Shawn Vincent BEST Sr., Appellant

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP14-003, 6 CTCR 23

12 CCAR 01

[Jay Manon, Attorney, for Appellant.
Sabrina Desautel & Curtis Slatina, Office of Prosecuting Attorney, for Appellee.
Trial Court Case No. CR-2013-36164/65]

Hearing September 19, 2014. Decided January 12, 2015.
Before Chief Justice Anita Dupris, Justice Rebecca M. Baker, and Justice R. John Sloan Jr.

Dupris, CJ

I. SUMMARY

Appellant was found guilty by a jury of three charges: Battery - Domestic Violence (CTLOC §§ 3-1-4 and 5-5-54(b)(1)); Disobedience of a Lawful Court Order (CTLOC §§ 3-1-123, 5-5-101(b), and 5-5-54(b)(2)); and Stalking (CTLOC §§ 3-1-15 and 5-5-54(b)(1)) on September 13, 2013. He was sentenced on November 7, 2013 to 900 days in jail with credit for 219 days already served. The jail sentence was allocated as follows: 360 days for the Battery - Domestic Violence, of which 180 were a mandatory minimum required under the Domestic Violence Code (CTLOC § 5-5-54); 360 days for the Stalking, of which 90 days were a mandatory minimum required under the Domestic Violence Code, *Id*.; and 180 days for the Disobedience of a Lawful Court Order (DLCO) , of which 45 days were a mandatory minimum required under the Domestic Violence Code, *Id*.. The total mandatory minimum days in jail, combined, are 315.

The trial judge entered a judgment and sentence which assessed the 315 as mandatory actual jail time to be served. Appellant filed a timely appeal, challenging the verdict of guilty to the Stalking and DLCO charges, as well as challenging the Trial Court's interpretation of mandatory minimum to mean actual time to be spent in jail. Oral Arguments were held on September 19, 2014.

At the Oral Arguments Appellant chose not to pursue the issue of whether he received adequate notice of the Okanogan Court Restraining Order which formed the basis of the charge of DLCO in that the Okanogan Court Order had adequate information to show he did receive such notice. The remaining issues were (1) whether the evidence supported the jury finding of guilty on the charge of Stalking; and (2) whether "mandatory minimum" jail sentence means actual jail time.[1] For the reasons set out below

[1] Appellant also asserted that the Trial Court erred in not giving an instruction on proving the domestic violence allegations by a preponderance of the evidence, as required by the Code. *See*, CTC, section 5-5-54. He withdrew this objection after a review of the record revealed that the Trial Court actually instructed the jury on the higher burden of proof: beyond a reasonable doubt, which was found to have been proven to the jury.

we affirm the conviction on the charge of Stalking, and reverse and remand the Trial Court's finding that "mandatory minimum" means actual time of incarceration required by the Code.

II. DISCUSSION

A. Standards of Review

The first issue regarding reviewing a jury's finding of guilt raises questions of law and fact, and the second issue is a question of law. Questions of law are reviewed *de novo*; mixed questions of law and fact are reviewed *de novo* if it is in the interests of justice. *See, CCT v. Naff,* 2 CCAR 50 (1995) and its progeny. We review both issues *de novo*.

B. Jury Verdict of Guilty on Stalking Charge

When reviewing a jury finding of guilty, we are guided by *Pakootas v. CCT,* 1 CCAR 65 (1993), and *Condon v. CCT,* 3 CCAR 45 (1996). The standard is we will not reverse a jury verdict unless "after reviewing the evidence in a light most favorable to the prosecution, no rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." *Condon, supra* (cites omitted).

Appellant argued both insufficiency of evidence and that the victim was not credible because she admitted on the stand that she had lied in her filings with the State Court when she attempted to get the restraining order vacated. The elements of the crime of stalking, as set out in the Court's jury instruction #16 are:

> "1. That on or about the 5th through the 18th day of October 2012, the defendant purposefully contacted Jacqueline Trevino; and,
> 2. The contact would have caused a reasonable person to fear bodily injury; and,
> 3. The defendant knew or should have know that Jacqueline Trevino would fear bodily injury; and,
> 4. Jacqueline Trevino did in fact fear bodily injury; and,
> 5. That the contact occurred on the Agency Campus, Nespelem, Washington, within the boundaries of the Colville Indian Reservation...."

The evidence presented to the jury on this issue is comprised of the testimony of Ms. Trevino, one of Ms. Trevino's co-workers, and Police Officer Delano, who identified Appellant's voice on the recorded messages submitted as evidence of the stalking. The jury had the evidence of Ms. Trevino's statements made to the State Court regarding her request to vacate the restraining order before it, and was able to factor it into its decisions on credibility of the witness. A witness testified that Appellant showed up at Ms. Trevino's workplace during working hours, demanding to see her.

Ms. Trevino testified Appellant was contacting her and pressuring her to change her statements to the State Court; and there were recorded messages which Appellant purported to make to Ms. Trevino which could be considered as intimidating and harassing. Finally, Ms. Trevino testified that Appellant's

behavior and contacts over the period of time set out in Jury Instruction 16 made her fear for her safety. All this evidence was before the jury when it made its decision to convict Appellant of Stalking.

A review of the evidence in a light most favorable to the prosecution shows that a rational trier of fact could find, beyond a reasonable doubt, that Appellant was guilty of the charge of Stalking. The evidence also showed that Appellant and Ms. Trevino had been in a relationship with each other at least at one time. The standard set out in *Condon, supra,* is met, and the conviction for Stalking should be affirmed. We so hold.

C. Mandatory Minimum Sentence Does Not Mean Actual Jail Time

The record shows that the Judge believed "mandatory minimum" jail sentence meant that she was required to direct Appellant to spend that much time in jail. The Trial Court did not give a reason for this decision, and rested it on the statutory language which mandated the jail term to be imposed. Appellant was given a cumulative sentence on all three (3) charges of 900 days, with credit for 219 days already served, and a mandatory minimum of 315 days on all three charges. Appellant asserts that the Trial Court did not consider whether any of the jail sentence's mandatory minimum amounts were subject to suspension.

Appellee asserts that the Legislative History of the Domestic Violence Code, CTC, Chapter 5-5, substantiates its belief that "mandatory minimum" jail time meant actual time in jail. A review of the Legislative History does not support this claim. First, legislative history is not statutory, and should only be used if there is ambiguity in a word or phrase. *See, eg., Exxon Mobil Oil Corp. v. Allapattah Services, Inc.* 545 U.S. 546 (2005). We have few cases in which we have relied on legislative history to support a statutory interpretation. *See, eg., Stead v. CCT,* 2 CCAR 27 (1993), *St. Peter v. CCT,* 2 CCAR 2 (1993), and *Wiley v. CCT,* 2 CCAR 60 (1995), all which reference the legislative history of the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§1301, *et seq.*. *See, also, Rodriguez v. CCT,* 9 CCAR 19 (2007) (self-defense in domestic violence cases), and *Davisson et al. v. CCT,* 11 CCAR 13 (2002) (burdens of proof required for domestic violence enhancements), both which reviewed the legislative history of the Tribes' Domestic Violence Code, CTC, Chapter 5-5. The last case in which we reviewed legislative history was *Pouley v. CCT,* 4 CCAR 38 (1997), an enrollment case. Neither *Rodriguez* nor *Davisson, supra,* addressed the issue of mandatory minimum sentencing.

CTC, § 2-1-76, Sentencing, states the judge "may suspend all or any part of the fine or sentence imposed by him...." We have defined "sentence" as "an essential part of a judgment in a criminal case which involves the legal consequences of a confession of guilt or a finding of guilt, punishment.... [It] also means punishment consisting of a fine, a jail term, or both." *St. Peter v. CCT,* 2 CCAR 2 (1993).

There is no specific finding in the legislative history of the Domestic Violence Code, CTC Chapter 5-5, which states the CBC meant "mandatory minimum" to mean "actual jail time to be served." The Code is not ambiguous regarding the judge's discretion in sentencing, within the limits set for each criminal offense. We have already held that "sentence" means the punishment in a judgment which includes a fine, jail time or both.

We have also recognized that the trial judge has broad discretion in sentencing a defendant, within the limits set by the law, as dictated by the ICRA. *See, eg., Coleman v. CCT*, 2 CCAR 43 (1993) ("[T]he trial judge has great discretion in determining the sentence of a defendant, provided that the trial judge does not exceed the statutorial punishment limits of the statute in question."); *Coleman v. CCT*, 2 CCAR 58 (1996) ("We decline to limit the Tribal Court's sentencing discretion absent legislative direction in the applicable criminal statute to the contrary."); and *accord*, *Carson v. CCT*, 5 CCAR 33 (2000) and *Justus-Finley v. CCT*, 7 CCAR 11 (2003). We will not unnecessarily restrict a trial judge's discretion to fashion a just sentence without explicit legislative direction to do so.

The CBC has enacted a comprehensive Domestic Violence Code. If it meant to restrict the Court's ability to sentence a defendant on a jail term, it would have stated so. We are mandated to read the Code as a whole and to give it a reasonable interpretation; we are mandated not to legislate, and to recognize the plain meaning of the words of the Code. We recognize that the CBC finds that domestic violence cases should get heightened scrutiny. However, there is nothing in the Domestic Violence Code which supports a finding that a defendant's mandatory jail term was to be considered as only actual time in jail. We so hold.

III. CONCLUSION

Based on the foregoing we AFFIRM the guilty verdict on the charge of Stalking. Further, we REVERSE the Court's finding that "mandatory minimum" means "actual time to be served," and REMAND for a sentencing hearing consistent with our ruling in this matter.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Jason M. PAKOOTAS, Appellee.

Case No. AP14-011, 6 CTCR 24

12 CCAR 04

[Wes Meyring, Office of Prosecuting Attorney, appeared for Appellant.
Dave Stevens, Office of Public Defender, appeared for Appellee.
Case No. CR-2013-36179]

Hearing September 19, 2014. Decision January 15, 2015.
Before Presiding Justice David C. Bonga, Justice Rebecca M. Baker and Justice R. John Sloan Jr.

Bonga, J

SUMMARY

On July 4, 2013 there was a motor vehicle accident on the Confederated Tribes of the Colville Reservation's Gold Lake Road involving Tribal members. Testimony was presented that Officer Johnathon Knutson had been informed that alleged Appellee Pakootas was the driver and that alcohol was involved. The accident resulted in suspected serious injuries to the driver and passengers who were transported to the Coulee Community Hospital. Testimony of Officer Knutson also informed the Trial Court that no other tests for alcohol consumption were given. Officer Knutson furt6her testified that he was advised to have a Special Evidence Blood draw be administered, that was performed without a warrant. On December 22, 2013 the Trial Court Granted the Defendant's motion to suppress the toxicology report without prejudice and this Appeal was timely filed.

Based o the reasoning below the Court of Appeals finds that the Trial Court was correct in applying the facts and law before it in granting the Motion to Suppress and therefore the Appellate Court **AFFIRMS** the decision granting the Motion to Suppress.

FACTS

The record as examined by the Appellate Court shows the following material facts in this matter:

1. There was a motor vehicle accident on the Confederated Tribes of the Colville Reservation's Gold Lake Road on July 4, 2013, involving Tribal members.
2. There were several officers dispatched to assist First Responders at the accident scene and were at the accident scene at 20:33:01 and were joined by Officer Knutson.
3. Officer Knutson was identified as clearing the scene of the accident for the hospital at 20:49:17.
4. Jason Pakootas was believed to be the driver and that alcohol was involved.
5. Officer Knutson testified he was advised to be the Officer at the hospital on July 4, 2013. Officer Knutson arrived at the hospital at 21:25:12. The Chief of Tribal Police Orr called the officers at the scene at 21:47:24 hours to ask if any WSP support was required.
6. Officer Knutson was advised to do a Special Evidence Blood draw due to the extent of the physical injuries to the vehicle occupants.
7. Officer Knutson testified he did have Jason Pakootas read and sign the Special Evidence Warning.
8. Officer Knutson testified Blood was drawn from Jason Pakootas at 22:30 on July 4, 2013.
9. Officer Knutson testified he did not read the implied Consent Warnings for Blood.
10. Officer Knutson testified he did not tell Jason Pakootas he had the right to refuse the blood test because he (Officer Knutson) did not believe Jason Pakootas had the right to refuse.
11. Officer Knutson testified he did not read the Washington State Implied Consent Warrant, nor the Voluntary Blood/Urine/Breath provisions, nor any CTC Implied Consent Warnings as he thought they were not necessary.

12. Officer Knutson testified he did not request the consent of Jason Pakootas for the blood draw on July 4, 2013.
13. Officer Knutson testified he did not seek a warrant to draw blood from Jason Pakootas.
14. Officer Knutson testified other officers had been involved, including Officer Marchand.
15. Officer Knutson testified officer duties included interviewing victims, witnesses, taking time sensitive pictures, measuring and accident reports.
16. Officer Knutson testified he had little experience with warrants and thought it too much work to call for a warrant.
17. Officer Knutson testified cell phone coverage was sporadic between the accident scene on Gold Lake Road and Coulee Medical Center.

The Appellate Panel, upon review of this case, would like to restate the desire that a trial court's Findings of Fact are written in such a manner that the facts are supported by the evidence in the record. The Panel, reluctantly, instructs the judge at trial to write findings of fact and conclusions of law in such a manner that one can know what the decision was based on. For example the Panel does not find it helpful when Findings of Fact are stated in the manner of "so and so testified that..." instead of stating something as an actual fact. As found in Black's Law Dictionary, 8th Ed., p. 664:

> Findings of Fact. A determination by a judge of a fact supported by the evidence in the record usually presented at the trial or hearing. <he agreed with the jury's findings of fact that the driver did not stop before proceeding into the intersection.>

STANDARD OF REVIEW

The Tribes have not challenged the Trial Court's Findings of Fact. In *Colville Confederated Tribes v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 Ind.Lw.Rptr. 6059 (1995) this Court held that "A Trial Court's Findings of Fact are presumed to be correct and should not be set aside unless clearly erroneous."

DISCUSSION

1. Did the Trial Court err by finding that the exigency did not exist to authorize a blood draw?

The material facts before us are undisputed and this Court after reviewing the facts does not find any of the facts to be clearly erroneous. Exigent Circumstances may exist if (1) a person's life or safety is threatened; (2) a suspect's escape is imminent, or (3) evidence is about to be removed or destroyed. *Black's Law Dictionary, 8th Ed.*, pg. 260. The Appellate Panel has concluded that there was a lack of evidence amounting to exigent circumstances, as there was insufficient effort made by the Tribes to develop the facts to a degree that might have justified the circumstances as requiring immediate action. This Court agrees with the position stated by Justice Sotomayer found in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) *"*...an exception to the Fourth Amendment's warrant requirement for nonconsensual blood

testing...must be determined case by case based on the totality of the circumstances" with sufficient evidence of an emergency situation that could amount to exigent circumstances were not proven at trial. Thus this record does not favor reversal.

2. Did the Trial Court err by exclusion of the Washington State Implied Consent Law in favor of the Tribes' own implied consent statute?

The decision by the Appellate Court does not reach the issue of whether or not the application of Washington's Implied Consent or the Tribes' implied consent should be the rule. The Panel believes the outcome would be the same as under *McNeely* that the totality of the circumstances does not support exigent circumstances as the officer made no effort as he thought it as "too much work to call for a warrant." Thus the facts in this matter precludes the need to rule on the Implied Consent Law question for this case.

It is therefore ORDERED that:

The decision of the trial court at the Motion to Suppress hearing is **AFFIRMED**. This matter is remanded to the Trial Court for action consistent with this order.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs,

Michael VINCENT, Appellee.

Case No. AP14-002, 6 CTCR 25

12 CCAR 07

[Curtis Slatina, Office of Prosecuting Attorney, appeared for Appellant.
Dave Stevens, Office of Public Defender, appeared for Appellee.
Trial Court Case No. CR-2013-36343]

Hearing November 21, 2014. Decided January 21, 2015.
Before Hon. Dennis L. Nelson, Hon. David C. Bonga, and Hon. Michael Taylor

Taylor, J

Proceedings Below

In December of 2013, a criminal Complaint containing three counts was filed in the trial court against Appellee. The Complaint charged Appellee, in Count I, that Appellee committed "an act which would be violative of federal criminal law or Washington criminal law" the possession of a firearm by a convicted felon in violation of a Washington State statute RCW 9.41.040(2)(B), such act defined as a tribal crime by CTC 3-1-231 punishable by 360 days in jail and/or a $5,000 fine. The Complaint

charged, in Count II, that Appellee committed "an act which would be violative of federal criminal law or Washington criminal law" the possession of a firearm which had its serial number removed in violation of a Washington State statute RCW 9.41.040, such act defined as a tribal crime by CTC 3-1-231 punishable by 360 days in jail and/or a $5,000 fine. The Complaint charged, in Count III, that Appellee possessed drug paraphernalia in violation of CTC 3-1-181.

On December 23, 2013, Appellee filed a Motion to Dismiss Counts I and II of the criminal Complaint arguing that a prior trial court, *CCT v Jane, et al*, 2 CTrR 31 (2001) held CTC 3-1-231 to be contrary to the Colville Tribal Civil Rights Act, CTC 2-1-178. The Jane court found this statute denied a defendant's right to due process of law in that it suffered from "improper incorporation, lack of notice and lack of prosecutorial standards." Ibid. at 2.

On January 31, 2014, after briefing by Appellant and Appellee, the trial court here, in an eight page opinion, granted Appellee's Motion to Dismiss Counts I and II of the Complaint with prejudice holding that CTC 3-1-231 is "void for vagueness." *CCT v Vincent*, No. 2013-36343. On Appellant's Motion, the trial court dismissed Count III without prejudice to simplify the Appeal in this matter. Ibid., Order of February 4, 2014, CR-2013-36343.

A Notice of Appeal was filed February 6, 2014, and an initial hearing was held to determine issues and establish a briefing schedule on March 21, 2014. The parties provided extensive briefing of the issues, including additional briefing at the request of the Court. Oral Argument was heard on November 21, 2014.

Issue on Appeal

While several issues were briefed by the parties, the central issue, which we decide today, is whether CTC 3-1-231 is violative of the due process of law provisions of the Colville Tribal Civil Rights Act, CTC 2-1-178, in that it is so vague that it denies the tribal community its right to know and understand the criminal laws to which it is subject and/or provides enforcement and prosecuting authorities with insufficient definition and certainty with regard to the laws they are obligated to enforce.

Standard of Review

The question of whether CTC 3-1-231 violates the due process provision of the Colville Tribal Civil Rights Act, CTC 1-5-2(h), is an issue of law. Issues of law are reviewed *de novo*. *Naff v CCT*, 2 CCAR 50, 2 CTCR 8, 22 Ind. L. Rptr. 6032 (1995).

Incorporation of Foreign Law

In *CCT v Wiley*, 2 CCAR 60 (1995), this Court clearly defined for the Tribes the scope of the power of the tribal legislature to incorporate the laws of other jurisdictions into tribal law. The *Wiley* Court found that the adoption by the Business Council of most of the provisions of the Washington State traffic code, including the criminal provisions, was appropriate, lawful and provided sufficient notice to the tribal community of the law that governed their activities on the public road within the Reservation.

Importantly, the *Wiley* Court found that the incorporation of these traffic laws operated prospectively so that the driving public could know that the current state traffic laws governed their behavior. However, in doing so the *Wiley* Court could look to CTC 9.1.02 (now renumbered as CTC 3-3-2) in order to find that the Business Council had the power to, and did, recognize that the state traffic laws would change over time by amendment, addition, or deletion. Section 9.1.02 specifically provided (and CTC 3-3-2 continues to provide) that state traffic code amendments, deletions and additions became Colville law at the time they occurred. Thus, it is clear to the community and to law enforcers what traffic law is to be applied on the date an offense is alleged to have occurred.

This is not the case with CTC 3-1-231. There is no provision in the Colville Law and Order Code that recognizes amendments, deletions, or additions that may occur in the federal or state criminal law after the date that CTC 3-1-231 was enacted and incorporates those amendments into Colville law. In the volumes of tribal law available to the Court, the legislative history of code sections amended or added to the code subsequent to its original adoption in 1972, are annotated section with dates and adopting resolution numbers. Section 3-1-231 has no such annotation so it can be assumed that it was part of the original 1972 code. Moreover, whatever prior date for the enactment of CTC 3-1-231 is postulated, it is at least arguable, that the felon in possession statues of the state and federal codes as they appeared in 1972 (or at some other prior date) are in fact the applicable law available to the Colville community and law enforcement when defining the offenses charged here. In oral argument Appellant clearly stated that the Tribes charged Appellee under current (2013) state statutes and that this was an assumption that had to be made.

The problem presented here is one of clarity and knowledge of the law to be applied. Basic concepts of due process require that the community subject to the law must be able to ascertain with certainty the law that the government may apply to them and that the government officials are not permitted to select among a variable set of standards.

Due Process and Void for Vagueness

Appropriate and clear notice of the law to the tribal community and tribal officials is a keystone of due process as defined in the law of the Colville Tribes. *Lambert v CCT*, 5 CTCR 34, 10 CCAR 52 (2011). CTC 3-1-231 by its language and the language of the other applicable provisions of the Colville tribal code, establishes as tribal law two very broad bodies of criminal law, i.e., the criminal statutes of Washington State and those of the United States. See: CTC 1-1-5. These bodies of criminal law may be inconsistent, if not conflicting, on the same subject. See, for example, the federal and state statutes dealing with the basic charges that are the subject of this appeal, a felon in possession of a firearm. See: 18 U.S.C. 922 (g) and RCW 9.41.040.

