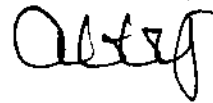


M-E-M-O-R-A-N-D-U-M

To: Brenda C. Desmond, Acting Chief Justice
D. Michael Eakin, Associate Justice
Clayton Matt, Associate Justice
Gregory T. Dupuis, Associate Justice
Indian Law Reporter
Ranald McDonald, Tribal Legal Department
Bob Stahl, Tribal Court
James Taylor, Tribal Defenders Office
Dusty Deschamps, Tribal Prosecutors Office
Jennifer Greene, Char-Koosta News
Cher Desjarlais, Decker and Desjarlais
Maylinn Smith, University of Montana

From: Abby Dupuis, Appellate Court Administrator



Date: November 22, 2002

Re: Opinion

Enclosed is a copy of an Opinion issued by the CSKT Appellate Court in Cause No. AP-00-174-P, In Re The Matter of Mary H. Burland.

**IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD NATION, PABLO, MONTANA**

IN RE MATTER OF
ESTATE OF:

MARY H. BURLAND,

Deceased.

)
) Cause No. AP-00-174-P
)
)

) OPINION
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Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes: Hon. Charleen Yellow Kidney, presiding.

Joey Jane, Arlee, Montana, Attorney for Appellant Andrea Thomas.

William Joseph Moran, Arlee, Montana, Attorney for Appellee Kenneth Burland.

Before, DESMOND, DUPUIS and EAKIN, Justices.

EAKIN, Justice:

This matter comes before this court on the appeal of the personal representative from the order of the trial court after a hearing at which the attorney for the personal representative failed to appear. We remand this matter for further proceedings at which the personal representative can be represented by counsel.

BACKGROUND

Mary Burland passed away on May 25, 2000. She is survived by two daughters, Andrea and Francine, and one son, Kenneth. Mary had made a will in August of 1994 in which she bequeathed to Kenneth her house and the 2½ acres of trust land on which the

house was situated. The remainder of her estate she bequeathed to her daughters. The house and land was also subject to a lease to the CS&KT Housing Authority. The Housing Authority had sublet the house back to Mary. Mary, in her sublease from Housing Authority, had named Kenneth as the successor to her leasehold interest. On May 11, 2000, two weeks prior to her death, Mary named Andrea as her attorney in fact. On May 19, 2000, using the power of attorney, Andrea changed the successor to the leasehold interest on the contract at the Housing Authority from the Kenneth to herself and her sister.

After Mary's death, Andrea informally moved the trial court to be appointed as personal representative on June 19, 2000. On July 20, 2000, Kenneth also informally moved the trial court to be appointed as personal representative. After a hearing on the two competing applications, the trial court appointed the Andrea as the personal representative. Disputes arose between Andrea and Kenneth as to location or existence of certain personal property that Mary had allegedly possessed. Andrea indicated she could not close the estate until she was satisfied she had located all the personal property.

The trial court set a hearing for closing the estate for November 28, 2001. Andrea's counsel did not appear at the hearing. The trial court proceeded with Andrea representing herself. The trial court determined that Andrea had not shown that Kenneth had any of the personal property that was in dispute. It also set aside the change in the successor to the leasehold interest in the house.¹ The trial judge then entered an order closing the estate.

¹The BIA probate of the trust estate found that Kenneth was entitled to inherit the 2½ acres on which the house is situated.

ISSUES

Andrea appealed the trial court's order raising, inter alia, the following three issues:

1. Did the trial court err by proceeding in the absence of Andrea's counsel?
2. Did the trial court err by failing to recognize the change in successor in interest to the leasehold interest in the house?
3. Did the trial court err by closing the estate without a final accounting from the personal representative?

STANDARD OF REVIEW

It is the prerogative of this court to establish the standard of review in various classes of cases if the standard is not established in laws adopted by the Council or by the prior decisions of this court. In exercising that prerogative, we may look to the standard of review adopted by other courts. *Bick v. Pierce*, 23 Ind. Law Rep. 6175, 6176 (CS&K Court of Appeals 1996).

The standard of review of the trial court's decisions concerning scheduling and conducting hearings is for an abuse of discretion, but to the extent that such decisions rest upon an interpretation of law, our review is de novo. *Bank One v. Shumake*, 281 F.3d 507 (5th Cir. 2002); *Bick v. Pierce, supra*. (We review conclusions of law to determine whether the trial's court interpretation of the law is correct.)

DISCUSSION

I. THE RIGHT TO COUNSEL

Generally, the trial court has broad discretion in scheduling and conducting the course of litigation in matters before it. That discretion is curtailed by any limits placed upon it by the Council in the laws establishing the court. In this case we find that the CSKT Laws Codified do limit the court's ability to proceed without counsel² present. Section 1-2-204 CSKT Laws Codified expressly grants a litigant the right to counsel at her own expense in all actions other than a Small Claims proceeding. In this action, Andrea had chosen to be represented and her counsel had previously appeared in the matter. When the trial court proceeded without her counsel present, it denied Andrea the right to counsel guaranteed by statute. Once a litigant has retained counsel and counsel has filed an appearance, a trial court may not proceed in an adversarial hearing without counsel present.³

Lay persons appearing before a court are at a distinct disadvantage when the opposing party is represented by professional counsel. The unrepresented litigant will not know the technical rules of evidence, will not know the elements of a particular cause of action, or even general procedure followed in presenting a case. For example, a lay litigant often

²"Counsel" includes not only attorneys but also advocates licensed to practice before the tribal court. Such non-attorney advocates are an essential and positive component of this and many other tribal justice systems.

