Supreme Court
of the Osage Nation
FILED: FEB 03 2020
By

IN THE SUPREME COURT FOR THE OSAGE NATION OF OKLAHOMA
OSAGE NATION RESERVATION
PAWHUSKA, OKLAHOMA

DOUGLAS TIMBRELL, Appellant/Respondent v. JENNIFER KENNEDY, Appellee/Plaintiff.	Case No. SCV-2018-01 **ORDER ON INTERLOCUTORY APPEAL**

Per Curiam:

COMES NOW the Supreme Court of the Osage Nation of Oklahoma to consider this interlocutory appeal of two different matters involving the same parties pursuant to Rules 26 and 33(d) of our Rules of Appellate Procedure. For purposes of this interlocutory appeal on the sole issue of personal jurisdiction over Appellant, case numbers DV-2018-16 and PO-2018-17 were consolidated.

INTERLOCUTORY APPEAL

This is an interlocutory appeal with a unique series of events before finally arriving before this Court.

1. Appellant filed his *Petitions in Error* on August 21, 2018 from orders entered on July 31, 2018. In his Petitions, Appellant states that the orders are appealable by right under section 33(d) of the Civil Appeals Rules, which allow an appeal from a Trial Court order that "Discharge,

vacate or modify or refuse to discharge, vacate or modify a provisional remedy which affects the substantial rights of a party." The *Petitions in Error* were filed within 30 days of the July 27, 2018 orders and otherwise met the requirements of section 34 of the Civil Appeals Rules.

2. On August 24, 2018, Appellant filed a *Motion for Determination by the Trial Court in Order for Defendant to Seek Leave for Interlocutory Appeal.*
3. On September 4, 2018, Appellee filed a *Counter Designation of Record.*
4. On September 5, 2018, Appellant filed a *Designation of Record for Appeal from Trial Court.*
5. On November 27, 2018, the Trial Court entered an *Order Certifying Orders for Interlocutory Appeal* in both matters.
6. Transcripts for hearings held on April 13, 2018; April 30, 2018; June 18, 2018; and July 27, 2018 were finalized on March 12, 2019 and May 13, 2019 and delivered to the Court.
7. The *Record on Appeal* was certified on July 31, 2019.
8. Appellant filed his *Combined Brief in Chief* September 30, 2019.
9. Appellee filed her *Combined Brief in Chief* October 31, 2019.

Despite the winding road leading to this appeal, we hold that this matter is an interlocutory appeal properly before this Court.

STANDARD OF REVIEW

The basis of Appellant's argument is that the Osage Nation Trial Court lacked jurisdiction over him. "Jurisdictional findings . . . are questions of law. The Court finds it is appropriate, therefore, to review such questions *de novo*, with no presumption of accuracy or correctness afforded to the conclusions of the trial court." *In re Gray*, SPC-2008-01 at 4. As we have in past cases, we look to Osage law first, "considering each provision as it relates to the others and giving each word its plain meaning when read in context to avoid absurd and inconsistent results." *Red*

Corn v. Red Eagle, SPC-2013-01 (2013). If Osage law is silent, we will turn to other sources to advise us, but always within the context of the unique characteristics of the Osage Nation's sovereign status.

FINDINGS AND CONCLUSIONS

From the Certified Record on Appeal filed July 31, 2019 and extensive briefs of the parties, and being fully advised in the premises, the Court finds and concludes as follows:

1. Jurisdiction is proper in this Court.
2. Appellant asserts that the Trial Court erred in denying his motion to dismiss for lack of personal jurisdiction in two cases filed in the Trial Court of the Osage Nation, DV-2018-16 and PO-2018-17.
3. In DV-2018-16, Respondent sought to establish sole custody of the parties' minor child. The Trial Court entered an *ex parte* temporary order on April 13, 2018 in favor of Appellee, granting her temporary sole custody of the minor on an emergency basis.
4. In PO-2018-17, the Trial Court entered an *ex parte* emergency protective order against Appellant on April 30, 2018.
5. Appellant appeared by and through counsel before the Osage Trial Court, asserting it lacked jurisdiction over him and objected to both causes of action. *Defendant's Motion to Dismiss and Brief in Support*, *In re P.P.K.*, DV-2018-06; *Respondent's Motion to Dismiss and Brief in Support*, *Kennedy v. Timbrell*, PO-2018-17.
6. The April 30, 2018 emergency protective order was made permanent in a subsequent order entered June 18, 2018 following a hearing at which all parties were present.
7. On or around April 19, 2018, Appellant filed an action in Mecklenburg County, North Carolina, seeking a determination of custody. *Temporary Custody and Visitation Order*,

Timbrell v. Kennedy, 18-CVD-7770.

8. Following consultation with the presiding Osage Trial Court judge, the North Carolina court found it had jurisdiction over the care and custody of the minor under North Carolina law and awarded temporary physical and legal custody of the minor to Appellee and granted Appellant visitation rights. *Id.* at 2.
9. In making its June 29, 2018 order, the North Carolina court held "No provisions of this Order shall be interpreted to allow any party to violate a protective order entered in any jurisdiction." *Id.* at 8.
10. Child custody disputes between two parents are subject to the Domestic Relations Act provisions under 9 ONC ch. 3.
11. The Domestic Relations Act states "The Court shall have jurisdiction over all issues within this Act wherein non-Indian defendants consent in writing to the jurisdiction of the Court." 9 ONC sec. 1-103(A)(3). It continues, however, to state "A person requesting affirmative relief in writing is deemed to have consented to the jurisdiction of the Court whether plaintiff or defendant." 9 ONC sec. 1-103(B)(1).
12. A child custody dispute between an Osage parent and a non-Indian parent would require—absent an allegation of abuse or neglect under applicable child protection laws and the Indian Child Welfare Act—that non-Indian defendant's consent, unless the non-Indian defendant requests affirmative relief in writing.
13. Osage law grants full faith and credit "to the records and judicial orders of any court of any state, any federal court of the United States or any court of a federally recognized Indian nation or tribe including Courts of Indian Offenses if the records or orders are executed before an appropriate official and in the manner prescribed by the law of the state or Indian nation in

which the record or judgment was executed." 9 ONC 3-141. At the time of filing, the North Carolina court exercised its jurisdiction under North Carolina law. In her *Combined Brief in Chief*, however, Appellee asserts that North Carolina lacked jurisdiction under its own laws in the first place as the child had not resided continuously in North Carolina for six month preceding Appellant's filing for custody, the child was not conceived or born in North Carolina and no legal finding of paternity had been made. *Appellee's Combined Brief in Chief* at 9. We decline to rule on that issue here as we find that jurisdiction in proper in the Osage Nation under Article II, Section 2 of the Osage Nation Constitution and that jurisdiction in continuing.

14. Osage law contains a wholly separate provision for protective orders due to domestic violence. 6 ONC 5-402 states: The person seeking relief may file a petition for a protective order, also known as a victim protective order (VPO) with the Osage Nation Trial Court if the victim or the defendant resides within the jurisdiction of the Osage Nation." Here, Appellee--the victim--resides within the jurisdiction of the Osage Nation.[1] Since the VPO issued in PO-2018-17 remains in full force and effect, any modification thereof would necessarily require that Appellant appear generally in the Osage Nation Trial Court and defend on the merits.

15. Osage law also states: "The filing of a petition for a protective order shall not require jurisdiction or venue of the criminal offense if either the plaintiff or defendant resides in the Osage Nation territorial jurisdiction." *Id.*

16. Jurisdiction in the VPO matter exists as a matter of Osage law because the Osage Appellee resided within the jurisdiction of the Osage Nation.[2]

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[1] The parties have stipulated that the Appellee and the minor are enrolled members of the Osage Nation, though nothing in the record establishes such membership.