Where a statute prohibits certain behavior and provides a criminal penalty for violation, that statute runs afoul of due process provisions like those in Colville Code or the Indian Civil Rights Act, 25 U.S.C. 1302, when the statute is so vague that the public cannot understand what conduct is prohibited

and/or law enforcement official, are not given specific instructions regarding what conduct is prohibited and what is not.

However, the void for vagueness limitation on statutes should be used sparingly. *Schwartzmiller v Gardener*, 752 F.2d 1341, 1364 (9th Circuit 1984).

Void for vagueness is concerned with defendant's right to fair notice and adequate warning that certain conduct runs afoul of the law. *Gentite v State Bar of Nevada*, 501 U.S. 1030, 1077-78 (1973). Moreover, courts are to give statutes with criminal penalties more scrutiny under the void for vagueness evaluation. *Forbes v Napolitano*, 236 F. 3d 1009, 1011 (9th Circuit 2000).

Void for Vagueness on Its Face

Statues may be void for vagueness on their face or as applied. A statutes will not be void on its face if it defines the offense with sufficient definitiveness that ordinary people can understand what conduct is prohibited; and establish standards that permit police to enforce the law in a non-arbitrary, non-discriminatory manner. *Nunez v City of San Diego*, 114 F, 3d 935, 940 (9th Circuit 1997).

"Among the most fundamental protections of due process is the principle that no one may be required at peril of life, liberty or property to speculate as to the meaning of … statutes. All are entitled to be informed as to what the State commands or forbids." *Cunney v Bd. of Trs. of Vill. of Grand View, N.Y.*, 680 F.3d 612, 620 (2nd Circuit 2011).

A statute may be void for vagueness if it fails to provide people of ordinary intelligence reasonable notice and opportunity to understand what conduct it prohibits. *Hill v Colorado*, 530 U.S. 703, 732 (2000); *Thibodeau v Portuondo*, 486 F.3d 61, 65 (2nd Circuit 2007). It may be void if it authorizes or encourages discriminatory enforcement because it fails to provide explicit standards for law enforcement officials. *Graynerd v City of Rockford*, 408 U.S. 104, 108-109 (1972).

Void for Vagueness as Applied

Appellee argues that this statute as applied should be struck down because the due process clauses of the Colville Civil Rights Act CTC 2-1-178 and the federal Indian Civil Rights Act 25 U.S.C. 1302, et. seq. require that the statute be sufficiently clear so as not to cause persons of common intelligence to guess at its meaning or to differ as to its application.

Here the tribal statute broadly sweeps together two very comprehensive bodies of criminal law that in many areas overlap, with differing definitions and, thus, obligations imposed for the same conduct. Such overlapping makes it difficult for the average person to be placed on notice as to what conduct is prohibited and, also, often provides law enforcement with both a choice as

to what law to apply to a specific set of facts. CTC 3-2-231 does not give clear direction to tribal authorities as to what law is to be applied to a specific set of facts.

In addition, the lack of a statutory direction as to the prospective or non-prospective application of the federal and Washington State bodies of criminal law CTC 3-1-231 leaves both the tribal community and tribal authorities without direction as to whether the Washington State felon in possession statutes apply as they existed when the Colville code of laws was adopted (1972) or as they existed when the offenses charged in this case took place (2013).

The "void for vagueness" violation of the due process provisions of tribal and federal civil rights law must rarely be applied to strike down a tribal statute. However, in this circumstance, the broad sweep of CTC 3-1-231 attempting to absorb two substantial bodies of law which regularly differ, together with the lack of statutory direction regarding amendments and additions to the federal and state bodies of criminal law leads us to find that this statute must be found to violate due process both facially and as applied.

Appellant argues that this Court in *CCT v Wiley*, 2 CCAR 60 (1995) found that the Washington State statutes proscribing driving while intoxicated absorbed by tribal statute into the Colville Code by reference, now CTC 3-3-1, were found to be lawful and within constitution power of the tribal legislature to enact. However, the tribal enactments reviewed by the *Wiley* Court did not incorporate two overlapping bodies of traffic law into the Colville Code and contained a provision that specifically provided for recognition of amendments and additions to the state code. Now CTC 3-3-2.

We also note that legal counselors to the Tribes have been aware of the questionable status of this statute for thirteen years. See: *CTC v Jane*, et. al., 2 CTrR31, CR-MN-2000-23985, Nov. 29, 2001. A legislative solution to the concerns set out in this opinion and in the two prior trial court opinions is available should the Tribes wish to absorb the criminal codes of other jurisdictions.

ORDER

Based on the foregoing authorities and analysis, we AFFIRM the decision of the Trial Court in this matter, and REMAND this matter to the Trial Court for further action on issues unresolved herein by the decision of the Trial Court, consistent with this Opinion and Order.

COLVILLE CONFEDERATED TRIBES, Appellant/Cross Appellee,

vs.

Rose CONDON, Appellee/Cross Appellant.

Case No. AP14-027, 6 CTCR 26

12 CCAR 12

[Wes Meyring, Office of Prosecuting Attorney, appeared for Appellant/Cross-Appellee.
Dave Stevens, Office of Public Defender, appeared for Appellee/Cross-Appellant.
Trial Court Case No. CR-2014-37262]

Hearing held January 16, 2015. Decided February 2, 2015.

Before Chief Justice Anita Dupris, Justice Dennis L. Nelson, and Justice Mark W. Pouley

Dupris, CJ

This matter came before the Court of Appeals for an Initial Hearing on January 16, 2015. Wes Meyring, Office of Prosecuting Attorney, appeared for Appellant-Cross Appellee. Dave Stevens, Office of Public Defender, appeared for Appellee-Cross Appellant.

Three outcomes can happen at an Initial Hearing: 1) the Court may find that there are sufficient grounds to proceed with a limited review of the record; 2) the Court may find that there are sufficient grounds to find error and remand to the Trial Court for action; or 3) that there are insufficient grounds to proceed with an appeal. The Court has found, in this instance, that there are insufficient grounds to proceed with this appeal and remands to the Trial Court.

In this case, the Tribes filed a Criminal Complaint against Ms. Condon. A Motion for Arrest Warrant and Corrections Hold was filed along with the Complaint. Approximately five (5) weeks later, spokesperson for Ms. Condon filed a Motion to Dismiss with Prejudice for Violation of Due Process Rights. The Court scheduled a motion hearing four (4) calendar days[2] later, over objection of the Tribes. Despite the short time frame, the Tribes managed to file an Answer to the Motion. At the hearing the Court dismissed the matter, without prejudice, quashed the warrant and removed the Corrections hold.

ABUSE OF DISCRETION

Appellant's argument that the Trial Court abused its discretion and acted outside the bounds of law by setting a hearing within five days of Defendant's motion in violation of CTC 1-2-10 and over objection of the Tribes is without merit. CTC 1-2-10 clearly states that motions "shall be filed and served on opposing party no later than five (5) days prior to the time specified for the hearing, unless a different period is fixed by these rules, by **order of the court** or for good

[2] Motion was filed 11/13/14, a Thursday, and the hearing was scheduled for Monday, 11/17/13.

cause shown." This language clearly allows the Court to use it's discretion to set motions hearings for times that may better serve the parties and the Court's schedule. The Appellant has failed to show how the earlier time significantly prejudiced the Tribes.

The Tribes also argue that the Court made a decision on information that wasn't fully developed. Defendant's counsel argued at the motion hearing that Ms. Condon was being held in a State mental health facility but was not able to receive the recommended treatment because of the Correction's Hold. With the hold removed and the warrant quashed, she would be able to receive the recommended treatment. The Tribes stated that this information was not presented in the form of an affidavit or other written document and that since the motion hearing was scheduled so quickly, they didn't have time to verify the details of the alleged treatment requirements.

We have found in past cases, that before we will overturn for abuse of discretion, we must find that the decision was manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. We did not find that the Court did that here.

One concern raised by the parties, and a reason for filing the appeals, is that the Trial Court is ignoring the rules regarding filing motions, and the time frames for hearing such motions ore often than necessary. This raises issues of procedural due process if the exception becomes the rule without consideration of the reasonable expectations of the parties to having the protection of the rules to follow.

It is well-known that the court rules for the Trial Court are sparse, and the only written ones are what is found in the statutes, We note, although it does not affect our decision in this case, that it is important that the Trial Court judges understand what the rules are and, unless there is a reason to forego the rules, it protects all the parties interests in a case to follow the rule. Our ruling herein is on this case specifically; it does not foreclose any further review of the issue in an appropriate case

Appellant further asserted that the matter should not have been dismissed without prejudice, but it has not shown prejudice for a dismissal without prejudice, In fact, Appellant has no restrictions on when it can refile the charges other than the statute of limitations, We hold this is not an appealable issue under the facts of this case.

DISMISSAL WITHOUT PREJUDICE

Appellee-Cross Appellant argues that the Court should have dismissed this action without prejudice based on due process violations. In her argument to the Trial Court she claimed that she was arrested for using her cousin's debit card without authorization to do so. She was incarcerated on Sept. 26, then attempted suicide on Sept. 27. The following Monday, Sept. 29, she was examined by a health care professional who determined she was a danger to herself. She was transported to Eastern State Hospital (ESH)that same day.

A few days later, the Tribes filed a motion to dismiss the citation, filed a criminal complaint for Theft, and requested that Ms. Condon be evaluated at ESH. She would be returned for arraignment within 72 hours after her evaluation. She was not appointed an attorney until two weeks later. On Oct. 13, after her evaluation was complete, ESH petitioned for a 90-day involuntary treatment hold. At the time of the motion hearing, she had been held for approximately 53 days.

There are not enough facts decided on the merits in this case to review in order to determine if the dismissal without prejudice violated any due process rights of the appellee/cross-appellant. This request is premature. Appellee/Cross Appellant argues that she was held beyond the statutory limit, but what we have in the facts are that she was being held, at least a part of the time, on an involuntary commitment order from the State of Washington, This issue is better raised on appeal once there has been a final judgment and order in this case For this reason we find the Cross-Appeal on the issue of alleged violation of due process rights of the defendant/Cross-Appellant should be dismissed.

CONCLUSION

Based on the foregoing, we hold that the Appeal and Cross-Appeal filed herein should be dismissed and the matter remanded to the Trial Court for appropriate action. It is so ORDERED.

Ryan CATE, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case Number AP13-014, 6 CTCR 27,

12 CCAR 15

[Jeremy Stevens and Jonnie L. Bray, Office of the Public Defender, for Appellant/Cross-Appellee Ryan Cate.
Curtis S. Slatina, Office of Prosecuting Attorney, for Appellee/Cross-Appellant Colville Confederated Tribes.
Trial Court Case Number CR-2013-36022]

Hearing held June 20, 2014. Decided April 24, 2015.
Before: Presiding Justice Theresa M. Pouley, Justice Gary F. Bass, and Justice R. John Sloan Jr.

Bass, J.

This matter comes before the Court of Appeals (COA) on the appeal of the Appellant from a verdict and judgment of guilty of the crime of Rape, and the cross-appeal of the Appellee.

ISSUES

1. Did the Trial Court err in not adopting and applying an implied bias rule in determining whether a third cousin of the victim was disqualified from being a juror in this case?

2. Did the Trial Court err in finding no juror malfeasance for a member of the jury not disclosing her relationship of being a third cousin to the Appellant during voir dire?

3. Was it misconduct of the prosecutor to mention the rape kit, or asking questions that called for heresay answers?

4. Was inadmissible heresay admitted?

5. Did the Trial Court err in curtailing the testimony of Diego Garcia on the basis that the testimony would be a violation of the Rape Shield Law?

6. Did the Trial Court err in giving the Appellant credit for the time served when he was on Electronic Home Monitoring (EHM) on pretrial release?

SUMMARY

The charge of rape in this case arose after the alleged victim, V. L., and the Appellant had been with a group of people at a bar named El Paraiso on New Year's Eve and then they and the

others went to an after-hours party at a private home. The alleged rape took place at the private home.

After the jury had rendered its verdict, the Appellant moved to vacate the jury verdict an grant a new trial. There were two grounds for the motion, The first was because a juror and V. L. were third cousins, and an implied bias rule should apply disqualifying that juror. The other basis was that the juror allegedly failed to disclose her relationship to V. L.

During the trial, there were repeated references to a rape kit in questions by the prosecutor. In addition, there were questions asked by the prosecutor of police officers that Appellant contends called for answers that were heresay and inadmissible. Appellant contends that this was prosecutorial misconduct.

The Appellant also alleges that heresay was admitted in the police officers' testimony.

Appellant called as a witness Diego Garcia. The Trial Court curtailed the testimony of Garcia about his interactions with V. L. at the home where the party took place and the alleged rape took place. Appellant contends this was error.

The Trial Court entered a judgment and sentence after the jury rendered its verdict, The Appellant was sentenced to 360 days in jail with none suspended. The sentence contained the following:

> *"Defendant shall receive credit for the time served and good time is allowed per the rules of the Correctional Facility. Upon service of 180 days in jail, the Defendant may move the court to release him on Electronic Home Monitoring. (EHM)"*

The Appellee cross-appeals contending that the court erred in giving the Appellant credit for time served on EHM while he was on pre-trial release.

STANDARD OF REVIEW

The issues are either questions of law which we review *de novo*, or mixed questions of fact and law which are also reviewed *de novo*[3].

ISSUES

1. The Trial Court did not err in not adopting and applying an implied bias rule in determining whether a third cousin of the victim was disqualified from being a juror.

The Colville Tribes have not adopted an implied bias rule by ordinance. The Appellant urged the Trial Court to adopt a rule of implied bias either as contained in Washington State law in R.C.W. 4.44.170 and .180, or as contained in federal cases.

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[3] *Naff v. CCT*, 2 CCAR 50, 2 CTCR 08, 22 Ind.Lw.Rptr 6032 (1995); *Pouley v. CCT*, 4 CCAR 38 (1997).

Title 4 of the Revised Code of Washington which contains R.C.W. 4.44.170 and .180 is a civil procedure law, and not a criminal procedures law. Title 10 of the R.C.W.s is the criminal procedure law of the State of Washington and it does not contain an implied bias law. The Washington State Constitution, Section 22, Rights of the Accused, provides for a right to an impartial jury. All decision in criminal proceedings in Washington State implicating an impartial jury are under the State Constitution or R.C.W. 2.16.110, not R.C.W. Title 4[4]. Therefore importation of a civil procedure rule from the State of Washington to a criminal proceeding in the Colville Tribal Court where the State of Washington has not seen fit to include such a law in its criminal procedure is inappropriate.

The Trial Court held a hearing on the motion by Appellant to vacate the verdict and order a new trial. In the Findings of Fact, Conclusions of Law and Order Denying Motion to Vacate and for New Trial dated July 12, 2013, in Findings of Fact 3, after hearing testimony with regard to the relationship between the juror and V.L., found that they shared the same great grandparents, not the same grandparents as alleged by the parties. The Court found that they were third cousins, not first cousins if they shared the same grandparents. Attached hereto is a Table of Consanguinity, which shows that they would be second cousins in the 6th degree of consanguinity if they shared great grandparents. Therefore, both the parties and the Trial Court were incorrect in the degree of consanguinity. Even if the Trial Court had imported the Washington State law with regard to implied bias, there would not have been implied bias as R.C.W. 4.44.170 and .180 only implies bias to the 4th degree of consanguinity.

The Appellant urged the Trial Court to adopt federal law with regard to implied bias. As is pointed out in footnote 5 in the July 12, 2013 Order referred to above, the United States and Washington constitutions are not binding on the Tribes[5].

The Tribes have their own jurisprudence with regard to an impartial jury[6]. The Trial Court in response to the motion to imply bias solely because of the degree of consanguinity between the juror and V.L., in the Order Denying Motions for Judgment Notwithstanding Verdict and Setting an Evidentiary Hearing dated June 27, 2013, in effect denied that motion. The Court ruled that the relationship alone is insufficient to impeach the verdict, but set an evidentiary hearing to determine whether there were facts that would establish bias. The Court ruled that an implied bias rule is not appropriate for the Colville Tribes because of the realities of the

[4] See *State v. Fire*, 145 Wn.2d 152 (2001) and *State v. Elmore*, 155 Wn.wd 758 (2005).

[5] *Tonasket v. CCT*, 7 CCAR 40, 42 (2004)

[6] CTLOC 1-5-2, 2-1-178.

Reservation community. Too many of the members of the Tribes are related to one another in some way. The jury pool is limited to members of the Tribes 18 years and over[7].

This Court agrees with the Trial Court that an implied bias rule should not be imported in Colville Tribal law, and therefore there is not implied bias.

2. The Trial Court did not err in finding no juror malfeasance for a member of the jury not disclosing her relationship of being a third cousin to the Appellant during voir dire.

The Trial Court held an evidentiary hearing to determine whether a juror had committed malfeasance for not disclosing her relationship to V.L. The Court took testimony as set forth in the Findings of Fact, Conclusions of Law, and Order Denying Motion to Vacate Verdict and for New Trial dated July 12, 2013. The Appellant does not dispute the Findings of Fact, but asserts that the Findings of Fact as found constitute juror malfeasance as a matter of law. After a *de novo* review of the Findings of Fact and Conclusions of Law, we find that there was no juror malfeasance and affirm the Trial Court on this issue.

3. The prosecutor did not commit prosecutorial misconduct by either mentioning the rape kit, or by asking questions calling for heresay answers.

The prosecutor in questioning several of the witnesses mentioned the words "rape kit." A rape kit, as explained by one of the nurses who examined the alleged victim, contains the items used to collect forensic evidence from the alleged victim and the alleged perpetrator. The Appellant asserts that the prosecutor committed misconduct by mentioning the rape kit while questioning witnesses, because the rape kit itself was not introduced into evidence. The Appellant did not object to the questions at any time during the trial, nor raise it as an issue in post-trial motions, and it only appears as an issue on appeal.

This court can decide, in its discretion, whether it will allow an appeal where the issue has not been raised at the trial court[8]. The rationale allowing appeals of issues that were not raised at the trial court is based on defendants eith4er being pro se or represented by spokespersons who are not law trained. Neither is present in this case. The appellant in this case was represented by both a law trained attorney and a spokespersons who is very experienced in criminal law, having been a prosecutor and public defender for many years in the trial court. By the issue not being raised at the trial level the prosecutor and court are denied the ability to resolve the issue at that level. This court exercises its discretion and denies consideration of the mention of the rape kit on appeal.

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[7] CTLOC 1-1-220.

[8] *CCT v. Olney*, 10 CCAR 75 (2011).

Likewise, the issue of prosecutorial misconduct with regard to the questions asked by the prosecutor which allegedly called for heresay answers was not raised at the trial court level. Therefore this court denies consideration. The issue of whether the answers were heresay is addressed later in this opinion.

4. Inadmissible heresay was not admitted in the trial.

The Federal Rules of Evidence (FRE), limited to the admissibility of heresay and impeachment evidence, are the current law of the Colville Tribes[9]. Heresay consists of statements other than one made by the declarant while testifying at the trial offered as evidence to prove the truth of the matter asserted.

The Appellant does not appeal on the basis fo heresay being admitted as such, but asserted that the prosecutor repeatedly asked questions calling for heresay answers, and thus committed prosecutorial misconduct. We have ruled on the prosecutorial misconduct issue earlier in this opinion. After a review of the testimony of the trial this court does not find that heresay was admitted, although the prosecutor did ask questions that called for heresay answers, which may be improper depending on the context in which they are asked. The Appellant objected and the court sustained the objections thereby not allowing the heresay questions.

Because of our ruling that no heresay was admitted, we do not address the issue of testimonial versus non-testimonial evidence addressed in *Crawford v. Washington*[10].

5. The Trial Court did not err in curtailing the testimony of Diego Garcia.

Mr. Garcia testified that while at El Paraiso, V.L. was there and that she was flirtatious and seemed "good to go." The prosecutor objected on the grounds of speculation, and the court overruled the objection. Mr. Garcia next testified that V.L. came into the bathroom and she sat on the sink with her leg up, and Mr. Garcia asked her to move her leg as it was blocking his way out of the bathroom, as he was trying to leave the bathroom. The prosecutor made a motion in limine to limit Mr. Garcia's testimony as it referred to past sexual behavior which is barred by the Rape Shield Law. An offer of proof was made by defense counsel that Mr. Garcia would testify that V.L. tried to kiss him and grope him, and that he was able to get out of the bathroom only when a Jordan Feldman came to the bathroom door. The court then ruled that Mr. Garcia could testify that there was some flirtation but no graphic details. Mr. Garcia then testified he was in the bathroom for five or ten minutes with the alleged victim, that he removed her leg and opened the door. He also testified that her leg was on the door jamb in the bathroom.

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[9] *Waters v. CCT*, 3 CCAR 35 (1996).

[10] 541 U.S. 36 (2004).

The issue is whether Mr. Garcia's testimony, which was not allowed in evidence, about V.L. attempting to kiss him and grope him was prior sexual behavior. Sect6ion 3-1-21 of the Colville Tribal Law and Order Code (CTLOC), commonly called the Rape Shield Law, reads:

> *"Evidence of the victim's past sexual behavior including but not limited to the victim's marital history, divorce history, or general reputation for promiscuity, non-chastity or sexual mores contrary to community standards is inadmissible on the issue of credibility, and is inadmissible to prove the victim's consent..."*

This is an issue of first impression in our court as to what constitutes past sexual behavior as contained in CTLOC 3-1-21. No definition of that phrase is contained in the CTLOC. We hereby adopt the following definition of past sexual behavior:

> *"Past sexual behavior means a volitional or non-volitional physical act that the victim has performed for the purpose of sexual stimulation or gratification of either the victim or another person or an act that is sexual intercourse, deviate sexual intercourse or sexual contact, or an attempt to engage in such an act, between the victim and another person."*[11]

Mr. Garcia testified that at El Paraiso, V.L. had been flirtatious and "good to go." He was allowed to testify that at the home where the alleged rape took place, V.L. had entered the bathroom while he was in the bathroom and told him that she loved him. He was not allowed to testify that V.L. tried to kiss him and grope him. The issue we are called on to decide is whether the testimony about V.L. trying to kiss and grope Mr. Garcia should have been admitted, or was barred by the Rape Shield Law.

