COURT OF APPEALS

Deitric Gray,

Appellant,

Case No. 19-AC-004

v.

Date: May 18, 2020

Mercy Metoxen,

Respondent.

FINAL DECISION

This matter has come before Appellate Judges Leland Wigg-Ninham and Sharon House, and Chief Appellate Judge, Gerald L. Hill.

JURISDICTION

The Court of Appeals has jurisdiction of this matter pursuant to §801.8-2(a)(1) and (2) of the Oneida Judiciary Code which grants this Court jurisdiction to review orders, sentences and judgments of the Trial and other lower Courts, and to review appeals of agency and administrative decisions.

BACKGROUND

The Appellant, Deitric Gray (hereinafter "Gray"), filed a Notice of Appeal with this Court on September 30, 2019, appealing the decision of the Family Court, dated September 10, 2019, wherein he was found in default for non-appearance. Gray claims that he was not provided actual notice of the hearing date. On October 25, 2019, this Court accepted his appeal for review. On January 28, 2020, the briefing schedule in this case was completed. On March 23, 2020, pursuant to Rules of Appellate Procedure §805.13-1(b)(2), this Court remanded to the Family Court an order

to address two (2) issues, and also to extend the date for a final decision. On March 26, 2020, the Family Court filed a Response to the Remand Order.

ISSUES

1. Was Gray given proper notice of the hearing date of September 10, 2019?

2. Should a Guardian Ad Litem, GAL, have been appointed?

ANALYSIS

In reviewing this matter, we determined that two (2) issues required clarification. First, was Gray provided proper notice of the hearing held on September 10, 2019. Second, whether the Family Court addressed the need for a GAL. This Court remanded these two (2) issues to the Family Court to address.

Notice of Hearing

Gray argues that he was not provided notice of the hearing date. The record shows that the Notice of Hearing was mailed to the same address as was used on a previous hearing notice, wherein Gray appeared for that hearing. The record also shows that Gray was served a copy of the motion to modify custody and placement of the parties' child by personal service at an address known by the respondent, Mercy Metoxen (hereinafter "Metoxen"), to be his place of residence, an address different than the mailing address. Upon receipt of the motion, Gray was then constructively on notice that a hearing would be scheduled. Correspondence on the record reveals that Gray used a different address to receive mail than where he was physically residing.

In the Family Court's response to this issue, a detailed rationale with citations from the record shows that a diligent and good faith attempt was made to inform Gray of the hearing in question, and that his failure to appear was due to his own negligence in attending the matter at hand. As stated above, Gray had appeared at a previous hearing wherein the notice was sent to the same mailing address. Furthermore, it is the implicit responsibility of each party to inform the court of changes in their contact information. If a party claims otherwise, they have the burden of

persuasion on this issue. Judiciary Law, 801.8-3(b). Gray offered no proof to contravene the legitimate assumption that he had been served. The Family Court cited the basis for accepting that the notice provided met the criteria set forth in the rules:

> "*Notice*:
> The procedure for filing a motion is found in 8 O.C. 803.7-5. 8 O.C. 803.7-5(a) states that the moving party shall submit the motion to the court, with proof of service. In this case, Ms. Metoxen filed a Motion for Modification of Legal Custody and/or Physical Placement on August 8, 2019. Filed with the motion was an Affidavit of Service which indicated that Mr. Gray was personally served by *[name redacted]* on August 7, 2019. The place of service was *[address redacted]*; however, the motion identified Mr. Gray's address as *[address redacted]*, which is the address that the Family Court has had on file for Mr. Gray dating back to November 2015.[1]
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> After processing Ms. Metoxen's motion, the Clerk of Family Court sent a Notice of Hearing to Mr. Gray in accordance with 8 O.C. 803.5-6(b). The notice was sent to the address that the court had on file. At no time prior to the hearing and after being personally served with a copy of the motion, which listed the telephone number and mailing address of the Family Court, did Mr. Gray contact the court to provide an updated mailing address.
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> Mr. Gray failed to appear at the hearing on September 10, 2019. Consistent with OFCR 7(A), the court confirmed that Mr. Gray was personally served in accordance with 8 O.C. 803.5-6(a) prior to finding him in default and proceeding pursuant to 8 O.C. 803.29-2.[2] As Mr. Gray was not present at the hearing, the court was unable to make any other confirmations other than checking the file prior to the hearing to ensure that the Notice of Hearing was sent to Mr. Gray and was not returned as undeliverable.
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> The information received by the court during the hearing supported the court's decision to find Mr. Gray in default. Ms. Metoxen indicated that Mr. Gray did not have a consistent physical address. The address provided by Ms. Metoxen and utilized by the court for the past four years was described as the address of Mr. Gray's grandmother. Such an address is significantly different than the address of a stranger who would not have the ability to pass information along to a party in a court action.
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> Based on Mr. Gray's non-appearance and the information presented at the hearing regarding Mr. Gray's girlfriend residing at the *[address redacted]* address, the Clerk of Family Court sent a copy of the Family Court's Order to both the *[address redacted]* and *[address redacted]* addresses on September 11, 2019."

