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

In re RAMONA CAJUNE, Petitioner	*	Cause No. AP-01-93
		ORDER DENYING PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION

I. ISSUES PRESENTED AND RELIEF REQUESTED

Pursuant to a petition dated December 18, 1992, Ramona Cajune, by and through her attorney, Roberta Hoe, requested the Civil Court of Appeals to grant a writ of mandamus and/or writ of prohibition under Rule 21(a) of the Federal Rules of Appellate Procedure. Petitioner seeks the writ to be directed to four trial judges of the Tribal Court of the Confederated Salish and Kootenai Tribes, namely the Honorable William Joe Moran, the Honorable Louise Burke, the Honorable Donald Dupuis, and the Honorable Steven Lozar. Petitioner also asks that the writ be directed to unnamed clerks of the Tribal Court.

The application for the writ is based on, as petitioner recognizes, a single case in Tribal Court, In re the Matter of Jacob Paul Harteis, Cause No. CC-001-92. The underlying case is an action filed by Leo Harteis, petitioner-below, against Ramona Cajune, respondent-below, seeking joint custody of their son, Jacob

Paul.

As grounds for the writ, petitioner Cajune alleges the following: (1) the various tribal judges acted beyond the scope of their jurisdiction and without jurisdiction on at least thirteen different occasions; (2) Judge Lozar failed to act with regard to issues before him on at least one occasion; (3) Judge Lozar engaged in inappropriate ex parte contact with Harteis on several occasions; (4) Judge Moran failed to act in a timely manner with regard to issues before him on at least three occasions; (5) the unnamed tribal court clerks accepted nonconforming documents on at least three separate occasions, and; (6) the unnamed tribal court clerks failed to act with regard to their specific duties on several occasions.

As a result of this alleged action or inaction, petitioner asserts that she has been denied due process of law, and has no other means than the issuance of the extraordinary writs to obtain any relief. She seeks the following remedies: (1) a writ of mandamus directed to Judge Moran to dismiss the underlying child custody case, In re the Matter of Jacob Paul Harteis, in order to "allow" Harteis to refile a petition conforming with the Rules of Civil Practice for the Tribal Court; (2) a writ of prohibition enjoining all four judges from hearing any future matters with regard to Cajune or Harteis; (3) a writ of mandamus directing all four judges to read and follow the Tribal Code; (4) a writ of mandamus directing the tribal court clerks to seal the extant case file of In re the Matter of Jacob Paul Harteis; and (5) a writ of

mandamus directing the clerks of the Tribal Court to read and follow the Tribal Code.

II. LAW GOVERNING EXTRAORDINARY WRITS

The gravamen of petitioner's argument is that the Tribal Court (trial court) lacked jurisdiction to render certain challenged decisions, and that such jurisdiction rested exclusively with the Civil Court of Appeals. The dominant principle of appellate jurisdiction is that a judgment must be final to be appealable. See e.g. 9 Moore's Federal Practice, ¶ 110.06, "Only Final Decisions Are Ordinarily Appealable" (1992). The traditional use of the writ [of mandamus] has been to aid appellate jurisdiction by "confin[ing] a lower court to the lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so." Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 26 (1943). "Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal." Id.[1]

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[1] In reference to the correlative writ of prohibition, the Supreme Court has stated:

> There is a well-settled rule by which this court is guided upon application for a writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or some collateral matter arising therein. If the lower court is clearly without jurisdiction the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. If, however, the jurisdiction of the lower court is doubtful, or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record, or if the complaining party has an adequate

The writ of mandamus cannot be issued to compel the lower court to decide a matter before it in a particular way, or to review its judicial decisions made in the exercise of legitimate jurisdiction. In re Rice, 155 U.S. 396 (1894). See also, Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 383 (1953) (purpose of the extraordinary writ is not to "control the decision of the trial court," but rather merely to confine the lower court to the sphere of its discretionary power). Nor can the writ be used to perform the office of a regular appeal or writ of error, even if no appeal or writ of error is given by law. American Const. Co. v. Jacksonville Ry., 148 U.S. 372, 379 (1893).

