Oneida Tribal Judicial System

Onʌyote ʔ a·ka Tsiʔ Shakotiyaʔ Tolé hte

APPELLATE COURT

Brooke Beltran,
Appellant

Docket No. 12-AC-013

vs.

Antwon Polk,
Respondent

Date: October 30, 2012

DECISION

This case has come before the Oneida Tribal Judicial System, Appellate Court. Judicial Officers, Janice L. McLester, Lois Powless, Winnifred L. Thomas, Jennifer Webster and Stanley R. Webster presiding.

I. Background

On April 19, 2012, Appellant, Brooke Beltran, filed an appeal of the April 9, 2012 Oneida Tribal Judicial System, Family Trial Court order alleging it to be clearly erroneous and against the weight of the evidence and arbitrary and capricious. We find the order of the Family Trial Court not in compliance with Chapter 79 Child Custody, Placement and Visitation, Section 79.10-5 and remand with instructions in accordance with Rules of Appellate Procedure, Rule 19(A(4))(5).

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A. Jurisdiction

This case comes to us as an appeal of an original hearing body, the Oneida Tribal Judicial System, Family Trial Court. Any person aggrieved by a final decision in a contested case can seek Oneida Tribal Judicial System review under Sec. 1.11-1 of the Oneida Administrative Procedures Act.

B. Procedural Background

On April 23, 2012 the Initial Review Body, of the Oneida Tribal Judicial System, Appellate Court met and accepted the appeal for review, in accordance with Rules of Appellate Procedure, Rule 9(D)(3): *The decision is clearly erroneous and is against the weight of the evidence presented at the hearing level.* A Motion to Stay the enforcement of the April 9, 2012 order was held in abeyance for failure to provide sufficient documentation to make a determination.

By way of background, on November 4, 2010, Mr. Polk filed a Motion for Modification of Custody and/or Physical Placement claiming Ms. Beltran would not allow him to visit their son JRB.

On December 10, 2010, the Family Trial Court of the Oneida Tribal Judicial System filed its decision granting Respondent visitation every other weekend with the parties exchanging JRB in Port Washington, Wisconsin. The December 2010 order was not appealed and is not at issue.

Subsequently Mr. Polk, who had been living in southeast Wisconsin, moved to Virginia. On July 12, 2011, Mr. Polk filed a Motion for Modification of Custody and/or Physical Placement requesting that he be granted shared physical placement of JRB.

The Motion for Modification was based on Respondent residing out of state since the initial placement order of December 10, 2010.

On October 11, 2011 a hearing was held to address a Motion for Modification of Custody and/or Physical Placement filed on July 12, 2011 by Respondent, Antwon Polk. Respondent had moved out of state and requested a change in physical placement. The motion had been granted in accordance to Chapter 79-12-1(b-2).

On October 12, 2011 the Family Trial Court entered its Order for Modification of Custody and/or Physical Placement stating as follows:

1. Respondent shall have physical placement Saturday, October 15, 2011 at 8:00 a.m. until Wednesday, October 19, 2011 at 7:30 p.m.
2. Parties shall meet at the Port Washington Exit 100, at McDonalds for all exchanges of minor child.
3. Petitioner shall provide a car seat for JB during Respondent's placement. Parties shall have a proper licensed driver for all transportation.
4. Respondent shall have placement one week out of every month, but shall not keep JB out of daycare over 25 hours per every 6-week period. Respondent shall provide one week notice to Petitioner when he is able to exercise placement (other than the Christmas schedule) by email or certified mail.
5. Commencing June 1, 2012, Respondent shall have placement until August 31, 2012 and every summer due to his current relocation to Virginia Beach, VA.
6. Respondent shall arrange for pickup of JB for the June 1, 2012 placement.
7. Petitioner shall arrange for pickup of JB for the August 31, 2012 placement.
8. Parties shall equally pay the $250.00 deposit to hold JB's daycare place, during the summer placement, at Step Ahead Child Care Center, 280 Cardinal Lane, Green Bay, WI.
9. Each party shall have JB speak to the other parent via phone at least twice a week at a reasonable time.
10. Commencing Thursday, December 22, 2012 at 7:30 p.m. Respondent shall have secondary physical placement until Sunday, December 25, 2012 at 10:00 a.m. Each year Respondent shall have secondary physical placement two days prior to Christmas Eve and Petitioner shall have placement on Christmas Day.
11. Since Respondent lives more than 200 miles away, the Court encourages the use of Skype or other video messaging as a form of child/parent recognition each Sunday at 1:00 p.m. The time is based on the location of JB.
12. All other orders shall remain in full force and effect.