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[1] As personal service may occur at an individual's residence; the home of a friend or family member; the workplace; or anywhere else in the community, the place of service is not an indication of a person's residence.

[2] Title 8, Chapter 806, Rule #1, Family Court Rules, §1.10-1 addresses default judgments; however, the updated rules did not go into effect until September 11, 2019. Therefore, the Family Court is referencing the prior version of the rules, which used to be under Chapter 807 of the Oneida Code of Laws. A copy of those rules is attached.

We are satisfied that the Family Court was diligent to ensure Gray was provided proper notice of the hearing before finding him in default, and thus, though not recited in the original decision, adequately proceeded under the circumstances.

Appointment of Guardian ad litem

In its response to the matter of necessity to appoint a GAL, the Family Court thoroughly explained that such appointment was not indicated, and in fact, nothing in the record showed there was any concern from either party for the welfare of the child:

> "*Appointment of a Guardian ad Litem*:
> Pursuant to 7 O.C. 705.8-2, the Family Court shall appoint a guardian ad litem for a child if the legal custody or physical placement of the child is contested or if the court has reason for special concern for the welfare of the child.[3] In this case, the issues of legal custody and physical placement were not contested. In accordance with 8 O.C. 803.29-2, when a party against whom a judgment for relief is sought has failed to appear, plead, or otherwise defend as required by the Oneida Judiciary Rules of Civil Procedure or elsewhere, a default judgment may be granted by the court upon receipt of whatever evidence is deemed necessary to establish the claim. In this case, Ms. Metoxen filed a Motion for Modification of Legal Custody and/or Physical Placement and requested primary physical placement and a set schedule for physical placement.[4] Since it had been more than two years after the initial order regarding legal custody and physical placement was entered,[5] Ms. Metoxen was required by 7 O.C. 705.12-2(b) to show that (1) there had been a substantial change of circumstances since the entry of the last order affecting legal custody or physical placement and (2) the modification was in the best interest of the child. The Family Court found that there had been a substantial change in circumstances as *[personal information redacted]*, was enrolled in the Oneida Nation's Head Start program and it was in the child's best interest to modify the order. As Mr. Gray did not oppose the modification at the hearing, the court did not include a written analysis pursuant to 7 O.C. 705.12-6; however, the decision was made based on the testimony regarding Mr. Gray's inconsistent physical address, the child beginning her schooling, and it being in the child's best interest to have a consistent residence during the school week.
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> Based on the information presented at the hearing, the court did not find any reason to appoint a guardian ad litem out of special concern for the welfare of the child.

[3] The Family Court did not find that the exception found in 7 O.C. 705.8-3 applied in this case.

[4] As the issue raised regarding the child's uninsured medical expenses would not be tied into a guardian ad litem appointment, the Family Court is not addressing that issue in this response.

[5] The initial order regarding legal custody and physical placement, which was based on the agreement of the parties, was entered on January 27, 2016, and awarded the parties joint legal custody and shared physical placement without a set physical placement schedule.

> During the court's colloquy with Ms. Metoxen, the court first addressed Mr. Gray's living situation. Ms. Metoxen indicated that she did not want to take Mr. Gray's parental rights away and still wanted him to be a part of the child's life; however, she wanted the child to be in a more consistent environment during the school week. Ms. Metoxen further asserted that she was uncomfortable with the child being moved around to different households and that there may be an upcoming period of incarceration for Mr. Gray. . . . Mr. Gray's lack of residential stability and the challenges that could present with a Monday-Friday school schedule could be appropriately addressed through weekend periods of physical placement as opposed to school night periods of physical placement, the court did not determine that it had special concern for the welfare of the child. This was further supported by Ms. Metoxen's statement regarding holidays, where she indicated that the parties have fairly good communication and do not have issues with holidays. This statement led the court to believe that the parties were capable of cooperating and communicating with each other and the only modification that had to be made was regarding school night periods of physical placement. The order allows the parties to modify the physical placement schedule by agreement during the summer and if Mr. Gray establishes residential stability."

This Court is satisfied that the rationale provided in the Remand Response addresses why a GAL was considered unnecessary. We agree with the decision of the Family Court.