A writ will lie only in the supervision of the proceedings of lower courts in cases where there is a legal right without any existing legal remedy. It does not lie to control the judicial discretion of the judge or court. Thus, where the action complained of rested in the exercise of this discretion, the remedy fails so long as the discretion was sound and according to law. Ex parte Bradley, 7 Wall 364, 376-77, 19 L. Ed. 214 (1868).

Beginning in the late 1960's with the decision in Will v. United States, 389 U.S. 90, 108 (1967), the Supreme Court has emphasized several times the limited nature of the mandamus remedy and cautioned against its use as a means of undermining the final judgement principle. While the courts have never confined themselves to an arbitrary and technical definition of

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remedy by appeal or otherwise, the writ ordinarily will be denied. Ex parte Chicago, R.I. & Pac. Ry., 255 U.S. 273, 275-76 (1922) (citations omitted).

"jurisdiction," it is clear that the extraordinary remedy of mandamus will lie only in exceptional circumstances amounting to a judicial "usurpation of power." DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945).

The party seeking mandamus (or prohibition) has the burden of showing that its right to issuance of the writ is "clear and indisputable." Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953). Petitioner in the case at bar has failed to meet this demanding, required standard. The record before us simply fails to demonstrate the necessity for the drastic, extraordinary remedies which she seeks. For the reasons discussed below, the application for the extraordinary writs is therefore denied. The Court will address the allegations set forth by petitioner in chronological and subject matter sequence.

III. "NON-CONFORMING" DOCUMENTS

The underlying action, In re Jacob Paul Harteis, commenced on January 25, 1992 when Leo Harteis, a non-Indian, filed a petition in Tribal Court seeking joint custody with Ramona Cajune, a tribal member, of their son Jacob Paul. Harteis' petition was filed pro se in handwritten form. Petitioner Cajune challenges the sufficiency of this filing on two grounds: (1) the petition was a "nonconforming document" under the Rules of Practice in Civil Actions and Proceedings in the Tribal Court of the Confederated Salish and Kootenai Tribes; and (2) the Tribal Court lacked jurisdiction over Harteis because he failed to stipulate to tribal jurisdiction until March 6, 1992.

Rule 12(a) of the Tribal Rules of Practice provides in pertinent part that "nonconforming papers may not be accepted for filing." Rule 12(c) then sets certain standards for filings prefaced by the word "shall," including paper size and quality, specifications for type or print, page numbering etc. Petitioner reads Rule 12 as an absolute prohibition on the filing of "nonconforming" papers. We think otherwise. The controlling phrase in Rule 12 is "[n]conforming papers may not be accepted for filing." (Emphasis added). The word "may" is discretionary, not mandatory. While the better and preferred practice is to assure that filings meet the standards set forth in Rule 12(c), the Rule on its face permits the filing of papers which do not precisely conform to the enumerated standards. We quote with approval Judge Moran's reasoning in a ruling on this same matter, as set forth in a December 4, 1992 order:

> ...This Court is a Tribal Court where handwritten requests by indigent tribal members for just remedies are frequently made. It is an idiosyncrasy that the Court customarily accommodates. Indian customs permeate the very way the Flathead Nation's governmental functions are carried out. This Court finds that petitioner's petition does not offend the Courts [sic] established procedure nor does it prejudice Respondent in anyway.[2]

We agree. We see no reason to depart from the long established practice of the Tribal Court, as applied to either

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[2] See Order Denying Motion to Set Aside Order and Amended Order and to Restrain Petitioner During Pendency of Proceedings, Cause No. CC-001-92, December 4, 1992 at 3 (marked as Exhibit 14 to Cajune's Petition for Writ of Mandamus and/or Writ of Prohibition) (hereafter Petition for Writs).

tribal members or non-members.[3] The filing of "nonconforming" documents is a matter within the sound discretion of the trial court, and we find no abuse of that authority. Petitioner Cajune has not demonstrated that the handwritten petition has resulted in a violation of her rights, or otherwise prejudiced her in the child custody action. Accordingly, this aspect of petitioner's complaint is insufficient to justify the granting of the extraordinary writs.

