

# ***Oneida Tribal Judicial System***

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## **APPELLATE COURT**

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**David Brunette,  
Appellant**

**Docket No. 12-AC-023**

**vs.**

**Heather House/Peggy Smith (Doxtater),  
Respondent**

**Date: May 10, 2013**

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## **DECISION**

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This case has come before the Oneida Tribal Judicial System, Appellate Court. Judicial Officers Janice L. McLester, Carole Liggins (Pro Tem), Lois Powless, Jennifer Webster and Stanley R. Webster presiding.

### **I. Background**

On December 17, 2012, Appellant, David Brunette, filed an appeal of the November 29, 2012 Oneida Tribal Judicial System, Family Court order No. 10-CS-220 on a Motion for Modification of Custody, Placement and/or Visitation. Mr. Brunette is alleging the hearings held in this case were biased, that the judicial officers had a conflict of interest, and that the decisions were against the weight of the evidence and exhibited a procedural irregularity. We affirm the decision of the Oneida Tribal Judicial System, Family Court.

*A. Jurisdiction*

This case comes to us as an appeal of an original hearing body, the Oneida Tribal Judicial System, Family Court. Any person aggrieved by a final decision in a contested case can seek Oneida Tribal Judicial System review under Sec. 1.8-1 of the Oneida Administrative Procedures Act.

*B. Factual Background*

This case was transferred to the Oneida Tribal Judicial System from Brown County Circuit Court on May 13, 2010. On December 10, 2010 Appellant, David Brunette, filed a Motion for Modification of Custody, Placement and/or Visitation. The court record reflects there were seven (7) hearings before the Family Court since this initial filing from January 13, 2011 through December 8, 2011. Subsequently, there have been two (2) additional hearings, January 24, 2012 and September 27, 2012. Guardian ad Litem reports have been filed on June 15, 2011, August 1, 2011, December 2, 2011 and February 2, 2012.

On January 24, 2012 the Family Court ordered:

- Appellant (Brunette) and Grandmother Peggy Smith (Doxtater) to have shared placement of the minor children.
- Placement shall occur at two week intervals.

On August 2, 2012, Appellant, David Brunette, filed a Motion for Custody and/or Physical Placement requesting sole legal custody and change the shared placement with Grandmother Peggy Smith (Doxtater) to primary placement with Mr. Brunette.

On August 8, 2012, Respondent Peggy Smith, Grandmother, filed a Motion for Custody and/or Physical Placement requesting to change the shared placement to primary placement with herself, Grandmother Peggy Smith. A hearing was held on September 27, 2012 where both parties presented their arguments.

At the time of the September 27, 2012 hearing Respondent, Heather House, had secondary placement of the children and was living with her mother Peggy Smith (Doxtater). Ms. House had requested Primary Physical placement. She continued to reside with mother but as of April 11, 2013, we received a letter from Ms. Smith that Ms. House no longer lives in the residence.

Appellant, David Brunette, had shared placement of the minor children and had requested primary physical placement alleging neglect, contempt, non-stable life and questioned the living arrangements at the Grandmother's home.

Respondent, Peggy Smith (Doxtater), requested primary placement of the children and for Appellant, David Brunette and Respondent, Heather House to have secondary placement on alternating weekends.

At the September 27, 2012 hearing Ms. House requested primary placement. All parties presented their arguments as to who is most suitable to care for the minor children, keeping them in a safe and stable environment.

The issue the Family Court identified was whether physical placement should be changed from shared placement between Mr. Brunette and Mrs. Smith (Doxtater), to primary placement with Heather House.

On November 29, 2012 the Family Court filed their decision and ordered the following:

- Ms. House and Mr. Burnette shall continue to have joint legal custody.
- Ms. House shall have primary placement of the minor children. Primary placement is granted with the condition she remain living with mother, Peggy Smith (Doxtater).
- Mr. Burnette shall have secondary placement every other weekend beginning December 7, 2012. A secondary school year placement and summer month placement was also identified, along with any additional placement to occur as mutually agreed upon between Ms. House and Mr. Brunette.
- Oneida Tribe Child Support Agency shall submit a Final Advisory Report and Order Adopting Agency Recommendation to the Family Court with an effective date of August 2, 2012.

