IN THE COURT OF APPEALS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, PABLO, MONTANA

IN RE THE MATTER OF THE APPLICATION OF LOUIS FYANT, Petitioner, On behalf of LOUIS FISHER DOB 9-25-88 v. CS&K TRIBAL COURT, & Tribal Social Services, Respondents.	Cause No. AP-95-415-CP WRIT OF HABEAS CORPUS

Pursuant to the opinion filed in this matter,

IT IS ORDERED that LOUIS FISHER be returned to his father LOUIS FYANT until the next review hearing in the Youth in Need of Care action and that all further proceedings in the Youth in Need of Care action be consistent with the opinion in this matter.

Dated this 1st day of November, 1996.

CONFEDERATED SALISH & KOOTENAI TRIBES COURT SEAL OF APPEALS FLATHEAD RESERVATION

D. MICHAEL EAKIN,
Acting Associate Justice

Associate Justice Margaret Hall and Acting Associate Justice Brenda C. Desmond concur.

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **WRIT OF HABEAS CORPUS** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 5th day of November, 1996

Andrea Olsen
Tribal Legal Services

Amy Peterson, Becky Dupuis, Susan Firth
Attorneys for Tribal Social Services

JoAnn Jayne
Tribal Legal Services

Deb DuMontier
Tribal Legal Services

Sheryl Steele
Tribal Legal Services

Leslie Kallowat
Tribal Court Judge

John B. Carter
Tribal Legal Department

Clerk of Court
Tribal Court

Abigail Dupuis

Abigail Dupuis
Appellate Court Administrator

IN THE COURT OF APPEALS OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, PABLO, MONTANA

IN RE THE MATTER OF THE APPLICATION OF L.F. Petitioner, On behalf of L.F. v. CS&K TRIBAL COURT, & Tribal Social Services, Respondents.	Cause No. AP-95-415-CP OPINION

Counsel for the Father: Andrea J. Olsen
Counsel for the Guardian ad Litem: Debra L. DuMontier
Counsel for Tribal Social Services: Amy Peterson

Counsel for Mother: JoAnn Jayne
Counsel for the Grandparents: Sheryl Steele
Counsel for the Amicus, CS&K Tribes: John B. Carter

This is an original action by a father seeking a writ of habeas corpus for a return of his child L.F.. For reasons discussed below, we grant the writ.

L.F. is currently in the physical custody of his maternal grandparents pursuant to an order of the trial court in a Youth in Need of Care action. L.F. and his half-brother J.F. were removed from the custody of their mother in 1995 with her consent. J.F. was placed with an aunt and eventually with the maternal grandparents. L.F. was placed with his father, L.F. in September of 1995. The father allowed L.F. to visit J.F. and the maternal

grandparents this last summer. (The mother is residing with her parents.) In July, the parties stipulated that L.F. would remain with his father and J.F. would remain with the maternal grandparents. A review hearing was held in August. The court was faced with a difficult decision between splitting up the brothers but maintaining L.F. with his father where he was doing well, or maintaining the brothers in the same home close to their mother. The court rejected the stipulation and ordered that L.F be placed with the maternal grandparents along with his brother.

The father then filed an original action for a writ of habeas corpus challenging the placement of L.F. with the grandparents. The original petition was denied with leave to amend. An amended petition was filed and we issued an order to show cause why a writ should not issue.

DISCUSSION

I. The Writ of Habeas Corpus is Available.

At the time of the adoption of the Tribal Children's Code, Title VI CS&K Tribal Code, the Council had not granted this court jurisdiction over original habeas corpus actions. The only method of review in a Youth in Need of Care action was by appeal. However, with the adoption of Ordinance 90B, this court acquired jurisdiction to issue several extraordinary writs in original proceedings.[1] For the first time we are asked to address whether

---

[1]The Ordinance requires that this court hold a bench conference within five days to determine whether to accept jurisdiction over the extraordinary writ, 3-2-401(4) CS&K Tribal Code, as was done for both the original petition and the amended petition in this matter. A single justice may

the writ of habeas corpus is available to a parent to challenge a custody placement in a Youth in Need of Care action.