We hold that in the context in which the alleged actions by V.L. took place, they were past sexual behavior. Kissing, depending on the context in which it took place, can be a volitional physical act for the purpose of sexual stimulation. In the context in which the alleged attempt to kiss was made, it would have been for the purpose of sexual stimulation.

The last part of this issue is whether the sexual behavior was past sexual behavior. Appellant asserts that it was not past behavior because it happened shortly before the incident with Mr. Cate, and should be controlled by the decision in *State v. Jones*, 168 Wn2d 713 (2010). The *Jones* case was one in which the defendant was charged with rape. The victim testified that the defendant put his hands around her neck and forcibly raped her. The Defendant made an offer of proof that he would testify that the alleged victim and another female engaged in a nine hour alcohol and cocaine fueled sex party in which the women danced for money and engaged in

[11] *State v. Baker*, 679 N.W.2d 7, 10 (Iowa, 2004); *State v. Wright*, 776 P.2d 1294, 1297-98 (Or. Ct. App. (1989)).

consensual sex with all three (3) males. The trial court held that the testimony was barred by the Rape Shield statute. The Washington Supreme Court held that the testimony should have been allowed as the ruling violated his Sixth Amendment right to present a defense.

The facts of the *Jones* case, *supra*, are marked different than the facts in this case. In the *Jones* case the whole defense consisted of the testimony of the defendant about the party. Without that testimony, the defendant had no defense. The defendant in this case was allowed to testify about his version of events in which he claimed consent, and thus could and did present his defense. The defendant in this case was not presenting his defense. In this case the trial court allowed Mr. Garcia to testify about everything but V.L.'s alleged attempt at kissing and groping him. Mr. Garcia was not a witness to the alleged rape itself, and was not a participant in the acts constitution the defense as was the defendant in the *Jones* case. The testimony of Mr. Garcia was intended to show that because V.L. had attempted to kiss him and grope him that it would be more likely that any sex the Appellant had with V.L. was consensual. That is exactly the type of testimony the Rape Shield Law is intended to prevent. Even if it were true that V.L. attempted to kiss Mr. Garcia and grope him, that would not mean that V.L. was ready to have sex with anyone. It would only mean that V.L. was interested in having sex with Mr. Garcia.

We hold that on the facts of this case, the proffered testimony of Mr. Garcia was past sexual behavior, which was barred by the Rape Shield Law, and the Trial Court was correct in disallowing such testimony.

6. The Trial Court did not err in giving Appellant credit for the time served when he was on EHM on pre-trial release.

Sentencing is with the "strict" discretion of the trial judge under the Tribal Code and case law. A sentencing decision is subject to appeal only for a "manifest abuse of discretion." It is clear that the discrt6ion to impose jail time and or a fine is vested with the trial judge. This discretion includes a judge's discretion in providing for or not providing for credit for any detention prior to trial. All decisions of this court have unwaveringly protected the discretion of the trial judge in sentencing unless it is restricted by tribal code or constitution[12]. There has been no showing that there has been a restriction of the trial court's discretion by tribal code or constitution or of a manifest abuse of discretion in this case. The granting of credit for time served on EHM on pre-trial release is affirmed.

ORDER

[12] *CCT v. Buckman*, 8 CCAR 101 (2006).

Finding no reversible error, we affirm the conviction and judgment, and remand to the Trial Court for further action.

Nankayet FINLEY, Appellant,

vs.

Meghan FINLEY, Appellee.

Case No. AP14-018, 6 CTCR 28

12 CCAR 22

[Parker Parsons, Northwest Justice Project, for Appellant.
Appellee appeared pro se.
Trial Court Case No. CV-GD-2012-35146 and CV-CU-2012-35110]

Hearing held April 17, 2015. Decision entered April 27, 2015.
Before Presiding Justice Mark W. Pouley, Justice David C. Bonga and Justice Michael Taylor

Pouley, J

FACTS

The following facts are undisputed. C.F., was removed from the Appellant/mother's care by the State of Washington in June 2011. In July 2011 the child was placed with her great aunt, the mother of Appellee and later transferred to the care of the Appellee in December 2011. On April 26, 2012 the Colville Confederated Tribes accepted jurisdiction and a Minor in Need of Care ("MINOC") case was started in the Colville Tribal Court. While the MINOC case was pending, the Appellee filed a third-party custody petition on May 7, 2012. As the MINOC and custody cases were still pending, on June 18, 2012 the Appellee filed a guardianship petition. On June 26, 2012 the trial court consolidated the custody and guardianship petitions. On July 3, 2012 the court issued a stay in the custody and guardianship matters because the MINOC case was ongoing. The stay was lifted on August 7, 2013, presumably because the MINOC matter was to close, but the record of that proceeding is not before this court.

On July 25, 2013 the trial court set a hearing on the guardianship/custody matter for November 20, 2013. On November 19, 2013 the court rescheduled the hearing sua sponte, citing the lack of an available judge on November 20. The hearing was rescheduled to January 8, 2014. The record is unclear as to what occurred on January 8, 2014, but on January 21, 2014 the court conducted a hearing at which Appellee appeared by phone and Appellant did not appear. The court entered a default "custody" order, continuing placement of the child with Appellee. On January 30, 2014 Appellee filed a motion for reconsideration, asking the court to enter an order of guardianship. On February 7, 2014, apparently in response to Appellee's motion, the court set a hearing for April 1, 2014. On March 31, 2014 the Appellant/mother moved to continue the April 1, 2014 hearing, arguing she did not have proper notice. The Court continued the matter to May

20, 2014 and, in the absence of the Appellant, entered an order that stated only, "The Order of 1-22-14 is titled custody/Guardianship order." The Appellant subsequently moved for an order setting aside the default and setting the matter for reconsideration. On June 13, 2014 the court granted Appellant's motion and set the matter for July 28, 2014, entering a second written order on June 26, 2014 stating the matter was "set for hearing/trial for guardianship" on July 28, 2014.[13]

All parties were present for the hearing on July 28, 2014. The court declined to take evidence or testimony and summarily entered an order denying the Appellee's May 20, 2014 motion for reconsideration.[14] The order does address the Appellant's motion to set aside the default and reconsider the orders. This appeal follows that order.

DISCUSSION

The facts surrounding the notice given to the Appellant regarding the proceedings are disputed and were the subject of much argument before this court. The record is frankly very unclear on this issue, but resolution of this question is unnecessary to the decision of the court. A brief explanation of the controversy and the court's observations of the record are still appropriate.

This court will not outline all the challenges to, or proof of notice given, to Appellant throughout all of these proceedings.[15] The most critical hearing in the series of activities was on January 21, 2014. At this hearing the Court entered a default order granting "custody" to the Appellee. The order indicated that Appellee was present by telephone and that "the respondents were served and did not appear." The record is silent as to how the court reached this conclusion. Although the hearing was originally scheduled for January 8, 2014, and there is a certification that a notice of hearing for that date was mailed to the Appellant[16] the record is completely silent as to how the matter was set for January 21, 2014 or the manner in which anyone was notified of the hearing. Based on the record before us, the court is unable to say with certainty that Appellant was notified of the January 21, 2014 hearing, or that she was notified that this hearing would be her only opportunity to present evidence and challenge the custody petition as required by *George v. George*, 1 CCAR 52 (1991) and *Gallaher v. Foster*, AP00-007 (July 23, 2002). It appears,

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13 It is unclear why a second order was required on June 26, 2014, but it does indicate the purpose of the scheduled hearing.

14 While the order references the May 20 motion, it seems more likely the court was denying the Appellant's motion for reconsideration since the effect of the July 28, 2014 hearing was to affirm the original January 2014 custody order.

15 Appellant asserts failure of adequate notice at several stages during the proceedings. Appellee contested some of these facts and also asserted Appellant was afforded adequate notice and opportunity to be heard in the MINOC case. This court does not consider the Appellant's notice or participation in the MINOC matter relevant in any way to the proceedings before the court here. Whether she was given adequate notice of other hearings in this case is also not immediately relevant so the court did not attempt to resolve those challenges.

however, the trial court may have attempted to correct this error on June 13, 2014 by setting the default aside and scheduling the matter for a "hearing/trial" on July 28. This may have cured some questions of notice and due process, if the court subsequently conducted a proper hearing and entered necessary findings and conclusions. Unfortunately, the record indicates that the court did not accept any testimony or evidence at the July 28 hearing, instead summarily upholding the findings and order entered January 21, 2014.

The petition for custody asserts as the only basis for custody that the "child was removed and placed with me since December 2011." If Appellant received proper service of the complaint, this is the only factual basis upon which a default judgment could be entered. There are no affidavits or exhibits in the record, and it appears the only evidence the trial court may have received was testimony from the Appellee by phone on January 21, 2014. Appellee was not a party to the MINOC case, although the child was placed in her care. Still, the court made findings as to the Appellant's participation in and progress made in the MINOC proceedings. Although not designated a "finding" the court states in summary that the mother was "facing charges in Federal Court." The court found "the child has no parent capable of caring for her at this time", which is a conclusion not a finding, presumably based on evidence presented in the MINOC case. The order is captioned a "Custody Order" and it orders that the minor child "shall remain in the custody" Appellee.

While the order states the child will remain in appellee's custody, it says nothing further regarding critical elements of a custody order. Is the order permanent? Is the Appellee designated as the child's custodian for the purposes of tribal, state and federal statutes or, for instance, enrolling the child in school and obtaining medical care? Though the Appellant/mother's parental rights were not terminated, the order places her right to visitation in the sole discretion of the Appellee. Presumably these are some of the same issues that led the Appellee to move for reconsideration and seek an order of guardianship, to which the court responded in the May 20, 2014 order that, "The Order of 1-22-2014 is titled Custody/Guardianship Order." Unfortunately, "titling" the order as one for guardianship does not resolve these questions, nor does it meet statutory requirements.

CTC 5-1-161(b) requires petitions for guardianship "shall list in detail the present conditions and circumstances which warrant the appointment of a guardian…" CTC 5-1-162 requires the court to conduct a hearing to determine the need to appoint a guardian, the party that is most appropriately the guardian, and "Make an order appointing a guardian, setting forth the scope of the guardian's authority, whether or not security for his performance is to be required, and the duration of such appointment." CTC 5-1-165 requires an appointed guardian to take an oath to faithfully perform her duties as guardian upon which the Court will issue letters of

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16 There is substantial argument that the mailing address used by the court was incorrect so there is some question regarding the

guardianship outlining the authority of the guardian. CTC 5-1-169 grants a guardian powers and duties, but does so only after letters of guardianship are issued. In this case, the only conditions supporting a request for guardianship asserted in the petition are "abandonment", falling short of the statutory requirements of CTC 5-1-161(b), none of the subsequent orders address any of the statutory mandates, and there is no evidence the Appellee took an oath of guardianship or that the court ever issued letters of guardianship. In sum, there is no way this court can find a guardianship of this minor child has been ordered.

When dealing with multiple proceedings regarding the health and safety of children, especially when the children, the parents and some of the other parties are the same in all of the cases, it becomes easy to let the cases overlap. It is important, however, to recognize that MINOC, third-party custody, and guardianship proceedings have different legal and factual criteria for review. The trial court must be mindful of these differences and consider only those matters before it. *Boozer v. Wilder*, 9 CCAR 01, 5 CTCR 11, 34 Ind.Lw.Rptr 6023 (Jan. 3, 2007). It is also critical that the action in which an order is entered has a sufficient record of facts to support the decision and not improperly or inadvertently incorporate facts developed in another proceeding. The January 21, 2014 order of "custody" suffers from many of these errors and subsequent orders of the court only confuse the matter further. It appears that granting Appellee "custody" of the minor child was the result of the court and Colville Family Services attempting to reach permanency on behalf of the child in the MINOC case. This is an important and necessary goal, but it must be accomplished in full compliance with the Colville Tribal Code and after strict adherence to the due process rights of all parties. It also must be accomplished in a manner that creates a sufficient record for review. This was not accomplished in the underlying case. Remand to the trial court is the proper remedy when there is an inadequate record for review, and there are legitimate questions as to notice to parties of important hearings and pleadings. *CCT v. Dogskin*, 10 CCAR 45, 5 CTCR 31, 38 Ind.Lw.Rptr. 6021 (Feb. 28, 2011)

The matter is REMANDED to the trial court for further proceedings consistent with this ruling. To that end, the Court and parties must clearly identify if the matter is proceeding as a petition for third-party custody or guardianship, the parties must be afforded reasonable and timely notice and opportunity to be heard and the Court must enter all appropriate orders, fully supported by complete findings of fact and conclusions of law.

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validity of that notice.

Shelly R. PRIEST, Appellant,
vs.
Ronda MARCHAND, Appellee.
Case No. AP15-003, 6 CTCR 29
12 CCAR 26

[Appellant appeared pro se.
Appellee appeared pro se.
Trial Court Case No. CV-CU-2014-37112]

Hearing held April 17, 2015. Decision made April 27, 2014.
Before Chief Justice Anita Dupris, Justice Gary F. Bass and Justice Theresa M. Pouley

Dupris, CJ

This matter came before the Court of Appeals for an Initial Hearing on April 17, 2015 before Chief Justice Dupris, Justice Bass and Justice Pouley. Appellant and Appellee appeared in person and without representation.

The Court explained the purpose of an Initial Hearing and then Appellant was asked to state what she believed were the issues to be considered in this matter. Appellee was given an opportunity to respond. After these responses, the Court determined that this matter should be remanded to the Trial Court for completion of the case. It became apparent to the Court that the Trial Court did not complete two important procedures in this case: 1) the Trial Court entered a custody order without articulating why it was in the best interest of the child to be removed from her parent, pursuant to CTLOC 5-1-121; and 2) the Trial Court interviewed the minor off the record. Further, the Trial Court appointed a new GAL without motion from the parties or articulating why there was a need for a new report.

DISCUSSION

In *Boozer v. Wilder*, 9 CCAR 01, 5 CTCR 01, 34 Ind.Lw.Rptr 6023 (2007) this Court stated:

> *Throughout these long arduous proceedings **the Trial Court never articulated the legal standards she was** applying regarding the placement of Minor in relation to either her father or her maternal grandparents.*
>
> *As a matter of law the Guardianship Statute does not preclude the Trial Court from considering a third-party petition for guardianship when*

> *there is a parent available, and basing its decision on whether the parent is "fit." It was appropriate for the Trial Judge to do so in this case. What was not appropriate for the Trial Court to do in this case was to treat it like a dependency, or an on-going custody case,* ***once it made its decision on the fitness of Minor's only parent****, Appellant here. It went beyond the bounds of its authority when it did so... It does not provide for a continuing jurisdiction over the way the fit parent raises his child, including what religious instruction must be given, or where the child can live.* (Emphasis added)

CTLOC 5-1-125(c) states that the Tribal Court shall determine questions of law and fact. In this case, the Trial Court entered a one-page order which granted custody to Appellee. There were no findings of fact or conclusions of law entered. Without an adequate record being made, this Court is severely hampered in making an informed review. We ruled, in a juvenile case, that when intervention is sought, it is the Trial Court's duty to make a complete record of why the intrusion is made and to make a complete record of why the disposition is necessary, as supported by the record. *Weber v. CFS,* 8 CCAR 32, 4 CTCR 23, 32 Ind.Lw.Rptr. 6139. While this case is a civil custody, when a court removes a child from its biological parents, that court should make sure that the law and evidence clearly show it was in the best interests of the child to be removed. This was not done in this case. There were no findings of fact or conclusions of law entered by the Trial Court. "Best interests of the child" was not entered on the order.

It was further brought to the attention of this Court that the Trial Judge interviewed the minor in chambers, off the record[17]. *In George v. George,* 1 CCAR 52, 1 CTCR 53 (1991)this Court ruled:

> *Given the Tribal Court's routine practice of tape recording all other aspects of civil proceedings, CTC 13.4.13(1)*[18] ***makes a verbatim record mandatory*** *with respect to the Court's interview in chambers of a child in a child custody proceeding.*

[17] Order From Motion Hearing, file stamped February 3, 2015.

[18] Now: 5-1-124, Child Custody-Interview with Child by Court-Advice of Professional Personnel. (a) The Tribal Court may interview the child in chambers to ascertain the child's wishes as to his or her custodian and as to visitation privileges. The Tribal Court may permit counsel to be present at the interview. **The Tribal Court shall cause a record of the interview to be made and to be made part of the record of the case.** *(Emphasis added)*

> *In the absence of a verbatim record of Kelly's interview by the Trial Court chambers, the record is inadequate for review purposes. Basic due process concepts dictate that the only remedy for an inadequate record is reversal and remand for a trial de novo to give the Trial Court* ***an opportunity to make a reviewable record***. (Emphasis added)

The Appellant is challenging the Trial Court's decision to appoint a new GAL. A GAL report was in the record, was apparently accepted by the Trial Court, and no written explanation was given to the parties as to why a new GAL should be appointed. CTLOC 5-1-124(b) allows for the appointment of a professional personnel or persons knowledgeable in the welfare of Indian children to give the court advice. It appears that a GAL had already been appointed and a report submitted. It is unclear from the record why a new GAL was necessary. Without written findings it is difficult to review the record. The Court certainly has the discretion to appoint a new GAL, but should put its reasoning why in written form so that the parties can better decide whether it is necessary to challenge the decision or not.

Appellee argued for dismissal of this matter as there hasn't been a final order entered. Her motion was denied, the Order From Motion Hearing meets the requirements for final order for issues on appeal.

CONCLUSION

A review of the record in this matter showed a lack of information concerning findings of fact and conclusions of law which directed the judge to make the decision that he made. It appears that an interview of the minor was done off the record which may have contributed to the judge's final decision, or not. It is unclear. An adequate review of the record can not be accomplished until there is a more complete record.

ORDER

This matter is remanded to the Trial Court for completion of the record. The Trial Court is ordered to submit a new order which includes findings of fact and conclusions of law concerning the award of custody and appointment of a new GAL. The Trial Court has thirty (30) days to comply.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Harry BESSETTE, Appellee.

Case No. AP14-014, 6 CTCR 30

12 CCAR 29

[Chaitna Sinha, Office of Reservation Attorney, for Appellant.
Mark Carroll, Attorney at Law, for Appellee.
Trial Court Case No. CV-OC-2013-36075]

Hearing held November 21, 2014. Decision entered June 17, 2015.
Before Hon. Theresa M. Pouley, Hon. Rebecca M. Baker, and Hon. David C. Bonga

Pouley, J.

SUMMARY

The Appellee Harry Bessette was dismissed from his position as a TERO Compliance Officer for the Tribes after he received a fourth Employee Warning Notice within one year. The first three were addressed on October 26, 2012. These were issued for two incidences of unauthorized decision making and one for improper use of his position. He was also issued an Employee Corrective Action Plan in lieu of dismissal. Under its terms, if he failed to comply with the corrective action plan, he could be dismissed. It was effective until January 25, 2013. In December, Mr. Bessette was issued a fourth Employee Warning Notice for improper use of his position. In December of 2012, he was dismissed and appealed to the Administrative Law Judge on December 21, 2012. The Administrative Law Judge upheld his termination on March 14, 2013 on a motion for Judgment on the pleadings. Mr. Bessette appealed under the Colville Tribes Administrative Procedures Act.[19] *The trial court reversed and remanded to the Administrative Law Court on April 4, 2014. This Appeal was filed by the Colville Tribes on May 2, 2014. Based on the reasoning below, the Court of Appeals finds that the trial court was correct in applying the facts and law before it and therefore AFFIRMS the decision of the trial court and remands this case to the trial court for action consistent with this opinion.*

STANDARD OF REVIEW

The issues in this matter are primarily legal issues concerning the interpretation of the Tribes Employee Policy Manual and thus the trial court's determination is subject to de novo

19 CTC 2-4-19 and 2-4-20.

review by the this Court. CCT v. Naff, 2 CTCR 08, 22 ILR 6032 (1995); *Finley v. CTSC*, 8 CCAR 38 (2006).

ISSUES

1. Did the trial court err in reversing the decision of the Administrative Law Judge (ALJ) for failing to articulate a standard for review of the motion and erroneously applying the doctrine of sovereign immunity?

2. Did the trial court err in affirming the authority of the Administrative Law Judge to grant a judgment on the pleadings without a hearing?

DISCUSSION

1. Did the trial court err when it reversed the Decision of the Administrative Law Judge dismissing the appeal?

The central argument of the Appellant is that the ALJ decision was correct in not allowing review of the warning notices that led to the termination of the Appellee and that sovereign immunity and separation of powers bars the ALJ from reviewing the employee warning notices. The trial court disagreed and reversed the decision of the ALJ. This court agrees with the trial court that the decision of the ALJ failed to articulate a standard of review and incorrectly denied review of the substantive issues regarding the employee warning notices which resulted in his dismissal.