On December 17, 2012 Mr. Brunette appealed to the Oneida Tribal Judicial System, Appellate Court for review, alleging:

- 1) The decision to be clearly erroneous and is against the weight of the evidence presented.
- 2) There is exhibited procedural irregularity which would be considered a harmful error that may have contributed to the final decision which, if the error had not occurred, would have altered the final decision.

*C. Procedural Background*

On December 17, 2012, Appellant, David Brunette, filed his Notice of Appeal of the Oneida Tribal Judicial System Family Court's November 29, 2012 order, alleging a conflict of interest, bias by the judicial officers and an exhibited procedural irregularity by the judicial officers acting outside their scope by advocating for Respondent, Heather House.

On March 21, 2013 the Oneida Tribal Judicial System, Appellate Initial Review panel of Judicial Officers Janice L. McLester, Judicial Officer Jennifer Webster and Judicial Officer Stanley R. Webster met to answer the threshold questions regarding the jurisdiction of the case and the procedural and material sufficiency of the Notice of Appeal. In accordance with the Oneida Nation Administrative Procedures Act Section 1.8-1 and the Oneida Tribal Judicial System, Rules of Appellate Procedure, Rule 9, the Initial Review body shall accept an appeal when an Appellant alleges with sufficient clarity that the original hearing body decision contains one or more of the following elements:

1. A violation of constitutional provisions.
2. The decision is outside the scope of the authority or otherwise unlawful.
3. The decision is clearly erroneous and is against the weight of the evidence presented at the hearing level.
4. The decision is arbitrary and/or capricious.
5. There is exhibited a procedural irregularity which would be considered a harmful error that may have contributed to the final decision, which if the error had not occurred, would have altered the final decision.
6. There is a presentation or introduction of new evidence that was not available at the hearing level, which, if available, may have altered the final decision.

The Appellate Review panel accepted this case for review under (5) procedural irregularity. The Appellate Initial Review panel also identified the threshold question of clearly erroneous to be alleged. An exchange of briefs was completed for review on March 12, 2013.

Appellant, Brunette failed to file an Appellant's Brief by January 16, 2013.

Respondent, Smith (Doxtater) filed a Respondent's brief on February 25, 2013.

Respondent, House failed to file a Respondent's brief by February 25, 2013.

On April 22, 2013 Respondent, Peggy Smith (Doxtater), filed a Notice to the Court. The Notice informed the Oneida Tribal Judicial System, Respondent, Heather House, no longer resided with Ms. Smith (Doxtater), which is a condition of Ms. House having primary placement in the November 29, 2012 Court order. This notice was forwarded to Appellant, Brunette and the Family Court.

The Appellate Review body consisting of Judicial Officers Janice L. McLester, Judicial Officer Carole Liggins (Pro Tem), Judicial Officer Lois Powless, Judicial Officer Jennifer Webster and Judicial Officer Stanley R. Webster deliberated on March 21, 2013 and on April 25, 2013 to review the merits of the appeal and now files its decision to affirm the decision of the Oneida Tribal Judicial System, Family Court.

The Appellate Review body determined Appellant Brunette failed to provide sufficient argument to support his allegations of bias or procedural irregularity which would have changed the outcome of the case.

## **II. Issues**

**Was the decision of the Oneida Tribal Judicial System, Trial Court clearly erroneous and against the weight of the evidence?**

**Was there exhibited a procedural irregularity which would be considered a harmful error that may have contributed to the final decision which, if the error had not occurred, would have altered the final decision?**

### **III. Analysis**

**Was the decision of the Oneida Tribal Judicial System, Family Court clearly erroneous and against the weight of the evidence?**

No. There is not sufficient evidence for a finding that the Family Court was clearly erroneous and against the weight of the evidence. Both parents are facing challenges with their living arrangements. The Trial Court panel made the best judgment available.

Guardian Ad Litem (GAL) are instructed to represent the best interests of the children in cases where the circumstances of legal custody, placement, visitation and the general welfare are found to warrant investigation.

The latest GAL report in record was dated February 2, 2012, in which the GAL's recommendation was to have Peggy Smith (Doxtater), Grandmother, given legal and physical placement. The GAL found this to be in the best interest of the children. The Family Court ruled primary placement with mother, Heather House, contingent on the fact she reside with Peggy Smith (Doxtater).

This recommendation from the GAL was based on an incident on January 31, 2012 in which Appellant, Brunette was involved in a domestic abuse, battery, criminal damage to property and disorderly conduct incident with his then girlfriend, Amanda Clark. Charges of this incident were eventually dropped by Ms. Clark.

