Social Services and the lack of control interfered with the Appellant's parental rights and delayed the progress of the case. The Appellant alleges seven (7) areas in which the lack of standards denied him of due process.

1. No standards for removal or procedure for reunification.
2. No established time frames for periodic review of the matter, causing delay.
3. Tribal Court's decisions were capricious and arbitrary due to lack of standards for visitation.
4. There were no standards requiring BIA to complete its investigation and submit reports on a timely basis.
5. BIA Social Service did not follow its own rules and regulations concerning diligence of investigation and timeliness of reports.
6. BIA Social Services lack of diligence in attempting to reunify the Appellant with his son.
7. Lack of standards for the GAL resulted in her lack of participation, thus her lack of diligence resulted in denial of Appellant's due process.

Fourth, the Appellant was denied a fair and impartial hearing due to an apparent relationship between Judge Rodriguez and Martinez which allowed for ex parte communications and the actions of the Judge which appeared to indicate the Judge was conducting her own investigation of the matter. Lastly, the Appellant urges that the intent of the Indian Child Welfare Act was contravened by the lengthiness of the case, the lack of diligence and lack of effort to reunite the Appellant with the Child.

The Appellant asks the Supreme Court to grant him sole legal and physical custody, or in the alternative, grant the Appellant custody with the physical residence in the home of Cindy Loretto and Frank Sanchez, paternal grandparents and licensed foster parents, appoint a Judge Pro Tempore to periodically review the case, schedule a hearing on the matter and grant any further relief as the Council deems just and equitable.

II

The Appellant's first assertion is that there is insufficient evidence to support the continued placement of the Child with Martinez and to deny the Appellant extended visitation with the Child. In the Appeal Petition, the Appellant states that he has not been convicted of any crime involving abuse or neglect or that no evidence that the Appellant had endangered the Child. The Appellant is correct that he has not been charged with a crime and, if he had been charged with a crime, there is not sufficient evidence to support continued placement. If he had been charged with a crime, placement would have had to be based on evidence of his abuse or neglect. However, that is an incorrect characterization of the nature of this case. This case came to the Nambe Pueblo Tribal Court through a voluntary placement, not through removal by authorities. At the hearing on July 16, 2003, the Judge made certain findings and those findings included descriptions of the Appellant's and the Child's mother's alcohol abuse and domestic violence and prescribed conditions to resolve the identified dysfunctions. The Appellant's actions of requesting custody prior to successfully completing the conditions indicate that he did not understand that the conditions were requirements for reunification. Because this was not an involuntary placement based on allegations of abuse or neglect, there is no requirement that the continued placement be related to the sufficiency of evidence related to abuse or neglect.

III

The Appellant's second point is that the Court abused its discretion by not giving proper consideration to compliance and discharge reports, the psychological assessment and his steady employment and observations of Family Services for Children, the organization that supervises visitations with the Child. The Court had the responsibility to review a wide range of information and sources of information when deciding to return the Child to the Appellant or in determining visitation. Many times the consideration given to one source of information must be weighed against other information coming to the attention of the Court. In this case, the compliance and discharge reports were marginal. The Appellant's psychological assessment found that he was not in need of treatment for any mental health issues. He did have a good employment and the record is silent as to observations by the Family Services for Children. However, these positive and marginally positive reports were counterbalanced by admissions of alcohol abuse and domestic violence, including driving under the influence (Hearing on September 8, 2004), driving without a license, failure to maintain communications with BIA Social Services, failure to sign a Client Services Agreement with BIA Social Services, and other negative actions. The Judge for the Nambe Pueblo Tribal Court did not abuse her

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discretion in her consideration of the Appellant's actions as a whole to guide her decisions.

IV

The Appellants third, and most complex, point was that the Appellant was denied his rights to due process. He makes several assertions. One, there was a lack of standards governing the removal and return of the Child, the time frames for review, visitation, specially unsupervised visitation, and the investigation and timely submission of reports. Two, BIA Social Services failed to follow its own policies and procedures and did not exercise diligence in trying to reunify the Appellant with the Child. Three, the GAL did not fully participate in the process, thus denying the Appellant his right to due process.

The claim that there is a lack of standards to guide the removal of the Child or procedure for reunification must be seen in light of the nature of the case. The Child was not removed from the home or from the custody of the Appellant. The Child was voluntarily given over to the Court by the Child's mother. Thus the lack of written tribal standards for removal of a child from a home has no impact on this matter. Concerning the lack of procedure for reunification, if one looks at the July 16, 2003 order, one can see that the Judge had established a number of standards that had to be met. The fact that the Pueblo has no written standards does not apply in this matter since the Judge established the standards that would apply in this case at the first court hearing.