The primary argument of Appellant is that employee warning notices under the Tribes Employment policy manual are not reviewable. The Appellant argues that sovereign immunity and separation of powers bars the review by the ALJ, the trial court and this Court. Sovereign immunity waivers must be clear and will not be implied by the Court. *CTEC v.* Orr, 4 CCAR 1 (1998). The Colville Tribes Employee Policy Manual specifically states that "Nothing in the manual constitutes a waiver of the Colville Tribes sovereign immunity. Certain limited remedies may be specifically provided for in this manual. " Employee Policy Manuel (EPM) (I)(i). Whether the Tribes waived its sovereign immunity is not relevant to this case because the EPM both grants and acknowledges remedies provided to employees for dismissal. The remedies sought by Appellee are precisely the kind of remedies that are available to an employee who has been dismissed from employment.

All regular employees have a right to appeal "**only** a dismissal or a reduction in pay" under certain requirements. EPM (D)(emphasis in the original). The EPM identifies the

process for an appeal of a dismissal to the ALJ, provides remedies available to the ALJ and standards of review. The EPM also provides and allows for judicial review of the final agency action under the Colville Administrative Procedures Act. CTC 2-4, *et.seq*. Appellee properly appealed his dismissal under the EPM to the ALJ. Then Appellee properly appealed to the Colville Tribal Court under the Colville Administrative Procedures Act. These actions are specifically authorized by tribal law and thus neither separation of powers nor sovereign immunity bars these claims.

The trial court reversed the ruling of the ALJ for two reasons finding the decision was arbitrary and capricious. First because the ALJ failed to state a standard of review including a failure to provide a link between the facts and the decision made and second because the ALJ relied on an error of law by not reviewing a dismissal which was based on warning notices. Appellant asks this court to extend sovereign immunity to dictate what particular actions resulting in dismissal can be reviewed. In particular, the Appellant argues that the Employee Warning Notices (EWN) which are the stated reason for the dismissal cannot be reviewed. This Court agrees with the trial court: "An appeal for a dismissal is not merely meant to question whether the EPM provided for dismissal, or that the EWNs were issued in the timeframes required. Rather an appeal necessarily extends to whether an EWN was properly issued, which includes whether there was a proper factual basis for its issuance in the first place." Tr. Ct. Op. at page 7. Thus, on remand the ALJ should consider all stated reasons for dismissal under the standards identified in the EPM.

The Appellant next argues that allowing review of Employee Warning Notices would cause the court to be "inundated with appeals" and would "eviscerate the Tribe's ability to manage its own employees, and day to day operations of the Tribe". The Court is sympathetic to the Tribes concern. To be clear, the holding in this case does not create new review of EWNs or change review standards under the EPM. This Court holds that review of an employee dismissal necessarily includes whether there was a proper factual basis for the actions that resulted in the dismissal. However, that review is limited to whether by "clear and convincing evidence . . . that the action being appealed was improperly implemented." EPM D.8. The court neither expands nor limits any review of EWNs that are not related to the reviewable issue of dismissal.

2. Did the trial court err in affirming the authority of the Administrative Law Judge to grant a judgment on the pleadings without a hearing?

The Appellee argues that the ALJ erred in entertaining and granting a motion for judgment on the pleadings. The Appellee claims that denying him a hearing on the matter, and instead allowing for a judgment on the pleadings, denies him due process under the EPM.

Instead of a hearing with witnesses, Appellee was served a motion for judgment on the pleadings. Appellee was granted an opportunity to reply and he did reply. Then the ALJ made a ruling on the legal issues without oral argument. This, it is claimed, violated his right to due process.

This Court continues to hold that "Due process is that which is due; notice and the opportunity to be heard." *Wilson v. Gilliland*, 8 CCAR 64, 67 (2006); *Swan v. Colville Business Council*, 1 CtrR 3, 4 (Colv. Tr. Ct. 1992). It has been well established in other courts that oral argument is not required for a litigant to receive due process. *In re Amendment of Rule 3*, 440 F.2d 847 (9th Cir. 1970). This Court holds that what is required in every case, however, is that the parties must receive an opportunity to present their position before a competent tribunal. *See, Johnson v. Horizon Fisheries, LLC*, 148 Wn.App. 628 (2009), *quoting*, *Hanson v. Shim*, 87 Wn.App. 538, 551 (1997). In this case, Mr. Bessette was provided notice of the motion for judgment on the pleadings, had an opportunity to reply, he did reply and the ALJ decided the issues on the basis of the briefing submitted. This meets the requirements of due process.

This Court affirms the trial court's decision that a motion for judgment on the pleadings in this matter was not in error.

ORDER

It is therefore ORDERED that:

1. The decision of the trial court is AFFIRMED.
2. This matter is remanded to the trial court for further action consistent with this opinion.

Franklin LAMBERT, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP14-019, 6 CTCR 31

12 CCAR 32

[Dave Stevens, Office of Public Defender, for Appellant.
Wes Meyring, Office of Prosecuting Attorney, for Appellee.
Trial Court case number CR-2014-37085]

Oral Argument held May 15, 2015. Decided September 14, 2015.
Before Chief Justice Anita Dupris, Justice Mark W. Pouley, and Justice Michael Taylor

Taylor, J. for the Panel

SUMMARY OF TRIAL COURT PROCEEDINGS

Appellant was arrested on April 17, 2014, for Rape. Appellant was charged by Criminal Complaint in April 21, 2014, with the crimes of Rape of a Child, CTC § 3-1-11, and Indecent Liberties. Appellant was arraigned the same day. The Complaint alleged that the crimes charged were committed on the "16th day of April through the 17th day of April 2014." The Indecent Liberties charge was later dismissed.

At arraignment, bail was set at $5,000.00 and Appellant was advised of his right to a speedy trial. Trial was set for June 12, 2014.

On June 2, 2014, on motion of the prosecution, and over the objection of Appellant, trial was reset for June 19, 2014. The prosecution's motion for continuance included a request to the Trial Court for a reduction in bail so that Appellant could be released pending trial. Neither Appellant nor the Trial Court took any action on the request to reduce bail. Appellant remained in custody.

At the pretrial hearing on June 16, 2014, over Appellant's objection, the Trial Court continued the trial to July 10, 2014. On June 27, 2014, the Trial Court put on the record the reasons for resetting the trial date. July 10, 2014, was twenty (20) days beyond the required speedy trial date set by the Tribal Code for a defendant in custody. The Trial Court found that, although Appellant had asserted his right to a speedy trial, rescheduling of the trial was required because of court scheduling and found that Appellant was not prejudiced by the continuance beyond the sixty (60) day limitation set out in the Colville Tribal Code, CTC § 2-1-102(d). Appellant objected to the continuance and the findings of the Trial Court. The trial actually began on July 8, 2014, eighteen (18) days beyond the statutory limit.

At trial the Trial Court found that Rape of a Child, or Statutory Rape, with which Appellant was charged, is a "strict liability" crime. As a result, Appellant was prohibited from introducing evidence that at the time his alleged sexual contact with the minor occurred he had a good faith belief that she was older than the statutory age that caused Appellant to be criminally culpable for his actions. A jury instruction proposed by Appellant which would have supported a justified mistake of age defense was also not allowed by the Court.

On July 8, 2014, the prosecution filed an amended complaint which changed the original complaint that stated the sexual contact had taken place on the "16th day of April through the 17th day of April, 2014," to a new complaint that alleged sexual contact occurred "on or about the 16th day of April, 2014." The Trial Court found no substantial rights of Appellant were affected and, over the objections of Appellant, granted the prosecution's Motion to Amend.

Because a jury could not be seated from the first panel of jurors, the jury that eventually heard and convicted Appellant was the second panel drawn for the trial. The trial judge conducted the initial *voir dire* of the second jury panel. Defense counsel then questioned the prospective jurors and objected when the prosecution questioned prospective jurors regarding

their attitudes toward the crime of Rape. Appellant was not permitted by the Trial Court to conduct a rebuttal *voir dire* to the prosecution's questions regarding rape and Appellant objected to the limitation.

The panel has received and considered the record in this matter, including the audio recording of the *voir dire* and empaneling of the jury. Each of Appellant's objections to the manner of the conduct of his trial is considered below.

RAPE AND STRICT LIABILITY

Appellant argues for reversal of his conviction on the ground that he was not allowed to present, as a defense to the Rape of a Child, or Statutory Rape, charge, that he was justifiably mistaken as to the age of the victim. The Trial Court found that the Statutory Rape charge requires a strict liability analysis which excludes the defense of justifiable mistake in age.

Appellant raises two arguments. First, that the Colville Tribal Code does not specifically exclude such a defense, and second, Washington State law, by statute, now allows the defense of justifiable mistake as to the age of the victim.

When Colville tribal law does not include code provisions or common (case) law on an issue the Tribal Code, at CTS § 1-2-11, directs us to rely next on state common law to resolve the issue. Here the majority state common law rule with regard to the defense of mistake of age in statutory rape prosecutions is that, as a strict liability crime, such a defense is not allowed. Celis v. State, 416 S.W.3d 419 (Tex.Crim.App. 2013); State v. Martinez, 52 P.3d 1276 (Utah 2002).

In addition, the Colville Business Council last reviewed and amended the Tribal Code provisions dealing with rape and defenses to a charge of rape in the year 2004. Congress added this mistake defense to the U.S. Code in 1986. 18 U.S.C. § 2243(c)(1), P. L. 654, § 2, November 14, 1986, 100 Stat. 3661. The Washington State legislature, in 1988, visited the state provisions dealing with Rape of a Child and defenses thereto, and added to the Washington Code, defenses based on justifiable belief that the child victim was of an age beyond that which would cause any sexual contact to be criminally culpable. We presume that the Colville Business Council was aware that such a defense was available under federal and state law and chose not to include it in tribal law. We hold that statutory rape is a strict liability crime.

SPEEDY TRIAL

Appellant was charged by criminal complaint and arraigned on April 21, 2014. Bail was set at $5,000.00 cash. Appellant never posted bail and was held in custody until trial. Because Appellant was in custody his last date for trial under the 60 day speedy trial requirements of the Colville Tribal Code, CTC § 2-1-102(d) was June 20, 2014. On June 2, 2014, the Court, with agreement by the parties, set a trial date of June 19, 2014.

On June 16, at the pre-trial hearing the Court, on its own motion, and over the objection of Appellant, set trial for July 10, 2014, citing Court scheduling and docket congestion. On June 27, 2014, the Court entered into the record the following findings:

1. Delay of the trial was due to court scheduling.

2. Appellant had continually asserted his right to speedy trial under tribal law.

3. Delay would not prejudice the Appellant or his defense.

Appellant objected to these findings.

The trial actually took place on July 8, 2014, some eighteen days past the trial date set out in the Colville (in custody) Speedy Trial Rule. Appellant argues for dismissal of his conviction on the ground that he was denied his right to due process[20] because his trial took place eighteen days beyond the date he was entitled to be tried under CTC § 2-1-102(d). Appellant argues that the first provisions of CTC § 2-1-102 governing time for trial for out of custody defendants, which permit the Court to extend trial dates beyond the statutory time limit "for cause or at request of the defendant," show that the 60 day limit in CTC § 2-1-102(d), which contains no such language allowing for extension by the Court, is absolute, and in this case, requires dismissal of Appellant's conviction. However, as we set out below, we find that the provisions of CTC § 2-1-102(d), the ICRA and the CTCRA, with regard to speedy trial requirements, are somewhat flexible and subject to both a preliminary review of the length of time beyond the statutory time limit and a balancing test.

A majority of the state legislatures (44) and Congress have enacted some version of the speedy trial requirement as a statute or court rule[21]. There is, therefore, a plethora of state[22] and federal common (case) law on the meaning of the federal and state constitutional, statutory and court rule speedy trial requirements.

In resolving the various contradictions regarding these rules, both the state and federal courts tend to base their analysis on the decision of the United States Supreme Court opinion in *Barker v. Wingo*, 407 U.S. 514 (1972). In *Barker* the Court announced a four part "balancing test" to determine whether the Sixth Amendment right to a speedy trial had been violated when the length of time beyond the statutory date upon which trial is required to be conducted is long enough to be found "presumptively prejudicial." It is not surprising then, that our Court, in

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20 *See:* Indian Civil Rights Act, 25 U.S.C. § 1302(a)(6); Colville Civil Rights Act § 1-5-2(f).

21 *See* generally, Susan Herman, The Right To Speedy and Public Trial, 161-167 (2006).

22 22 CTC 1-2-11 directs that the Courts of the Colville Tribes, when Colville law is unavailable, look to "state common" law. Therefore, issues raised on appeal, which cannot be resolved by established Colville law, are to be resolved by a review of the common law as developed by the courts of the states and not by the common law of any single state.

confronting claims that a Colville statute required dismissal of a criminal conviction for failure to sentence within 60 days of a guilty plea, looked to *Barker v Wingo* for analysis of the claims.

In *Stensgar v. Colville Confederated Tribes*, 2 CCAR 20, 1 CTCR 76, 20 ILR 6151 (1993) the Court found that an eighteen day delay beyond the 60 day limitation set out in a tribal statute requiring the Court to issue a sentence after the presenting to the Court of a guilty plea was subject to a *Barker* analysis. While the *Stensgar* Court specifically did not approve of the trial court's action in going beyond the 60 day limitation set out in the statute, it did find that the limitation was not absolute. Instead the Court found that the lag in sentencing subjected the action of the Trial Court to a ***Barker*** analysis in order to determine whether a denial of due process had taken place.

The *Stensgar* Court went on to find that the eighteen day delay did not violate the defendant/appellant's due process rights. The Trial Court based the delay on court congestion, which the ***Stensgar*** Court accepted as valid, and the *Stensgar* Court found that the trial judge put into the record factors that supported the failure to act within the 60-day limit.

Here, unlike the facts in *Stensgar*, the Appellant did regularly assert his right to speedy trial, which would militate in his favor were the time extension beyond the rule longer.

Appellant also raises the issue of his concern regarding the extension of his pretrial detention. Appellant was offered a reduction in bail but did not pursue the offer in any substantial manner. Nothing in the record indicates that the additional eighteen days impaired Appellant's defense.

Appellant argues that the lack of statutory permission for the Court to exercise discretion in trial setting in CTC § 2-1-102(d) as compared to the other three sections of the Colville speedy trial statute makes the 60 day time limit in CTC § 2-1-102(d) mandatory. We find, however, that the lack of discretionary language in CTC § 2-1-102(d) rather than making the 60 day limitation mandatory, may subject exceeding the 60 day time limit to a *Barker* analysis if the additional time before trial is of sufficient length to meet the "presumptively prejudicial" test set out in *Barker.*

In *Barker*, the Court found that in order to be required to conduct a due process review of a violation of a speedy trial claim, the asserted delay must be beyond a period that could be found to be "presumptively prejudicial." The standard for "presumptively prejudicial" was not stated, but under this standard the state and federal courts have looked at time lags from a few months to seven and ten years with a trend toward some flexibility. This flexibility appears to be required because the only remedy available for violation of the speedy trial requirement is dismissal of charges.

A review of recent state appellate decisions shows, with one exception, that periods of less than seven or eight months between the filing of charges and a date of trial are not considered 'presumptively prejudicial." When the lag between filing and trial is not "presumptively prejudicial" these courts find that it is unnecessary to review the remaining *Barker* factors to

determine whether any due process violation has taken place. The exception is Minnesota, where pursuant to statutory rules, a trial must be held within 60 days of the date that a defendant makes a formal demand for a speedy trial. The failure to conduct a trial within the 60 days triggers a full ***Barker*** review. *State v. Johnson*, 911 N.W. 2d 136 (Minn. App. 2012).

As a result, and specifically limited to the facts of this appeal, we find the additional eighteen days during which Appellant remained incarcerated prior to trial does not meet the "presumptively prejudicial" standard and no further *Barker* analysis is required.

VOIR DIRE

The manner of the conduct of *voir dire* is ordinarily within the discretion of the trial judge. In reviewing the conduct of *voir dire* of a jury we apply an abuse of discretion standard.

After considering the audio record of the *voir dire* and empaneling of the jury in in this case, we do not find that the Trial Court abused its discretion. We do not find that the questions regarding the act of rape asked of the prospective jurors were prejudicial, nor do we find that the denial of the defense of rebuttal *voir dire* was prejudicial to Appellant's defense.

AMENDMENT OF COMPLAINT

Immediately prior to the commencement of the trial, the prosecution moved to amend the complaint to state that the unlawful sexual contact between Appellant and the alleged victim occurred only on the 16th of April, 2014, rather than the 16th and 17th of April, 2014 as stated in the original complaint. While this amendment did reduce the burden on the prosecution to prove sexual contact on the 17th of April, 2014; it also allowed the defense to focus its defense to the allegations involving any activities of the 16th of April, 2014. We find no prejudice to Appellant in the allowing of the amendment.

ADMISSION OF APPELLANT'S CRIMINAL RECORD

At trial, Appellant testified regarding his prior convictions for crimes involving dishonesty. The Court then permitted the prosecution to introduce into evidence Judgment and Sentencing orders and charging documents as evidence of those convictions. Appellant asserts that the Court erred by allowing those documents to be seen by the jury.

Appellant correctly notes that the Trial Court may not use state common law to decide questions regarding the introduction of evidence. *See*: CTC § 2-1-171. Appellant argues that, lacking state common law as a guide, the Court must look to Washington State Rules of Evidence to resolve evidence issues. Appellant further argues that under the Washington rules the introduction of the sentencing orders and charges would not have been permitted. However, the Colville Code, when tribal law and state common law are unavailable, directs the Court to look to federal statutes in resolving issues. *See*: CTC § 1-2-11. The Federal Rules of Evidence became

federal statutory law in 1975. P.L. 93-595, 88 Stat. 1956. This Court has for some years recognized the Federal Rules of Evidence applicable to this issue, FRE 609, and federal decisions interpreting it as the evidence rule of the Tribes.

When considering the issue of the application of evidence rules in proceedings before the Colville Tribal Court and the Court of Appeals, the Federal Rules of Evidence have been looked to as defining how the issue should be resolved. In *Waters v. Colville Confederated Tribes*, 3 CCAR 35, 2 CTCR 19 (1996) the Federal Rules of Evidence 607, 801 and 803 controlling hearsay were applied both by the Trial and Appellate Courts with regard to the proceedings therein. In *Tonasket v. Colville Confederated Tribes*, 7 CCAR 40, 4 CTCR 13,(2004) this Court, while not specifically adopting FRE 606(b) as applicable to the proceedings therein, did follow that Rule and interpretation of that Rule, to resolve one of the key issues before it. In *Louie v. Colville Confederated Tribes*, 8 CCAR 49, 4 CTCR 27,(2006) this Court recognized that the Tribes had not enacted its own rules of evidence and then went on to apply FRE 201 to resolve the evidentiary issue presented by the appeal.

We review the evidentiary ruling of the Trial Court for abuse of judicial discretion. When Appellant, here, testified regarding his prior convictions, the door was opened to the Court allowing evidence of those convictions to be presented to the jury pursuant to FRE 609. *Sanchez v. McCray*, 349 Fed. Appx. 479 (11th Cir. 2009); *U.S. v. Jackson*, 310 F.3d 1053 (8th Cir. 2002); *U.S. v. Perry*, 857 F.2d 1346 (9th Cir. 1988). We find no abuse of discretion, here, in allowing evidence of the prior convictions to be presented to the jury.

CONCLUSION

The Trial Court is Affirmed and this matter is remanded to the Trial Court for further action consistent with this Opinion.

In Re the Writ of Habeas Corpus for Max LAZARD,
Garry ZACHERLE, Appellant,
vs.
Max LAZARD, Appellee.
Case No. AP15-012, 6 CTCR 32
12 CCAR 39

[Michael Humiston, Office of Reservation Attorney, appeared for Appellant.
Dave Stevens, Office of Public Defender, appeared for Appellee.
Trial Court Case No. CV-OC-2015-38192; CR-2014-37191]

Hearing held September 18, 2015. Decided October 1, 2015.
Before Hon. Anita Dupris, Hon. Dennis L. Nelson, and Hon. Michael Taylor

Taylor, J.

This matter comes before the Court of Appeals (COA) for an Initial Hearing on September 18, 2015 upon an appeal of a Writ of Habeas Corpus issued by the Trial Court on July 20, 2015. Appellant appeared through counsel, Michael Humiston, CCT Office of Reservation Attorney; Appellee appeared through counsel, David Stevens, CCT Public Defender's Office. After reviewing the record and applicable law, we find the Trial Court erred in issuing the Writ of Habeas Corpus. The reasoning is set out below.

SUMMARY OF FACTS

Appellee in this matter sought a Writ of Habeas Corpus from the Trial Court based on his claim that aspects of his sentencing violated the Tribal Law and Order Act of 2010, in that the public structure of Colville Tribal law did not provide published rules of evidence. The Trial Court granted the Writ and Appellee was released from custody. At the time the Writ was sought Appellee was in custody pending an active appeal of his convictions.

On August 21, 2014, Appellee was charged with four counts involving Delivery of a Controlled Substance. On September 25, 2014, he pleaded guilty to Count 1, Count 2, and Count 4 of the complaint. Count 3 was dismissed pursuant to a plea bargain. He was informed on his Statement of Guilty Plea, which he initialed, that "The judge does not have to follow anyone's recommendation as to sentence and may sentence up to the maximum allowed by law. The judge may also decide to make my sentences run concurrently or consecutive." The joint sentencing recommendation was 360 days in jail and 180 days suspended with one year supervised probation.

The Court ordered a Pre-sentence Investigation. The Pre-sentence Investigation recommended 360-days incarceration with two years of supervised probation.