On October 20, 2011, Appellant, Brooke Beltran, filed an appeal of the October 12, 2011 decision of the Family Trial Court asserting an error in the trial court's refusal to appoint a Guardian ad Litem (GAL).

On November 8, 2011, Appellant sought a stay of the Family Court Order of October 12, 2011, in Docket No. 09-PA-120, until her appeal could be determined. Appellant was granted five (5) days to perfect her filing and on November 21, 2011 a stay was granted.

On January 10, 2012, the Appellate Court under Docket No. 11-AC-024 agreed and remanded the case to the Trial Court for appointment of a "GAL and further proceedings consistent with this opinion."

On April 3, 2012 a hearing was held before the Family Trial Court where Guardian Ad Litem, Susan Doxtator reported her findings and recommendations. On April 9, 2012 the court entered its order with the following:

1. Parties shall have joint legal custody of the minor child, JB.
2. Respondent shall have secondary placement on April 13, 2012 at 7:00 p.m. until Sunday, April 15, 2012 at 2:00 p.m. The parties shall continue to utilize the McDonalds at Port Washington, Exit 100 for the exchange.
3. Respondent shall have secondary placement of minor child, JB from June 10, 2012 until July 21, 2012 in Virginia Beach, VA. Respondent shall arrange for pickup of JB on June 10, 2012. Respondent shall be responsible for transportation cost of minor child, JB to VA.
4. Petitioner shall arrange for pickup of minor child, JB on July 21, 2012. Petitioner shall be responsible for transportation cost of minor child, JB from VA.
5. Respondent shall also have secondary placement of minor child, JB one weekend per month from Friday at 7:00 p.m. until Sunday at 2:00 p.m. provided he is in Wisconsin and he must give the Petitioner one week advance notice of his intention to exercise the secondary placement.
6. Parties shall allow the other party to contact the minor child two times per week via telephone or Skype when they do not have placement of the minor child, JB.
7. Parties shall provide current contact information while they maintain placement.
8. Respondent shall pay half the daycare deposit ($125.00) by May 8, 2012 to hold JB's daycare placement during the summer at Step Ahead Child Care Center, 280 Cardinal Lane, Green Bay, WI.
9. Petitioner is also responsible for half the payment ($125.00) to hold JB's daycare placement and this must also be paid by May 18, 2012.
10. Parties shall continue to maintain individual health insurance for the minor child, JB.
11. Petitioner shall claim the minor child for tax purposes in even tax years and Respondent shall claim the minor child for tax purposes in odd tax years as long as he is current with his child support by December 31st of the odd tax year.

12. All other orders shall remain in full force and effect.

On April 19, 2012, Appellant, Brooke Beltran, filed an appeal of the April 9, 2012 Oneida Tribal Judicial System, Family Trial Court order alleging it to be clearly erroneous and against the weight of the evidence.

The Appellate Review body consisting of Judicial Officer, Janice L. McLester, Judicial Officer Lois Powless, Judicial Officer Winnifred L. Thomas, Judicial Officer Jennifer Webster and Judicial Officer Stanley R. Webster deliberated on August 14, 2012, September 25, 2012 and October 25, 2012 to review the merits of the appeal and now files its decision to remand with instructions to the Family Trial Court. The Trial Court is instructed to re-issue its order to include findings of fact and conclusions of law and to include the panel's reasons for the modification as required by Sec. 79.12-6. The appellate panel believes that reasoning should include whether and how the Guardian ad Litem report, presented to the Trial Court on April 3, 2012, factored in to the trial panel's decision. A new hearing is not required; only a new order in compliance with Sec. 79.12-6.

II. Issues

Was the decision of the Family Trial Court clearly erroneous and against the weight of the evidence?

Was the decision of the Family Trial Court arbitrary and capricious?

III. Analysis

Was the decision of the Family Trial Court clearly erroneous and against the weight of the evidence?

We find the court failed to follow Chapter 79, Section 79.12.6 and Section 79.10-5 which both require that when a modification is opposed, as it was in this case, the panel "shall state, in writing the reasons for its modification or termination." The trial court decision did not include

the reasoning for its order. Had it done so, the parties would have a better idea as to how the court came to its decision.

Oneida Tribal Judicial System, Rules of Civil Procedure, Rule 26: Decisions, Opinions, and Orders states:

(A) Written: Every decision, opinion, and order rendered by the trial court in a case **shall** be in writing and **shall** include the findings of fact and conclusions of law.

1. Findings of Fact are a determination of fact by the trial court concerning facts asserted by one party and denied by another. Such findings shall consist of a concise statement of each fact found upon each contested issue of fact.