³This does not prevent the court from entering an order or judgment to which the parties have stipulated. The action, at that point, is no longer adversarial. Nor do we address the situation in which there has been no appearance of counsel but the litigant desires counsel.

confuses an opening statement with presentation of evidence. It is for these reasons that a trial court gives a self represented litigant greater latitude in presenting a case. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Even if this courtesy is extended, the lay litigant is still at a disadvantage in proceeding against a skillful attorney.

The court too remains at a disadvantage when one party is unrepresented. The court has the obligation not only to be fair but also to appear fair. "It is not enough that the judge, despite his predetermination of essential facts, may put them aside and conduct a fair trial but that there also shall be such an atmosphere about the proceeding that the public will have the 'assurance' of fairness and impartiality." *Connelly v. United States Dist. Court*, 191 F.2d 692, 697 (9th Cir. 1951); *see also, Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 at 172, n. 19. (Frankfurter concurring.) Denying one party the opportunity to have a lawyer does not give the impression of impartial justice.

It should be the non appearing counsel, not the party, who suffers the consequences of the failure to appear. Our holding today does not leave a trial judge powerless if an attorney or other advocate fails to appear for a hearing. The trial court still has wide discretion in how to deal with counsel. It may, among other sanctions⁴, hold counsel in contempt, impose costs for the delay, or even remove counsel from the case if it gives the litigant time to retain substitute counsel. The one sanction that the trial court cannot impose

⁴Obviously counsel would have a due process right to a hearing before imposition of sanctions. *See, e.g. Glatter v. Mroz*, 65 F.3d 1567 (11th Cir. 1995). The record in this case does not contain the reasons counsel failed to appear. Both parties argued matters outside the record concerning that failure. Without a record, those arguments are not properly before this court.

under 1-2-204 CSKT Law Codified is proceeding without counsel and denying the party the right to counsel.

We also note that the federal courts have held that there is a right to counsel at one's own expense in civil and administrative matters. To deny that right may be a denial of due process. *Sheppard v. Anderson*, 856 F.2d 741 (6th Cir. 1988). While such federal case law interpreting the Due Process clause is not controlling on this court in interpreting tribal law, we find it persuasive in interpreting Section 1-2-204.

II. SELF DEALING BY THE FIDUCIARY

The trial court did not indicate what standard it used to review Andrea's actions in changing the successor to the leasehold interest. Nor did either party address what standard a trial court should use when a person holding a power of attorney uses that power for her own benefit. While we are compelled to remand on the first issue, we believe it may be beneficial for the trial court to have some guidance when the self dealing issues arises again on the remand.

The trial court was correct in viewing with skepticism Andrea's attempt to change the successor on the leasehold interest. The person holding the power of attorney has a fiduciary duty to the person granting that power. However, as appellant notes, a senior will often want a spouse or adult child, the natural recipient of largess, to be the one to act on her behalf. Self dealing by a family member holding a power of attorney should be upheld in a limited number of situations. Self dealing is permissible if the self dealing has a demonstrable benefit to the person granting the power, the dealing is specifically authorized by statute or

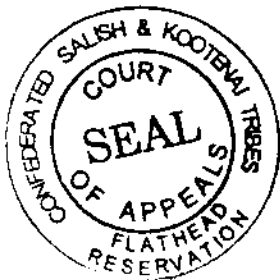
regulation, (e.g. Medicaid nursing home regulations that allow the community spouse to transfer some assets into her name alone), the self dealing is consistent with a course of conduct established prior to the grant of the power (e.g. continuation of annual gifts), or the person granting the power expressly authorized the self dealing in the document granting the power or in a subsequent ratification of the self dealing. Since Andrea did not have counsel at the hearing, we are unable to determine if she would be able to show one of these factors.

III. The Need for a Final Accounting

Because we remand on the first issue, we need not address the need for the final accounting. It is hoped that on remand the parties and the trial court can insure that this issue does not arise again.

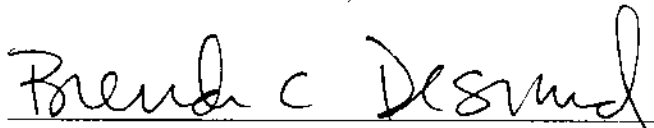
CONCLUSION

The appellant had a statutory right to be represented by counsel and had elected to exercise that right. The trial court erred in proceeding without her counsel present. The matter is remanded for further proceedings at which appellant can be represented by counsel.




D. MICHAEL EAKIN, Associate Justice


GREGORY T. DUPUIS, Associate Justice


BRENDA C. DESMOND, Associate Justice

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the **OPINION** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 22nd day of November, 2002.

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