On November 21, 2014, Appellee was sentenced to 360 days on Count 1 with no time suspended; 360 days on Count 2 with no time suspended; and 360 days on Count 4 with 360 days suspended. Appellee was allowed to go to treatment and get day-for-day credit after serving one year. The Court imposed 36-months' probation. Appellee noted his exception to probation length, but did not raise issues regarding the Indian Civil Rights Act and its recent amendments, titled the Tribal Law and Order Act of 2010.[23] Thus, the Trial Court had no opportunity to rule on the sentencing limitations in the TLOA.

Appellee timely appealed his sentencing to this Court (November 25, 2014) arguing that the length of his sentencing/probation violated the ICRA/TLOA because the manner in which the Colville Tribal Law and Order Code and the common law of the Colville Tribes establish tribal rules of evidence places mandatory TLOA limits upon the sentencing/probation authority of the Tribal Court. Appellee's appeal is still pending before this Court. Briefing and oral arguments have been completed and the matter fully submitted on September 18, 2015.

Several months after his sentencing and appeal, Appellee petitioned for a writ of habeas corpus (July 15, 2015) pursuant to CTC § 2-1-121, arguing that the manner in which Colville Tribal Law treats rules of evidence places mandatory TLOA limits on the sentencing authority of the Colville Tribal Court. Appellee argued that the length of his sentence/probation was beyond that permitted by the provisions of TLOA.

At the same time Appellee, pursuant to CTC § 1-1-143, filed a motion with the Trial Court to disqualify the judge who sentenced him. The reasons for disqualification set out in the Affidavit of Prejudice included sentencing Appellee to terms different than those recommended by (1) prosecution and defense and (2) the Pre-sentence Investigation. In addition, the Affidavit alleged that the sentence imposed by the Court violated "the Indian Civil Rights Act of 1968 as amended." (i.e., TLOA).

The Trial Court on July 17, 2015, acting through a reviewing judge, granted the Motion disqualifying the sentencing judge from hearing the Appellee for a writ of habeas corpus, finding that the sentencing judge imposed a sentence "double the joint recommendation and far in excess of the Pre-sentence Investigation.[24]

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[23] Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261. (TLOA)

[24] While our holding in this matter causes the issue of disqualification of the trial judge to be moot, the finding of the reviewing court would appear to lack careful consideration. Issues that might have been considered by the reviewing court include that the Appellee had written notice of judicial discretion in his sentencing, current Colville law appeared to permit the sentence imposed by the trial judge and sentencing, when accomplished within the law of the jurisdiction, is generally not considered evidence of judicial prejudice.

On July 17, 2015, the Court granted the Appellee the writ of habeas corpus and directed the release of Appellee from incarceration. The Tribes timely filed an appeal of the granting of the writ and the disqualification of the sentencing judge. The Order granting the Writ reviews the requirements and limitation included in TLOA and finds that, because Colville law does not comply with certain provisions of TLOA, the sentence imposed upon Appellee was and is beyond the jurisdiction of the Tribal Court and unlawful. Order, Conclusions of Law and Order granting Writ of July 17, 2015.

DISCUSSION

The Trial Court wherein the Petition for the Writ was filed appears to have been aware that a habeas writ may not issue when the basis upon which the writ is sought is also the basis of an active proceeding before the Court of Appeals. *Zacherle v. CCT*, 8 CCAR 70, 4 CTCR 30 (2006). Trial Court Order of 20 July 2015, Finding of Fact #1.6.

The Order granting the Writ states "The issue before the Court of Appeals varies from Mr. Lazard's legal issues outlined in the Habeas Petition in this action." No support for this statement is provided either in the Findings, the Conclusions or in the Petition. There is no indication in the Order that the Trial Court in which the Petition for the Writ was filed reviewed any of the filings in *Max Harley Lazard v CCT*, AP-14-019 which would have revealed that the basis upon which the Writ was sought, i.e., sentencing beyond that allowed pursuant to the Tribal Law and Order Act of 2010, Pub. L. 111-211, 124 Stat. 2258 (2010), is precisely an issue put before this Court in appeal of Appellee's convictions.

Pursuant to our holding in *Zacherle v. CCT*, 8 CCAR 70, 4 CTCR 30 (2006) a trial court must decline to hear a question when that very question is already pending before this Court. The failure of the Trial Court to follow the law as set out in *Zacherle* divested the Trial Court of jurisdiction to grant the Writ. *See also: Desautel v. Dupris*, 11 CCAR 6, 8 (2011). We hold that the Trial Court lacked jurisdiction to entertain the Petition for the writ of habeas corpus in this case.

ORDER

Based on the foregoing, it is ORDERED that the Writ of Habeas Corpus issued on July 17, 2015 in this matter is void and this matter is remanded to the Trial Court for proceedings consistent with this opinion.

Jennifer Peoples GALLAHER, Appellant,

vs.

Vernon REYES, Appellee.

Case No. AP15-017, 6 CTCR 33

12 CCAR 42

[M. Carroll, Attorney at Law, appeared for Appellant.
L. Reinbold, Attorney at Law, appeared for Appellee.
Trial Court Case No. CV-CU-2013-35034]

Hearing November 20, 2015. Decided November 24, 2015.

Before Chief Justice Anita Dupris, Justice Rebecca M. Baker, and Justice Gary F. Bass

Dupris, J.

This matter came before the Court of Appeals for an Initial Hearing on November 20, 2015. Appellant appeared in person and with spokesperson Mark Carroll. Appellee appeared in person and with spokesperson Leone Reinbold. Appellant appeals the Trial Court's decision to deny her Motion to Recuse Judge Nomee from hearing this case. Appellant alleges that Judge Nomee resides across the street from Appellee and feels that this proximity potentially jeopardizes her right for a fair trial.

A petition for custody was filed in the Trial Court on January 31, 2015. An Order Assigning Judge was entered on September 22, 2015. The assigned judge entered an Order for Temporary Custody on September 30, 2015. Appellant then alleges that she discovered that the Appellee and Judge Nomee were neighbors. She then filed a Motion to Recuse on October 14, 2015. Another judge entered an order which denied Appellant's motion. No hearing was held on the motion.

Colville Tribal Law and Order Code (CTLOC) § 1-1-143, Disqualification of Judge states:

> Any party to any legal proceeding hereunder, including trials and appeals, may accomplish a change of assignment of his case from one judge to another upon filing an Affidavit of Prejudice with the Court, giving satisfactory reasons for the change. The Affidavit shall be in written form and must be filed with the Court before any trial action whatever has been taken by the initial judge. The initial judge shall refer the affidavit to another judge for decision.

This Court has previously found that a reviewing judge should make more detailed inquiries regarding whether there are sufficient facts to support allegations of potential bias on the part of a judge. *See, CTEC Gaming v. Mosqueda*, 8 CCAR 61, 4 CTCR 28, 33 I.L.R. 6101 (2006).

In *Ortiz v. Pakootas*, 5 CCAR 50, 3 CTCR 36, 28 I.L.R. 6183 (2001), this Court remanded the case back to the trial court to allow the judge to "make a specific inquiry into the facts alleged to support the Appellant's claim of unfair treatment and lack of notice before she enters an order on the Motion to Recuse. Such an inquiry may be made either by accepting sworn affidavits on the issues or by having a hearing on the motion." Finally in *Cleparty v. CCT*, 2 CCAR 19, 2 CTCR 55, 21 I.L.R. 6004 (1993) determined that the submitted affidavit of prejudice did not contain sufficient statements of fact from which the reviewing judge could make an informed decision.

In the instant case, Judge George reviewed the Motion to Recuse Judge Nomee and entered her decision to deny the motion. The allegations in the affidavit attached to the motion state that after the temporary custody hearing the Appellant called her attorney to say that she discovered that Judge Nomee lived directly across the street from Appellee. Judge Nomee did not disclose this information to the parties and thus it gave the appearance that Judge Nomee was giving preferential treatment to Appellee. The affidavit further states that when Judge Nomee was assigned the case, notice should have been sent to the parties[25].

The parties concur that there was no hearing held on the motion. There were no sworn affidavits submitted which detailed how either party was prejudiced by Judge Nomee's presence on the Bench. While allegations of the appearance of fairness may be sufficient in some instances to show prejudice, in this case, we do not believe Judge George did a sufficient inquiry as to the basis of the allegations. The affidavit was signed by the spokesman for Appellant which contain the allegations allegedly made by his client to him. The client did not sign the affidavit. The facts stated in the affidavit were not independently verified by Mr. Carroll.

Based on the foregoing, this Court finds that the reviewing judge did not conduct a sufficient inquiry into the allegations in the Affidavit of Prejudice and this case should be remanded to make such an inquiry.

It is ORDERED that the Order Granting the Appellee/Petitioner is vacated and this matter shall be remanded to the Trial Court to conduct an inquiry into the facts alleged in the Affidavit Of Prejudice and a new order be issued thereafter.

[25] Appellant cites to CTLOC 1-1-140(b) which states that when an assignment is made for judges <u>other</u> than the Chief Judge or associate judges, notice must be given to the parties. In this case, Judge Nomee is an associate judge, even though her title is "Traditional Judge", thus no notice is required.

Cheynne GARDNER, Appellant,

vs.

Aaron HOLCOMB, Appellee.

Case No. AP15-015, 6 CTCR 34

12 CCAR 44

[Parker Parsons, Attorney, NJP, for Appellant.
Appellee appeared without representation.
Trial Court Case No. CV-CU-2015-38023]

Hearing November 20, 2015. Decision November 30, 2015.
Before Chief Justice Anita Dupris, Justice Dave Bonga, and Justice Theresa M. Pouley

Bonga, J

This matter came before the Court of Appeals (COA) for an Initial Hearing on November 20, 2015. Parker Parsons, Northwest Justice Project, appeared for Appellant. Appellee appeared personally and was not represented by a spokesperson.

After a review of the record and the law, the COA finds that the Trial Court did not have subject matter jurisdiction. Therefore this case shall be remanded to the Trial Court for dismissal.

SUMMARY

A Petition for Custody and/or Support and a Proposed Parenting Plan were filed by Appellee/Petitioner on January 30, 2015. In his petition, Appellee/Petitioner states that the Trial Court has jurisdiction over this matter. *Petition for Custody and/or Support, I. Jurisdiction.* He goes on to state that he does not live on the Colville Indian Reservation but he is a member of the Colville Tribe. He then states that the Appellant/Respondent does not reside on the Colville Reservation. The minor child does not live on the Colville Reservation and is not enrolled, though Appellee/Petitioner states that the minor "could be enrolled if not for the mothers [sic] interference."

In her answer, Appellant/Respondent argues that the Court does not have jurisdiction, that she is not a member of the Colville, and that the minor does not live, and has never lived, on the Colville Reservation. She also states that the Appellee/Petitioner has not lived on the Colville Reservation for at least five years. Appellant/Respondent denies that the minor could be eligible for enrollment with the Tribe.

A paternity hearing was held on June 30, 2015. At that hearing the Trial Court found that both parties consented to jurisdiction for purposes of establishing paternity, pursuant to § 2-2-1 of

the Colville Tribal Law and Order Code (CTLOC)[26]. The Trial Court found that the Court had subject matter jurisdiction over the parties by citing to Chapter 5-1[27] of the CTLOC. The Trial Court cites to CTLOC 1-1-70[28] and 1-1-431[29] as granting jurisdiction to the Court. The Trial Court went on to interpret the language in *In Re the Name Change of Mitzi Jean Sweowat,* 10 CCAR 01, 5 CTCR 19, 36 I.L.R. 6041 (2009) as granting broad scope of authority to the Courts in determining jurisdiction[30].

A custody hearing was held on September 3, 2015. Both parties appeared and neither were represented by a spokesperson. The Court found that there was a domestic violence incident in which the Appellant/Respondent was the perpetrator. Custody was awarded to the Appellee/Petitioner. Appellant/Respondent timely filed an appeal.

JURISDICTION

"The issue of subject matter jurisdiction is a question of law, subject to a review *de novo.* We review findings of fact under the clearly erroneous standard, and errors of law *de novo.*" *Green v. Green,* 10 CCAR 37, 5 CTCR 39 (02/08/2011). "The question of jurisdiction is entirely one of law. The standard of review for questions of law is non-deferential to findings and conclusions of the trial court and is *de novo." Hoover v. CCT,* 6 CCAR 16, 3 CTCR 44, 26 I.L.R. 6035 (03-13-2002).

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[26] 2-2-1. Jurisdiction Generally. The Court shall have jurisdiction of all suits involving persons residing within the Tribal jurisdiction as defined by this Code and all other suits in which a party is deemed to have consented to the jurisdiction of the Court, or in which the events giving rise to the action occurred within the Tribal jurisdiction as defined by this Code.

[27] 5-1-205. Jurisdiction. (a) the Court shall have jurisdiction of any action to determine paternity brought under this Chapter. The action may be joined with an action for divorce, dissolution, annulment, declaration of invalidity, separate maintenance, filiation, child support, or any other civil action in which paternity is an issue including proceedings in Juvenile Court...

[28] Colville Tribal Court Jurisdiction – Defined. The jurisdiction of the Tribal Court and the effective area of this Code shall include all territory within the Reservation boundaries, and the lands outside the boundaries of the Reservation held in trust by the United States for Tribal members of the Tribes, and it shall be over all persons therein... To the greatest extent permissible by law, the jurisdiction of the Tribal Court shall apply to all persons on lands in the North Half and on other lands w[h]ere the Colville Tribes may be authorized to enforce its interests or rights and members asserting rights held by the Tribe without regard to location.

[29] Acts Submitting Person to Jurisdiction of Tribal Court. (a) The Colville Confederated Tribes shall have civil jurisdiction over: (1) any person residing or present within the Reservation or lands outside the boundaries of the Reservation held in trust by the United States for Tribal members of the Tribes; ... (6) Children and their parent(s), guardian, legal custodians or other persons with responsibility for or control of the child who leave the exterior boundaries of the Reservation and over whom the Court had jurisdiction at the time they left; (7) Persons living in a marital relationship within the Reservation notwithstanding subsequent departure from the Reservation, so long as the petitioning party has continued to reside on the Reservation; (8) Persons engaging in the act of sexual intercourse within the Reservation with respect to which a child may have been conceived; ... (11) Any child custody proceeding as defined in the Indian Child Welfare Act, 25 U.S.C. § 1903(1)...

[30] "This Court will continue to view the jurisdiction of the Tribes broadly unless there is an express limitation on the exercise of that jurisdiction."

DISCUSSION

This Court discussed subject matter jurisdiction briefly in *Freund v. Pearson*, 1 CCAR 29, 1 CTCR 43, 16 I.L.R. 6150 (09-28-1989). Appellant Freund argued that the Court did not have subject matter jurisdiction because he was not domiciled on the Colville Reservation, citing *Mississippi Band of Choctaw Indians v. Holyfield* (U.S. Supreme Court, decided 04-03-1989) 16 I.L.R. 1008. This Court found that his argument was not supported as it dealt with the exclusive jurisdiction of Indian children under the Indian Child Welfare Act (ICWA).The minors in *Freund* were not subject to ICWA, but were before the Court pursuant to the Tribes' Domestic Relations code. The Court concluded that the Tribe had exclusive jurisdiction because of the "on reservation domicile of the mother."

The child in the instant case is also not subject to the ICWA. The case was brought before the Trial Court pursuant to CTLOC Title 5-1. Therefore the domicile of the child follows the domicile of the mother, which is off-reservation.

The Trial Court denied the Appellant/Respondent's motion to dismiss and ruled that there was jurisdiction in addition to 5-1 through sections 1-1-430 and 1-1-431(a)(10). This Court states that "this section (1-1-431(a)(10)) clearly is in keeping with the overall jurisdiction section providing for exercise of jurisdiction to the greatest extent permissible by the law because authorized civil jurisdiction over "all causes of action which involve a member of the Tribe." *Sweowat, supra*. As stated before, the facts of this case indicate that neither Appellant Gardner nor her daughter, Haley, are members or eligible for membership in the Tribes. The fact that Haley may be eligible at some time in the future for care through Indian Health Services is irrelevant in determining if Haley is a member of the Tribes which is necessary for jurisdiction by the Tribes' court system. The child is a descendant and not eligible for enrollment as a member[31]. The Appellant/Respondent has argued at all times that the Court did not have jurisdiction to hear this matter. This Court agrees. It appears that the Trial Court over-reached to find jurisdiction over this custody.

Based on the forgoing, this Court finds that the Trial Court did not have subject matter jurisdiction to entertain this case. The order granting custody on September 15, 2015 should be vacated, and this case should be remanded to the Trial Court for dismissal.

It is ORDERED that:

1. The Trial Court did not have jurisdiction to hear this matter.

2. The Findings of Fact, Conclusions of Law, and Decree of Custody entered on September 15, 2015, are vacated.

[31] Appellee/Petitioner argued before this Court that the child was enrolled as a descendant, but that designation was determined to pertain to Indian Health Services benefit eligibility only. There is nothing in the CTLOC Enrollment Statute, Chapter 8-1, which confers any type of membership on descendants.

3. This case is remanded to the Trial Court for entry of an order of dismissal.

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Jerry LOUIE, Appellant,

vs.

COLVILLE TRIBAL FEDERAL CORPORATION, Appellee.

Case No. AP13-023, 6 CTCR 35

12 CCAR 48

[Mark Carroll, Attorney at Law, appeared for Appellant.
Tim McLaughlin, Attorney at Law, appeared for Appellee.
Trial Court Case No. CV-OC-2012-35234]

Hearing January 16, 2015. Decided December 1, 2015.

Before Hon. Theresa M. Pouley, Hon. Rebecca M. Baker, and Hon. Gary F. Bass

BAKER, J.

THIS MATTER comes before this court on an appeal by Jerry Louie ("Louie") from the Order of the Colville Tribal Court ("Tribal Court"), per the Honorable Cynthia Jordan. This order had dismissed Louie's petition for review of a decision, after an evidentiary hearing, of the Administrative Hearing Officer ("AHO"), the Honorable S. Renee Ewalt. The Tribal Court's and the AHO's dismissal orders had the effect of upholding Louie's termination from employment at Mill Bay Casino, an enterprise of the Colville Tribal Federal Corporation ("CTFC"). In 2012 Louie was terminated from his employment with CTFC without any prior progressive discipline. Louie challenged his termination through CTFC supervisors, to no avail. He then appealed to the AHO on numerous grounds, while also arguing that the AHO lacked subject matter jurisdiction to decide his appeal. After an evidentiary hearing and an adverse ruling by the AHO Louie sought review in Tribal Court and now this court on the basis of both the Colville Confederated Tribes' Administrative Procedures Act ("APA"), CTC § 2-4-1 *et seq.*, and the Colville Tribal Civil Rights Act ("CTCRA"), CTC § 1-5-1 *et seq*.

Although for different reasons than those cited by the Tribal Court, we affirm.

Appellant Louie was represented throughout by attorney Mark J. Carroll. Appellee CTFC was represented throughout by attorney Timothy H. McLaughlin.

FACTS

The procedural facts are not in dispute, nor are the facts related to the history of Louie's initial hire as an employee of the Colville Confederated Tribes ("CCT" or "the Tribes"), then of the Colville Tribal Enterprise Corporation ("CTEC"), and of his later retention as an employee of the Colville Tribal Federal Corporation ("CTFC"), appellee herein. Also undisputed is the ownership of CTEC and CTFC and the adoption of the CTEC Employee Policy Manual, which later became the Employee Policy Manual of CTFC. Finally, it is not in dispute that CTEC's (later CTFC's) Employee Policy Manual, while emphasizing the at-will nature of CTFC's

employment except in certain instances, it also provided a mechanism for review of terminations by an administrative hearing officer ("AHO") who is independent of the tribal entity, now CTFC. Later, a document called "Supplementary Procedures for Administrative Hearings" was generated.[32]

Jerry Louie became an employee of the Tribes in 1982. In 1996, however, he took a job with the Mill Bay Casino when the casino was owned and operated by the Colville Tribal Enterprise Corporation ("CTEC"), a wholly-owned corporation of the Tribes. In early 2006, while Louie was still an employee of CTEC, this court decided *Finley v. Colville Tribal Services Corporation*, 8 CCAR 38, 33 I.L.R. 6038 (2006), which established that Tobias Finley, at the time a seasonal employee of a previous wholly-owned enterprise of the Tribes, Colville Tribal Services Corporation ("CTSC"), possessed a property interest in his continued employment. CTSC had argued that its employee policy manual accorded no right of review for terminated seasonal employees, because, like new employees, they were subject to a "probationary status." Construing CTSC's employee policy manual against its drafter, CTSC, this court held on due process grounds that, like other Tribal employees accruing benefits while employed, Finley should have had the right to a review by an administrative law judge of the merits of the reasons for his termination.

Later in 2006, the Board of Directors of CTEC adopted an Employee Policy Manual ("EPM"), and existing employees, including Louie, were required to acknowledge that they were subject to the EPM's terms and conditions in order to continue to work there. Louie complied with this request and kept his employment. Notably, the CTEC EPM explicitly and conspicuously[33] made all CTEC employees "at-will" employees and, although "guidelines" for progressive discipline were provided, they were delineated as "guidelines" only, and not required to be followed in "appropriate circumstances," going on to provide:

> Nothing in this section [pertaining to progressive disciplinary guidelines] alters the at-will nature of the employment relationship between CTEC and its employees. This policy should not be construed as promising specific treatment in a particular situation.[34]

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[32] The record does not establish whether this document was adopted by CTEC's Board of Directors or its staff. Thus we respectfully disagree with the AHO's statement at page 18, lines 21-22, that "to argue that the Supplementary Procedures are being used without the awareness or approval of the Board of Directors or Chief Executive Officer is pure nonsense." This issue, while, as discussed *infra*, is not determinative in this case, it could well be crucial in future cases brought under the CTCRA.