CONCLUSION

Family Court determined that Gray was given proper notice of the hearing held on September 10, 2019, and that the appointment of a GAL was not indicated under the circumstances.

Finally, we are encouraged that the Response to the Remand Order included the availability of the parties to utilize the provisions of Peacemaking to resolve any remaining issues in this case, acknowledging that neither party appeared hostile regarding the affection and care that each had for the child, and that they communicated civilly.* The decision and order of the Family Court was not final in any real procedural sense and does not foreclose further action in the matter should that become necessary, nor does it jeopardize Gray's relationship with the parties' child. A party may seek amendment of any order at any time provided that they can show the authority for such amendment as well as supportive facts.

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* ". . . the court believes that the parties could benefit from participating in the peacemaking process once the appeal is finalized."

ORDER

For the reasons set forth above, pursuant to Rules of Appellate Procedure, §§ 805.13-1(b)(1) and (2), this Court having received adequate response to the Remand Order hereby affirms the original decision of the Family Court dated September 10, 2019.

By the authority vested in the Oneida Judiciary, Court of Appeals, in Oneida General Tribal Council Resolutions 01-07-13-B and 03-19-17-A, the Order of the Family Court is affirmed. Dated this 18th day of May 2020, in the matter of Case No. 19-AC-004, *Deitric Gray v. Mercy Metoxen.*

It is so ordered.

DISSENTING OPINION

I, Appellate Judge, Leland Wigg-Ninham, respectfully dissent from the majority with the reasoning and use of the Default Judgment; Family Court Rules, 8 O.C. 807, Rule7(C) *"If the Family Court finds that proper notice was provided, the Court MAY [emphasis added] enter a judgment against the party that failed to appear. The court, in its discretion, MAY [emphasis added] require a party to produce sufficient evidence to support a judgment against the other party."* This rule allows for the court to use Judicial Discretion based on Oneida Child Custody, Placement and Visitation Law; 7 O.C. 705.3-1(a) "In the Best Interest."

It is my opinion that Default Judgments should not be used in Family Court, or for that matter; in Civil procedure, because it goes against the purpose of Oneida Family Court Law; 806-1-1, Purpose and Policy; *"The purpose of this law is to establish a Family Court and to provide for the administration of law, judicial procedures and practices by the Oneida Tribe as a sovereign nation by exercising the inherent power to make, execute, apply and enforce its own law and to apply its own customs and traditions in matters affecting the Oneida People as it pertains to the family and/or children. and 806.1-2, It is the policy of the Tribe to provide a knowledgeable, a fair and impartial forum for the resolution of all family matters that come before the court pursuant to a grant of authorization by law."*

In addition, Default Judgment goes against the Oneida Nation's Haudenosaunee traditions, heritage and cultural values involving family because it can be punitive in nature by taking away established visitation, thus creating undue anxiety for the child and continues the inter-generational trauma imposed upon Indian People when the children were taken from their parents during the Boarding School Era.

As a result of the Default Judgment in this case, one parent was given primary placement based on educational needs and testimony/evidence from that parent only. Although education is a part of the law it isn't the first and most important part of the law. The first major goal of Oneida's; Law; 705.3-1(a)(1) "In the Best Interest" of the child is to; *"Promote a meaningful and loving relationship with both parents and family."* A Default Judgment does the opposite by continuing to foster conflict between parents and keeps them in the adversarial mode, "one loses, one wins." Furthermore, in my opinion, Default Judgments; especially in the first instance, violate Haudenosaunee tradition and understandings of due process. All due process is not the same, and the Haudenosaunee tradition and teachings requires more process than one missed court date in order to take away something as important as visitation of minor children.

In my phone conversations with other judge's regarding what they do when one parent does not appear at a hearing, I found that most Tribal Courts and State Family Courts reschedule the hearings or order a Show Cause hearing.

In conclusion, if the Default Judgment Rule was eliminated, or modified, by Oneida's law makers, I believe the court would be viewed as a court of "Peacekeeping" and be aligned with 7 O.C. 705.3-1(a)(1) and the vision of the Oneida Nation. Judiciary Law, 8 O.C 801, Preamble; *". . . in accordance with these scared responsibilities, this Judiciary shall serve to establish and administer justice in a consistent fashion, considering the context of all relevant circumstances, and through the fair application and interpretation of Tribal Laws and Policies, Rules of Court, decisional law, tribal tradition and custom and common sense, decisional law, tribal tradition and custom and common sense."* (Oneida Tribes Haudenosaunee traditions, heritage and cultural values.")