

COPY

IN THE CROW COURT OF APPEALS
IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

In Re. the Marriage of)
RACHEL SUE OLD COYOTE,)
)
Petitioner-Appellee,)
)
and)
)
MICHAEL JAMES VILLEBURN,)
)
Respondent-Appellant.)
-----)

CIV. APP. DOCKET NO. 97-013

FILED this 29th day of
August 19 97
Stacy Ruth Davis
Clerk of Crow Tribal Court

By _____ Deputy

OPINION AND
ORDER DISMISSING APPEAL

This is a case involving determination of custody of the parties' three minor children following their divorce. Rachel and the children are all members of the Crow Tribe, and they currently live in Hardin, Montana. Mike is an enrolled Turtle Mountain Chippewa, and currently resides in Tucson, Arizona.

Mike has appealed from the Order of the Tribal Court (Stewart, J.) entered May 7, 1997, denying his motion to dismiss for lack of subject matter jurisdiction. Mr. Villeburn timely filed his Notice of Appeal on May 16, 1997.

For the reasons explained below, this court is compelled to dismiss for lack of appellate jurisdiction because the Tribal Court's order is not a final appealable order. Our careful review of the record convinces us that dismissal of the appeal at this time will not impose undue hardship on the parties or the children.

A. *Jurisdictional Facts*

Mike filed a petition for dissolution of marriage in Pima County, Arizona, on

July 2, 1996. He filed and served an application for default judgment on or about August 8th. Although Rachel attempted to file a response on August 29, the Superior Court granted a decree by default on September 3, 1996. Mike called Rachel to tell her about the Arizona decree that same day, and sent her a copy by Federal Express (Transcript at 39). Thereafter, Rachel retained counsel in Arizona and moved to set aside the default on October 17, 1996 (Respondent's Exh. 2).

On November 7th, the Pima County Superior Court set aside the default decree with respect to all matters except the uncontested dissolution. Marriage of Villeburn and Old Coyote, Case No. D-111656 (Pima County, Ariz., Nov. 7, 1996)(Minute entry setting aside default). The Arizona court also found that, as disclosed in Mike's affidavit, the children had only resided in Tucson for three-and-one-half months when the petition was filed, and "[p]rior to that time . . . the children had resided with respondent in the state of Montana for a period of in excess of six months." Id. Consequently, "[a]t the time of the filing of this petition, Montana and not Arizona was the home state of the minor children." Based on these findings, the Arizona court held in its minute entry on November 7, 1996, that it lacked subject matter jurisdiction over the custody determination, and dismissed that part of the proceeding. Id.

Meanwhile, Rachel commenced this case in the Crow Tribal Court on November 5, 1996, asserting that the Arizona court lacked jurisdiction to enter the default custody decree. After conducting a preliminary hearing that same day which was attended only by Rachel, the Tribal Court issued an order granting Rachel temporary custody of the children pending further proceedings, and ordering that the children be returned to their mother. Temporary Custody Order (Nov. 5, 1996). Mike was served with the Tribal Court's order in Tucson on November 7th, the day of the Superior Court's hearing on Rachel's motion to set aside the default decree

(Transcript at 41). The Arizona authorities enforced the order, and the children were taken from Mike later that same afternoon (Transcript at 42).

On December 3, 1996, Mike filed a motion to dismiss the Tribal Court proceeding for lack of jurisdiction. A hearing on the motion was held on April 10, 1997. Both parties attended with their respective counsel, and both parties gave testimony on the jurisdictional facts (*see* 66-page Transcript). Following the hearing, both parties' counsel filed proposed findings of fact and conclusions of law.

In the proceedings below, Mike contended that the Tribal Court lacked jurisdiction under the Section 10-1-130 of the Crow Tribal Code and the similar provisions of the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, because the children never physically resided on the Crow Reservation for a 6-month period prior to the filing of his decree. Except for a few weeks around Crow Fair during August, 1995, when they stayed with Rachel's sister at Dunmore, Rachel and the children spent the remainder of their 7 months in Montana prior to Mike's filing for divorce with Rachel's other sister in Bozeman (these facts are not disputed, and are consistent with Rachel's brief in support of her motion to set aside the Arizona custody determination). Therefore, Mike argued, consistent with the PKPA, the Arizona court ceded jurisdiction over the custody matters to a Montana state court, not to the Crow Tribal Court.