The second claim relating to standards was that there is a lack of standards that define time frames for review of child custody cases. The Law and Order Code for the Pueblo of Nambe defers to Federal law, meaning that applicable Federal law will be applied when tribal custom or tradition does not resolve a matter. Generally established timeframes are not within the purview of tribal traditional law except in very general terms. However, the Adoption and Safe Families Act (ASFA) regulations, 45 CFR 1356, establish a number of requirements that include a timetable for review hearings, requirements for reunification unless certain conditions exist (none of which apply in this matter) and requires certain judicial determinations. This Act is a part of the Social Security Act which is used to govern the disbursement of Title IV-E funds and establishes Federal standards in foster care cases involving payment of IV-E foster care funds.

ASFA requirements include a timetable for review of cases and require that there be certain findings by the Judge. A review of the Court orders indicates that the Judge made the necessary judicial determination that the best interests of the Child were to remain in temporary

custody of Martinez at the first hearing on July 16, 2003, as required in 45 CFR 1356.21(c). However, other requirements that the Court find that there be reasonable efforts to determine permanency, plan reunification or a non-application of the reasonable efforts, 45 CFR 1356.21(d), were not met and timely review was not conducted.

The AFSA also places time limitations on lengths of time a child can be in foster care and if there is no reunification with the parents, their parental rights are to be terminated. This is to ensure that there is a plan for a permanent home for the child. However, it has been the position of the New Mexico Children, Youth and Families Department that tribes and pueblos do not have to terminate the parental rights as long as there is some tribal alternative that ensures that the child will have a permanent home (the State administers Title IV-E funds). Under ASFA, there can be no termination of parental rights if the child is in placement with family members or the services necessary for reunification have not been provided. Thus the BIA Social Services recommendation for termination of parental rights is a violation of ASFA.

There is a question as to whether the ASFA regulations would apply in this matter. There are two aspects to the question of applicability. One, if the Child or his caretaker is receiving Title IV-E Foster Care funding, the requirements found in the regulations would certainly apply. However, in this case the record is unclear as to whether Martinez is receiving IV-E funds to subsidize the Child's foster care, so the application of the regulations based on IV-E is unclear. Second, the Law and Order Code of the Pueblo of Nambe, states that "In all civil cases, the Nambe Court shall apply any laws of the United States that may be applicable, any authorized regulations of the Department of Interior and any ordinances or customs of the tribe not prohibited by such federal laws." Chapter 1, Section 17(a) of the Law and Order Code, Pueblo of Nambe. This section would appear to require the application of ASFA and its regulations, which establish the standards the Appellant claims do not exist.

The third claim is that there are no standards for visitation. The assertion by the Appellant went on to state that the progress made by the Appellant was ignored by the Court when visitation was established. This question is closely related to the Appellant's second point that the Court abused its discretion by not giving proper consideration to compliance and discharge reports, the psychological assessment and his steady employment and observations of Family Services for Children. By necessity, the decision as to visitation is made case by case. There are no easy formulas that can be used to determine the number of visits, their length of time, the time between visits and whether those visits should be supervised. These kinds of cases fall

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within the discretion of the Court. Often conditions change and the Court must be able to respond in a reasonable and appropriate manner. For that reason, the Court has the authority to use its discretion to fashion the visitation needs as determined by the current situation. The Appeals record notes six (6) separate orders relating to visitation. The Appellant wanted unsupervised visitation, but also admitted to driving under the influence of alcoholic beverages, not having a driver's license, and domestic violence. The Court had to take these actions and other negative reports into consideration as well as the positive reports that were made about the Appellant. There is nothing to indicate that the Court was unreasonable in its attempt to meet the visitation needs of the parties.

The fourth, fifth and sixth points the Appellant makes concerning the lack of standards is that BIA Social Services has no standards for diligent investigation and timely reports and the inability of the BIA Social Services to follow its own procedures, including requirements for reunification of the family. It is clear that the BIA Social Services failed to complete its responsibilities in this matter. The timeliness of the reports is not the only issue. BIA has the responsibility to ensure that the ASFA requirements are met relating to reunification, review hearings and case management. But the record does not reflect any BIA requests for review hearings and the client services agreements does not contain services designed to reunify the family. However, an appeal in the Nambe Pueblo Supreme Court is not the forum to resolve these issues. The BIA has always maintained that its enforcement of tribal court orders is out of courtesy because the BIA is not under the jurisdiction of any tribal court. Thus the Nambe Pueblo Supreme Court could not order the BIA Social Services to respond to its previous Tribal Court orders in a timely manner. This Court is without jurisdiction to address the fourth and fifth claim of denial of due process.

The Appellant also states that the lack of participation by the GAL denied him of his right to due process. While the GAL may not have done her duties to the degree of satisfaction the Appellant desired, the record does not indicate any misfeasance or malfeasance on her part. It is also hard to see how the attorney who is supposed to represent only the interest of the Child could deny the Appellant his rights to due process. There is no evidence in the record that indicates that the level of participation by the GAL (other than appealing this matter to the Nambe Pueblo Supreme Court) negatively impacted the Appellant.