2. Conclusions of Law are the propositions of law arrived at by the trial court after, and as a result of, the findings of fact.

3. Decisions, opinions, judgments and orders are generally used interchangeably to refer to the written form of the final adjudication of the case by the trial court.

    a. These terms shall also include any intermediate decision or ruling which adjudicates any issue brought before the trial court but which does not close the case.

The Court also failed to provide issues of facts and conclusions of law. It failed to provide reasoning as to why the GAL report and recommendations were or were not taken into consideration. The Trial Court is the facts finder and by failing to present their findings of facts the parties are denied acknowledgement of their concerns.

Section 79.10-3 Allocation of Physical Placement states: "In determining the allocation of periods of physical placement, the Commission shall consider each case on the basis of the factors in 79.10-4. The Commission shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each party and that maximizes the amount of time the child may spend with each party, *taking into account geographic separation and accommodations for different households.*"

The Trial Court order failed to identify if the court used its judicial discretion in determining the weight the outside influences had in regard to the best interest of the child. The court order was negligent in identifying the basis from which law, evidence or witness testimony was utilized when reaching their determination. This in accordance with Chapter 79, Child Custody, Placement and Visitation, Section 79.10 Custody and Physical Placement, 79.10-5 Final Order which states "*If legal custody or physical placement is contested, the Commission shall state in writing why its findings relating to legal custody or physical placement are in the best interest of the child.*" (Italics added). And Section 79.12 Revision of Orders, 79.12-6 Reasons for Modification which states "*If a party opposes modification or termination of a legal custody or physical placement, the Commission shall state, in writing, its reasons for the modification or termination.*" (Italics added).

Was the decision of the Family Trial Court arbitrary and capricious?

Yes. Previous case law sets out the arbitrary and capricious standard:

> Under the arbitrary and capricious standard, a reviewing court must consider whether an original hearing body's decision was based on consideration of relevant facts and evidence and whether there had been a clear error of judgment. The court may reverse only when the original hearing body offers a decision so implausible that it could not be attributed to the evidence and facts presented. Thus, the scope of review under the standard is narrow, and a court may not substitute its judgment for that of the original hearing body. *O-Tech Solutions, LLC, Mr. Curtis Danforth v. Oneida Bingo & Casino, Oneida Indian Preference, Docket No. 10-AC-017, 12-10-10.*

The O-Tech Solutions, LLC case states that the Appellate Court may not substitute a judgement of the trial court, in this case Family Trial Court, unless the relevant facts of evidence or a clear error of judgement is presented. We are troubled by the appearance that Mr. Polk is actually living in Wisconsin but claiming legal residence in Virginia. The Trial Court did not resolve this issue or discuss how it affected the Court's decision.

By the court failing to provide its reasoning as required in Section 79.10-5 and Section 79.12-6, it remains unclear as to how and why the final order of placement and visitation resulted. The court could not establish positively where Respondent lives. Respondent's address is listed as Virginia; however he is frequently in Wisconsin. It was not established if he is employed and how that may affect his ability to make contact with his child. It was established that Mr. Polk has no vehicle, no driver's license, and no child safety equipment for transportation. Decisions are to be made in the best interests of the child. The record does not reflect how the trial court's determinations were made or if the GAL report was taken into consideration.

Section 79.8-5(a) states the responsibilities for a GAL: "be an advocate for the best interests of the child." The GAL report and recommendation supports a stable schedule for the child to build a relationship with his father which could in the future be expanded. This Appellate body has reviewed the GAL report and has taken into consideration the recommendation of the GAL. Given the uncertainty of the father's living situation, the GAL recommendations appear sound.

However, the Appellate body is not the fact finder nor are we as close to the case as the Trial Court. It is the trial court that sees and hears first-hand the evidence and witness testimony presented when making their decisions. This, is especially important in cases where children are involved. By providing the reasoning for their decisions, all parties become aware that the concerns for their children are being heard.

IV. Decision

In accordance with Oneida Tribal Judicial System, Rules of Appellate Procedure, Rule 19 Reversal Affirmance or Modification (A) Powers of Appellate Court: Upon appeal from a judgment or order from an original hearing body decision, the appellate court of the Oneida Tribal Judicial System may:

(5) Require such other action or further proceedings as may be appropriate to each individual action.

The Trial Court is ordered to review their April 9, 2012 order and provide the required reasoning, finding of facts and conclusions of law in accordance with Rules of Civil Procedure, Rule 26 and Chapter 79, Section 79.10-5 Custody and Physical Placement; Final Order, and Section 79.12 Revision of Orders, 79.12-6 Reasons for Modification.

The Trial Court shall do so within 30 days of the issuance of this order.

It is so ordered.