Mike further contended that the Tribal Court does not otherwise have jurisdiction under either Crow Tribal Code §§ 10-1-130(1)(b)(i) or (d)(i), respectively, because the children have never had a "significant connection with the Crow Indian Reservation," and no Montana court has declined jurisdiction of the custody matter. In the latter regard, it appears from the record that Mike filed an action in the state district court in Big Horn County sometime during the pendency of the Tribal Court proceedings, Resp. Brief at 7 (Dec. 23, 1996), which was still pending at

the time of the hearing (Transcript at 43).

Rachel responded that her and the children's real home has always been the Crow Reservation (as it will always be for all Crows), and that when she came to Crow Fair in August, 1995, she was returning home to her family and the Crow Reservation. She the children stayed with her sisters in Dunmore and Bozeman, and later moved to Hardin, because there was nowhere else to live on the Reservation (Transcript at 22). Rachel also contended that the children have close cultural connections to the Crow Reservation: with Mike's encouragement, they always retained the Old Coyote name in the matrilineal tradition, they were all three enrolled (the enrollment application of the youngest child had not yet been approved by the BIA at the time of the hearing), and they attended Crow Fair a number of times while they lived in Arizona, as well as other religious ceremonies and family and cultural events on the Crow Reservation. *See* Transcript at 23-25 (Rachel's testimony); 45-48 (Mike's testimony). One of the children goes to Head Start in Crow Agency (Transcript at 25). In view of these ties, Rachel's counsel contended, it would not make any sense for the custody of these Crow children to be determined by a Montana state court rather than the Crow Tribal Court.

Rachel further argued that Tribal Court jurisdiction is not inconsistent with the Arizona court's order, since the Crow Reservation is within the boundaries of the "state of Montana." Finally, Rachel cited the Montana Supreme Court's recent decision in Agri West v. Koyama Farms, Inc., ___ Mont. ___, 933 P.2d 808 (1997), as requiring that the Montana state courts decline to exercise jurisdiction when the Crow Tribal Court has already asserted jurisdiction by entering a temporary order.

On May 7, 1997, the Tribal Court issued its order denying Mike's motion to dismiss for lack of subject matter jurisdiction, based on its findings that Rachel and the children moved to the Crow Reservation upon the parties' separation in

August, 1995, and that the children all have a significant connection with the Crow Indian Reservation as provided in Crow Tribal Code § 10-1-130(1)(b)(i). Mike appeals from that order.

B. Appellate Jurisdiction

The first issue in this appeal is whether the *Court of Appeals* has subject matter jurisdiction, which we here raise on the court's own motion and can dispose of without briefing.

The Court of Appeals has jurisdiction to "hear all appeals from *final* judgments and/or orders of the Crow Tribal Court[.]" Crow Tribal Code § 3-1-103(2)(emphasis added). The requirement of finality for appellate jurisdiction under the Crow Tribal Code, as well as in the federal court system, "protects a variety of interests that contribute to the efficiency of the legal system." Stringfellow v. Concerned Neighbors, 480 U.S. 370, 380 (1987). These interests include avoiding delay and expense for the litigants, avoiding urgent consideration on appeal of matters that might become moot in the course of further proceedings, and allowing trial judges to preside on cases brought before them without undue interference. *Id.* This court has previously looked to guidance in the federal caselaw for purposes of determining its appellate jurisdiction as granted by the Crow Tribal Code. *See Estate of Red Wolf v. Burlington Northern Railroad Co.*, Civ. App. Docket No. 94-31 (Order Dismissing Appeal of various pre-trial rulings, Jan. 29, 1996).

A final order is "one that 'ends the litigation on the merits and leaves nothing for the court to decide but to execute the judgment.'" In re. Benny, 791 F.2d 712, 718 (9th Cir. 1986), *quoting Catlin v. United States*, 324 U.S. 229, 233 (1945). By its nature, the Tribal Court's order denying Mike's motion to dismiss does not bring the case to an end. "Rather, 'it ensures that litigation will continue[.]'"

Confederated Salish & Kootenai Tribes v. Simonich, 29 F. 3d 1398, 1401-02 (9th Cir. 1994)(denial of motion to dismiss under *Younger* abstention doctrine), *quoting* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 275 (1988).

