COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Willard Anthony CARSON, Appellee.

Case No. AP16-009, 7 CTCR 24

14 CCAR 01

[Weston Meyring, Office of Prosecuting Attorney, for the Appellant.
Jonnie L. Bray, Office of Public Defender, for the Appellee.
Trial Court Case No. CR-2015-38174]

Decided January 18, 2018

Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Gary F. Bass

BONGA, AJ

DISCUSSION

Defendant/Appellee Willard Carson plead guilty on May 11, 2016 in case number CR-2015-38174 to criminal offenses involving Domestic Violence (hereinafter DV): (Count I) Trespass of Buildings-DV, (Count II) Battery-DV, and (Count V) Battery-DV. At sentencing, the Appellant Tribes recommended that the Defendant obtain a domestic violence perpetrator's evaluation and comply with any and all treatment recommendations. The Tribes' position was that the evaluation by a domestic violence professional entity was mandated by Colville Tribe's Law and Order Code section 5-5-54(a). The Trial Court, using its discretion, sentenced the Appellee to participate in the Tribes' Peacemaker's Circle program in lieu of obtaining a domestic violence perpetrator's evaluation. That decision has lead to this appeal.

In our court system the cultural approach has been eroded and largely replaced by the non-Indian court system. Because of this, it is the trial judge's heightened responsibility to maintain the cultural milieu of the proceedings before it. The judge is a tribal leader, who must make day-to-day decisions for the good of the whole community…*Sonnenberg vs. Colville Tribal Court*, 5 CCAR 9 (1999).

We hold the trial judge did not abuse her discretion by not mechanically sentencing Carson. The trial judge had sufficient information to meaningfully exercise her sentencing discretion, and she exercised her discretion by sufficiently individualizing sentencing so that the punishment fit not only the offenses, but the individual. *David St. Peter vs. Colville Confederated Tribes*, 2 CCAR 2, 14 (1993). Being an independent branch of the government, the Tribal Court has the inherent power to administer appropriate punishment for any violation of

Tribal law. This Court determines that the Trial Court acted accordingly as prescribed by Tribal law and did not abuse its discretion. *Henry Pakootas vs. Colville Confederated Tribes*, 4 CCAR 1, p.2 (1997). We believe that incorporating Tribal customs into the Tribes written law is very important. It is what will set us apart from the state and federal courts. Customs and traditions are viable, living doctrines that grow with the community and the time. They are not static, frozen in the past of tepees and buckskin clothing…Our customs and traditions in our current Tribal Court system is an important task which should not be taken lightly by the courts or the parties. *Smith vs Colville Confederated Tribes*, 4 CCAR 58, 61, (1995). As such, the Trial Court is **AFFIRMED** and this matter is remanded to the Trial Court for actions consistent with this opinion.

It is SO ORDERED.

Terrah FINLEY, Appellant,

vs.

CCT CHILDREN & FAMILY SERVICES, et al., Appellees

Case No. AP18-002 IA, 7 CTCR 22

14 CCAR 02

[Richard Lee, Office of Public Defender, for Appellant.
Wes Meyring, Office of Prosecuting Attorney, for Appellee CFS.
Adam Becker, Office of Legal Services, for Appellee Minor Child.
Jay Manon, Attorney, for Appellee Cameron Winfrey.
Taylor Finley, Appellee, Pro se.
Trial Court Case Nos. MI-2017-40015 and CV-CU-2017-40207]

Decided April 4, 2018.

Before Dupris, CJ and Gary Bass, AJ[1]

Procedural Summary

Appellant filed an Interlocutory Appeal and Petition for a Writ of Mandamus for companion cases, one in juvenile court (MI-2017-40015) and one in civil court (CV-CU-2017-40207) on January 17, 2018. She requested this Court to do the following:

First to review three (3) rulings on her motions in juvenile court:

1. Denial of Appellant's motion for recordings of the Temporary Custody Hearing;

[1]AJ Theresa Pouley found cause to abstain from voting on this matter.

2. Granting Appellee/CFS's motion to continue the Adjudicatory Hearing; and
3. The court's ruling that the juvenile court has jurisdiction;

Second to review rulings in the civil case for the following:

4. Denial of Appellant's Motion to Dismiss for lack of jurisdiction.
5. Granting the motion to stay the civil case;
6. The Court's sua sponte issuance of a protective custody warrant without a pending MINOC case; and
7. The failure to follow time requirements in the Juvenile Code by the Tribes and the Court after the minor was taken into protective custody.

Finally, she asks for a Writ of Mandamus to direct the Trial Court to issue an order on its ruling on Appellant's Affidavit of Prejudice against the presiding judge.

On January 19, 2018 we granted the motion for a Writ of Mandamus and directed the Trial Court to issue a final written order regarding the Affidavit of Prejudice. We set the deadline for the order to issue within ten days of our order. We reserved on all other issues raised by Appellant. Based on the reasoning set out below we find Appellant has not met her burden for an Interlocutory Appeal in either the juvenile or the civil causes of actions herein and find cause to deny the Interlocutory Appeal, and remand to the Trial Court for any further actions.

Interlocutory Appeal Standards

An interlocutory appeal (IA) is an exception, and not the rule. More stringent standards are set for an IA. It is granted prior to the final decision on the merits of a case only if it can be shown one of the following applies: the Court so departed from accepted and usual course of judicial proceedings; or the Court has committed an obvious error rendering further proceedings useless; or the issues presented involve a controlling issue of law/ substantial ground for difference of opinion; and appeal decision may materially advance the ultimate end of the litigation. (COACR 7-A).

It is Appellant's burden to prove the exceptional circumstances recognized in the grounds for an IA set out in our Court Rules. The basis of her appeal rests on her disagreement with the rulings the Trial Court has made on her motions on several procedural issues she raises at the trial level. It is not the responsibility of the CoA to superintend the Trial Court's

administration of a case on a daily basis when the matter has not even gone to a final resolution on its merits. We are charged with reviewing the final decisions of the Trial Court. Appellant has failed to show this Court any judicial irregularities, obvious errors, or rulings that present a controlling issue of law or substantial grounds that, if reviewed by this Court, would contribute to the final resolution to the cases, both in the civil and the juvenile courts.

For future reference, we will no longer accept an appeal that combines rulings from two separate cases, two separate courts, *eg.* juvenile and civil courts herein. For the reasons stated, we DENY the Interlocutory Appeal, and REMAND the matter to the Trial Court for further actions. We so hold.

Richard GABRIEL, Appellant,

vs.

COLVILLE BUSINESS COUNCIL, Appellee.

Case No. AP18-003, 7 CTCR 23

14 CCAR 05

[Jonnie Bray, Spokesperson, for Appellant.
Jason D'Avignon and Carmel McCurdy, Office of Reservation Attorney, for Appellee.
Trial Case No. CV-OC-2017-40110]

Decided June 27, 2018.

Before Presiding Justice Michael Taylor, Justice David C. Bonga, and Justice R. John Sloan Jr.

SUMMARY

Appellant Gabriel was expelled from his position as a member of the Colville Business Council (CBC) on June 15, 2017. The expulsion was by vote of the CBC pursuant to Colville Constitution Article IV, Sec. 2 and Tribal Code (CTC) Chapter 1-8-20 which governs the behavior of members of the CBC.

After an Ethics Complaint was filed against Appellant the CBC issued a bill of particulars which contained several allegations of violation by Appellant of specific provisions of CTC Chapter 1-8-20. These particulars basically involved financial and contractual relations between Appellant and the Colville Tribes and his actions regarding these relations while an elected member of the CBC. After receiving the Complaint the Rules Committee of the CBC began an investigation pursuant to the requirements of CTC, Chapter 1-8 the Council's Code of Professional Responsibility. When the initial investigation, conducted in part by an outside attorney, was complete, the Rules Committee scheduled a hearing and provided Appellant with Notice, including a copy of the Complaint against him, the investigation report, a list of expected witnesses, an overview of the hearing procedure, and a statement of his right to call witnesses and defend himself against the charges. These actions by the Rules Committee are prescribed by the Colville Constitution and the Council's Code of Professional responsibilities, especially CTC 1-8-30(c).

The hearing was held on May 18, 2017. Appellant appeared and contested the charges. Following the hearing, the Rules Committee voted unanimously to recommend to the CBC to

expel him and on June 15, 2017, the CBC by majority voted to expel him.

On June 23, 2017, Appellant filed a Complaint in the Tribal Court alleging that his due process rights were violated, asking for money damages, and a finding that CTC 1-8-3(e) prohibiting expelled Council members permanently from running for Council positions is in violation of the Colville Constitution.

During the time that the investigation, hearing, and votes by the Rules Committee and CBC took place, Appellant was, or was about to become, a candidate for election to the position on the CBC that he occupied and from which he was expelled. The election for CBC positions took place shortly after he was expelled and he was unsuccessful in retaining his seat on the CBC.

The Amended Complaint filed by Appellant in the Tribal Court set out the following objections to the process utilized by the CBC Rules Committee and the CBC to review and determine the allegations of violation of CTC 1-8-20 which were made regarding Appellant's actions while a member of the CBC:

1. No "notice" was given to Appellant of the standard proof to be used by the CBC in reviewing Appellant's behavior as a member of the CBC.
2. Evidence outside of that produced at hearing was considered in deciding whether Appellant had violated CTC 1-8-20.
3. Hearsay evidence was relied upon by the CBC in deciding whether Appellant violated CTC 1-8-20, thereby denying Appellant the opportunity to confront witnesses.
4. The legal advisor to the CBC in its deliberations regarding Appellant's behavior was a "potential" witness in the hearing involved in this case.
5. The CBC members who complained regarding the behavior of Appellant met in "private" with members of the committee investigating the complaint and excluded other CBC members from these meetings.
6. The investigating CBC committee did not rule on objections "raised" by Appellant.
7. Appellant was not provided with a statement of findings of fact based on evidence "presented" at the CBC hearing. Rather the reviewing committee provided a conclusory statement without facts recommending Appellant's expulsion from the CBC.
8. Appellant received no notice of witnesses to be questioned at the CBC hearing.
9. The complaining witness was allowed to participate in the hearing.
10. The vote to expel Appellant took place only nine days prior to the general election for the members of the CBC, an election in which Appellant was a candidate and

appeared on the ballot.

11. The CBC did not provide a public statement as to the factual basis for its action in expelling Appellant.
12. The CBC, prior to the election dates, informed the public that under the Colville Code, Appellant was not allowed to run for the CBC position.
13. Appellant was obstructed by tribal staff from removing his belongings from his CBC office.
14. The CTC provision prohibiting an expelled member of the CBC from running again for the CBC does not comport with the tribal constitution.

Seeking injunctive relief, Appellant reasserted all 14 allegations set out above and asserted that Appellant had been defamed by statements quoted in the Colville Tribal Tribune. As relief, Appellant petitioned the Trial Court for a declaratory judgment holding that his expulsion was improper as unconstitutional and violated his procedural due process rights and used the wrong legal standard. Appellant also requested a declaratory judgment to find Appellant eligible to run for office in future CBC elections. Appellant characterized the actions of the CBC regarding his expulsion as reckless, negligent, and retaliatory causing him pain, humiliation and emotional distress and requested various forms of damages, costs, and attorney fees.