IV. ISSUES CONCERNING PERSONAL AND SUBJECT MATTER JURISDICTION AND TRIBAL POWERS

Petitioner's contention that the Tribal Court lacked jurisdiction over Harteis at the time he filed the petition for joint custody on January 25, 1992 on the alleged basis that he failed to stipulate to tribal jurisdiction is equally unpersuasive.[4] Section 1.4 of the Tribal Children's Code provides:

> The Tribal Court shall have jurisdiction over any child custody proceeding involving an Indian child residing or domiciled within the Flathead Reservation or having significant contacts with the Reservation Community and

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[3] So too with additional challenges to the filing of other "non-conforming" documents by Harteis, a non-Indian. See e.g., Petition for Writs, Exhibit 7. The Court notes that the Tribes are bound by the Indian Civil Rights Act, 25 U.S.C. § 1302(8), which provides in relevant part that "[n]o Indian tribe in exercising powers of self-government shall deny to any person within its jurisdiction the equal protection of its laws..." The Rules of Practice in Civil Actions and Proceedings in the Tribal Court of the Confederated Salish and Kootenai Tribes constitute a tribal law enacted in the exercise of self-government. As discussed below, the Tribes properly exercised jurisdiction over Harteis in the child custody action. Accordingly, the Tribes must afford Harteis equal protection under Rule 12.

[4] Cajune agrees that Harteis did in fact consent to the personal jurisdiction of the Tribal Court on March 6, 1992, and the record before us so indicates.

> over all Indian children who are members of the Confederated Salish and Kootenai Tribes. The Court shall have exclusive jurisdiction over all child custody proceedings involving any Indian child who is a Tribal member of the Confederated Salish and Kootenai Tribes who resides within or is domiciled within the Flathead Reservation or is a protected child of the Tribes.

The underlying action is a child custody proceeding involving Jacob Paul. It is undisputed that the boy is an "Indian child residing or domiciled within the Flathead Reservation." Therefore, under the plain language of Section 1.4, subject matter jurisdiction over this child custody proceeding vested in the trial court on January 25, 1992 when Harteis filed his petition for joint custody of Jacob Paul. Similarly, personal jurisdiction vested over Harteis in the trial court as to the underlying child custody action the same day by virtue of the fact that he filed the petition in Tribal Court.

Rule 13.1(a) of the Tribal Rules of Civil Practice provides in pertinent part that "[if] the plaintiff is not a Tribal member, the complaint shall also contain plaintiff's consent to the personal jurisdiction of the Tribal Court for purposes of any counterclaim or crossclaim that may be asserted in the context of the filed action." In effect, Cajune grounds her challenge to the jurisdiction of the Tribal Court over Harteis on this provision. In light of the above, Cajune's argument is misplaced. Notwithstanding, the purpose of Rule 13.1(a) is to assure tribal court jurisdiction over non-Indian plaintiffs for purposes of counterclaims or crossclaims filed in relation to the underlying action, here the child custody case involving Jacob Paul. The

record before us evinces no counterclaims or crossclaims that were filed against Harteis pursuant to the underlying action between January 25, 1992 and March 6, 1992, the date Harteis formally consented to the personal jurisdiction of the Tribal Court, or at any other time. In short, there is no factual or legal basis to support Cajune's challenge to Tribal Court jurisdiction over Harteis.[5] Therefore, this prong of petitioner's complaint cannot serve as a basis to grant the extraordinary writs she seeks.

V. CHALLENGES TO TRIBAL COURT ORDERS AND JURISDICTION

Petitioner next challenges certain matters culminating in a tribal court order of March 6, 1992 granting unsupervised visitation to Harteis. She also challenges the legal sufficiency of the order.