[33] This provision was set forth in Part VI of the EPM. CTFC Exhibit 1 before the ALJ.

[34] EPM at Section XII(B), CTFC Exhibit 1 before the ALJ.

Clearly it was the intent of the CTEC EPM to avoid the implications of *Finley*. The CTEC EPM further provided that any future policies for the CTEC organization, with some exceptions, could be made only by action by the CTEC Board of Directors.[35]

In 2009, someone at CTEC developed "Supplementary Procedures" applicable to CTEC employment.[36] These "Supplementary Procedures" provided details for how administrative appeals would be handled, setting up specific mechanisms for such appeals in the event that all internal CTEC supervisory review of an employee's termination had taken place and the employee still felt aggrieved.

Although Louie made various objections to hearing before an AHO and argued that the AHO process was not applicable to him, and moved the AHO to recuse herself for being biased, arguments addressed *infra*, he makes no argument that the particular AHO assigned was not an AHO anticipated by the Supplementary Procedures or – if the Supplementary Procedures were simply a staff-generated document – that they exceeded the authority of the staff. Nor does he challenge the propriety of the selection process for AHOs under the Supplementary Procedures, although he does take issue with the fact that he did not receive a copy of the Supplementary Procedures until after he had appealed his termination to the AHO. Nevertheless, Mr. Louie ultimately received a full evidentiary hearing before the AHO.

While the Employee Policy Manual is silent on this point, the Supplementary Procedures provide that the AHO hearing is the employee's final remedy and explicitly state that no further review is allowed, to include any appeal to or review by Tribal Court or, indeed, by this court.[37] The Supplementary Procedures, along with the EPM, also contain language to the effect that sovereign immunity is not waived by any of their provisions.[38]

In 2010, the Tribes' Business Council, the governing body of the Colville Confederated Tribes as the sole shareholder/owner of CTEC, transferred all of CTEC's assets to CTFC.[39] All CTEC employees then began to be paid by and to receive benefits from CTFC rather than CTEC. No new policy manuals have been adopted since CTEC's assets were transferred to CTFC, but it

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[35] CTSC Exhibit 1 before the ALJ, EPM Section I(B).

[36] ALJ Finding of Fact No. 1.27 (testimony of Debi Condon). CTFC Exhibit 3 before the ALJ.

[37] Supplementary Procedures, Administrative Hearings, subsection B.14, CTFC Exhibit 3 before the AHO.

[38] EPM at p. 8, Part III.; Supplementary Procedures at p. 1, under Generally, paragraph F.

[39] AHO Finding of Fact No. 1.27 (testimony of Debi Condon).

is undisputed that all *obligations* of CTEC (if any) under the CTEC EPM and Supplementary Procedures accompanied the transfer of assets.[40]

Specifically in relation to Mr. Louie, the AHO made a number of Findings of Fact, to which Mr. Louie has not assigned error. While we emphasize that it is singularly unhelpful when a fact-finder, such as the AHO here, prefaces each "Finding of Fact" with the words, "X testified that . . .,"[41] nevertheless it is clear from the AHO's conclusions of law and, especially, the lengthy discussion in the "Order" section of her written decision, that she adopted the testimony of CTFC's witnesses and largely discounted that of Mr. Louie. It is on this basis that we recite the following facts.

On April 17, 2012, Jerry Louie was terminated from his employment at CTFC.[42] The letter declared that Mr. Louie was "not happy with [his] job" and cited the at-will employment clause set out in Section VI of the EPM.[43] He had not been given any written warnings or progressive discipline,[44] although his supervisor had discussed various issues and grievances with him over time.[45] The AHO found that he was not terminated due to retaliation for Mr. Louie's contacting the Tribal Employment Rights Office or a Councilwoman regarding grievances, and, although Mr. Louie was a member of the protected class in regard to age discrimination, age was not a factor in the decision to terminate him.[46] He timely appealed his termination through the chain of command at CTFC, but to no avail. He then properly and timely submitted notice that he wished to appeal his termination and requested a hearing before an Administrative Hearing Officer as set forth in the EPM.

The Honorable S. Renee Ewalt was assigned to hear Mr. Louie's appeal. Before the AHO, CTFC filed a motion to quash a subpoena. AHO Ewalt set a briefing schedule but counsel for Mr. Louie needed additional time. Ultimately, AHO Ewalt, despite Mr. Louie's late-filed

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[40] *Ibid.*

[41] Such a statement is not really a "finding" but a recitation of the testimony.

[42] AHO Finding of Fact No. 1.2.

[43] AHO Finding of Fact No. 1.3.

[44] *See* AHO Finding of Fact Nos. 1.7 and 1.15.

[45] AHO Finding of Fact Nos. 1.13 – 1.15.

[46] AHO Finding of Fact No. 1.16.

brief, considered both parties' briefings.[47] Without oral argument, she granted CTFC's motion to quash. Subsequently AHO Ewalt held a full evidentiary hearing. In a 28-page decision replete with findings of fact and conclusions of law, AHO Ewalt upheld Mr. Louie's termination and dismissed his appeal. At one point during the course of the appeal, AHO Ewalt may have told Mr. Louie that if he was dissatisfied with her decision he would have the right to further appeal to the Tribal Court.

I. ISSUES ON APPEAL

Preliminarily, CTFC has moved to dismiss this appeal, raising two grounds for its motion:

1. This court, like the Tribal Court, lacks subject matter jurisdiction to conduct any type of review of Louie's termination by virtue of the structure of the CTEC/CTFC Employment Policy Manual and Supplementary Procedures.
2. CTFC, as a "Section 17 federal corporation,"[48] is entitled to sovereign immunity from suit in this case.

Louie raises a number of issues, which can be encapsulated as follows:

1. The CTEC Employee Policy Manual and Supplementary Procedures do not apply to him, and thus he should be treated as a Tribal employee which entitles him to review of his termination by the Colville Tribal Court under the Colville Tribes' Administrative Procedures Act, CTC § 2-4-1 *et seq.*; and the AHO's statement that he was entitled to Tribal Court review should be enforced;
2. Louie was deprived of an impartial decision-maker to review his termination from employment with CTFC, which implicated the right of due process when the AHO refused to recuse herself.
3. As a result of the denial of due process to him, and even if the CTEC EPM applies to him, the Colville Tribal Civil Rights Act ("CTCRA"), CTC § 1-5-1 *et seq.,* entitles him to relief via the Tribal Court because he was not afforded due process after being deprived of his employment, a property interest under Finley, supra.

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[47] AHO Findings of Fact and Conclusions of Law; Order Dismissing Appeal, at p. 2, ll. 8-10.

[48] *See, generally,* CTFC's Response Brief and Renewed Motion to Dismiss (filed December 22, 2014).

II. STANDARD OF REVIEW

This matter concerns combined issues of law and fact.

> Combined issues of law and fact are reviewed under the non-deferential *de novo* standard when the administration of justice favors the Court of Appeals. "Clearly erroneous" review is used in such questions when the administration of justice favors the Trial Court. *CCT v. Naff*, 2 CCAR 50, 2 CTCR 10, 22 ILR 6032 (1995).

Finley v. CTSC, supra (2006).

Here, issues presented by CTFC pertaining to subject matter jurisdiction are purely questions of law. The status of CTFC and the resultant applicability of the doctrine of sovereign immunity, however, present mixed questions of law and fact, with the factual issues not entirely determined in this record.

The issues presented by Louie pertain to the significance of the factual history of the establishment of CTEC and CTFC, which is not disputed; the applicability of *Finley, supra,* a question of law; the application of those factors to Louie's particular termination from employment, a mixed question of law and fact; and the subsequent hearing(s) in front of the AHO, including her denial of Louie's motion for recusal, again mixed questions of law and fact.

Since the issues presented herein are ones of combined law and fact, albeit with the facts either undisputed, or, in the case of the facts pertaining to CTFC's sovereign immunity argument, undetermined, the *de novo* standard applies.

III. SUMMARY OF DECISION

As to the issues raised by CTFC:

1. Although this court has no subject matter jurisdiction under the Tribes' APA to consider direct appeals from AHO decisions involving CTFC employee terminations, the Tribal Court, and in turn this court, retain subject matter jurisdiction to review cases when, as here, a claim of a violation of the CTCRA has been made.
2. Although CTFC, which claims to be a "Section 17 federal corporation," may in fact possess some sovereign immunity by virtue of this alleged status, there has been inadequate development of the facts to establish this status in the record *in this case,* whether before the AHO, the Tribal Court or this court.

As to the issues raised by Louie:

1. Since Louie agreed to become subject to the Employee Policy Manual, rather than refusing or declining to do so, he is bound by its provisions, which include review of his termination from employment by only an Administrative Hearing Officer and which allow no review by the Tribal Court system under the Tribes' Administrative Procedures Act. Further, the

AHO's statement that Mr. Louie had a right of appeal to Tribal Court is of no consequence.

2. No showing has been made that the AHO was prejudiced when she declined to recuse herself after deciding a pretrial motion without oral argument, or that in doing so she demonstrated herself to be other than an impartial decision-maker.
3. Since a full evidentiary hearing occurred before the AHO, Louie enjoyed the benefit of notice and an opportunity to be heard, the two key elements of due process.

In sum, Louie is not entitled to the protection of the Tribes' APA but instead to a hearing before an AHO. Louie's particular challenge to the AHO's impartiality was without basis in this record. And the AHO who heard his case afforded him due process of law, including both notice and an opportunity to be fully heard on the merits of his employment appeal.

Because CTFC has moved to dismiss the appeal for lack of subject matter jurisdiction, and because of sovereign immunity, this opinion will first address CTFC's issues set forth above, and, because we deny CTFC's motion to dismiss Mr. Louie's petition, will then address the three issues raised by Louie.

CTFC's ISSUES

1. **Although this court has no subject matter jurisdiction under the Tribes' APA to consider direct appeals from AHO decisions involving CTFC employee terminations, the Tribal Court, and in turn this court, retain subject matter jurisdiction to review cases when, as here, a claim of a violation of the CTCRA has been made.**

Although it is true that Louie's Petition for Review filed in the Tribal Court cited largely to the Tribes' Administrative Procedures Act, CTC § 2-4-20, it also included a claim that the AHO's decision "denied Jerry Louie of due process " (Petition, at p. 3, l. 3) and was "[i]n violation of constitutional provisions" (Petition, at p. 3, l. 10). It went on, in the prayer for relief, to cite not only CTC § 2-4-20 (the APA) but also CTC § 1-5-2(h), a section of the Colville Tribal Civil Rights Act (CTCRA) dealing with denial of equal protection and due process.[49]

APA direct review is simply unavailable, since there is no code section allowing it in this situation, as we will discuss more fully *infra*. But that does not end the inquiry.

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[49] CTC 1-5-2(h) provides:

> **Civil Rights of Persons Within Tribal Jurisdiction.** The Confederated Tribes of the Colville Reservation in exercising powers of self-government shall not:
> * * *
> (h) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law[.] . . .

CTFC has steadfastly maintained in this case that there is *no* set of circumstances under which review by the Tribal Court system can occur in CTFC employment termination appeals. We disagree.

While we agree that the CTEC Employee Policy Manual and the mechanism for review of employment terminations by an administrative hearing officer has replaced any Tribal Court system review of such terminations under the Tribes' APA, CTC § 2-4-20 (see discussion, *infra*, of Mr. Louie's issues), this begs the question of whether, under any circumstances, the Tribal Court, and in turn this court on appeal from Tribal Court, has the power to consider *any* matter originating as a CTFC employment appeal to the AHO.

We note that the CTCRA provides:

> **1-5-3 Right of Action**
>
> Any person may bring an action for declaratory and/or injunctive relief only, against any executive officer or employee of the Confederated Tribes, or any employee or officer of any governmental agency acting within the jurisdiction of the Colville Tribal Court, to protect the rights set out in CTC § 1-5-2 of this Chapter.
>
> **1-5-4 Colville Tribal Court**
>
> Actions brought under CTC § 1-5-3 shall be brought only in the Courts of the Confederated Tribes of the Colville Reservation[,] notwithstanding the fact that a court of another jurisdiction may have concurrent jurisdiction.

CTC 1-5-3 and -4.

Thus, since Louie has pled a violation of CTC § 1-5-2(h), albeit in the context of his employment with CTFC, he is entitled to seek relief in the Tribal Court. Specifically, Amendment X, to the Colville Tribes' Constitution provides, in Article VIII, as follows.

> Section 1: There shall be established by the Business Council of the Confederated Tribes of the Colville Reservation a separate branch of government consisting of the Colville Tribal Court of Appeals, the Colville Tribal Court, and such additional Courts as the Business Council may determine appropriate. It shall be the duty of all Courts established under this section to interpret and enforce the laws of the Confederated Tribes of the Colville Reservation as adopted by the governing body of the Tribes.

A claim under the CTCRA, which is part of the "laws of the Confederated Tribes of the Colville Reservation," in accordance with the Tribes' Constitution, is thus to be "interpreted" and "enforced" in and by the Tribal Court system. Otherwise stated, the Tribal Court and this court possess subject matter jurisdiction to hear Louie's claims under the CTCRA arising out of the termination of his employment with the CTFC.

2. Although CTFC, which claims to be a "Section 17 federal corporation," may in fact possess some sovereign immunity by virtue of this status, there has been inadequate development of the facts to establish this

status in the record in this case, whether before the AHO, the Tribal Court or this court.

CTFC has made the claim that it is entitled, as a "Section 17 federal corporation," to immunity from suit, at least in the context of this case. We disagree, primarily because the record in this case has not been developed either timely or sufficiently to determine (a) if CTFC is, in fact, a "Section 17 federal corporation," or (b) what the parameters of sovereign immunity are in relation to such corporations.

Thus, we look again to the Colville Tribal Civil Rights Act, under which we have determined that the Tribal Court system has subject matter jurisdiction, and find the following additional provision:

> 1-5-5 Sovereign Immunity
>
> When suit is brought in the Colville Tribal Court under CTC § 1-5-4 to protect rights set out in CTC § 1-5-2, the sovereign immunity of the Colville Tribes is hereby waived in the Courts of the Tribes for the limited purpose of providing declaratory and injunctive relief, where appropriate under the law and facts asserted to protect those rights; provided, the immunity of the Tribes is not waived with regard to damages, court costs, or attorney's fees.

CTC 1-5-5.

Clearly, then, the Business Council did not intend for the *Tribes* themselves to be immune from suit (for the limited relief as provided in CTC § 1-5-5) under the CTCRA. Nor, on the record in this case, are we able to come up with a rationale for holding that a wholly-owned corporation of the Tribes should be immune from suit – subject, again, to CTC § 1-5-5, which does not allow damages, court costs, or attorney's fees but only declaratory and injunctive relief, which would include a declaration that the termination violated CTC § 1-5-2(h) (due process) and reinstatement (albeit without back pay). We note that the discussion of CTFC's purported status as a "section 17 federal corporation" has been, at best, sketchily developed. Here again the Code guides us by providing that the Court of Appeals "shall not . . . entertain issues on appeal that have not been fully developed and ruled on by the Trial Court." CTC § 1-2-106(f).

Thus, while it is certainly possible that a future case may have a properly developed record on this important issue, this case does not.

We move, then, to the issues raised by Mr. Louie.

B. LOUIE'S ISSUES

1. **Since Louie agreed to become subject to the Employee Policy Manual, rather than refusing or declining to do so, he is bound by its provisions, which include review of his termination from employment by only an Administrative Hearing Officer and which allow no review by the Tribal Court system under the Tribes' Administrative Procedures Act.**

Further, the AHO's statement that Mr. Louie had a right of appeal to Tribal Court is of no consequence.

As indicated in our discussion of the first of CTFC's issues above, we agree that the APA does not apply and is not available for review of Mr. Louie's termination. Here is our reasoning for that conclusion.

First, CTFC is correct in noting that the Tribes' Code limits APA review to cases involving

> Chapter 4-5 (On-Site Wastewater Treatment and Disposal); Chapter 4-6 (Mining Water Quality Protection); Chapter 4-7 (Forest Practices Water Quality); Chapter 4-8 (Water Quality Standards); Chapter 4-9 (Hydraulics Project Permitting); Chapter 4-15 (Shoreline Management); Chapter 10-1 (Tribal Employment Rights); and Chapter 10-3 (Indian Preference in Contracting) of the Colville Tribal Code.

CTC § 2-4-1. And, as CTFC also points out, all those matters concern actions by the Tribes itself, not actions by CTFC. *See* CTC § 2-4-20, defining "agency" as "any tribal board, commission, department or officer authorized by law to propose rules for adopting [sic] by the Business Council or to adjudicate contested cases . . . ." CTC § 2-4-3(a). Further, the Code provides that the Tribal Court of Appeals "shall not have jurisdiction to order the Trial Court to take any administrative personnel actions other th[a]n that permitted under applicable personnel policy." CTC § 1-2-106(f). So, while it may perhaps be argued that CTFC's Board of Directors is a "tribal board," within the meaning of CTC § 2-4-20 defining an "agency," it has not been established that CTFC's Board of Directors is "authorized by law to propose rules for adop[tion] *by the Business Council* or to adjudicate contested cases." (Emphasis supplied.)

Further, although it is unfortunate that the AHO apparently made the statement to Mr. Louie that he had a right to appeal any adverse decision of the AHO to Tribal Court, this cannot result in a such a right – at least not the right to a direct appeal of the AHO's decision. To repeat, this ~~c~~ourt "shall not have jurisdiction to order the Trial Court to take any administrative personnel actions other th[a]n that permitted under applicable personnel policy." *Id.* On the other hand, the AHO's statement – according to our decision herein – was at least accurate at least insofar as Mr. Louie's right to have the Tribal Court review a decision which violates due process is concerned, as we discuss, *infra.*

APA review is simply not available to terminated employees of CTFC.

2. **No showing has been made that the AHO was prejudiced when she declined to recuse herself after deciding a pretrial motion without oral argument, or that in doing so she demonstrated herself to be other than an impartial decision-maker.**

Mr. Louie has made no claim that the AHO was not selected in such a way that he was denied due process.[50] Rather, he complains that the AHO set a deadline for briefing on a pretrial motion brought by CTFC and decided the motion without oral argument. He then asked the AHO to recuse, and she denied that request.

First, as CTFC points out, Mr. Louie was not prejudiced by the AHO's setting of a deadline for briefing, because ultimately it is clear that she considered Mr. Louie's response to the pretrial motion, despite its having been submitted somewhat later than her briefing schedule had provided. This is made clear from the AHO's Findings of Fact and Conclusions of Law; Order Dismissing Appeal, at page 3, lines 6 through 8.

Second, although Mr. Louie expected and would have liked a live hearing on the pretrial motion, and terms the AHO's denial of the motion to quash a "*sua sponte*" order, this is a mischaracterization. Citing *Meusy v. Thomas*, 10 CCAR 62, 5 CTCR 39, 38 I.L.R. 6053 (2011), Mr. Louie correctly points out that this court has expressed its disapproval of *sua sponte* rulings on substantive issues. But unlike a *sua sponte* order, an order issued on a motion *without oral argument* is not *sua sponte*. Rather, the test is whether procedural due process has been accorded the parties before a ruling is made, and whether the judicial officer has maintained not only a sense of fairness but also the appearance of it. *See, e.g., Edwards v. Bercier*, 10 CCAR 18, 5 CTCR 23, 37 I.L.R. 6009 (2009). Nothing in the Tribes' Law and Order Code requires a hearing, in person, on any given motion. What counts is that all parties be given notice of the motion and an opportunity to be heard – "heard," that is, in the sense of having an opportunity to weigh in on the issue(s) presented in the motion; and the judge must consider the arguments made by all parties in a fair and impartial manner, giving his or her reasoning for the ruling, and demonstrating that he or she was being fair and impartial to both parties.

Thus, in relation to CTFC's pretrial motion to quash, in due process terms, Mr. Louie had notice of the motion and an opportunity to be "heard" via his written submittals. He received "process" that was "due." Thus, the AHO's approach in receiving and considering briefs from both parties and then deciding the case without oral argument did not form a basis for the AHO's disqualification as being "prejudiced" against Mr. Louie.

Moreover, it is well-settled in regard to recusal of judges for cause – and indeed codified by the Tribes' Business Council with respect to Tribal Court at least – that once a discretionary ruling has been made in a given case, a party cannot wait until after a ruling adverse to himself

[50] We note with some concern that the Supplementary Procedures state that the AHO "may be selected from a panel of [AHOs] retained by CTEC [now CTFC]. . . ." Supplementary Procedures, Administrative Hearings, Appeals, Paragraph 15, at p. 3. Thus, since an AHO serves essentially at the pleasure of CTFC, we wonder if such an AHO would be an impartial decision-maker. But since this issue was neither raised nor briefed in this case, we do not address it here.

and then move to disqualify the judge because the judge has been "unfair" in ruling against him.[51] While there is no specific code section pertaining to AHOs, by analogy it makes no sense that a request for disqualification be countenanced once a discretionary ruling – such as the AHO's ruling on CTFC's motion to quash – has been issued.

Although in this court's experience such attempts to disqualify a judge after a discretionary ruling has been made are all too common, these attempts cannot be countenanced. Otherwise, the "forum-shopping" problem would wreak havoc on the administration of justice. Likewise, although the Colville Law and Order Code requires any affidavit of prejudice *in the Tribal Court system* to be heard by another judge, we see no reason why this should be extended to the AHO system, when, as here, a clearly discretionary ruling has already been made by the AHO who, then, by refusing to recuse, denies the motion for recusal herself.