Appellant asserted that CTC Chapter 1-1-431 (10), Chapter 2 et al, and Chapter 1-5 et al, and, pursuant to CTC 1-5-8, various insurance policies held by the Tribes provided various bases for Court jurisdiction.

In response to Appellant's Complaint the Appellee Colville Business Council (CBC) filed in the Tribal Court a motion to dismiss. The CBC presented the following defenses:

1. The sovereign immunity of the Tribes and the CBC.
2. The lack of claim for which relief can be granted.
3. The complaint raised political questions that are beyond the authority of the Courts.
4. For the Courts to entertain the matters asserted in the complaint offends, in the specific circumstances of this dispute, the doctrine of separation of governmental powers which is now a part of the constitutional structure of the Colville government.

The Trial Court dismissed the action on the ground that sovereign immunity prevented the CBC, in the specific circumstances of this expulsion of one of its own members, from being sued. We find that oral argument would not aid the Court in determining this Appeal.

PROCEEDINGS IN THE COURT OF APPEALS

At the initial hearing, the Court of Appeals, being concerned that the various defenses

asserted in the Tribal Court by Appellee could prevent the claims of Appellant from being considered by the Courts, directed the parties to provide further briefing on the justiciability of Appellant's claims. After the completion of all requested briefing we affirm the dismissal of the Appellant's action, but on a ground different from that relied upon by the Tribal Court.

In the requested additional briefing, Appellee continued to argue extensively that in this matter the CBC was protected by sovereign immunity and that the waivers of immunity contained in the Colville Civil Rights Act, CTC 1-5-1 to 1-5-8, did not, for several reasons, apply to the claims asserted by Appellant in the Amended Complaint. In footnote number 18 to its brief, the Appellee continued to raise the defense that Appellant's Complaint should not proceed because the claims raise a "political question."

In the "reply Brief" of Appellant, arguments regarding the general scope of Colville Tribal sovereign immunity and waivers contained in the Colville Civil Rights were presented.

STANDARD OF REVIEW

In this Appeal we are not asked to review the factual basis for the expulsion of Appellant from his seat on the CBC, but rather whether his law suit may go forward in the Tribal Court after being dismissed in total by that Court on the ground that the CBC is protected by sovereign immunity. This is an issue of law. Issues of law are reviewed de novo. *Confederated Tribes v Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032 (1995); *Pouley v Colville Tribes*, 4 CCAR 38, 2 CTCR 39, 25 ILR 6024 (1997).

SEPARATION OF POWERS

In *CCT v Meusy*, 10 CCAR62, 5 CTCR 39 (Colville Ct. App. 2011) the Court found that an amendment to the Tribes' Constitution and Bylaws (Amendment X, 1991), now Article VIII of the Constitution, by specifically establishing the tribal judiciary as an independent branch of Colville government, revised the structure of tribal government from one in which all governmental authority, executive, legislative, and judicial, resided in the Colville Business Council, to one in which issues like those presented by this appeal must be considered in light of that doctrine of separation of powers. In *Meusy*, the Court found that separation of powers now is rooted not only in written law, Amendment X, establishing Article XIII of the Constitution, but in the customs and traditions of the various peoples who make up the Colville confederacy.

In a more recent decision, *Swan v Colville Business Council*, 11 CCAR83, 6 CTCR 20 (Colville Ct. App. 2014), the Court, citing *Meusy*, again relied on the separation of powers doctrine, and its roots in the culture and traditions of the Tribes, to find that the Courts were

not empowered to review the actions of a co-equal branch of government, the Colville Business Council, when it acts in duly convened session, to decide how tribal assets are to be utilized.

CONSITUTION AND LAW

Therefore, we must consider in the specific circumstances of this Appeal, wherein the actions of the Colville Business Council in expelling one of its own members are called into question, whether the Colville judiciary has a role in reviewing the actions of its sister branch of government. To do so we must first look to the Constitution and laws of the Tribes to determine whether such a judicial review is permissible.

The section of the Constitution establishing the Judiciary, Article XIII, makes no reference to removal of a duly elected member of the Colville Business Council. Section 1 of that Article does impose a duty on the Courts to "interpret and enforce the laws of the… Tribes… as adopted by the governing body of the Tribes." However, several other provisions of the Constitution do specifically deal with removal or discipline of members of the Colville Business Council.

> Council Sole Judge of Members: The Business Council of the Confederated Tribes of the Colville Reservation shall be the sole judge of the qualifications of its members." Article II, Sec. 7.
>
> Regulations to Fill Vacated Position: If a councilman… shall… be removed… from office… the Business Council shall declare the position vacant and appoint a member from the district affected to fill the unexpired term." Article IV, Sec. 1.
>
> "Expulsion of Councilman: The Business Council may by majority vote expel any member for neglect of duty or gross misconduct. Before any vote for expulsion is taken in the matter, such member… shall be given a written statement of the charges against him at least five (5) days before the meeting of the Business Council before which he is to appear, and he shall be given an opportunity to answer any and all charges at the designated Council meeting. The decisions of the Business Council shall be final." Article IV, Sec. 2.

To carry out its constitutional responsibilities under Article IV, Sec. 2, to review and resolve allegations regarding misfeasance or malfeasance committed by members of the Colville Business Council, Chapter 1-8 of the Colville Tribal Law and Order Code was adopted. CTC 1-8-2. This Chapter, entitled "Council's Code of Professional Responsibility" includes

CTC 1-8-1 through 1-8-36 and includes "Conduct of Discussion and Debate in Committee and Full Sessions." Resolution 1987-176 (April 19, 1987).

These provisions include comprehensive definitions, CTC 1-8-3; creation of a special committee of the Colville Business Council (Rules) to review the behavior of members of the Council, CTC 1-8-5; granting powers to the Rules Committee to review and investigate the behavior of members of the Council, CTC 1-8-8(a) through (i); setting standards for behavior of members of the Council, CTC 1-8-20(a) through (e); setting rules for filing complaints and conducting hearings regarding such complaints against members of the Council, CTC 1-8-30(a) through (m); setting a process for conducting Colville Business Council meetings and votes regarding the expulsion of a member from the Council, CTC 1-8-33. In addition, the special section governing debate in Council sessions includes sections 2(d) and (e), which provide for expulsion of Council members pursuant to provisions 1-8-20(d)(2) and Article II, Sec. 7, of the Constitution.

These comprehensive provisions, which all predate the adoption of Amendment X establishing the Colville judiciary as a separate branch of tribal government, rely solely on actions and internal agencies of the Colville Business Council to deal with the behavior and discipline, including expulsion, of members of the Council. It is notable that only one very limited section of this process provides any authority to the Colville courts. CTC 18-30(i). (At the request of the Rules Committee of the CBC, the Courts may enforce a CBC subpoena by contempt.)

In exercising its constitutional authority to "determine the scope of the jurisdiction" of the Courts, Article VIII, Sec. 1, the Colville Business Council, has restrained the Courts from ordering the Colville Business Council to make personnel decisions other than those permitted under the applicable personnel policy. CTC 1-2-106(b).

In reviewing the language of the Constitution of the Tribes, the relevant precedent in Colville Tribal law, and the relevant provisions of the Colville Tribal Code, we find that, under the specific facts and circumstances of this action by the CBC to investigate and determine alleged ethical lapses by one of its members, jurisdiction lies exclusively within the constitutional and statutory powers and authority of the CBC itself. Where the language of the Constitution provides for the CBC to be the sole judge of the qualifications of its own members, sets out a process for the CBC itself to hear and decide questions involving the behavior of its own members, and states that decisions of the CBC in such matters shall be final, it is important for the Courts to respect the separation of governmental powers that the Constitution, through the provisions of Amendment X, now provides.

FUTURE ELIGIBILITY

Appellant complained regarding the effect of his expulsion from the Colville Business Council on his future eligibility to become a candidate for the Council under CTC 1-8-3(e). Appellant was, at that time of filing the complaint, not attempting to become a candidate for a future Council position. As a result, issues raised regarding the effect of CTC 1-8-3(e) are not ripe for review by the Courts.

CONCLUSION

The dismissal by the Tribal Court of this action is affirmed upon the grounds set out in this Opinion.

Mariah GALLAHER, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP18-005, 7 CTCR 23

14 CCAR 11

[J. Manon, Attorney, for the Appellant.
W. Meyring, Office of Prosecuting Attorney, for the Appellee.
Trial Court Case No. CR-2017-40039]

Decided November 9, 2018.
Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Michael Taylor

Taylor, J.

FACTS

Appellant was charged and went to trial on three counts of prohibited acts – one count of possession of methamphetamine and two counts of possession of drug paraphernalia. The charges were the result of two separate incidents which Appellant's location and person were searched.

The Colville Tribal Office of Public Defense was appointed to represent the Appellant. Appellant was tried by a jury and convicted on all three counts. Prior to trial Appellant, for various reasons, was incarcerated for a total of eighty days. Appellant was sentenced to jail for the time already served and a year probation with one year of jail time suspended on

compliance with probation conditions set by the Court.

Prior to trial, defense counsel filed a petition for a writ of *Habeas Corpus* and an interlocutory appeal and motions attempting, on several grounds, to obtain dismissal of all the charges against Appellant. The Court denied all the motions and the Appeal was dismissed by agreement. Shortly before sentencing, the prosecution informed the Court that prior to trial the public defender representing Appellant had been employed as an associate judge of the Colville Tribal Court. During a term as associate judge, defense counsel presided over Appellant's case, reviewing the complaint and issuing a summons. After being informed of this circumstance, the Trial Court made no inquiry into the effect of a conflict, granted the Prosecution motion to disqualify defense, and submitted the sentencing order to defense counsel for signature.

Shortly thereafter new counsel was appointed for Appellant who filed this Appeal presenting the following grounds for reversing the convictions and/or requesting a new trial.

1. The Trial Court erred by failing to grant Appellant's motion for judgment of acquittal (or directed verdict) challenging the definition of the items seized from on or near Appellant as drug paraphernalia and holding that the methamphetamine found in the home in which Appellant was found as a guest was in her actual or constructive possession.
2. The appointed defense counsel was ineffective and Appellant was prejudiced.
3. Appellant was denied her right to be represented by conflict free defense counsel under the Colville Civil Rights Act, CTC § 1-5 and the Indian Civil Rights Act § 25 U.S.C. 1302 because defense counsel acted in this case as both trial judge and defense counsel without the informed consent of Appellant in violation of Washington Rules of Professional Conduct 1.12.

STANDARD OF REVIEW

Application of the Rules of Professional Conduct is a question of law. Questions of law are reviewed *de novo*. *CCT v. Naff*, 2 CTCR 08, 2 CCAR 50 (1995).

HOLDING

We find that the argument regarding conflicted counsel presented by Appellant has merit and is sufficient for us to reverse the conviction of Appellant and return this matter to the Trial Court for a new trial. In doing so we are well apprised of the reluctance of this Court to interfere with the deliberations of a jury. However, in circumstances like this one where the law and the rights of a defendant have not been properly protected, we find it necessary to do so.