The record before us indicates that Cajune filed a child custody action concerning Jacob in Sanders County Justice Court prior to the time Harteis filed his petition for joint custody in Tribal Court. On January 24, 1992 the Sanders County Justice Court issued a Preliminary Injunction Order directed primarily to Harteis, restraining him from certain conduct and contacts, discussed below.

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[5] In at least two separate rulings, the Tribal Court properly found that it had the requisite jurisdiction over this child custody proceeding, including subject matter jurisdiction and personal jurisdiction over Harteis. These findings are memorialized in tribal court orders which are part of the record before us. See Order of Temporary Visitation, March 6, 1992, paragraph 1 at page 1 (Petition for Writs, Exhibit 18); Order Denying Motion to Set Aside Order and Amended Order and to Restrain Petitioner During Pendency of Proceedings, December 4, 1992 at 2-3 (Petition for Writs, Exhibit 14).

On January 25, 1992, Harteis filed the joint custody petition in Tribal Court. On February 14, 1992 Cajune filed a response to Harteis' petition, and therein requested the Tribal Court to issue an order of temporary supervised visitation regarding Harteis and Jacob Paul.

On February 20, 1992, the Sanders County Justice Court, pursuant to a motion by Cajune, referred all matters of visitation and custody of Jacob Paul to the Tribal Court, in deference to the joint custody action filed there by Harteis. In relevant part, the Sanders County Justice Court order provided:

> This Court feels that the intent of the law regarding restraining orders and preliminary injunctions [citations omitted] in Justice and City Courts is to protect a person from harassment, abuse, and/or violence; if there is a conflict between the parties regarding custody or visitation, those matters should be handled in the proper jurisdiction, i.e., the District Court or Tribal Court.[6]

Cajune complains that the Tribal Court did not take judicial notice of or reinstate the Preliminary Injunction Order issued by the state court, notwithstanding that the state court order transferring the child custody action to Tribal Court was entered into the record of the tribal court proceeding concerning Jacob Paul, here styled as In re Jacob Paul Harteis. Petitioner further complains that her "decision to allow the transfer of the proceedings" from state court to Tribal Court was "partly based on the understanding" that the state injunction would be continued by

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[6] See Cajune v. Harteis, Cause No. C-6/108, Order, February 20, 1992, Sanders County Justice Court (Petition for Writs, Exhibit 21).

the Tribal Court.[7] Petitioner then asserts that the state court could have retained jurisdiction under Public Law 280.

The gravamen of this aspect of petitioner's complaint is that the Tribal Court granted Harteis unsupervised visitation of Jacob Paul, pursuant to an Order Granting Temporary Visitation issued on March 6, 1992. She contends that the order has "little basis in law or fact." Although petitioner does not provide any support for this contention, it is apparent that her challenge to the tribal court order is based on the discretionary grant of unsupervised visits to Harteis. Cajune, in effect, argues that the tribal court should not have granted Harteis unsupervised visits because the state restraining order allegedly prohibited Harteis "from having any contact with Cajune, or any members of her household until July 23, 1992."

In the first instance, the Tribal Court is not required to reinstate or even consider orders of state courts once jurisdiction of a particular matter has vested in the Tribal Court. It is a fundamental principle of federal Indian law that:

> In matters of internal self-government within tribal territory, tribal powers are exclusive, and federal and state powers are inapplicable, unless such tribal powers have been limited by federal treaties, agreements, or statutes. Absent a limiting federal treaty or federal law, tribal powers may be exercised unfettered by assertions of federal or state authority. Cohen, Felix, Handbook on Federal Indian Law (1982) at 236.

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[7] There is nothing in the record before us to substantiate this allegation. The Court further notes that Cajune petitioned the state court to transfer the proceedings to Tribal Court. Her statement that she "allow[ed] the transfer of the proceedings" from state court to tribal court is therefore not an accurate representation of the transfer proceeding.

As to choice of law decisions made under the judicial policy of comity, a sovereign forum is always free to reject a foreign law that conflicts with its own public policy. Id. at 384. Further, the Indian Child Welfare Act requires the United States, the states, territories, possessions, and other tribes to give full faith and credit to tribal laws and proceedings applicable to child custody proceedings. Id.