We thus conclude that no due process violation occurred when the AHO refused to recuse and proceeded to hold the evidentiary hearing.

3. Since a full evidentiary hearing occurred before the AHO, Louie enjoyed the benefit of notice and an opportunity to be heard, the two key elements of due process.

Louie's final argument is that he was not afforded due process because, among other things, he was not allowed to receive copies of the recordings of the AHO's proceedings as provided in the Supplementary Procedures. Also part and parcel of his argument is that he simply was not afforded due process because Tribal Court did not allow a direct appeal under the APA. Additionally, he argued that the AHO determined the facts in the case in such a way that his termination was upheld. Noticeably absent, however, from his argument is that the evidence, disputed though it was, did not provide *any basis* for the AHO's findings of fact and in turn her conclusions of law leading to the upholding of his termination.

While we strongly disapprove of the fact that Mr. Louie has been unable to obtain copies of the recordings of the hearing at his own expense, since this is explicitly provided in the Supplementary Procedures, Administrative Hearings, Appeals, Paragraph 11,[52] nevertheless, we fail to see how, in this case, such a failure on the part of those conducting the hearing implicates due process. This is because there is no argument that the AHO's findings of fact are not supported by substantial evidence. Additionally, there is simply no right to APA review in CTFC terminations because of the EPM.

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[51] CTC 1-1-143 provides: "Any party to any legal proceeding . . . may accomplish a change of assignment of his case from one judge to another upon filing an Affidavit of Prejudice with the Court, giving satisfactory reasons for the change. *The Affidavit shall be in written form and must be filed with the Court before any trial action whatever has been taken by the initial Judge*. The initial Judge shall refer the affidavit to another judge for decision." (Emphasis supplied.)

[52] "All proceedings shall be recorded, and either party may obtain a copy of the tapes at his/her own expense, except where the ALJ determines that a portion or portions of the hearing must remain sealed to protect employee confidentiality."

As the parties have pointed out in their briefing, employer-employee relations, and whether an employee is "at-will" – *i.e*, serving at the will of the employer -- or has some rights to dispute and seek relief from an employment decision, are questions the answer to which originating with the common law doctrine of master and servant. However, the "at-will" starting point in the analysis of any employer/employee relationship based on employment policy manuals and other public policy issues has been softened over the years in many jurisdictions. Here the AHO properly relied on a seminal Washington case, namely, *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). We must emphasize that state case (common) law is to be considered guidance for us only in the absence of Colville Tribal Code or case law.[53] But the AHO could thus be and, we agree, was in this instance properly persuaded by the rationale enunciated in Washington's *Thompson v. St. Regis, supra.* Indeed, a reading of this case is instructive. Generally speaking, in the absence of a contract, an employee serves at the will of the employer, who need give no reason for an employment decision adversely affecting the employee. *Ibid.*, 102 Wn.2d at 228. As explained by the Washington court in *Thompson:*

> [I]f an employer, for whatever reason, creates an atmosphere of fair treatment with promises of specific treatment in specific situations and an employee is induced thereby to remain on the job and not actively seek other employment, those promises are enforceable components of the employment relationship. We believe that by his or her objective manifestation of intent, the employer creates an expectation, and thus an obligation of treatment in accord with those written promises. See Restatement (Second) of Contracts, §2 (1981) (promise is a manifestation of an intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made).

Ibid., 102 Wn.2d at 230.

That opinion went on to clarify:

> It may be that *employers may not always be bound by statements in employment manuals*. They can *state in a conspicuous manner that nothing contained therein is intended to be part of the employment relationship and are simply statements of company policy*.

Id. (emphasis supplied).

Thus we note with rapt attention that the drafter of CTEC's EPM's Part I., "Manual Objectives," Paragraph C., "Use of Manual," states: "This manual is to be used as a guide to operations and does not constitute an employment contract or a commitment to employment of a specific duration." EPM at 3. And, Part V., entitled "Responsibility for Policies & Procedures,"

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[53] CTC § 1-2-11 provides: "In all cases the Court shall apply, in the following order of priority unless superseded by a specific action of the Law and Order Code, any applicable laws of the Colville Confederated Tribes, tribal case law, state common law, federal statutes, federal common law and international law."

states, " . . . An individual situation . . . may be left to the discretion of the Chief Executive Officer or his/her designee. . . . In the absence of specific written policy, management always reserves the right to make decisions or take appropriate action in the best interests of the company." EPM, Part V.A., at 11. And, significantly, in relation to Mr. Louie's claim that he was denied a process of progressive discipline to which he was entitled, Part XII., "Discipline," Paragraph A., "Company Rules," states in part:

> Violation of CTEC enterprise policies or rules may result in disciplinary action up to and including termination. CTEC may impose a more or less severe level of discipline for any offense or violation deemed by the company to be particularly serious.

EPM at 31. And Paragraph B., entitled "Disciplinary Guidelines," says:

> The following is [sic] merely intended as guidelines. CTEC reserves the discretion to deviate from the following under appropriate circumstances. Nothing in this section alters the at-will nature of the employment relationship between CTEC and its employees. This policy should not be construed as promising specific treatment in a particular situation.

Id. Similar permissive and non-mandatory language disclaiming any intent to create a promise of a course of action is included in Paragraph C., "Discipline":

> Discipline *may* follow a series of progressive steps that *may* be followed with a given employee. There are cases that might require immediate suspension and/or dismissal. The large majority of disciplinary actions, however, involve matters where the supervisor *may,* and *should,* apply progressive steps at working to correct the problem.

Ibid., at 32 (emphasis supplied).

Thus, in regard to Mr. Louie's claim that he was denied the benefit of progressive discipline and should not therefore have been terminated, it certainly appears clear to this court that the AHO's interpretation of the EPM was correct.

However, we also must note that there are several other areas of the EPM which sound in the nature of mandatory obligations on the part of the employer towards its employees in contrast to the "guidelines" in the progressive discipline arena. These include the recitation of company policies in relation to conflict of interest, anti-nepotism, occupational safety and health (Part VIII.B., D., and E., respectively; EPM at 17-18); substance abuse (Part X.B.1. and 2.; EPM at 22-25); and harassment (Part X.C.; EPM at 26-28). The EPM also recites as company policy a commitment to abide by the Tribal Employment Rights Ordinance ("TERO"), which include the policies against discrimination on the basis of among other things, age. See Part VII.A. We assume, also, that this would include protection from retaliation for reporting such violations to proper authorities, such as the Tribal Employment Rights Office and/or Business Council members. For, in *St. Regis Paper, supra,* the at-will "presumption" has been somewhat circumscribed, for example, when the employment decision violates a statute or is contrary to

public policy. *See Thompson v. St. Regis Paper Co., supra,* 102 Wn.2d at 232-233, and cases cited therein.

Mr. Louie made claims under the EPM's anti-nepotism policy. He claimed, too, that he was retaliated against for reporting grievances to the Tribal Employment Rights Office as well as to a Tribal Councilwoman. He said that he was discriminated against on the basis of his age. And the AHO heard testimony, considered exhibits, and addressed them each fully in her written decision, ultimately concluding that nothing occurred justifying his reinstatement to employment on this basis. In fact, the AHO addressed each and every claim that Mr. Louie raised and continues to raise in this court. It is quite apparent from the AHO's Findings of Fact and Conclusions of Law; Order Dismissing Appeal that, in addition to a deliberation on several pretrial motions, a lengthy evidentiary hearing occurred and that testimony was had from nine (9) witnesses. As well, 21 appellant's exhibits and 8 CTFC exhibits were considered. Moreover, the AHO, as we have previously stated, issued a 28-page decision with rulings on the pretrial motions and with 34 detailed findings of fact and 29 conclusions of law. While, as we have stated, we might find fault with the form of some of the findings of fact,[54] it appears that the AHO resolved any disputed issues of fact in favor of CTFC. This it was the AHO's prerogative to do. And Mr. Louie does not challenge any particular finding of fact (nor, indeed, any particular conclusion of law).

Thus, the failure of CTFC or others associated with the hearing to provide copies of the tapes is not a due process violation leading to a CTCRA remedy of reinstatement and the other relief sought in Mr. Louie's prayer for relief before the Tribal Court. Mr. Louie received a hearing. He had notice of it prior to its going forward. He presented evidence. And he received a decision, albeit one with which he was dissatisfied.

Mr. Louie was accorded due process of law.

Thus, Mr. Louie's petition to declare a violation of the Colville Tribal Civil Rights Act based upon a denial of due process, and under *Finley, supra,* must be denied.

IV. SUMMARY AND ORDER

CTFC's motion to dismiss for lack of subject matter jurisdiction should be denied. CTFC's motion to dismiss on the basis of sovereign immunity should also be denied.

Jerry Louie was subject to the CTEC Employee Policy Manual, and the procedures in the Supplementary Procedures insofar as they did not create additional provisions beyond those in the EPM.

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[54] We once again emphasize that a "finding of fact" prefaced with the phrase, "X testified that . . . " is not actually a "finding" of fact but a *recitation of the testimony.* Nevertheless, Mr. Louie makes no issue of the sufficiency of the evidence in supporting the conclusions of law, which are in the correct format and which along with the Order section, as we have stated, *supra,* made clear whose testimony was accepted and whose was rejected.

The AHO properly denied Mr. Louie's motion to recuse and properly heard and granted CTEC's pretrial motion, inasmuch as the AHO considered Mr. Louie's as well as CTFC's briefing, albeit without oral argument. He was not denied an impartial decision-maker or, in turn, due process on this basis.

Finally, Mr. Louie had the benefit of a full evidentiary hearing, and his unsuccessful request for copies of the recordings of the hearing bears no relevance to the issues he raises on appeal, nor to the propriety of his termination. He was, in sum, accorded due process of law.

Mr. Louie's petition was properly dismissed by the Tribal Court, albeit for reasons different from ours.

IT IS THEREFORE ORDERED:

1. CTFC's motion to dismiss for lack of subject matter jurisdiction is denied.
2. CTFC's motion to dismiss on the basis of sovereign immunity is denied.
3. The Tribal Court's dismissal of Jerry Louie's petition for judicial review under the APA is affirmed.
4. The Tribal Court's dismissal of Jerry Louie's petition under the CTCRA is affirmed.

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Max LAZARD, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP14-023, 6 CTCR 36

12 CCAR 64

[David Stevens, Office of Public Defender, for the Appellant.
Jared Cobell, Office of the Prosecuting Attorney, for the Appellee.
Trial Court Case No. CR-2014-37191]

Hearing held September 18, 2015. Decision issued December 11, 2015.
Before Chief Justice Anita Dupris, Justice Dennis L. Nelson, and Justice Michael Taylor

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

INTRODUCTION

The relevant facts in this matter are not challenged. Max Lazard was charged with four counts of Distributing a Controlled Substance, CTC 3-1-179. In accordance with a plea agreement he pleaded guilty to three of the four counts. The fourth count was dismissed. He was sentenced as follows: Count I - 360 days incarceration; Count II - 360 days incarceration; Count III - 360 days incarceration with 360 days suspended conditioned upon several factors and a probationary period of three years. The sentences were consecutive. As such, Mr. Lazard was sentenced to serve 720 days incarceration with the possibility of 360 days more should he not comply with the conditions of the suspended sentence. The probationary period was 1080 days.

Mr. Lazard objected at sentencing to the length of the probationary period. There is no record of objection to the imposition of two 360 day sentences to be served consecutively (i.e stacking). This issue developed during briefing and oral arguments.

ISSUES ON APPEAL

The Notice of Appeal states the ruling being appealed was: "On September 25, 2014, Mr. Lazard pleaded to three counts of Delivery of a Controlled Substance. (A fourth count was dismissed pursuant to the plea agreement.) On November 21, 2014, Mr. Lazard was sentenced to 360 days on two counts consecutive to one another with no time suspended. He was sentenced to 360 days with 360 suspended on the remaining count. Mr. Lazard was given 36 months probation. He noted his exception to the length of probation at the time of sentencing.

Both the appellant and the appellee attempted to enlarge the issue on appeal by expanding it to include "What is the maximum length of time allowed for either one count or several

counts?". This issue was not raised before the trial court. Issues not considered and ruled upon by the trial court cannot be raised on appeal. This court is without jurisdiction to hear matters raised for the first time on appeal. See CCT LOC 1-2-106(f). Jurisdiction. Neither party presented briefing or argument regarding why this rule should not apply.

Accordingly, we have determined there is one issue before us; to wit: whether the three year probationary period imposed at sentencing is unreasonable.

STANDARD OF REVIEW

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

DISCUSSION

The appellant was sentenced to serve 720 days incarceration with 0 days suspended. He was also sentenced to an additional 360 days incarceration with 360 days suspended upon several conditions. The period of probation was 1080 days. The appellant objected to the length of the probationary period as being unreasonable, but other than that, the issue appears to not have been discussed. The trial court provided no explanation for the length of the probationary period.

The length of the probationary period should be reasonable. CTC § 3-1-261; *Mellon v. Colville Confederated Tribes*, 4 CTCR 17, 8 CCAR 01, (01/12/2005). We assume the probationary period begins with the first day of incarceration. There is nothing in the record indicating otherwise. A 1080 day probationary period is not unreasonable for a total sentence of 720 days incarceration.

The sentence of the trial court is AFFIRMED.

Jeanne JERRED, Appellant/Cross Appellee,

vs.

LeRoy JERRED, Appellee/Cross Appellant,

Case No. AP15-018, AP15-019, 7 CTCR 01

12 CCAR 66

[Victoria Minto, Northwest Justice Project, appeared for Appellant/Cross Appellee.
Appellee appeared personally and without representation.
Trial Court case number CV-DI-2012-35229]

Hearing held December 18, 2015. Decided February 4, 2016.

Before Justice Mark W. Pouley, Justice Dave Bonga, and Justice R. John Sloan Jr.

Pouley, J.

SUMMARY

This matter came before the Court of Appeals following a contentious dissolution of a long-term marriage. While there were some procedural complications in the lower court, some of which were brought to the attention of this court, they were ultimately resolved and not the subject of this appeal or decision.

The Trial Court entered very detailed Findings of Fact, Conclusions of Law and a Decree of Dissolution and Order Regarding Real Property on October 5, 2015. Cross appeals followed.

This court reviewed all of the pleadings filed in this matter. At the initial hearing the court heard from the parties, allowing them to clarify all of the issues on appeal and their positions.

The purpose of the initial hearing is for the Court of Appeals to determine whether the facts or law as presented warrant the appeal to move forward with briefing of the issues; or whether the issues are so clear as to allow the court to dismiss or grant the appeal and/or remand the matter immediately to the Trial Court for further action. Having reviewed the files and considered the presentation of the parties at the initial hearing, this court entered an immediate oral ruling affirming in part, remanding for action in part, and reversing in part. This opinion follows.

ISSUES

1. Did the Trial Court err in awarding the wife a share of the retirement annuity earned as a result of the husband's employment, and if not, did the Trial Court enter proper orders distributing that award?
2. Did the Trial Court distribute the parties' assets and liabilities in a fair and equitable manner?

DISCUSSION

Issue 1: Did the Trial Court err in awarding the wife a share of the retirement annuity earned as a result of the husband's employment, and if not, did the Trial Court enter proper orders distributing that award?

(Wife's appeal, AP15-018)

The Respondent/husband earned a Civil Service Retirement System annuity based on his employment with and retirement from the United States Government. The Findings of Fact and Conclusion are clear and specific that the benefits were entirely earned during the marriage. The Trial Court awarded the wife a $600 per month share of the account. The Respondent/husband did not specifically challenge the Court's findings except to say he didn't believe the Court fairly considered his evidence or argument on the matter. This Court will not substitute our judgment for the trier of fact as the findings of the Trial Court clearly support the award. The decision of the Trial Court is AFFIRMED.

The Court did, however, order distribution of the property in a manner that allows the husband to collect all of the monthly annuity distribution and requires him to pay the wife's share directly to her. Given the history of this marriage and the especially contentious nature at dissolution, it is error for the Court to create a requirement for ongoing relations between these parties. The Court's order places the burden of collecting the annuity on the wife if the husband fails to pay on time. This remedy creates a flash point for continued disputes and possible abuse. The goal of all dissolutions should be to separate the parties as completely as possible, this is doubly true when there is a history of domestic violence and abuse. We find the Trial Court's remedy to be erroneous, especially since there is a very simple solution to the issue.
The Appellant/wife correctly notes that the federal retirement system easily addresses this conflict. 5 U.S.C. ss 8345(j) provides an approved Retirement Benefits Order the Court can enter, directing the United States Office of Personnel Management to pay the wife's share of the monthly annuity directly to her. The order also creates a survivor annuity which is supported by the findings of the Court, but not directly addressed in the decree.

The matter is REMANDED for the court to enter the "RETIREMENT BENEFITS COURT ORDER" presented as an attachment to the appellate panel by the Appellant/wife.

Issue 2. Did the Trial Court distribute the parties' assets and liabilities in a fair and equitable manner?

(Husband's cross-appeal, AP15-019)

The Respondent/husband filed a cross appeal essentially stating that he finds the distribution of property to be unfair and he does not believe the Court adequately considered evidence or arguments that he presented at trial. The Respondent fails to specifically present a cognizable issue for appeal. The Court obviously considered and weighed all evidence and

entered detailed Findings of Fact. This Court was unable to find, and the Respondent/husband was unable to articulate, any basis to disturb those findings.

His appeal is DISMISSED.

Restraining Order Clarification

During the initial appeal the husband raised a question regarding the continuing restraining order entered by the Trial Court. Upon questioning it was revealed the husband had a concern that he may be found to violate the technical language of the restraining order if he were to exit his vehicle to open a gate to access real property awarded to him by the Court. The Court of Appeals does not believe that was the intent of the Trial Court and REMANDS this matter directing the Trial Court to clarify the restraining order as necessary to allow the husband legal access to the property awarded by the Court.

CONCLUSION

Based on the foregoing, the Court AFFIRMS the distribution of the Retirement Account, and directs the Trial Court to enter the appropriate order to the Federal Government for direct distribution of the Retirement funds, DISMISSES the husband's appeal, and REMANDS to the Trial Court for an order clarifying the parameters of the Restraining Order.

James WALKER, Appellant,

vs.

Talitha & Eric LADUCER, Appellees.

Case No. AP15-008, 7 CTCR 02

12 CCAR 69

[Jay Manon and Jennifer Manon, appeared for Appellant.
Eric Laducer, Appellee, appeared for Appellees.
Trial Court Case No. CV-OC-2014-37282]

Decided February 4, 2016.

Before Chief Justice Anita Dupris, Justice Rebecca M. Baker, and Justice Mark W. Pouley

Pouley, J.

SUMMARY

This case involves a simple agreement for the purchase of a 1995 Toyota 4Runner. On August 21, 2014 the Appellant (Walker) agreed to purchase the vehicle from the Respondents (the Laducers) for $1800, giving them $800 and promising to pay the balance within two weeks.[55] The Laducers signed the vehicle title and gave it to Walker. Walker never filed the title with the Washington State Department of Licensing to complete the transfer. The agreement to pay the remaining $1000 was never reduced to writing and the Laducers failed to complete or file documentation to claim a security interest against the vehicle with any entity, including the State of Washington.

In October, while Walker was driving the truck, he ran out of gas and was stranded at the side of a road. When Colville Tribal Police arrived to assist, Walker was arrested on an outstanding warrant. The vehicle was left roadside. Learning of the vehicle's location, and having not been paid the balance owing for the truck, without notifying Walker, the Laducers took possession of the truck and had it towed to their home. Upon inspection of the truck the Laducers discovered the truck had sustained damage while in Walker's possession. Again, without notifying Walker, the Laducers had the truck repaired.

After he was released from jail, Walker went to the Laducers' residence to retake possession of the truck. The Laducers refused to release it to him. Walker then filed a civil complaint in the Colville Tribal Court seeking the return of the truck, transfer of title, and the cost of repairs and improvements he performed on the vehicle. The Laducers counterclaimed, seeking

55 Walker testified that he paid $1000 with a promise to pay another $800. He also testified that he paid $800 to Mrs. Laducer later the same day. The Trial Court, as finder of fact, did not find Walker's testimony credible. Findings of Fact are reviewed under the abuse of discretion standard. We will not substitute our judgment on the credibility of the witnesses for the finder of fact without a showing of such abuse.

reimbursement for damages including the cost of repairs, loss of use of the vehicle while in Walker's possession and direct and incidental costs of litigation.

The matter came before the Court for a bench trial on March 13, 2015. Although neither party pled that the "custom and tradition" of the Colville Confederated Tribes (Tribes) provided dispositive law in this matter, the judge solicited testimony from witnesses regarding their personal knowledge of any practice on the Colville reservation of people purchasing vehicles with an I.O.U. and taking possession of vehicles before transferring full payment. The Court found "It is a common practice – or "usage of trade" – on the Colville reservation for vehicles to be sold without transferring title until payment in full, but allowing possession before payment in full." The Court therefore ruled in favor of the Laducers, allowing them to retain possession of the truck and awarding them damages for the full cost of repairs, the loss of use of the vehicle during the time Walker was in possession, time loss from work and gas to travel to and from court, and filing fees. Walker was given credit for the $800 he previously paid and the cost of a tailgate he installed on the truck. This appeal followed.

ISSUES

Issue 1: Did the Trial Court violate the parties' right to due process by interjecting itself into the proceedings and basing its decision on a theory not presented by any of the parties?