Conflicted Defense Counsel

It is uncontested that defense counsel in this case acted both as the trial judge and defense counsel. The issue is whether the circumstances in this case require reversal of the convictions, or allow them to stand. We recite a list of potential reasons for each direction.

1. Circumstances Allowing the Convictions to Stand

a. It is argued that the Colville Tribes has no rule prohibiting the trial judge in a criminal case from becoming a defense counsel in the same case.

b. It is argued that defense counsel in this case acted diligently to provide a defense to Appellant.

c. It is argued that evidence of an actual conflict must be provided.

d. It is argued that Appellant cannot provide evidence of prejudice to her by the judge/counsel circumstance.

2. Circumstances Requiring Reversal of the Convictions

a. It is argued that Washington and all neighboring states have Rules of Professional Conduct (RPC) that specifically prohibit the judge/counsel in the same case arrangement[2].

b. It is argued that where the Tribes have no law on an issue, state law can be looked to for resolution of the issue.

c. It is argued that the Colville Tribal Civil Rights Act provides for the right to counsel at the expense of a defendant – as does the Indian Civil Rights Act. Both are applied to actions in the Colville courts. *Stoneroad-Wolf v. CCT*, 4 CTCR 32, 8 CCAR 83 (2006). This right to counsel requires an unconflicted counsel and tribal case law has interpreted due process protections consistent with state/federal interpretations. *Davisson v. CCT*, 6 CTCCR 04, 11 CCAR 13 (2012).

d. It is argued that the judge/counsel circumstance is construed as an actual conflict and prejudice is presumed and does not have to be proved.

The circumstance that occurred in this case, with the trial judge moving from the bench to the defense counsel chair in the same case, is considered so odious to the concept of fairness and due process of law, to which every criminal defendant is entitled; that every state supreme court is our region has adopted a stringent rule against it. Criminal defendants in the Colville courts are entitled to protections of their rights to fairness, equal protection, and due process as strong, if not stronger, than in the state and federal systems. *Davis v. CCT*, 6 CTCR 04, 11

[2] See: Wash. RPC 1.12; Idaho RPC 1.12; Ore. RPC 1.12; California until recently had no rule against the judge/counsel arrangement. However, California Supreme Court recently adopted a prohibition. Cal. RPC 1.12.

CCAR 13 (2012).

Even the appearance of bias or unfairness is reason to return a decision to the Trial Court for rehearing. *Mueri v. Carden*, 6 CTCR 17, 11 CCAR 75 (2014).

The presumptively prejudicial standard in this circumstance requires us to return this matter to the Trial Court for proceedings consistent with this opinion[3]

Under most circumstances allegations of conflicted or ineffective counsel require criminal appellants to show actual prejudice in order to obtain relief from an appellant panel. *State v. Johnson*, 143 Wn. App. 2, 177 P.3rd 1127 (Wn. App. 2007). Thus, for example, where trial counsel fails to object to admission of evidence or a specific jury instruction there is a presumption that the omission is a trial tactic and does not show prejudice or incompetence. Prejudice, however, can be shown where trial counsel failed to provide a jury instruction to which a defendant is clearly entitled. The Supreme Court of Washington has followed the Supreme Court of the United States in holding that only where an actual conflict exists for defense counsel will conflict or prejudice be presumed and a new trial with unconflicted counsel be required. *In Re Davis*, 152 Wash.2d 647, 673-674, 101 P.3d 1 (2004); *State v. Johnson*, 143 Wn. App. 1 (2007); *State v. Dhaliwal*, 113 Wash. App. 226, 53 P.3d 65 (2002).

Here, in the preliminary stages of this case, the individual who became defense counsel was a full time, associate trial judge for the Colville Tribal Court. In that judicial capacity the defense counsel was assigned and managed this case. Defense counsel in this case is an active member of the bar of Washington State and, therefore, bound by the Rules of Professional Conduct for the Washington Bar, including RPC 1.12, which specifically prohibits any bar member, and any members of the law firm or legal association of which they are a member, from acting to represent any criminal defendant whose case that bar member dealt with in any judicial capacity.

Under these particular circumstances we find that an actual conflict existed and conflicted counsel and prejudice to Appellant are to be presumed. The Appellant's right to unconflicted counsel under the Tribal and federal civil rights acts were compromised in this case.

The Colville judiciary has never adopted rules of professional conduct for spokespersons (a/k/a legal ethics), however, the Colville Tribal Code at CTC § 1-2-11 allows this Court to look to state common law when there exists a circumstance where tribal law is lacking regarding a subject this Court is obligated to determine. We have set out in this

[3] Rule 1.12, prohibiting counsel from representing a client in a case wherein counsel, while acting as a judge or other judicial officer has presided over that very same case, is a part of the Model of Rules of Professional Conduct (2016), published by the American bar Association. These rules have been adopted by the Supreme Courts of forty-eight states, Puerto Rico, the District of Columbia, Guam, the Northern Mariana Islands, and the Virgin Islands.

Opinion rules of professional conduct for state bar members which have been adopted by the Supreme Courts of more than forty-eight states. In each instance those rules strictly prohibit a bar member, and his or her associates in a law firm or legal organization, from representing a defendant when the counsel has dealt with the defendant's case as a judge or judicial officer.

Moreover, the Washington State Bar and the Washington State Supreme Court have both interpreted the RPC's of Washington State to apply to the activities of Washington bar members when the activities take place in the tribal courts. We return this matter to the Colville Tribal Trial Court for proceedings consistent with this opinion.

David A. LEACH, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP17-004, 7 CTCR 25

14 CCAR 15

[Appellant appeared through counsel, Richard A. Lee, Office of Public Defender.
Appellee appeared through counsel, Sabrina Fenton, Office of Prosecuting Attorney.
Trial Court No. CR-2017-40028]

Decision November 27, 2018

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

OPINION ORDER AFFIRMING and REMANDING

DUPRIS, CJ

SUMMARY

Appellant was charged with Battery, and found guilty by a jury on April 20, 2017. The jurors were given the standard instructions, and asked the standard questions on voir dire. On May 5, 2017 Appellant filed a request for a new trial, alleging one of the jurors had stated on April 4, 2017, to another person that she didn't want to go to jury duty and that she would find anyone guilty. This was sworn to in an affidavit by a person not involved in the case. The affiant further swore she knew the juror knew one of the witnesses. Appellant argued in his motion for a new trial that the juror committed juror misconduct for not disclosing she knew the witness, and for failing to disclose she was already predisposed to find the defendant guilty.

The trial court denied the motion for a new trial, holding Appellant/defendant did not meet his burden of proof regarding juror misconduct. Appellant timely appealed this ruling.

ISSUE

Did the Trial Court err in not granting a motion for a new trial based on allegations of juror misconduct?

STANDARD OF REVIEW

We are asked to review a legal issue. We review such issues *de novo*. *Naff v. Colville Confederated Tribes,* 2 CCAR 50, 2 CTCR 08, 22 Ind.Lw.Rptr. 6032 (1995).

DISCUSSION

Based on the reasoning set out below, we affirm the Trial Court and remand.

We have discussed the standards to use when assessing juror misconduct in *Tonasket v. CCT*, 7 CCAR 40 (2004), drawing on FRE 606(b). As set out in this federal rule of evidence, we found the public interests of protecting the sanctity of the jury discussion paramount to the interests of justice, and established that the limiting exception to this rule is if it can be shown by substantial evidence there is juror incompetency because of misconduct.[4]

In *Tonasket* we found that Appellant did not meet his burden of showing substantial evidence of juror misconduct when his mother stated she had seen a juror sleeping during closing arguments. The circumstances here are similar in that a third person is alleging knowledge of misconduct of a juror.

The juror's alleged statements were made to the third person while not under oath, and before the jury trial even commenced. At the trial the juror answered questions regarding bias and impartiality under oath before a judge. A hearsay affidavit of a non-party, non-participant does not constitute "substantial" evidence of the juror's misconduct.

Appellant argues if he had known of the juror's alleged statement that she was angry for being called as a juror and would find anyone one guilty, this would be sufficient grounds to challenge the juror for cause and have the juror dismissed from the jury panel. Appellant did have an opportunity to examine all the potential juror's, under oath, and could have established any biases or prejudices at that time. Appellant has not shown

---

[4]. "One recognized exception to the prohibitions of FRE 606(b) is '...to retain the common-law exception allowing post-verdict inquiry of juror incompetence in cases of substantial if not wholly conclusive evidence of incompetency.' [citations omitted]... We adopt this standard when inquiring into juror incompetence, finding the public policy considerations of FRE 606(b) persuasive." *Id.* at 43.

us substantial evidence that the juror's alleged out-of-court statement about her displeasure in being called for jury duty prevails over her statements made under oath.

Appellant also alleges juror misconduct, based on the allegations in the third party's affidavit that the juror did in fact know one of the witnesses and failed to disclose it when asked under oath. Apparently the witness was called on behalf of the defendant/Appellant. It is not clear how this failure to disclose had an affect on the verdict. Appellant has the burden to prove, or at the least raise enough facts to review, how the juror's acquaintance with his witness evinced a bias or prejudice against Appellant. Mere statements that they knew each other is not substantial evidence of a tainted juror.

The Reservation is a small community, and it is not uncommon for those called for jury duty to know defendants, witnesses, and friends and relatives of defendants and witnesses. Such knowledge, by itself, may necessitate a closer review during the *voir dire* process, but is not necessarily an automatic reason to disqualify a juror. It is incumbent on the attorneys in the case to be fully prepared to conduct the *voir dire* questions to ensure an impartial jury panel.

There is nothing in the record to indicate Appellant did not receive a fair and impartial trial. Appellant has not met his burden to show otherwise.

We hold the trial court did not err in not granting a new trial, and AFFIRM and REMAND for actions consistent with our holdings.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Robert TONASKET, Appellee.

Case No. AP11-005, 7 CTCR 26

14 CCAR 18

[Melissa Simonsen, Office of the Prosecuting Attorney, for the Appellant.
Stephen Graham, Attorney, for the Appellee.
Trial Court Case No. CR-2009-32036]

Oral Arguments held September 16, 2011.

Before Chief Justice Anita Dupris, Justice Gary F. Bass, and Justice Earl L. McGeoghegan[5]

Bass, J.

SUMMARY

The Appellee, Robert Tonasket, was charged with Actual Physical Control (Physical Control) of a Motor Vehicle while under the influence of Intoxicating Liquor or Drugs (Count 1) and Prohibited Acts - Possession (Count 2). During the resulting trial, the arresting officer testified as follows: that an oncoming vehicle's high beams flashed and the driver waived at the police car. The officer stopped and the driver of the vehicle that stopped the officer said that she observed a silver vehicle on the Manilla Creek Road stopped blocking traffic. She gave the officer the license number of the vehicle. She said the vehicle had a male driver asleep behind the wheel. She said that she knocked on the door, observed the male wipe his face and then look at her and leave. She said that the vehicle was 2½ miles up the Manilla Creek Road. The Officer apparently did not obtain any information identifying the person or automobile that the person was driving.