[2] We note that under Osage law: "A protective order issued under this Act shall not in any manner . . . purport to determine the issues between the parties as to child custody, visitation or visitation schedules . . . except child

17. Appellee states that Appellant consented to jurisdiction when he requested a determination of paternity in open court on April 30, 2018. *Appellee's Combined Response to Petitions in Error and Preliminary Statement* at 3 ("*Appellee's Response*"); *Appellee's Combined Brief in Chief* at 2. The representation is based on the proceedings on April 30, 2018 and June 18, 2018, which was later documented in a *Court Minute* on July 27, 2018. We hold that the Trial Court did not err in finding that Appellant had consented to personal jurisdiction.

a. "Affirmative relief" generally means "relief raised by a defendant by raising a counterclaim or cross-claim that *could have been maintained* independent of the plaintiff's action." *Black's Law Dictionary* 1404 (9th ed. 2009) (emphasis added). Osage Nation law allows a party to file a separate cause of action to determine paternity. (The record indicates that Appellee had actually stated her intent to do so at the hearing on April 30, 2018.) We find that the record supports the Trial Court's holding that Appellant raised the issue of paternity by producing a birth certificate to the Trial Court and requesting a finding that he was the minor's biological father, thereby seeking affirmative relief.

b. A reading of the entire record indicates that Appellant produced the minor's birth certificate at the April 30, 2018 hearing and stipulated to paternity based on the document. *April 30, 2018 Hearing Transcript* at 4.

c. When the Trial Court asked if Appellee contested paternity, her counsel answered that she was contesting paternity and requested that the Osage Trial Court establish paternity of the minor through genetic testing, which was denied as untimely. *Id.* at 5. Appellant's attorney responded that he was certain that he was the minor's father. The Trial Court found that

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visitation orders may be temporarily suspended or modified to protect from threats of abuse or physical violence by the defendant or a threat to violate a custody order." 6 ONC sec. 5-504(*I*). Osage law does not intend the VPO to be a permanent solution to a child custody dispute between two parents.

Appellant was the minor's biological father based on the birth certificate produced by Appellant. *Id.*

d. As further indication that the father introduced the birth certificate and requested the paternity ruling, at the June 18, 2018 hearing Appellee's attorney stated ". . . over our objection, they [referring to Appellant and attorney] asked this Court to adjudicate the matter of paternity, [and] presented the court with evidence . . . in the form of a birth certificate." Appellant's counsel agreed with Appellee's statements on the subject. *June 18 Hearing Transcript*, at 4-5. The Trial Court ultimately held that Appellant requested affirmative relief and entered it in its *Court Minute* on July 27, 2018.

e. Under 9 ONC 1-103(B)(1), a person requesting affirmative relief in writing is deemed to have consented to the jurisdiction of the Court whether plaintiff or defendant. This language, however, does not necessarily mean that a request for affirmative relief must be made in writing in order for jurisdiction to attach: it merely reflects the commonsense principle that jurisdiction attaches when relief is requested in writing. Where a represented non-Indian seeks affirmative relief orally in open court and presents documentary evidence in support of such requested relief, the person through his or her own action has demonstrated his or her consent to the court's jurisdiction. Here the Appellant had the benefit of legal counsel and could have strictly limited his appearance to contesting the court's exercise of jurisdiction over him, which it appears from Appellant's pleading he had intended to do. Instead, however, Appellant requested affirmative relief from the court on a central issue material to the dispute and supported the request with documentary evidence, thereby abandoning the limitation on his appearance and satisfying the writing requirement. Where a represented party has expressly demonstrated his or her consent to

the court's jurisdiction in such manner, he or she is thereafter estopped from further contesting the exercise of the court's jurisdiction. To hold otherwise would permit parties to both litigate substantive issues in the courts of the Osage Nation and defeat the court's jurisdiction if dissatisfied with the result. Such effect offends principles of justice, fundamental fairness, and judicial economy

18. Paternity can be disputed by either parent under Osage law. Appellant's name on the birth certificate is not a presumption of paternity; paternity is presumed if the parents were married at the time the child is born, if the father executes an affidavit of paternity, or genetic testing established a 98% statistical probability of paternity. 9 ONC 3-116. None of those elements exist here.