Habeas corpus, the great writ, has long been used to challenge the custody of children. *King v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763). The mother and grandparents suggest that we follow the federal courts in finding that a writ of habeas corpus is not available in the federal system to challenge a custodial placement of a child. *See, e.g. Lehman v. Lycoming County*, 458 U.S. 502 (1982). We find that there are different considerations present **within** a tribal system. First, federal courts do not generally consider family law matters, *Barber v. Barber*, 62 U.S.(21 How.) 582 (1858); *Sanders v. Robinson*, 864 F.2d 630 (1988), yet tribal courts routinely hear such matters. In addition, a federal court hearing a custody matter arising on reservation could put the federal court into direct conflict with a tribal court on issues of custody of Indian children. While federal courts should not be deciding the custody of Indian children, it is the duty of this court, whether by appeal or habeas, to enforce tribal law.

In state courts, where federalism concerns are not present, courts have, by and large, found that a petition for a writ of habeas corpus is an acceptable method in some circumstances to test the legality of custody of a child. *See, Olney v. Hobble*, 396 P.2d 367 (Kan. 1964); *Cole v. Dawson*, 504 P.2d 1314 (Nev. 1973); *Roberts*

---

issue a writ of habeas corpus, 3-2-406(3) CS&K Tribal Code. Because of current vacancies on this court, the court deemed it prudent to have three justices rule upon accepting jurisdiction over the application.

v. Staples, 442 P.2d 788 (N.M. 1968); *Gilbertson v. Gilbertson*, 498 P.2d 1381 (Okla. 1968); *Yost v. Phillips*, 535 P.2d 94 (Ore. 1975); *R. v. Whitmer*, 515 P.2d 617 (Utah 1973); *McNeal v. Mahoney*, 574 P.2d 31 (Az. 1977); *Wood v. Dist. Court*, 508 P.2d 134 (Colo. 1973); *In re Ewing*, 529 P.2d 1296 (Id. 1974); *Karol v. Karol*, 613 P.2d 1016 (Mont. 1980). While this court will not always find the decisions of state courts persuasive, if a great number of states have allowed a particular use of a remedy, we will assume that the Council wanted that use of the remedy when it adopted that remedy.

The Tribal Attorney, taking a position opposite that of the attorney for Tribal Social Services, urges us to find that the Children's Code sets out the sole method of review, an appeal. Sec. VI-1-109 CS&K Tribal Code. The Tribes argue that this court should limit the writ to instances when a person is held on criminal charges or a criminal conviction. The Tribal Attorney cites to no provision of the Ordinance nor to any legislative history that suggests that the Council wished to so limit the writ.[2] Nor is there anything in the Children's Code to suggest that appeal is exclusive. Unless the Council specifically directs that one remedy is exclusive, the better policy is to find that remedies are cumulative. *See, e.g. F.D.I.C. v. McSweeney*, 976 F.2d 532 (9th Cir. 1992). The fact that an appeal may lie, does not prohibit the use of an extraordinary writ, if the applicant can

---

[2]We note that the code does direct us to use the rules of criminal procedure and evidence if an evidentiary hearing is necessitated. Ordinance 90B at § 3-2-406(5)(b)(ii). We do not find that this directive for procedure in an evidentiary hearing implicitly limits the scope of the writ.

show that the remedy by appeal is inadequate.

While it does appear that a temporary order in a Youth in Need of Care action is appealable, *In Re the Matter of D.T.P.*, AP-94-056CP (May 14, 1996), the unique facts of this case indicate that appeal is inadequate here. At the time the application was first filed, there was no written judgment of the trial court from which to appeal. Additionally, the order of the trial court is due to expire in early November. The normal appeals process would exceed the duration of the order from which the appeal was taken. The appeal would become moot, but the trial court could again enter a similar order. The matter is capable of repetition yet could escape review by appeal. These facts make an extraordinary writ necessary.

Counsel also informed the court of apparent conflicts within the divisions of the trial court on the underlying issue of parental versus extended family preference in placement in Youth in Need of Care actions. That conflict within the court also encourages us to use extraordinary means to resolve the issue.