The federal courts have generally applied the finality doctrine even when the dismissal motion is based on jurisdictional grounds. "The denial of a motion to dismiss on jurisdictional grounds obviously does not end the litigation on the merits," and is therefore not an appealable final order. In re. Benny, 791 F.2d at 718 (bankruptcy); *see also*, Catlin, 324 U.S. at 236. Thus, the explicit language of the Crow Tribal Code, supported by the federal caselaw, do not vest the Court of Appeals with jurisdiction to immediately review the Tribal Court's denial of Mike's motion to dismiss for lack of subject matter jurisdiction.

To be sure, the federal courts have applied the finality doctrine in a "practical rather than a technical" manner to allow interlocutory appeals for a "small class" of orders under the three-pronged test set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). Under the "collateral order doctrine" recognized in Cohen, a lower court decision, although technically not final, is immediately reviewable "if the order (1) 'conclusively determines the disputed question'; (2) 'resolves an important issue completely separate from the merits of the action'; and (3) is 'effectively unreviewable on appeal from a final judgment.'" Simonich, *supra*, 29 F. 3d at 1402, *quoting* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). Consistent with federal caselaw, this court has previously recognized the collateral order doctrine and granted immediate review of the denial of a motion to intervene. *See* Estate of Red Wolf v. Burlington Northern, *supra*, and Opinion dated Jan. 19, 1996 (affirming order denying Little Nest motion to intervene).

However, the federal courts have generally held that denial of a motion to dismiss on jurisdictional grounds fails the third prong of the Cohen test, because the

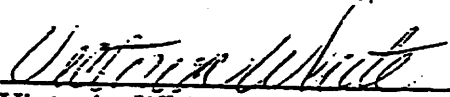
order "remains effectively reviewable on appeal from the final judgment." In re. Benny, 791 F.2d at 719; Simonich, 29 F.3d at 1403. "Normally, a denial of a motion to dismiss is not final" for purposes of the federal appellate jurisdictional statute. Marx v. Government of Guam, 866 F. 2d 294, 296 (9th Cir. 1989). The notable exception is when the lack of jurisdiction is based on sovereign immunity or a question of law as to a public officer's absolute or qualified immunity. Id., citing Mitchell v. Forsyth, 472 U.S. 511 (1985). The reason for this exception is that "the essence of absolute immunity is its possessor's entitlement not to have to answer for or even defend . . . ; without immediate reviewability, rejection of a valid claim to immunity from suit would, in effect, not be reviewable at all." Durning v. Citibank, N.A., 950 F.2d 1419, 1422 (9th Cir. 1991).

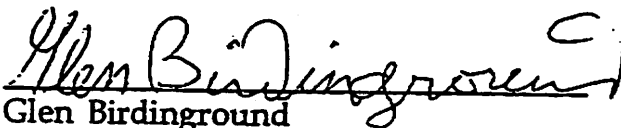
The latter considerations are not present in this case. The issue of the Tribal Court's subject matter jurisdiction will still be effectively reviewable after the Tribal Court has made a final custody determination, if Mike still wishes to appeal at that time. On the other hand, Mike may be satisfied with the Tribal Court's ultimate decision and decide not to appeal, thus illustrating the sound judicial policy underlying the finality doctrine in Tribal Code.

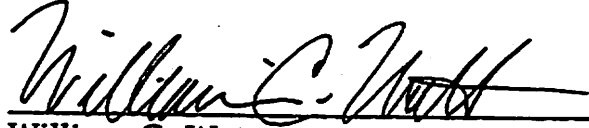
The court is also mindful of the uncertainty and potential further disruption of the parties' (and the children's) lives that could be caused by a later reversal for lack of jurisdiction after the Tribal Court issues a final custody decree. It is in the interest of preventing any unnecessary delay that this procedural ruling is being issued without briefing or argument. In any event, we question whether there are sufficient grounds in the record for reversing the Tribal Court's findings of fact regarding the children's home or their connections to the Crow Reservation under the "clearly erroneous" standard for review of factual findings on jurisdictional issues.

Based on the foregoing opinion, IT IS HEREBY ORDERED that this appeal is DISMISSED WITHOUT PREJUDICE for lack of appellate jurisdiction. The Clerk shall immediately notify the parties and the Tribal Court of this Order.

DONE AND DATED this 29th day of August, 1997.


Victoria White
Chief Judge, Crow Court of Appeals


Glen Birdinground
Judge, Crow Court of Appeals.


William C. Watt
Judge, Crow Court of Appeals

cc: Natasha J. Morton, Esq.
Harold G. Stanton, Esq.