V

The Appellant also asserts that the Judge denied the Appellant a fair hearing due to her impartiality and bias. There are allegations of ex parte communications with Martinez by the Judge and that the Judge was expanding her role as judge to include prosecutor and social worker. These claims may be a matter of concern in a court system that is based wholly in the adversarial system and is governed by written rules of procedure. However, the Pueblo of Nambe maintains a court system that is significantly different from the American court system. Although the Pueblo has modified its traditional Court to allow for a tribal judge rather than the Governor or Lieutenants serving as judge, the traditional aspects of the Nambe Pueblo Tribal Court remain, including the questioning of the witnesses by the Judge.

The Court is small and serves a small population. Having a prosecutor, defense attorney, and court-based social worker are far beyond the financial capabilities of the Pueblo; yet those tasks usually assigned to such personnel must be done. It must be conceded that there is the appearance of unfairness or bias; however maintaining a tribal court that is based in tribal tradition and maintaining its cultural base may result in the creation of such an impression. The issue of the structure of the Court can only be addressed through the political and cultural processes of the Pueblo.

VI

The last point in the Appellant's petition was that the intent of the Indian Child Welfare Act (ICWA) was to prevent the break-up of Indian families and the actions of the BIA Social Services and the GAL contradicted that intent and that the best interest of the Child is to have a meaningful relationship with the Appellant. Neither of these points are legal considerations. The Appellant cites Matter of D.S. 577 N.E.2d 572 (Ind. 1991) to support the statement of the intent of the ICWA; however there are other interpretations. The basic structure of the ICWA seems to indicate that the main intent was to ensure that decisions made about Indian children were made by tribal courts and not state courts, unless the tribe was willing to allow the state court to hear the case. The tribal court may allow for the breakup of family under ICWA, if the conditions warrant such action and such action is in the best interest of the child.

In this case, the best interest of the Child is to have a meaningful relationship with the Appellant. But the Nambe Pueblo Tribal Court cannot order that relationship to exist. Granting the Appellant custody of the Child does not automatically create a meaningful father/son relationship. A meaningful father/son relationship can only exist because the Appellant is in control of his life: not drinking, not

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drugging, not expressing his frustration in ways that hurt other people, living a life that is free of crime. These things can only happen if the standards established by Judge Rodriguez in the July 16, 2003 hearing are met, including treatment, counseling, and clearing up old legal issues. Whether these things are done is up to the Appellant. Whether there is a meaningful relationship between the Appellant and the Child is in the hands of the Appellant.

VII

The points of the Appellant's Petition that need to be resolved relate to the applicability of ASFA to this matter (Part IV, supra). The Appellant's assertion that there are no standards establishing timeframes for review is true as long as one only looks to written tribal law and BIA regulations. However that defect can be rectified through the application of ASFA. The Law and Order Code for the Pueblo of Nambe states that Federal law will be applied, however, there is some question as to applicability of ASFA in cases that are not IV-E funded foster care. However, to not apply ASFA would violate the Appellant's rights to due process because the Pueblo of Nambe does not have procedural requirements for hearings, timeframes or judicial determinations in child welfare cases. **Remanding this case to the Nambe Pueblo Tribal Court for rehearing in accordance with the standards established by ASFA and that require all further proceedings on this matter follow the ASFA standards will resolve this matter.**

June 21, 2005

**IN THE MATTER OF EDWARD VANCE,
ATTORNEY No. 013111**

**SWITCA No. 05-006-ACTC
ACTC No. JV-03-007**

Appeal filed June 22, 2005

Appeal from the Ak-Chin Indian Community Court
Jerry Derrick, Judge

Appellate Judge: Albert Banteah

ORDER

THIS MATTER comes before the Southwest Intertribal Court of Appeals from the Ak-Chin Indian Community Court and arises out of a dispute over suspension of practice of law in the Ak-Chin Indian Community for a period of two years to be followed by one year of probation.

The appellant, by and through counsel, has now filed a withdrawal of notice of appeal. This Court hereby grants the withdrawal. It is therefore the order of this Court that the above matter be and it is hereby dismissed.

SO ORDERED.

July 14, 2005

MARIE DASHENO,

Appellant,

v.

PUEBLO OF SANTA CLARA,

Respondent-Appellee.

**SWITCA No. 05-007-SCPC
SCPTC No. CR 05-1117**

Appeal filed August 16, 2005

Appeal from the Santa Clara Tribal Court,
Joseph Naranjo, Chief Judge

Appellate Judge: Stephen Wall

UNPUBLISHED ADVISORY OPINION

SUMMARY

The appellate judge recommended that the tribal court's final order be affirmed in part. The lack of bail was immaterial given appellant's guilty plea and sentence. Appellant made a knowing waiver of the right to legal counsel. The statement of probable cause to conduct a DWI investigation included an adequate basis. The seven-day jail sentence was not an enhancement; rather, it was authorized by the tribal code. The appellate judge recommended that the careless driving charge be dismissed because the statement of probable cause did not describe how appellant was driving her vehicle.

December 2, 2005