We do not believe this will open the flood gates to habeas litigation in this court. It should be noted that the agency most likely to be forced to defend such actions, Tribal Social Services, strongly supports the issuance of a writ in this instance and is unconcerned about a flood of habeas applications. The Guardian ad Litem also unequivocally supports the issuance of the writ. While the preferred method of review of Children's Code cases remains appeal, there will be a corresponding drop in the number of appeals

when review is had by means of an extraordinary writ.

II. The Writ Will Issue.

The father, besides having the burden to show that a writ is available, must also show that it should issue in this instance. Under the facts of this action, the writ will issue.

The father alleges constitutional violations, but cites no specific constitutional protection for the family. Since we find no applicable provision of the tribal constitution, the "constitutional" protection, if it is there, is a substantive part of the Due Process clause of the Indian Civil Rights Act, 25 U.S.C. § 1302(5). While Due Process may protect certain family relationships, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Prince v. Massachusetts*, 321 U.S. 804 (1944), the protection is from the interference of the government in family matters. The "constitutional" protection does not necessarily apply in conflicts between parents and members of the extended family. In *Moore*, the constitution protected the right of a grandmother to have her grandchildren reside with her. In *Prince*, the Court was addressing the rights of an aunt. The Supreme Court's substantive due process cases have focused on the state limiting family relationships, not intervening in disputes within the family.

Most states have found that parents have rights superior to extended family. *See, e.g. Karol v. Karol, supra.* The protection of the nuclear family found in the Due Process Clause of the Fourteenth Amendment is not the same as the protection of the Due

Process Clause of the Indian Civil Rights Act. The state decisions are reflective of different culture and traditions. In the culture of the Tribes, extended families play a much greater role in raising children. The rights of such extended family members will not necessarily be subordinate to natural parents when those extended family members have been rearing a child in their home or when they can offer more continuity of care than a parent who has not played a major role in parenting.

However, in this action, the child was in the actual physical custody of the father[3] on Reservation. Tribal Social Services, the Guardian ad Litem and the parents all agreed that the child was doing well. Under those circumstances, a court cannot change the custody of the child from the parent to a member of the extended family residing off Reservation who had not previously had custody. The preference for a parent with actual physical custody retaining custody of a child in a Youth in Need of Care action is the remedy the Council directed when that result is possible. Title VI, Sec. 3-5(b) requires Tribal Social Services to first place the child with the parent caring for the child, prior to looking to extended family members.

Other policy considerations also affect our decision. Parents who do not live together should be encouraged to enter into

---

[3]We realize that the father may not have played an active role in caring for the child prior to Tribal Social Services removing the child from the mother. However, the situation presenting itself to this court is that the father has been the primary caretaker for the child for about the last year.

agreements concerning the custody of their children. Enforcement of those agreements is an essential element in encouraging the parents to make such agreements. A parent is less likely to agree to a summer visit or other contact with the non-custodial parent or extended family if he thinks he must litigate after the visit to get a return of the child. In this case, the parties agreed the child should visit his brother and grandparents in Oregon during the summer. The benefits of such visits will not again be realized if the agreement to return the child is not enforceable.

CONCLUSION

A separate document will issue, using the full names of the persons involved, directing a return of L.F. to his father, L.F. The clerk is directed to return the original file to the clerk of the trial court.

Dated this 1st day of November, 1996.

CONFEDERATED SALISH & KOOTENAI TRIBES COURT SEAL OF APPEALS FLATHEAD RESERVATION

D. MICHAEL EAKIN,
Acting Associate Justice

Associate Justice Margaret Hall and Acting Associate Justice Brenda C. Desmond concur.

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **OPINION** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 5th day of November, 1996

Andrea Olsen
Tribal Legal Services

Amy Peterson, Becky Dupuis, Susan Firth
Attorneys for Tribal Social Services

JoAnn Jayne
Tribal Legal Services

Deb DuMontier
Tribal Legal Services

Sheryl Steele
Tribal Legal Services

Leslie Kallowat
Tribal Court Judge

John B. Carter
Tribal Legal Department

Clerk of Court
Tribal Court

Abigail Dupuis

Abigail Dupuis
Appellate Court Administrator