Past history reported on GAL reports of June 15, 2011, August 1, 2011, December 2, 2011 and February 2, 2012 indicate an unstable environment for both Mr. Brunette and Ms. House, which

is not of benefit to the children. The GAL recommendation fluctuates between primary placement with Mr. Brunette in the June 15, 2011 GAL report to primary placement with Grandmother, Peggy Smith (Doxtater) in GAL report of August 1, 2011, primary placement with Heather House in GAL report of December 2, 2011 and most recently with primary physical placement with Grandmother, Peggy Smith (Doxtater).

The Family Court record indicated the Judicial Officers showed no bias when reviewing the hearing testimony, allowing parties to present their arguments and rebut allegations/assertions and making a final determination on evidence presented at the hearings.

**Was there exhibited a procedural irregularity which would be considered a harmful error that may have contributed to the final decision which, if the error had not occurred, would have altered the final decision?**

The Trial Court did not formally answer Mr. Brunette's August 2, 2012 motion. We find this to be a procedural irregularity, but a harmless error at this point. The Court granted Heather House primary placement with the condition she continues to reside with Grandmother, Peggy Smith (Doxtater). Ms. House is currently in non-compliance of this order as indicated by notice of Ms. Smith (Doxtater). Also, we are uncertain of the Trial Court's authority to enter an order conditioning Ms. House's placement of the children on the fact that she live with her mother. In any case, these issues appear to be moot as Ms. House is allegedly no longer living with her mother, Peggy Smith, and therefore is not meeting the condition of the order if she wishes to have primary placement of her children. A new hearing is needed to adjust placement accordingly.

The Appellate body is not the fact finder nor are we as close to the case as the original hearing body, in this case the Oneida Tribal Judicial System, Family Court. It is the original hearing body that sees and hears first-hand the evidence and witness testimony presented when making their decisions. The Appellate Court will not substitute a judgment of the original hearing body,

in this case Oneida Judicial System, Family Court, unless the relevant facts of evidence or a clear error of judgment is presented.

#### **IV. Decision**

The decision of the Oneida Tribal Judicial System, Family Court is affirmed. The Family Trial Court order of November 29, 2012, is affirmed but also remanded for reconsideration based on the allegation that Respondent, Heather House, is no longer living with Peggy Smith (Doxtater).

The allegation of the trial court being biased is not supported by the record. The Appellant, David Brunette, received his due process, by being allowed a hearing and being allowed to speak in his appeal. The Court was not acting as an advocate on behalf of Ms. House. Mr. Brunette did not cite to any specific instances of bias or other conduct which was improper or unbiased. The appellate panel reviewed the transcripts and recordings and did not see any basis or support for Mr. Brunette's general allegations. Without specific examples or evidence of bias, Mr. Brunette's allegations fail.

The Judiciary is a well established court and takes great effort in providing a neutral setting which allows both parties to present testimony, evidence and witness and where everyone is treated equally. In review of the transcripts and recording of the September 27, 2012 hearing, the court had given a great deal of patience by providing the parties latitude in presenting their arguments.

Still the Family Court failed to answer two motions that were brought forward. We now remand this case to the Family Court to hear and answer specifically the original motions filed by Mr. Brunette and Mrs. Smith (Doxtater):

- On August 2, 2012, Appellant, David Brunette filed a Motion for Custody and/or Physical Placement requesting sole legal custody and changed the shared placement to primary placement.



- On August 8, 2012, Respondent Peggy Smith, Grandmother filed a Motion for Custody and/or Physical Placement requesting to change the shared placement to primary placement with Grandmother Peggy Smith.

Furthermore, the Family Court is to review the current allegation the Respondent, Heather House is currently not in compliance of the November 29, 2012 order by no longer living in residence of Grandmother, Peggy Smith (Doxtater).

In accordance with Oneida Tribal Judicial System, Rules of Appellate Procedure, Rule 19  
Reversal Affirmance or Modification:

- (A) Powers of the Appellate Court: Upon appeal from a judgment or order from an original hearing body decision, the appellate court of the Oneida Trial Judicial System may:
- (1) Reverse, affirm, or modify the judgment or order as to any or all parties;
  - (2) Remand the matter to the trial court or original hearing body and order a new trial/hearing on any or all issues presented; the order returning a case shall contain specific instructions for the trial court or original hearing body.

It is so ordered.