The officer went to the scene and found the vehicle described by the witness. The Appellee was sitting in the driver's seat of the vehicle, with the motor running while blocking the lane of traffic and facing the wrong direction. Appellee was passed out. There was a strong odor of alcohol coming from the vehicle, an open bottle of beer and several others on the floor as well as another box of six cans. The officer testified that the Appellee was passed out and he was unable to wake him until he shook him. The Appellee had bloodshot, glassy eyes, with his hand on the steering wheel and he moved the gear selector back into gear from park. When the Appellee exited the vehicle he was swaying and stumbled on his feet. Marijuana was found in the back seat.

Appellee moved in limine to limit the testimony of the officer as to what the witness told him based on the right of confrontation of the

[5] Justice McGeoghegan passed away in December 2011. He actively participated in deliberations and his contributions are included in the final opinion.

person who gave the officer the information that lead him to the scene. The trial court ruled that the officer could testify as to what the witness told him.

The judge conducting the jury trial was Judge Cleveland. A motion for new trial was made by the Appellee after the jury found him guilty of Physical Control and not guilty of Possession. After several resettings of the time for hearing of the motion, because of docket conflicts, Judge Flamand signed the last order setting the time for hearing. No objection was made to Judge Flamand's signing the order. Judge Flamand then heard the motion and granted the motion for new trial based on violation of right to confrontation by allowing the officer to testify to what the witness told him. No objection was made to Judge Flamand hearing the motion.

Appellant, Colville Confederated Tribes, timely appealed the Order for New Trial, with the specific ruling appealed being: Judge Flamand should not have heard the motion for new trial as she was not the trial judge; and that there was no violation of the confrontation clause in allowing the officer to testify what the witness told him when she waved him down. After review of the record and hearing oral arguments, the Court of Appeals affirms the Trial Court and remands.

ISSUES

1. Was there a violation of the confrontation clause?

2. Is the issue of Judge Flamand's hearing the motion for new trial moot?

STANDARD OF REVIEW

Since both the issues are issues of law, the standard of review is *de novo*. *CCT v. Naff,* 2 CCAR 50, 2 CTCR 08, 22 Ind.Lw.Rptr. 6032 (1995).

DISCUSSION

1. Was there a violation of the confrontation clause?

The analysis in this case starts with the decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), a United States Supreme Court (US Court) decision that changed the law in cases involving confrontation of witnesses. The US Court had previously ruled in *Ohio v. Roberts,* 488 U.S. 56 (1980) that the test of whether hearsay testimony was admissible in confrontation cases was whether it was reliable. The new test articulated in *Crawford*, *supra*, was whether the hearsay was testimonial. If it was testimonial, it is not admissible; and if it was not testimonial, its admission will rely on the hearsay rule and its exceptions. The court ruled that at a minimum the term testimonial covers prior testimony at a preliminary hearing, before a grand jury, at a former trial, and police interrogations. The witness testimony in the *Crawford* case, *supra,* was testimonial because it was a police interrogation. The court left a more complete definition of what would be testimonial for later cases.

In *Ohio v. Clark*, 135 S.Ct. 2173 (2015), the Court further defined the meaning of testimonial statements by a non-testifying witness: "A statement qualifies as testimonial if the 'primary purpose' of the conversation to 'creat[e] an out-of-court substitute for trial testimony.' In making that

'primary purpose' determination, courts must consider 'all of the relevant circumstances.'"

The witness testimony in this case was not prior testimony at a preliminary hearing, before a grand jury, or at a former trial. It was not a police interrogation, but just the witness voluntarily giving the police officer information to alert the officer to a potentially serious situation.

As is indicated in the *Crawford* decision, *supra*, whether the witness testimony in this case if admissible depends on the hearsay rule and its exceptions. The Federal Rules of Evidence were adopted by this Court in *Desautel v. CCT*, 13 CCAR 03 (2016). FRE 802 **Hearsay Rule:** "Hearsay is not admissible except as provided by these rules or by the rules prescribed by the Supreme Court pusuant to statutory authority or by Act of Congress." FRE 801 **(C) Hearsay:** "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The statement of the witness to the officer is a statement other than one made by the officer testifying at the trial, and thus hearsay.

The Appellant asserted at the trial when the issue of confrontation arose, that the statement of the witness was only for the purpose of probable cause. Probable cause is not an issue for the jury to determine as it is an issue of law. The trial judge rules on issues of law, the jury decides on issues of fact. The only use of the witness' statement to the police officer at that point would have been to prove the truth of the matters asserted in the statement, thus making it a hearsay statement under the rule.

None of the exceptions to the hearsay rule which are set forth in the previously mentioned FRE's are applicable to the witness' statement to the officer. Therefore the statements are inadmissible, except that there is another FRE applicable to this case and that is Rule 52. **Harmless and Plain Error: (a) Harmless Error.** "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

State of Washington v. Kendra Lynn Watt, 160 Wash.2d 626 (2007) was a case involving right of confrontation of a witness. The court ruled that a constitutional error was harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error, citing *Nedder v. United States*, 527 U.S. 1 (1999). This Court was unable to find any similar cases in any of the Tribal Court decisions published in VersusLaw. Our Court in *Zacherle v. CCT*, 9 CCA 10 (2007) adopted the harmless error concept, although that case did not involve the confrontation clause issue.

This Court adopts the rule that an error allowing hearsay testimony is harmless if the court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.

The evidence the officer found when he arrived at the scene would have convinced a jury beyond a resonable doubt of Appellee being in physical control of a vehicle therefore the allowance of the testimony of the witness is harmless error.

2. Is the issue of Judge Flamand's hearing the motion for new trial moot?

This Court's ruling on the confrontation issue renders the issue of who heard the motion for new trial moot.

CONCLUSION

Based on the foregoing, the Court finds that the testimony of the police officer regarding the statement of the witness who gave him information about a potential violation was harmless error and did not violate the confrontation clause. The decision to grant a new trial is moot.

It is ORDERED that the decision of the Trial Court is reversed and this matter is remanded to the Trial Court for action consistent with this decision.

COLVILLE CONFEDERATED TRIBES, Appellant,

vs.

Sundown CAMPBELL, Appellee.

Case No. AP17-008, 7 CTCR 27

14 CCAR 22

[Wes Meyring, Office of the Prosecuting Attorney, for Appellant.
Jonnie Bray, Office of Public Defender, for Appellee.
Trial Court Case No. CR-2016-39162]

Decision December 21, 218

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

Nelson, J

Sundown Campbell was convicted of Disobeying a Lawful Court Order - Domestic Violence. The Domestic Violence Code provides that cases involving domestic violence are subject to enhanced sentencing upon conviction. Prior to sentencing, Ms. Campbell moved for a Judgment Notwithstanding the Verdict to dismiss the enhanced sentence which the jury determined was mandated by law in accordance with the jury instruction it received. The Court granted the motion on the grounds that an enhanced sentence is mandated only for those defendants who were convicted of violation of a Protection Order. Campbell was convicted of violating a condition of release and not one issued under an Order of Protection. We affirm.

STANDARD OF REVIEW

The material facts of these cases are not disputed for the purpose of this appeal. The issues are entirely those of law. Accordingly, the standard of review is *de novo*. *Colville Confederated Tribes v. Naff,* 2 CCAR 50, 2 CTCR 08, 22 Ind.Lw.Rptr 6032 (1995), *Wiley, et al. v. Colville Confederated Tribes,* 2 CCAR 60, 2 CTCR 09, 22 Ind.Lw.Rptr 6059 (1995).

FACTS

This appeal involves facts from two trial court cases: CR2015-38232 (the 2015 case) and CR2016-39162 (the 2016 case).

Sundown Campbell was charged in the 2015 case with Battery, CTLOC § 3-1-4, Malicious Mischief, CTLOC § 3-1-5, and Battery (Domestic Violence) CTLOC §§ 3-1-4 and 5-5-54(b)(3). During the pendency of the 2015 case she violated her conditions of release. She allegedly violated that condition without any action being taken by the Prosecutor's Office in that case. She was acquitted of the first two counts and the third was dismissed upon motion by the prosecutor.

In 2016, Ms. Campbell was charged in a new complaint with Battery (Domestic Violence), CTLOC §§ 3-1-4 and 5-5-54(b)(3) against the same alleged victim. In addition, a second charge was added: Disobedience of a Lawful Court Order (Domestic Violence), CTLOC §§ 3-1-233, 3-1-123, 5-5-101(b), and 5-5-54(b)(2). The second charge emanated from the alleged violation of release conditions in the 2015 case, which appears not to have been addressed by that court.

Ms. Campbell was found Not Guilty of the Battery (Domestic Violence) and Guilty of Disobedience of a Lawful Court Order (Domestic Violence) by a jury.

Conviction of an offence involving domestic violence mandates an enhanced sentence of fifteen days. CTLOC § 5-5-55. Ms. Campbell subsequently moved for a Judgment Notwithstanding the Verdict asking the Trial Court to dismiss the domestic violence enhancement penalty on the grounds that the enhancement penalty is applicable only to those cases in which a violation of an Order of Protection occurred. The Trial Court agreed and dismissed the enhancement portion of the sentence. The Tribes appealed.

ISSUE

Whether violation of a release condition of "no contact" with an alleged victim is subject to the domestic violence sentencing enhancement when the "no contact" order was issued under a general condition of release and not included in an Order of Protection.

DISCUSSION

The Tribes set forth three arguments in their brief: 1) The evidence was sufficient to convict and the Trial Court should not have set aside the verdict of the jury; 2) Any error in jury instruction No. 9 was harmless; and 3) The Appellee waived the right to appeal the jury instruction by not objecting to it until after the trial was completed.

The Evidence Was Sufficient to Convict and the Trial Court Should Not Have Set Aside the Verdict of the Jury: The Tribes argue that violation of a condition of release in a criminal proceeding involving domestic violence automatically initiates an enhanced penalty upon conviction. This is an overly-broad interpretation of the Domestic Violence Code.

"We are mandated to read the Code as a whole and to give it reasonable interpretation; ..." *Best v. Colville Confederated Tribes,* 12 CCAR 01, 6 CTCR 23, (2014). Stated another way, we look at a statute's language and give its words plain meaning. *Green v. Green*, 10 CCAR 57, 5 CTCR 37, 38 Ind.Lw.Rptr 6049 (2011).

The plain meaning of the enhanced penalty provision mandated in domestic violence cases is that the enhanced penalty is initiated only by a violation of an Order of Protection. CTLOC § 5-5-55(d). No Order of Protection was issued in either of the previously mentioned cases, which both involved allegations of domestic violence.

The Tribes are trying to bootstrap the enhanced penalties for violating an Order of Protection onto general conditions of release which are issued in almost every, if not all, criminal matters. Conditions of Release are imposed by a trial court during arraignment. The conditions are set to maintain the status quo regarding alleged victims and witnesses and to protect property. Should a condition of release be violated during the pendency of the case, the prosecutor usually files with the Court a Motion to Show Cause why the defendant should not be held in contempt of court for violating the release order.

This was done in the 2015 case when Ms. Campbell allegedly violated a condition of release prohibiting contact with the alleged victim. A violation of these conditions led to the complaint for Disobedience of a Lawful Court Order being filed in the 2016 case together with a new complaint for Battery (Domestic Violence) which alleged the same victim as named in the 2015 complaint. As noted, the jury found Ms. Campbell Not Guilty of Battery. She was found Guilty of Disobedience of a Lawful Court Order.