19. Osage law states: "If a child is born during the course of the marriage and is reared by the husband and wife as a member of their family without disputing the child's legitimacy for a period of at least two years the presumption cannot be disputed by anyone except the father on the basis of fraud." 9 ONC 3-117. This formed the basis of the Trial Court's denial of Appellee's request to establish paternity via genetic testing. The parties, however, are not married and were not married at the minor's birth. *Petition for Determination of Custody*, DV-2018-16 at 1. The two-year limitation does not apply.

20. The Court finds that paternity is a dispositive fact that must be conclusively established and if the Appellee believes that Appellant is not the minor's biological father, then paternity testing should be completed at Appellee's expense. We hold the Trial Court erred in denying Appellee's request to confirm paternity via genetic testing as untimely.

21. This Court further holds that the parties remain bound by the protective order entered by the Osage Trial Court on June 18, 2018 as PO-2018-17. The Trial Court has continuing personal

and subject matter jurisdiction over the parties in that case. Appellant cannot effectively assert claims for visitation without modification of that protective order. Unless the parties come to an agreement, the Trial Court cannot make any such modifications without giving each party notice and opportunity to be heard.

22. To the extent North Carolina has asserted jurisdiction over the parties, its orders and those of the Trial Court of the Osage Nation must be read together. However, given the time that has elapsed since the commencement of the proceedings below, the continuation of the North Carolina court as a proper venue is questionable as the currently relevant witnesses and evidence as to the best interests of the minor child are within the jurisdiction of the Osage Nation.

23. Appellant notes correctly that there is no developed case law of the Osage Nation regarding the scope of personal or subject matter jurisdiction based on the facts presented here. He goes on to state, however, "It has been publicly stated that this is an exemplar case for Chief StandingBear's [sic] stated public policy of creating an environment where allegedly abused Osage women may return to their homelands and be welcomed with open arms." *Appellant's Combined Brief in Chief*, at 5. This characterization reflects a fundamental misunderstanding of the jurisdictional reach of the Osage Nation regarding Osage citizens. Assuring the protection of the Nation over its citizens wherever they may be is not simply a matter of "public policy;" it is a protection set forth in the Osage Nation Constitution. Article II, Sec. 2 extends jurisdiction in the courts of the Osage Nation over "...all Osage Citizens, subjects, property and activities outside [the territory of the Osage Nation] affecting the rights and laws of the Osage Nation. *Osage Nation Const., Art II, Sec. 2.* The Osage Trial Court's asserting jurisdiction over the Appellee and the minor child was proper and the VPO entered June 18,

2018 as PO-23018-17 remains in full force and effect.

24. Both Appellant and Appellee have indicated a willingness to participate in a settlement conference. The Court encourages the parties to do so and orders that any agreements between the parties be committed to writing and made a part of the record in all proceedings before the Osage Trial Court and, if applicable, the North Carolina court.

ORDER

Based on the foregoing, IT IS ORDERED:

1. The Court AFFIRMS the Trial Court's order issued in PO-2018-17;
2. The Court AFFIRMS the Trial Court's orders issued in DV-2018-16;
3. The Court REMANDS this matter to the Trial Court for proceedings consistent with this opinion, including: obtaining proof of Osage citizenship, adjudication of paternity; determining whether the Appellee still wishes to establish paternity through genetic testing at her expense; and ordering the parties to mediation to resolve outstanding issues regarding parenting time and child support; and
4. Each party shall bear their own costs.

SO ORDERED: January 31, 2020.

By: /s/ Meredith D. Drent
Chief Justice

/s/ Drew Pierce
Associate Justice

/s/ Elizabeth Lohah Homer
Associate Justice