Issue 2: Was there sufficient evidence to support the Court's application of traditional law to resolve the matter before it?

Issue 3: Are there sufficient findings in the record to support the Court's award of damages?

STANDARD OF REVIEW

This case concerns combined issues of law and fact and are reviewed *de novo* with the Court giving deference to the Trial Court's findings of fact, but questions of law are reviewed non-deferentially. *CCT v. Naff* , 2 CCAR 50, 2 CTCR 08, 22 Ind.Lw.Rptr. 6032 (1995). The question of whether a party to an action was afforded due process is a legal question that will be reviewed *de novo*. *Edwards v. Bercier*, 10 CCAR 18, 5 CTCR 23 (2009). In a *de novo* review the Court of Appeals must examine the entire record to decide if the judge conducted the hearing properly and made the correct legal conclusion. When the question before this Court is whether the Trial Court, in making findings of fact and conclusions of law, has properly applied previously enunciated guidelines for the application of legal principles, the panel reviews the case *de novo* to determine if the trial judge erred in its application of the law to the facts of the case. *CCT v. Marchand*, 9 CCAR 65, 5 CTCR 17 (2008).

REVIEW

A key distinction between tribal courts and state courts is often the role of the court in helping parties resolve disputes. Tribal courts must, however, avoid becoming advocates in a case in the desire to problem solve. This Court previously warned that judges must maintain their objectivity at all times, respect the roles of the parties appearing before them and not appear to take sides in disputes. *CCT v. Boyd,* 10 CCAR 08, 5 CTCR 21, 36 Ind.Lw.Rptr. 6099 (2009). While it is not improper for a judge to question witnesses for clarification of testimony, the court violates a party's procedural due process by introducing legal theories on its own for the first time at trial. *Edwards v. Bercier,* 10 CCAR 18, 5 CTCR 23 (2009). Here the Trial Court did just that by *sua sponte* asking witnesses about a custom of the tribal community of purchasing vehicles with I.O.Us. Since this was not a theory presented in any of the pleadings, there was no way the parties could be prepared to examine the witnesses on this issue or call rebuttal witnesses to challenge the theory. In raising this issue on its own, and conducting all questioning of the witnesses on this theory, the Court violated the parties' right to due process.

Even if the custom of informal transactions were raised by the parties, there is insufficient evidence in the record for the Court to reach the conclusion that it is a matter of customary law or "usage of trade". This Court clearly established in *Smith v. CCT,* 4 CCAR 58 (1998) the person asserting "custom and tradition" as a legal basis for the Court to grant relief has a burden to produce evidence that supports the claim. Merely soliciting the opinions or personal observations of the parties is insufficient to establish a legal basis for ruling. "To define a custom or tradition in our current Tribal Court system is an important task which should not be taken lightly by the courts or parties." *Id.* at 60. Here the Court, on its own, asked the parties and witnesses, people with no special knowledge or background, if they were familiar with the practice of individuals on the reservation buying and selling vehicles without a formal contract or transfer of title. That is well below the standard to find customary law required by *Smith* or subsequent cases such as *Marchand v. CCT*, 8 CCAR 43 (2006). We find, as a matter of law, that the Court erred in finding this transaction is controlled by the customary law of the Colville Confederated Tribes.

Because the Trial Court created the customary law and the law was created from the inadequate testimony of the lay witnesses before the Trial Court, it is impossible to determine the scope of that law and the remedies that may be appropriate. More specifically there are no facts to support a finding or conclusion that self-help repossession by the sellers is even allowed. It is undisputed that the parties did not complete a title transfer with the Washington Department of Licensing. It is also undisputed that the Laducers did not complete a legal security interest in the vehicle under Washington law. Had the Laducers perfected a security interest, Washington statutory law may have granted them a right to self-help repossession of the vehicle. It is unclear if such a right exists at common law or under any form of Colville tribal law. We hold the Trial Court's findings and conclusions regarding the custom and tradition of the Tribes for informal

transactions offers no legal basis supporting the Laducers' repossession of the vehicle in the manner in which it was conducted in this case and therefore does not support the remedy awarded by the Trial Court.

CONCLUSION

The judgment and order of the Trial Court is VACATED and the matter is REMANDED for the Trial Court to analyze the evidence previously presented at trial and enter a judgment consistent with this opinion and the laws applicable to the Colville Tribes.

If the Trial Court still concludes that possession of the vehicle should be awarded to the Laducers, the Court must enter specific Findings of Fact and Conclusions of Law that support any additional award of damages. While there is a factual record supporting the cost of repairs to the truck, it is unclear what legal standard the Court used to find Walker entirely responsible for those repairs. Additionally, there is no finding of fact or legal conclusion supporting the Court's award of extra damages for the Laducers' loss of use of the vehicle, or for the compensation of their time and gas to appear in court for this matter.

Kelly JERRED, Appellant,

vs.

Colleen LESKINEN, Appellee,

Case No. AP14-024, 7 CTCR 03

12 CCAR 73

[Victoria Minto, Attorney, NW Justice Project, for Appellant.
Tena Foster, Attorney, for Appellee.
Trial Court Case No. CV-CU-2014-37102]

Hearing held September 18, 2015. Decided January 13, 2016.
Before Chief Justice Anita Dupris, Justice R. John Sloan Jr., and Justice Michael Taylor

SUMMARY

On April 10, 2014 Colleen Leskinen, Appellee herein, filed for third-party custody of K.L.L, a minor child, against her parents, Kelly Jerred, mother (Appellant), and Roy Leith, father (Leith). The minor had been residing with Appellee for an extended period of time. Leith did not contest the petition nor any of the Court's rulings. He has not participated in this Appeal.

On April 28, 2014 the Court held a show cause on the issue of temporary custody of the minor. Temporary custody was given to Appellee with visitation to Appellant. The ensuing order set a permanent custody hearing for June 17, 2014; no *George*[56] notices given either by court order or by separate notice.

Appellee moved for continuances on June 13, 2014 and July 7, 2014. The custody hearing was continued on these motions without, it appears, adequate notice to Appellant of the changes, and without *George* notices. The hearings were set on July 25, 2014 and September 5, 2014. Appellant picked up the order resetting the hearing to July 25, 2014 on July 21, 2014. No other notices had been sent to her from the Appellee or the Court.

On July 17, 2014 the GAL moved to continue hearing, stating the parties did not object and that he would fax the motion to the parties. Appellant did not have a fax, nor did she agree to the continuance; she did not receive the GAL's motion to continue. The Court granted the GAL's motion to continue on August 19, 2014 and reset the permanent custody hearing to September 25,

[56] *George v. George*, 1 CCAR 52 (1991). We held the notices sent to parties in custody cases were inadequate, and violated due process. We required the trial court to include in all notices for permanent custody hearings language informing the parties that the permanent custody hearing was the one and only opportunity to present one's case, so all witnesses and evidence needed to be presented on the issue of custody at this hearing.

2014. No *George* notices given either by court order or by separate notice. The GAL filed a copy of his report with the Court on Sept. 4, 2014 but did not provide a copy to Appellant.

The permanent custody hearing was held on September 25, 2014. It was originally set for two (2) hours, but the trial judge extended it to three (3) hours without prior notice to parties of the extension. Of the regularly-scheduled two-hour hearing Appellee used one hour and forty-five minutes. Appellant moved to continue because her witnesses left after waiting two (2) hours. She explained to the judge that she thought the hearing would be continued if it didn't finish within the two (2) hours for which it was set, so she told her witnesses they could go back to work if they weren't called within the two hours of the scheduled hearing. The Judge denied the motion and directed Appellant to proceed without her witnesses. The Court granted the petition and awarded custody to Appellee, whose attorney was to provide the proposed order.

On Oct. 31, 2014 Appellant moved to (1) compel Appellee to present the order; and to (2) sanction Appellee's attorney for not doing so. Unknown to Appellant, Appellee's attorney had filed the proposed order on this date. It did not have a signature line for Appellant, nor was she given a copy prior to it being submitted to the Court. The Judge signed the proposed order without a hearing or without giving Appellant an opportunity to review and comment on the proposed order. The Judge amended the order on Nov. 11, 2014 at Appellant's request, but did not did not rule on motion for sanctions.

On Dec. 15, 2014 Appellant filed a timely Appeal.

ISSUES

We address two (2) issues herein:

(1) Were Appellant's due process rights violated by the Court in the manner in which the case was heard?

(2) Does the best interests of a child standard preclude a consideration of the fitness of a parent in a third-party custody action?

DISCUSSION

Standard of Review

The issues herein are questions of law. We review *de novo. See, Naff v. CCT,* 2 CCAR 50 (1995), and its progeny.

Due Process Violations

We are asked to decide if Appellant's due process rights were violated by the Court in the manner in which the case was heard. A review of the complete record supports the finding that yes, her due process rights were violated. We so hold based on the reasoning set out below.

We find the record replete with procedural due process violations made by the Trial Court. In *Mueri v. Carden*, 11 CCAR 75, 76 (2014) we stated:

> The benchmarks for procedural due process are well-established in our jurisprudence. Providing the minimum, basic requirements of procedural due process, i.e. adequate, meaningful notice, opportunity to be heard, and opportunity to present one's case before a decision is made, should be second nature to all trial judges by now.... [W]hen the Trial Judge fails to allow both parties to present their cases before making his decision, it gives an appearance of bias and unfairness.

After Appellee filed her petition for third party custody on April 10, 2014, a temporary custody hearing was held, with notice provided to Appellant. Four permanent custody hearings were set[57] on motions to continue filed by both Appellee and the Guardian Ad Litem (GAL), with no input from Appellant, and no *George* notices provided to Appellant.

Appellee asserts that the lack of *George* notices was pro forma. That is, although the orders setting the hearings provided a checklist for the judge to fill out to provide adequate notice, and he failed to do so, this would not defeat the adequacy of the notices in and of itself. She asserts that a review of the record on a whole would support a finding that Appellant received adequate notice.

We don't agree. Appellant was consistently left out of the loop when the matter was set and reset without her input. She had no expectation that she had to fit all her evidence within a two-hour period when she noted the majority of the two-hour period was taken by Appellee's case; when it was extended another hour with less than thirty minutes notice to her, she did not have adequate time to get her witnesses back to testify. Her understanding was that the hearing would have to be continued. The Judge disagreed and required Appellant to go forward without being able to present all of her evidence.

In *Lezard v. DeConto*, 10 CCAR 23 (2009) we recognized that inadequate notice of what is to be considered in a hearing impacted all other procedural rights. A litigant does not have adequate time to prepare for the hearing, and to submit evidence on his own behalf. We stated "[e]ven if the end result appears clear to the judge, the parties have a right to present their evidence in a meaningful manner. The judge is the gatekeeper of due process. It is the Court's

[57] The temporary custody hearing was held on April 28, 2014. The permanent custody hearings were set for June 17, 2014, July 25, 2014, September 5, 2014, and September 25, 2014.

responsibility to ensure adequate notice is provided to every litigant, and to allow everyone who appears in Court to have his say in his own way." *Id* at 25.

The procedural due process violations were compounded when Appellant was not allowed to present her case fully before the Court made its decision. The Court appeared to put time allowance and expediency over a meaningful hearing. The record shows that the Court did not allow Appellant to present her part of the case by (1) not allowing Appellant the opportunity to call all of her witnesses; (2) requiring Appellant to take the stand before she could present her case in her own fashion (i.e. Appellant wanted some of her other witnesses to testify before she did); and (3) conducting the Court's own inquiry of Appellant without allowing her to present her case in a manner she wished to use. Further, when Appellee's attorney presented the proposed order she failed to notify Appellant, nor did she provide Appellant a copy of the proposed order before submitting it to the Judge.[58] The Judge then signed the proposed order without including Appellant in the decision on it's form and content. These are just a few examples of the lack of due process at the custody trial.[59]

First, we are mindful of the trial judge's discretion to manage a trial in the manner the Court chooses, as well as the time constraints the judge felt the Court was under at the time of the hearing. The limit to this discretion, however, is that it cannot negate a litigant's right to a full hearing on the merits, with an opportunity to present evidence on the litigant's own behalf. The record clearly shows Appellant did not have this opportunity. Appellant asked for a continuance and it appears the only reason it wasn't granted was that the Court had other hearings scheduled that day and didn't know when it could be put back on the calendar. Judicial expediency overrode Appellant's right to be heard in a meaningful manner.

The Trial Court still doesn't have written procedures to guide parties, especially those appearing pro se, through the legal labyrinth of procedures; *e.g*, asking for subpoenas, securing admissible evidence, or service of documents on the other parties. A lack of written guidance heightens the Court's responsibility to provide the litigant with a full, fair and impartial hearing on the merits. *See CCT v. Olney*, 10 CCAR 75 (2011) (....Tribal courts ... are faced every day with pro se parties....Accordingly, tribal courts are forced to be flexible, but just, in the application of

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[58] In her brief Appellee's attorney argues that orders are routinely presented to the Trial Court without the other party's signature or notice. She was just following what is accepted at the Trial Court. We cannot stress enough how this is <u>not</u> acceptable practice, no matter if it happens regularly at the Trial Court. As an attorney she is held to an ethical standard which should direct her to do it correctly.

[59] Due process problems persisted after the final ruling, according to Appellant. First, Appellant's attorney, through her staff, was refused access to the public court file; and second, she was not provided a copy of the record upon her request to the Trial Court. These are administrative matters that should be addressed by the Chief Judge and the Court Administrator to ensure this is not a reoccurring problem.

the law."). We now hold Appellant was not afforded due process, the judgment should be vacated and this matter should be remanded for a new trial.[60]

Best Interest of Child and Fitness of Parent

We are next asked whether the Trial Court should have considered the fitness of the parent as part of the best interest of the child standard as applied in this case. Based on the reasoning below we hold yes, the Court should have considered it.

A review of the record shows that the Court appeared to be confused on this issue. At one part of the oral ruling granting third-party custody to Appellee, the Court stated "...it's what's in the best interest of your daughter, not whether you're fit or not. That's not the standard here. That's not the test. It's the best interest of the child." (Audio record, September 25, 2014, at disc 3, 37:17-36). Later in the same ruling the Court stated: "In order to find that third-party custody I have to find that neither parent is fit." (*Id* at 55:18-48).

There are no findings that either parent was unfit. The only Finding remotely applicable to this issue is #3 in which the Trial Court found that Appellant "had been stable since, approximately January 2014." The Court did not issue Findings specifically addressing the factors to be considered in CTLOC § 5-1-121. Appellant asserts they were not specifically addressed in the hearing, nor were they addressed in the final order prepared by Appellee's attorney. Appellee points out in detail different parts of the record that could support the different custody factors to consider. We have no way of knowing if these were the specific findings of the Trial Court, however, since they were not included in the Findings of Fact and Conclusions of Law. We are not persuaded by Appellee's assertions on this issue.

The U.S. Supreme Court has consistently recognized that a parent's right to his/her child is a fundamental liberty interest protected by the 14th Amendment of the Constitution. "The liberty interest at issue in this case — the interest of parents in the care, custody, and control of their children — is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*[61], 530 U.S. 57 (2000), citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) as the seminal case.

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[60] Appellant asks also, as an alternative to another hearing, that we direct the parties to the Peacemakers Court. This is a motion that should first be considered by the Trial Court, and not reviewed for the first time in this Court. We will not rule on this request.

[61] The U.S. Supreme Court upheld the Washington State Supreme Court's ruling that the third party visitation statute was too broad and infringed on the parents' fundamental rights to make decisions in the best interests of their children. *Troxel* reaffirmed the fundamental liberty interest of a parent towards his/her child.

State courts have followed suit in recognizing the fundamental liberty interest parents have in raising their children and deciding what is in their best interests. For example, the Colorado Supreme Court in *In Re D.I.S.*, 249 P.3d 775 (Colorado, 3/21/2011) held that the parents do not relinquish their fundamental liberty interest in raising their child upon consenting to a guardianship. The Court went on to say the "majority of post- *Troxel* cases decided by our sister states have held that parents do not give up their liberty interest by consenting to guardianship for the child." *Id* at 782. The Colorado Court found this liberty interest raises a presumption that unless a parent is unfit he has a right to custody of his child.

In Re D.I.S. was a case in which parents voluntarily placed their son in a relative's home under a guardianship with the understanding that the placement was not permanent; the mother had medical issues to work through. They sought return of the child after a 7-year long placement. The Colorado Court recognized their fundamental right to the child and found their decision to place the child out-of-home was based on their decision of what was in the best interests of the child.

In Re D.I.S. states the majority of state courts followed this line of reasoning, i.e. the rebuttable presumption is that it is in the child's best interests to be placed with a fit parent. *See, In Re the Guardianship of D.J.*, 682 N.W.2d 238, 246 (Nebraska, 2004) (the parental preference principle serves to establish a rebuttable presumption that the best interests of the child are served by reuniting the minor child with his or her parent); *Boisevert v. Harrington*, 796 A.2d 1102 (VT , 2002) and *Hunter v. Hunter*, 771 N.W. 2d 694 (2009), both which are in accord with *In Re D.I.S.*. The Nebraska Court lists three courts who do not adopt this rule: Mississippi, California and Tennessee. These courts appear to take the position that if the child is voluntarily placed with a third party the parent loses the parental preference right found in *Troxel* and its progeny. The case cites can be found in the Nebraska opinion.

Washington post-*Troxel*, *supra*, addressed non-parental custody in *Custody of Shields*, 157 Wash.2d 126, 136 P.2d 117 (2006). It recognized the constitutional presumption that a fit parent acts in the best interests of his/her child, and that the non-parent has the burden to show either the parent is unfit or that placement with a fit parent "...would cause actual detriment to the child's growth and development." *Id* at 129. Washington allows third party custody actions, similar to our Code provision (CTlLOC § 5-1-120, Child Custody Proceeding) under RCW 26.10.030; the petitioner must allege either the child does not reside with the parent or that the parent is unfit.

The presumption of parental preference stated by the state courts is considered rebuttable, the burden of proving it inapplicable resting on the person asserting third party custody. Again, we refer to the cases cited in *In Re D.I.S.* for the statements of this rule.

We discuss at length the state rules because we do not have tribal statutory guidance or our own case law on this issue. CTLOC § 2-2-102[62] instructs us to next apply state law in the absence of our own law on the issue before us.

Appellant aptly points out that we have held that in order to be found to be a "fundamental right" the right must have its roots in our customs, traditions, common law, our Constitution, or the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1601 *et seq.*, *Tonasket v. CCT*, 7 CCAR 40 (2004). The federal decisions regarding the issue of a right of a fit parent have, as their foundation, the presumption that parental rights to one's child rise from a fundamental liberty interest under the federal and state constitutions.

We have recognized that custom and tradition are not static concepts; they evolve with our culture and times. *See, eg. Swan v. CCT*, 11 CCAR 83 (2014) (our customs and traditions are viable doctrines which, by necessity, grow and change to meet the ever-changing nature of our community.). Traditions and values regarding families have evolved. Extended families were the norm in our past; in many ways they still are, in a modified sense. It was customary that all the adult family members played a role in a child's life, in his development. This still happens, yet our laws have changed this tradition. We now recognize a westernized approach to child custody.

For practical purposes, *eg*. medical and educational decisions, there needs to be proof of who has the authority to make these decisions. In fact, it appears this is the reason this case was filed in the first place. Our tribal government has legislated a more formal approach to answering these questions by enacting child custody statutes. This is an evolution of family custom and tradition which takes into account modern realities.

Appellant has pointed out that if this case were a guardianship action or a Minor-In-Need-Of-Care (MINOC), her fitness would be the primary issue. Our children's code emphasizes deference to reuniting the child with her parents. Appellant asks why we would use a lesser standard in third-party custody action. We agree. We have modern child custody statutes; we are instructed to look to states' laws in the absence of our own; we have a responsibility to decide how this custom and tradition of family has evolved.

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[62] 2-2-102. Applicable Law: "In all civil cases the Court shall apply, in the following order of priority, any applicable law of the Colville Confederated Tribe, tribal case law, tribal customs, state statute, state common law, federal statues [*sic*], federal custom law, and international law."

Although the path the federal and state courts have followed considers the right of the parent to raise a child fundamental and protected by the federal Constitution, we need not go that far. We recognize it is a logical progression of our culture to afford the same protection to tribal parents, which is no less than would be afforded them in our sister courts. This gives deference to the applicable code provisions.

The custody statute also instructs the Court to consider "all relevant factors" in its decision. Fitness of a parent is a relevant factor when deciding to remove a child from the legal custody of a parent; it is a factor in guardianship actions and MINOC hearing, and can be no less in a custody action. The question then becomes whether, if the parent is fit and presumed to be the primary custodian, can the non-parent petitioner overcome this presumption with evidence that it would still be in the child's best interests to be placed out of the parent's care. We accept the reasoning of a majority of the state courts that the burden of rebutting its applicability to the best interests of the child lies with the third-party petitioner. We so hold.

CONCLUSION

Based on the foregoing we hold (1) Appellant's due process rights were violated by the procedural irregularities in this case; and (2) placement preference with a fit parent is a rebuttable presumption in a third-party custody case for which the non-parent petitioner has the burden to overcome this presumption.

It is so ORDERED that the judgment entered herein on October 31, 2014 is VACATED and this matter is REMANDED for a new trial.

Concurring Opinion

Sloan, J.

I agree with the opinion of the Court on the issue of due process and the standard adopted in third-party custody actions involving a natural parent. In addition, I believe that limiting a final custody hearing for two (2) hours is in itself a violation of fundamental fairness to both parties.