The Tribes indicated in their pleadings that they sought to impose the enhanced penalty mandated for violation of an order associated with conviction of crime involving domestic violence. Campbell opposed this by arguing the conviction for Disobeying a Lawful Court Order of the court was based upon a violation of a general condition of release in a criminal case and not upon a violation of an Order of Protection. Thus, the enhanced sentencing provision should not apply the. The Trial Court agreed.

On appeal, the Tribes filed supplementary authority showing the Trial Court adopted an enhanced sentence for Disobedience of a Lawful Court Order in a trial court case in which the defendant had violated a Protection Order. See *Colville Confederated Tribes v. Seymour,* Case No. CR2012-35167, Colville Tribal Court. Although a Tribal Court decision is not binding on this court, we can distinguish *Seymour* from this case in that the complaint in this case arose from an alleged violation of release conditions and not from an Order of Protection. The distinction is significant.

Any Error in Jury Instruction No. 9 Was Harmless: Jury Instruction No. 9 sets forth the definition of domestic violence and is patterned upon CTLOC § 5-5-3(d). The definition of domestic violence is not relevant to the issues raised in this appeal.

The Appellee Waived the Right to Appeal the Jury Instruction by Not Objecting to it until after the Trial Was Completed: We held in *Condon v. Colville Confederated Tribes,* 3 CCAR 48, 2 CTCR 20, 23 Ind.Lw.Rptr 6127 (1996), that "failure to object to a jury instruction constitutes a waiver of the right to later challenge the instruction." This remains the general law. However, when a jury instruction contains a misstatement of the law, the instruction is presumed prejudicial unless the prosecution can show the misstatement is harmless. *Cox v. Spangler*, 141 Wn.2d 431, 5 P.3d 1265 (2000).

In the matter before us the form provided the jury for the Special Verdict (as to Count II) stated:

> We, the jury in the above-entitled action, find that the plaintiff (has) (has not) proved beyond a reasonable doubt

that the crime of Disobedience of a Lawful Court Order alleged in Count II involved domestic violence as describe

in Jury Instruction ___.

This instruction is intended to advise the court whether an enhanced sentence should be imposed upon a defendant who has been involved in a crime involving domestic violence. In this case, the instruction is insufficient. It does not include a reference that the Disobedience of a Lawful Court Order must be in conjunction with violating an Order of Protection and not a condition of release routinely issued in all criminal cases.

The Tribes have not proven this omission to be harmless. Accordingly, we hold the failure to object to this instruction is not determinative in this instance.

CONCLUSION

We affirm the order of the Trial Court and remand this matter to it for action consistent with this Opinion. It is SO ORDERED.

Sonya WHALAWITSA (Marconi), Appellant

vs.

Linda & Frank KAUWELOA, and Jason KAUWELOA, Appellees.

Case No. AP17-007, 7 CTCR 28

14 CCAR 27

[Leone Reinbold, Attorney, appeared for Appellant.
Mark C. Carroll, attorney, appeared for Appellees.
Trial Court Case No. CV-CU-2007-27370]

Decided December 7, 2018.

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

Dupris, CJ

SUMMARY OF TRIAL COURT PROCEEDINGS

A permanent custody order entered on record on July 8, 2009 and signed August 9, 2009 granted custody of the minor child, Kaulika Kauweloa (KK) to his mother, Sonya Whalawitsa (now Marconi; SWM) against the father, Jason Kauweloa (JK). On March 7, 2016 the paternal grandmother of KK, Linda Kauweloa (LK), and KK's father, JK, filed an *ex parte* request for a protection order and temporary orders against Appellant/mother, SWM. After the hearing on the request on March 28, 2018, LK and her husband, Frank Kauweloa (FK), filed a Third Party Petition for Custody of KK. The Court denied the *ex parte* order and set the matter for a hearing on March 28, 2016. On March 14, 2016, LK's motion to recuse Judge Nomee was denied. On March 24, 2016 Chief Judge Stuart assigned the case to Pro-Tem Judge Dana Kelley.

The order setting the hearing on March 28th states: "The Court has set a hearing for March 28, 2016 @ 1:00 pm on the issues of visitations. The court will include Show Cause in regards to Ex Parte Motion filed by Respondent on 3-7-16 and Motion to intervene by Linda Kauweloa on this same day of hearing."

The Court entered a temporary custody order on March 28, 2016, giving KK to his paternal grandmother. The Judge took judicial notice of another case regarding KK's brother JM, after apparently talking to JM's Guardian Ad Litem *ex parte* regarding domestic violence allegations in JM's case. The conversation with the GAL appears to be initiated by the GAL. The GAL was appointed to KK's case at this time, without notice to any of the parties. The Court based its finding of temporary custody on JM's case, and on "alleged domestic violence" in

Appellant's home, stating KK's best interests needed to be protected.

On April 25, 2016 LK filed an amended third party custody petition,[6] which is the subject of the appeal herein. A trial was held on the petition June 30, 2017, July 26, and July 28, 2017. On August 31, 2017 the Court granted the third party custody petition, placing KK with his paternal grandmother, LK, and ordering counseling, evaluations, and structured visitation. The Court stated in its order: "This case shall be reviewed at the end of the school year to see if sufficient progress has been made to look at placing the child back with the mother."

This Appeal ensued. The issues set out by Appellant are:

1. Her due process rights were violated by the Court relying on findings from a preliminary hearing (of March 28th) as a basis for granting the petition.
2. Best interests is not the proper standard in a third-party custody case.
3. It is an error of law to remove a child from a parent's care when finding that the parent had been a victim of domestic violence.
4. Substantial justice has not been done when the alleged DV occurred over a year before the trial and no new allegations have been made since December, 2015, and there are no allegations Appellant was at any time a perpetrator of DV.

STANDARD OF REVIEW

Appellant asks that we review for errors of law and fact. Our standard of review is *de novo*. *CCT v. Naff*, 2 CCAR 50 (1995).

DISCUSSION

A. Judicial Notice

Each notice of the hearings did have the *George v. George*[7] language, *i.e.* this is your one and only opportunity to present all your evidence, but the nature of the hearings had flaws.

For the March 28th hearing, Appellant was told the hearing would be on LK's motion for a restraining order and issues on visitations. Prior to the hearing, a different judge was appointed, and the new judge apparently heard testimony regarding temporary custody, and

---

[6] A major problem in this case is that proper procedure was not followed in the filing of the third-party petition. It shouldn't be filed under the case number for the original case, which is an action between parents. It should have been filed under a separate case number in that it has different parties. As we discuss in our opinion, a third-party petition and a modification of a custody order between two parents have different standards of review. The Trial Court needs to make sure proper procedures are followed.

[7]. *George v. George*, 1 CCAR 52 (1991) sets out the standard notice language that must be used in Notice of

took into account information from the GAL in KK's brother's case, which was not before the Court. Appellant didn't appear to get notice that these very important issues would be addressed, nor that the Court would take judicial notice of a different case involving another child. We have ruled on the standards for taking judicial notice which were not followed herein. Initially we addressed judicial notice in a criminal trial, *Louie v CCT*, 8 CCAR 49 (2006), and extended the standards to juvenile cases, *Randall et al v. CFS*, 11 CCAR 39 (2012). We now hold that we will apply the standards to all cases before us.

The standards are:

> (1) taking judicial notice in a criminal jury trial is disfavored, especially when the Court takes judicial notice of facts that would prove or disprove an element of the offense charged;
>
> (2) Courts may take judicial notice of public records... but only to prove the existence of the orders, and not the proof of the facts therein, especially when the facts are subject to dispute; and
>
> (3) when a Court is going to take judicial notice... the Judge should (a) give notice to the parties of what she is going to take judicial notice [of] so the parties may provide rebuttal evidence; (b) allow the parties to present such rebuttal evidence; and (c) instruct the jury that the judicially-noted evidence may be accepted or rejected, and given whatever weight the jury sees fit, as with other evidence. *Louie, supra*, at 56.

Further, we have adopted the Federal Rules of Evidence (FRE). *Desautel/Randall v. CCT*, 13 CCAR 3, 7. FRE 201(b) says that "'a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.'" Id at 54 (cites omitted).

The key provisions for this case are that if the judge is going to take judicial notice, first, the fact must be judicially-noticeable. Here, the facts in question are in regard to the facts found in Appellant's other case, not otherwise on the record of the instant case, *i.e*. reasons Appellant's other child was not in her custody. These alleged facts do not meet the FRE 201(b) standard. Second, Appellant was not given prior notice the facts in the other case were going

---

Hearings for custody cases.

to be raised and accepted as fact, nor was she allowed a chance to rebut the alleged facts.

We hold the trial court erred in taking judicial notice of the temporary orders that found domestic violence in the home as the reason another child wasn't in Appellant's custody. This error was repeated by the court when both Judge Kelley and Judge Jordan found the domestic violence explanation not credible. We find Appellant's due process rights were violated.

B. Standards for Third-Party Custody

KK was placed out of his mother's custody at a show cause hearing on an emergency motion for temporary orders. Although the motion for temporary orders had language about temporary custody, the Court's order setting the hearing stated it was about visitations issues, the father's *ex parte* motion and LK's motion to intervene. This hearing was before the third party custody petition was filed. A year and ½ later a three- day trial was held on the merits of the third party petition.

The applicable statute on a third party custody petition is CTC § 5-1-120, Child Custody Proceeding - Commencement - Notice - Intervention. It states, in relevant part: "A child custody proceeding is commenced in the Tribal Court...(2) By a person other than a parent, by filing a petition seeking custody of the child; but only if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian."

CTC § 5-1-128 states the Court "shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the [court] at the time of the prior decree, that a change has occurred in the circumstances of the child or his or her custodian and that the modification is necessary to serve the best interests of the child." The presumption is that the original custodian shall prevail unless it is shown either the custodian agrees to the change, or has consented to the integration of the child into another family, or that to stay with the original custodian is "detrimental to his or her physical, mental, or emotional health and harm is likely to be caused by a change of environment is outweighed by the advantage of a change to the child."

CTC § 5-1-121 Child Custody - Relevant Factors in Awarding Custody lists 6, non-exclusive, factors for the Court to consider in awarding custody. This statute does not say it only applies to custody cases between parents. In reading the statutes as a whole, we find this section would also apply to third party custody cases, specifically regarding whether the

parents are fit to be custodians. It puts "best interests" first and "traditions and customs" second in considering how the Court is to evaluate the relevant factors.

The controlling case for standards for third party custody cases is *Jerred v. Leskinen*, 12 CCAR 73 (2015). In *Jerred* her minor child was placed with Leskinen, under a temporary custody order. The original placement started out with the consent of Jerred; she tried to revoke the consent, and Leskinen brought the third party custody action to prevent the revocation of the consent placement. In *Jerred* we discussed the concepts of the fundamental rights of parents to their children, as found in federal and state courts, as well as it being a natural progression in our traditions and customs regarding child rearing. We recognized that our legislature have westernized the approach by the adoption of child custody statutes. *Id* at pp 77-79.

In *Jerred* the appellant/mother argued that "fitness of a parent" was an element to consider under the best interests test; it is required in Minor-In-Need-Of-Care cases (dependencies) and guardianship causes of action. It should be no less in third party custody cases. We agreed, finding that CTC § 5-1-121, Relevant Factors in Awarding Custody, did not exclude weighing the fitness of a parent as a relevant factor. In fact it is very relevant. *Id* at79. We held that placement preference is a rebuttable presumption in a third-party custody case for which the non-parent petitioner has the burden to overcome this presumption, recognizing the fundamental right of a parent to the custody of her child absent a specific finding that it would "cause actual detriment to the child's growth and development. (Cite omitted) *Id* at78-79.

Once a permanent custody order is entered, there is presumption it should be the final, subject to a modification only when either it is consented to or when circumstances dictate a change based on a change of circumstances that put the child in potential harm. *See* CTC § 5-1-128.

A Review of the Trial Court's Findings of Fact

We review the Court's Findings of Fact, Conclusions of Law and Order of Custody issued from the trial on August 31, 2017 for compliance with the standards set out in *Jerred*, *supra.* First, we review the first two pages of the Trial Court's Findings/Conclusions and Order to discern what the Court may have actually relied on in the evidence for her findings. The first two pages appear to set out a judicial summary of the testimony received at trial. We have consistently stated that judicial summaries of evidence in a trial are not favored in that they are

not findings of fact, and render it difficult for our Court to assess the evidence upon which findings are made. *See Zavala v. Milstead*, 10 CCAR 58 (2011), *Lezard v. DeConto*, 10 CCAR 23 (2009), and *Boozer v. Wilder*, 9 CCAR 1 (2007).

It appears the Court relied extensively on the Guardian-Ad-Litem's report (GAL) to support its findings. The record shows that the GAL interjected herself into the case, *sua sponte*, at the hearing on the temporary issues heard at the March 28th hearing.[8] The GAL report is Exhibit #15 in the Trial Court file. In *In Re the Matter of Bernard v Adolph, Fry, v. Colville Tribal Court*, 11 CCAR 90 (2014), we held that a "GAL is a friend of the Court; she is an advisor to the Court on what is in the best interests of the minor. She investigates, reports, and recommends as an objective witness." *Id* at 91.

The GAL report relies heavily on various reports of unnamed sources as well as references to some police reports she reviewed regarding allegations of domestic violence in Appellant's household. It appears the latest reference was to incidents in 2016; nothing in the report references incidents in 2017. The contemporaneous testimony of Appellant was that she and her husband were in counseling and doing better. This is not referenced in the Court Order.

The GAL report has many subjective comments on, basically, how Appellant has failed to live up to the GAL's expectations. For example, she is alleged to have made contentious remarks to the GAL about the grandparent-custodians; she has failed to have adequate contact with her child according to the GAL's assessment; and she is unwilling to have meaningful communication with the grandparents or the GAL. Finally, the GAL uses inappropriate subjective comments throughout her report. For instance, she refers to Appellant several times as being manipulative; she is often "disheartened;" and she made an accusation against the maternal grandmother that she used the minor to try to get back into good graces with Appellant. This type of language goes beyond any expectation of an objective assessment of what is in the best interests of the child. If the Court relied on the GAL's comments extraneous what went beyond what was necessary to make an objective, reasoned recommendation, it would be error. From the record we so find the Trial Court erred in this regard.

Based on the law, we review the Court's Finding of Facts in light of the applicable standards: (1) a presumption that the original custody order is final, and is only modified if (2) the child is not in the current custody of the parent by consent; or (3) the original custodian is not a fit custodian. Granting a third party custody petition necessitates (4) a review of the non-exclusive relevant factors set out in CTC § 5-1-121, as well as the burden of proof of contemporaneous unfitness of a parent as required to modify a custody order under CTC § 5-1-128.

First, the Court found that the child has not been in the custody of Appellant/mother for over a year. His removal was not voluntary, nor consented to, and Appellant has contested it throughout the term of the case. This cannot be a basis for meeting the requirements either under CTC §§

---

[8]. The GAL learned the case was proceeding in the Tribal Court, and contacted Judge Kelley *ex parte*, to let him know Appellant was involved in another custody case regarding Appellant's other son, and that the GAL was the GAL for that case. She informed the Judge that there were concerns regarding domestic violence in the household involving Viteolee Marconi, Appellant's husband. It appears the Judge took this information into consideration when entering his orders granting temporary custody to the paternal grandparents and appointing the same GAL to the instant case.

5-1-121 or 15-1-128.

The main issue under all of the tests is whether the Court found Appellant to be an unfit parent. The presumption is that the child is to remain with his custodian unless the petitioner shows, by a preponderance of the evidence, it is in the child's best interests to avoid potential harm to his physical, emotional or mental health by placing with someone else.

The Court entered findings of domestic violence: Finding # 3:"There are still concerns about DV in the mother's home"; Finding #4: "Judge Kelly [sic] made a finding that there was probable DV in the home"; and Finding #5: "Judge Kelly [sic] did not find the mother's explanation of her injuries to be credible and this Court also finds them to not be credible." It appears the Court relied on findings of a different judge, who relied on information he had from a different case, *i.e.* the custody case involving Appellant's other son, JM. There is nothing in the Findings that indicate the Court did an independent assessment of evidence regarding Judge Kelley's findings, and she let them influence her findings on the matter, to the detriment of Appellant.

This is further bolstered by the Court's Findings #7 and #8, in which the Court orders Appellant and her husband to complete the psychological evaluation ordered in the other custody case. We have held :

> "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 ...[t]he trial court must be mindful of these differences and consider only those matters before it. It is also critical that the action in which an order is entered has sufficient record of facts to support the decision and not improperly or inadvertently incorporate facts developed in another proceeding." *Finley v. Finley*, 12 CCAR 22, 25 (2015) (cites omitted).

The reliance on the allegations of domestic violence in the past, without an assessment of whether there was a present detrimental environment for the child is insufficient to overcome the presumption of maintaining the original custody order, all by itself. The fitness of the parent is not addressed in the findings of fact. The fitness of a parent in a third party custody action is a relevant factor that must be addressed by the Court. There is no indication this has been done in this case.

CONCLUSION

Based on the foregoing we find that the Trial Court committed reversible error in granting the third party petition, and we REVERSE and REMAND for a new trial.

It is so ORDERED.

Melissa LOUIS-WILLIAMS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP18-012, 7 CTCR 29

14 CCAR 35

[Mark J. Carroll, Attorney, for Appellant.
Jason D'Avignon, Office of Reservation Attorney, for Appellee.
Trial Court Case No. CV-OC-2018-41035]

Decided February 19, 2019

Before Presiding Justice Michael Taylor, Justice David C. Bonga, and Justice R. John Sloan Jr.

Taylor, J.

SUMMARY

Appellant Williams was elected to the Colville Business Council (CBC) in June of 2017 and sworn into that position in July of 2017. In the fall of 2017, an ethics complaint was filed with the Business Council against Ms. Williams alleging misuse of a tribal credit card. In December of 2017, the Business Council held a hearing regarding the use of the credit card by Ms. Williams. In January of 2018, the Business Council voted to ratify CBC Resolution 2018-54 expelling Ms. Williams from the Business Council. In the course of being separated from the CBC Ms. Williams applied for a cash payment in return for her alleged accrued and unused vacation leave of 235.19308 hours. This cash payment was denied.

In February 2018, Ms. Williams filed a civil rights complaint for injunctive and declaratory relief and damages (CTC §1-5-1, *et. seq.*) attacking her removal from the CBC and demanding payment for alleged unused vacation. CV-OC-2018-41035. Appellant alleged that the claims made were covered by applicable tribal insurance. The Appellee Tribes filed a motion to dismiss raising the defenses of un-waived sovereign immunity and non-judiciable based on separation of powers.

On June 27, 2018, this Court upheld dismissal of a complaint filed in the Tribal Court by a former member of the CBC attacking an expulsion from the CBC. In *Gabriel v. Colville Business Council*, AP18-003, 14 CCAR 05, 7 CTCR 23 (2018), this Court found such claims non-justiciable based on the language of the Constitution of the Tribes and the doctrine of separation of powers.

In July of 2018, the Tribal Court dismissed the Complaint filed by Ms. Williams based on the holding in *Gabriel v. Colville Business Council*, Ibid.

STANDARD OF REVIEW

The material facts of this case are not disputed for the purpose of this appeal. The issues are entirely those of law. Accordingly, the standard of review is *de novo*. *Colville Tribes v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 Ind.Lw.Rptr 6032 (1995), *Wiley, et al. v. Colville Confederated Tribes*, 2 CCAR 60, 2 CTCR 09, 22 Ind.Lw.Rptr 6059 (1995).

ISSUES

The Complaint in this appeal involves two separate issues. First, was Ms. Williams improperly expelled from her elected position by

action of the Colville Business Council? Second, was Ms. Williams unlawfully denied a substantial sum of money which she is owed by the Tribes representing her alleged number of hours of unused vacation leave?

DISCUSSION

The Tribal Court was correct in dismissing the portion of the Complaint which attacked Ms. Williams' expulsion from her elected position after hearing before the CBC. As we stated in *Gabriel v. Colville Business Council*, the CBC retains exclusive jurisdiction over who may maintain their position as a member of the Constitutional legislative body of the Tribes. Such questions are non-judiciable based on the doctrine of separation of powers. On this question the Tribal Court decision is upheld.

With regard the question of alleged financial compensation for unused vacation hours owed to Appellant, we return this matter to the Tribal Court for further review. Separation of powers may not be a basis for denying the justiciability of claims for money due and owing. Appellant brought her claim for compensation under provisions of the Colville Tribal Civil Rights Acts including CTC § 1-5-8. The Tribal Court in its review of this portion of Appellant's complaint should consider, among any other relevant issues raised by the parties, the meaning of CTC § 1-5-8 provisions including "Notwithstanding any other provision…"; "any claim made under this Chapter,"; and "the Tribes carries an active and enforceable policy of liability insurance…"

ORDER

The decision of the Tribal Court dismissing the portion of the Complaint attacking Appellant's expulsion from Colville Business Council is upheld. The portion of Appellant's

complaint alleging an unlawful denial of money owed for unused vacation leave is returned to the Tribal Court for proceedings consistent with this Opinion[9].

James CLEMENTS & Jason CLEMENTS, Appellants,

vs.

COLVILLE CONFEDERATED TRIBES, Appellees.

Case No. CV-OC-2018-41000, 7 CTCR 30

14 CCAR 37

[Jay Manon, Attorney, for Appellants.
Jason D'Avignon, Office of Reservation Attorney, for Appellee.
Trial Court Case No. CV-OC-2018-41009]

Decided March 19, 2019

Before Chief Justice Anita Dupris, Justice David C. Bonga, and Justice Dennis L. Nelson

Dupris, CJ

PROCEDURAL SUMMARY

On January 5, 2018 Appellee, Confederated Tribes of the Colville Reservation (CCT) filed a Civil Complaint against Appellants James Clements and Jason Clements, as well as against South Bay Excavating Company, Inc. and Liquid Networks, Inc.. Appellee alleged Appellants, in their individual and corporate capacities, committed breach of contract. Appellants herein made a limited appearance and moved to dismiss the action based on lack of subject matter and personal jurisdiction.

On May 17, 2018 the Trial Court entered an order denying Appellants' motion to dismiss, from which they timely filed an Interlocutory Appeal, alleging the issues of subject matter and personal jurisdiction involves controlling substantive issues of law which could determine a sooner termination of the litigation. Briefs were filed and we held an hearing on the request for the interlocutory appeal on December 21, 2018.

SUBJECT MATTER JURISDICTION

The subject of the lawsuit is a contract entered into by the parties[10] regarding construction services on the Colville Reservation. The damages alleged to have occurred on the Colville Reservation. The contract which is the basis of the Civil Complaint states the Colville Tribal Court has sole and exclusive jurisdiction over disputes under the contract. The Trial Court held it had subject matter jurisdiction, based on the facts stated.

---

[9] The panel has determined that this Appeal may be resolved without oral argument. Appellant attempted to file additional documents with the Court of Appeals. The documents were not derived from the Tribal Court file. The Court of Appeals did not accept or consider these documents.

[10] We refer to the parties as designated by the Complaint, and make no decision if Appellants herein are

We agree.

PERSONAL JURISDICTION

Appellants point out that the contract in question was entered into by South Bay Excavating Company, Inc. , which was later assigned to the company Liquid Networks, Inc., formed by Appellant Jason Clements. They allege they did not act as individuals; the actions were taken by the corporations.

Appellee argues because of the inherent closeness of Appellants and the corporations, the Courts should "pierce the corporate veil" and find personal jurisdiction over the individual Appellants/Respondents.

This is an interlocutory appeal. There has been no fact-finding for us to review regarding the arguments for and against personal jurisdiction. The question of piercing the corporate veil is a question of fact. As such, it is not ripe for an interlocutory appeal, it is a matter for the fact-finder at the trial level. For these reasons we dismiss without prejudice the interlocutory appeal on this issue.

We **AFFIRM** the Trial Court's decision that it has subject matter jurisdiction. We **DISMISS WITHOUT PREJUDICE** the appeal regarding personal jurisdiction and remand to the Trial Court for action consistent with this decision.

It is SO ORDERED.

---

subject to personal jurisdiction as individuals.

Patricia Davis GIBSON, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP18-011, 7 CTCR 31

14 CCAR 39

[Mark J. Carroll, Attorney, for Appellant.
Peter Eberland, Attorney, for Appellee.
Trial Court Case No. CV-OC-2016-39151]

Decided March 19, 2019

Before Presiding Justice Michael Taylor, Justice David C. Bonga, and Justice R. John Sloan Jr.

Taylor, J

SUMMARY

The "Civil Rights Act of the Confederated Tribes of Colville Reservation", Chapter 1-5 of the Colville Tribal Code (the Act), provides a method within the structure of law of the Colville Tribes to protect the civil rights of those subject to tribal jurisdiction. The rights protected by the Act are specified in CTC § 1-5-2. All court actions to protect rights set out in the Act are limited to claims for relief brought in the courts of the Colville Tribes. CTC §§ 1-5-3, 1-5-4, 1-5-5, and 1-5-8.

In order to enforce the rights set out in the Act, a complainant may select one or both of two forms of action. First, a complaint may be brought for declaratory and injunctive relief against "any executive officer or employee" of the Tribes or any employee or officer of "any governmental agency acting within the jurisdiction" of the Tribal Court. CTC § 1-5-3. For such actions the sovereign immunity of the Tribes is specifically waived by CTC § 1-5-5 in the Tribal Court for the limited purpose of granting the declaratory and injunctive relief provided for in CTC § 1-5-3. However, in CTC § 1-5-5 immunity is specifically not waived "with regard to damages, court costs, and attorney fees."

The second form of action to protect civil rights set out in CTC § 1-5-2 is established by the provisions of CTC § 1-5-8 and is the central focus of this Appeal.

Appellant, a former tribal employee, filed an action for damages against the Confederated Tribes of Colville Reservation claiming a right to sue pursuant to Colville Tribal Law and Order Code (CTLOC) § 1-5-8. In her complaint she alleged sexual harassment; discriminatory conduct; infliction of emotional distress; and violation of tribal employment policies.

In the Tribal Court and here the Tribes timely presented a number of defenses, both legal and factual. Among the defenses pleaded is the unwaived sovereign immunity of the Tribes. Sovereign immunity is an affirmative defense. *Swan v. Colville Business Council*, 11 CCAR 83, 6 CTCR 20 (2014). Affirmative defenses are generally waived if not timely pleaded. *Davidson v. Hansen*, 954 P.2nd 1327, 135 Wn.2d 112 (Wash. 1998).

In dismissing Appellant's complaint the Tribal Court found the complaint barred in total by the unwaived immunity of the Tribes. Appellant argues that CTC § 1-5-8 permits her action for money damages because that section of the Act specifically allows suit for damages against the Tribes up to a maximum amount available from the current policy of insurance

purchased by the Tribes. In the Court record is a copy of the current policy insuring the Tribes against various liabilities, which policy includes a clause prohibiting the insurer from raising the defense of sovereign immunity unless directed to do so by the Tribes. Also in the record is a letter signed by an agent of the insurer recognizing potential coverage under the policy, assuming proof, of some of Appellant's claims.

STANDARD OF REVIEW

In this Appeal we are not asked to review the factual basis of Appellant's claims of harassment and discrimination, but rather whether this suit may go forward after being dismissed in total by the Tribal Court on the ground that the Tribes and a tribal agency is protected by sovereign immunity. This is an issue of law to be reviewed *de novo. Confederated Tribes v. Naff*, 2 CCAR 50, 2 CTCR 08 (1995).

DISCUSSION

Section 1-5-8 states as follows:

Insurance

> Notwithstanding any other provision of this Chapter or the Colville Tribal Code; with respect to any claim made under this Chapter, in the Courts of the Confederated Tribes, for which the Tribes carries an active and enforceable policy of liability insurance, suit may be brought for damages up to the full available amount of the coverage provided in the insurance policy; provided, no judgment on any such claim may be for more than the amount of insurance carried by the Tribes; and further provided, any such judgment against the Tribes may only be satisfied pursuant to the provisions of the policy or policies of insurance then in effect.
>
> (Chapter 1-5 Adopted 2/4/88, Resolution 1988-76)
> (Certified 2/16/1988)

We proceed to review, as did the Tribal Court, the relevant language of Section 1-5-8. The first phrase of § 1-5-8 is "Notwithstanding any other provision of this Chapter or the Colville Tribal Code;"… "Notwithstanding" is a powerful word, meaning despite, in spite of, regardless of. For example, a judgment notwithstanding the verdict, means that the verdict of the jury was "guilty" but the judgment of the court was acquittal. The plain meaning of "Notwithstanding" is "despite" (*Merriam Webster's Collegiate Dictionary*, 10th ed. 1995); "in spite of, regardless of." (*Webster's Collegiate Thesaurus*, 1975); "irrespective of" (*Black's Law Dictionary*, current online edition).

The word "notwithstanding" recognizes the existence of some barrier, but requires that the barrier be disregarded. The Colville Code provides a list of definitions CTC § 1-1-350-366 but requires that when a word used in the Code is not defined in the Code such words be given

their common meaning. CTC § 1-1-7.

Applying this first phrase of CTC § 1-5-8 to circumstances of this Appeal we find that the "Notwithstanding" phrase provides a limited waiver of tribal immunity as set out in CTC §§ 1-1-6 and 1-5-5 and elsewhere in the Code, for violation of rights enumerated in CTC § 1-5-2. And thus, if the immunity defense is not raised by the Tribes, or by the Tribes directing their insurer, the Tribal Court may proceed to adjudicate issues before it without regard to the immunity barrier.

We conclude that the language of CTC § 1-5-8 provides a waiver of sovereign immunity provisions as set out in the Colville Tribal Code. CTC §§ 1-1-6, 1-1-5. A waiver of statutory immunity provisions, however, does not end our review of the issue. Our cases provide us with the understanding that in Colville tribal law the doctrine of sovereign immunity has at least two facets, both equally powerful. In *Swan v. Colville Business Council*, 11 CCAR 83, 6 CTCR 20 (2014), we said "the doctrine of sovereign immunity has long been incorporated in both our statutory and case laws." In *Colville Tribal Enterprise v. Orr*, 5 CCAR 01, 3 CTCR 05 (1999), we said "The Tribes have also codified its inherent power of sovereign immunity…" In *Stone v. Somday*, 1 CCAR 09, 1 CTCR 14 (1984), we said "the…Tribes codified this well-established concept…underscores the validity of its application in…suits against the Tribe." To underscore something, that thing must be already in existence. That thing is the inherent or case law recognized power of the sovereign to consent, or not, to suits against itself.

Here, in CTC § 1-5-8 there is a waiver of the statutory formulation of sovereign immunity set out in the CTLOC, but no waiver of the inherent power of immunity residing in the existence of the Tribes as a sovereign nation and recognized in the common law of the Tribes, and of that of the United States, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), and the states as well. The codification of immunity in the Tribal Code does nothing to limit or weaken tribal sovereign immunity, but gives notice to the membership and the public of the existence of the doctrine.

Thus, if immunity is raised as a defense in claims brought under CTC § 1-5-8, where insurance coverage is available, it is a complete defense unless a clear waiver of common law immunity is otherwise shown. This must be the case even where the tribal treasury would be protected from financial loss by a policy of insurance for which the Tribes has fully paid.

CONCLUSION

The dismissal by the Tribal Court of this action is affirmed upon the grounds set out in

this opinion.[11]

Jennifer NOLAN, Appellant,
vs.
Celia PAUL and Barry COLLINS, Appellees.
Case No. AP18-017, 7 CTCR 32
14 CCAR 42

[Parker Parson, Attorney, for Appellant.
Appellees were not represented and did not appear.
Trial Court Case No. CV-CU-2015-38168]

Decided March 19, 2019
Before Chief Justice Anita Dupris, Justice Dennis L. Nelson, and Justice Mark W. Pouley

Dupris, CJ

PROCEDURAL SUMMARY

Jennifer Nolan (Appellant) and Celia Paul (Appellee) filed a Petition for Agreed Custody for Appellee's children with the Trial Court on June 19, 2015. Appellee Barry Collins, the children's father, was in jail at the time of the filing and did not sign the Petition. Appellant was granted temporary custody of the three minor children of the Appellees, KRC, ASC, and ZBRC, on June 19, 2015 pending a hearing on June 30, 2015. The Trial Court issued its an order from this hearing on September 11, 2015 granting temporary custody to Appellant.

A final order granting custody of the children to Appellant was entered on record on August 1, 2016, signed on August 25, 2016, and resigned on September 1, 2016. There is no reason given by the Court why the order had to be resigned. The final order required Appellee to have supervised visits until she submitted two clean UA's. Appellee was also ordered to obtain a chemical dependency evaluation and follow the recommendations; attend the Peacemaker's Circle to address domestic violence and parenting issues; and to obtain a mental health evaluation and follow the recommendations of the evaluation.

The Court entered an Order on Motion dated September 11, 2017 and filed September

[11] The panel has determined that this Appeal may be decided without oral argument. All written submissions have been considered.

14, 2017, which modified the parenting plan regarding visitation. There is no written motion in the Trial Court file requesting such a change. On November 21, 2017 Appellant filed a Motion for Emergency Order asking the Court to reconsider its Order of November 14, 2017, in which the Court once again modified the parenting plan significantly without adequate notice to Appellant that such a modification would be considered. This motion was granted and the order was reversed.

Once again the Trial Court entered an order modifying the visitation portion of the original final custody order on September 27, 2018 without notice to Appellant that the Court was considering the modification. One reason the Court gave for the modification was based on a finding that Appellee was in compliance with her counseling orders. Appellant requested the evidence this finding was based on, and asked the Court to reconsider its ruling again.

Appellant was not allowed to review the evidence upon which the Court modified its orders regarding Appellee's visitation. The Court stated that Appellant was not privy to the evidence based on "HIPAA" laws. The Court denied Appellant's Motion to Reconsider by an order dated October 3, 2018. Appellant filed a timely appeal[12], and the Initial Hearing was held on December 21, 2018.

At the Initial Hearing we determined that Appellant was not given due process in the method the Trial Court uses to review and modify final custody orders, and, based on the reasoning set out below, we find cause to reverse and remand the Trial Court's orders of September 27, 2018 and October 3, 2018.

DISCUSSION

A review of the file shows that the Trial Court subjects the parties to what are termed "Status Hearings" or "Review Hearings," even though a final custody order has been in place since 2015. The main purpose of these hearings appears to be to monitor Appellee in order to address her visitation with the children.

A review of the child custody statutes show the following:

1. CTC § 5-1-123 requires the party seeking a modification of a custody order to file a motion and affidavit setting out the facts upon which the movant bases his or her

[12] She filed an Interlocutory Appeal, but we are treating it as a final appeal in that it addresses a

motion. The Motion and Affidavit must be served properly on the other party, and the Court must deny the request unless it finds adequate cause to set a show cause hearing on the modification request.

2. CTC § 5-1-126(b) allows the Court to modify a visitation order, regardless whether there has been a change of circumstances, whenever the change would serve the best interests of the child.
3. CTC § 5-1-128 sets out the stringent standards for modifying a custody order, which are not favored by this statute.

The Trial Court relies on CTC § 5-1-126(b) in finding it necessary to set continual review hearings. Such a continual review of the non-custodian's compliance or noncompliance with the conditions the Court has set out gives the appearance of a quasi-dependency case. This conflicts with the purpose to have finality in the permanent order and causes unnecessary disruption in a case in which the children are not in a dependency situation.

The child custody statutes must be read as a whole, and attention needs to be taken regarding the due process safeguards therein. When a custody order is granted, it is presumed it will not be modified continually. The visitation statute relied upon by the Court is just on part of the whole scheme of the custody statutes. When the final custody order was entered, it was based on what was in the best interests of the children. The Court also found it in the best interests of the children that Appellee/mother address her drug and alcohol problem, and attend counseling. Appellee was given supervised visitation pending the outcome of these conditions.

Even though there is a specific statute referring to modifying visitation, it does not change the fact that modifying a visitation order is modifying the underlying custody order. CTC § 5-1-126(b) must be read in conjunction with CTC § 5-1-123 and CTC § 5-1-128. In this case, Appellant was not afforded the due process in that she did not receive the notice required to inform her that a modification of visitation was going to addressed. Appellee did not file the required motion and affidavit, so the Court could not make a finding that a show cause hearing should be set as required.

Finally, Appellant's due process was violated when the Court appeared to rely on evidence the Court would not make available to Appellant when the Court last modified the

---

modification of a final custody order.

visitation orders. It is black letter law that if the Court is going to rely on evidence, all parties have the right to review the evidence. We were unsure what the reference to HIPAA meant, and the Order of October 3, 2018 did not have adequate findings of fact to elucidate the issue for us.

In conclusion, continual reviews of permanent custody cases, set by the Court without a properly-made request of one of the parties should be used sparingly. In order to appear objective, the Court should only hold hearings in civil cases when procedurally-adequate requests are made by one of the parties. Such cases are not dependency cases. Secondly, the Court needs to make adequate findings of fact when it is modifying a visitation order, setting out specifically why it is in the best interests of the children. That is the test to use, not what is in the best interests of the non-custodian. Last, the apparent lack of due process for the appellant necessitates that we reverse and remand for a hearing which comports with the custody laws. We so hold.

It is THEREFORE ORDERED that the Order of October 3, 2018 is reversed and this case is remanded to the Trial Court for action consistent with this decision.

Melissa WILLIAMS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP18-007 IA, 7 CTCR 33

14 CCAR 45

[Mark Carroll, Spokesman, for Appellant.
Sabrina Desautel Fenton, Spokesman, for Appellee.
Trial Court Case No. CR-2018-41032]

Decided November 16, 2018

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

Dupris, CJ

PROCEDURAL SUMMARY

On March 20, 2018, the Tribes, through a special prosecutor, Tim Rybka, filed a criminal complaint against Melissa D. Louis, aka Melissa Williams (Appellant), with five counts all relating to the use of a tribal credit card. These charges have not been litigated on their merits yet. On March 23, 2018, Chief Judge R. Steckel entered an order assigning the case to Judge Tom Tremaine.[13]

On April 30, 2018 at a scheduled Omnibus hearing the parties requested a continuance; the Court continued it to May 24, 2018. At the hearing the court noted the defendant (Appellant herein) had filed a Motion to Dismiss, to which the Tribes (Appellee herein) filed a Response Brief. The Court set a briefing schedule on the Motion to Dismiss.

On May 1, 2018 Appellant filed an Affidavit of Prejudice against Judge Tremaine, alleging a conflict in that Judge Tremaine was the presiding judge on both the civil and criminal cases involving Appellant. On May 8, 2018 Chief Judge Steckel's Order dated May 3, 2018 was filed with the Court. Judge Steckel denied Appellant's request to remove Judge Tremaine from the criminal case, finding insufficient reason stated to show potential prejudice or impartiality.[14]

On May 18, 2018 Appellant timely filed an Interlocutory Appeal on the denial of her motion to remove Judge Tremaine from her criminal case. In her Notice of Interlocutory Appeal Appellant also noted a Petition for Writ of Mandamus[15], but did not specify what she actions she wanted us to direct the Trial Court to do. Based on the reasoning set out below we deny Appellant's requests and dismiss this appeal.

DISCUSSION

A denial of a motion and affidavit to remove a judge from a case is subject to an

---

[13] It is noted that there is no original Order Assigning Judge in the official court file; a copy was provided to this Court by a party.

[14] We note that the tenor of Judge Steckel's order is not written as respectfully as we expect from our judicial officers, yet it is not a basis for overturning his decision. We encourage our judicial officers to remember as tribal leaders we must always set the example of courtesy and respectfulness in our writings as well as when in Court.

[15] "Writs of Mandamus are issued from courts to compel officials to perform acts that the law recognizes as an absolute duty, rather that acts that may be at the official's discretion. Ministerial acts are those which are performed according to explicit directions by a subordinate official, allowing for judgment or discretion on the part of that individual." *Stout v. CFS, et. al,* 9 CCAR 46 (2008). Appellant made no arguments relevant to this issue, and we

Interlocutory Appeal by statute. CTC § 1-1-143. Appellant makes two arguments for the basis of her appeal: (1) Pro-Tem Tremaine's appointment as judge in this case did not comport with the statutory requirements of appointment of pro-tems, and therefore, was not valid; and (2) Judge Tremaine also presides on the civil case brought by Appellant against Appellee Colville Tribes (Tribes), which evinces an appearance of unfairness and bias.

CTC § 1-1-140, Sessions of Court, sets the parameters of which trial court judges are to sit on cases before the Colville Tribal Court. In section (a), the Chief Judge is the primary judge to hear cases before the Court. He or she may call in an Associate Judge when needed. Section (b) states a pro-tem may be appointed by the Chief Judge in "the case of disability, absence or unavailability of both the Chief Judge and the associate judges."

Section (c) requires the Court to give notice to all parties of the assignment of a pro-tem, and the parties have seven days to file an objection to the assigned pro-tem. The objection must state the reasons for the objection and a request that the case be reassigned to another judge. It should be noted these objection requirements are the same as used in an Affidavit of Prejudice.

It appears from the trial court record that the above-stated procedure was not followed: the parties did not receive specific notice that Judge Tremaine was to preside over the criminal case. However, at the Omnibus Hearing on April 30, 2018, the parties learned that Judge Tremaine was the presiding judge on the case. Following the April 30th hearing, Appellant filed her Affidavit to Recuse him, which was then denied by Chief Judge Steckel.

We find that adequate notice was provided to Appellant of Judge Tremaine's appointment to fulfill the requirements of CTC § 1-1-140. Although it is a concern that the statute was not strictly applied herein, we find it harmless error, and encourage the Trial Court to be attentive to the procedures in this statute.

The second basis of the appeal, *i.e.* the appearance of unfairness and bias because Judge Tremaine presides over both the civil and criminal cases involving Appellant, requires a review of the Affidavit itself, as well as the reasoning of the order denying it.

We have had a minimum number of Interlocutory Appeals on requests to remove a judge from a case. In *CTEC Gaming Commission v Mosqueda*, 8 CCAR 61 (2006), we summed up some of the parameters of such a review: first, the standard of review is clearly erroneous; second, the reviewing judge of an affidavit against another judge requires a careful review of

---

consider it waived.

the affidavit and a particularized inquiry into the facts alleged in each case. Next, although additional fact-finding is not necessary in each case, it may be needed when the affidavit contains serious allegations and little facts. Finally, such fact-finding may be by a hearing or by sworn affidavits. *Id.* At p. 62.

In this case, there are no facts to find. The parties agree Judge Tremaine presides on both the civil and criminal cases of Appellant. Chief Judge Steckel, after some unnecessary verbiage, did state in his findings there was no conflict for Judge Tremaine to hear both cases, and finding that limited judicial resources necessitated his appointment, did not commit a clear error. Therefore, we affirm his Order Denying [The Recusal Motion].

Finally, we have been asked by Appellant to disallow the Special Prosecutor's participation in this case in that he is not a member of the Colville Tribal Court Bar. This issue was not raised first at the trial level, nor in the Interlocutory Appeal. We will not consider it beyond the following: There is no provision in our statutory law for an appointment of a *pro hoc vice* member of the Colville Tribal Court Bar. As the statutory law stands now, the members of the Colville Tribal Court Bar must be admitted to practice by taking an exam and paying fees. The Colville Business Council (CBC) is the governing body to address membership and disciplinary issues.

Although the practice of *pro hoc vice* is common in the state and federal court systems, they are established and governed by their respective rules. We have no similar rules or laws to follow in such a procedure. It is not up to the Courts to develop these rules; it is up to our legislature, that is, the CBC. For these reasons we will not recognize his participation in the Appeal as we only recognize participants who are a member of the Colville Tribal Court Bar. This is an issue to be considered at the trial level upon remand.

We hold that the Trial Court's Order herein is Affirmed and the matter remanded to the Trial Court for actions consistent with our decision.