The Confederated Salish and Kootenai Tribes constitute a sovereign government under federal and tribal law. The judicial branch of the tribal government embodies relevant aspects of this sovereignty and is at liberty to administer justice as it sees fit, so long as it is according to law--Public Law 280 notwithstanding in the instant case. Petitioner has not cited any violation of law, and we are aware of none, which would support her contention that the Tribal Court erred in granting Harteis unsupervised visitation of Jacob Paul.

Petitioner has misread the state order when she contends that it restrained Harteis from having "any contact" with "any members" of Cajune's household. The order on its face is limited to restraining Harteis from "any contact" or communication with Cajune. It is silent as to restraining Harteis from "any contact" with Jacob Paul. See Petition for Writs, Exhibit 22, paragraph 5, page 2. In any event, the order contemplates that Harteis will have visitation rights of his son, limited only by geographical considerations. Id., paragraph 4 at page 5.

The record before us establishes that both Harteis and Cajune

submitted testimonial and documentary evidence which the Tribal Court considered prior to issuing its March 6, 1992 order granting Harteis unsupervised visitation of his son. The record further indicates that Cajune was represented by counsel at the time of the March 3 hearing. Judge Lozar's March 6, 1992 order expressly states that based on the oral and documentary evidence submitted, there was no evidence to substantiate a concern or fear that Jacob Paul would be in any danger or suffer hardship in the presence or care of Harteis. See Petition for Writs, Exhibit 18, paragraph 2 at pages 1-2.

Further, the matter was, in effect, reconsidered on November 10, 1992 before Chief Judge Moran pursuant to a motion filed by Cajune through her counsel, Roberta Hoe, to set aside the March 6 order and restrain Harteis from having any contact with Jacob Paul.[8] Hoe represented Cajune at the hearing. In a December 4, 1992 order, the Tribal Court, "after thoroughly reviewing the file in this matter and hearing testimony of both parties," ruled that the preponderance of the evidence required a finding that the best interests of Jacob Paul would not be served by denying him the benefit of a close association with both parents, and that such can be facilitated without threat to the minor child's safety or welfare.[9]

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[8] Petitioner states that this motion was based, in part, "on ongoing fear that premised the Sander's County Justice Court's Restraining Order." See Petition for Writ at 12.

[9] See Order Denying Motion to Set Aside Order and Amended Order and to Restrain Petitioner During Pendency of Proceedings, December 4, 1992 at page 1 (attached as Exhibit 14 to Petition for

The record before us regarding the temporary visitation order and the issue of Harteis' contact with Jacob Paul reveals no abuse of discretion or usurpation of power on the part of the Tribal Court.[10] There is no indication that petitioner or Jacob have been prejudiced in any way, or that her rights to due process have been violated. In short, this prong of Cajune's petition is insufficient to warrant the granting of the extraordinary writs she requests.

V. ISSUES CONCERNING SCOPE OF TRIBAL COURT JURISDICTION

A. Factual and Procedural Background

The next series of events of which Cajune complains are complex and intertwined, and form the primary basis of her application for the extraordinary writs. Following the issuance of Judge Lozar's March 6, 1992 Order of Temporary Visitation, petitioner Cajune timely filed a Notice of Intent to Appeal,

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Writs).

[10] Both the March 6 and December 4 temporary child custody orders appear to be soundly based on fact and law, contrary to Cajune's assertions. We find no conflict between these orders and the state restraining order directed to Harteis. In an instructive vein, this Court follows the rule that child custody and related matters are committed to the sound discretion of the trial judge, and that such decisions will not be upset unless there is clear abuse of discretion. See Opinion and Order Re Custody of Adri Michelle, King v. King, Cause No. AP-01-92, Appellate Court of the Confederated Salish and Kootenai Tribes, December 8, 1992 at 1-2, citing In re the Marriage of Tweeten, 172 Mont. 404, 563 P2.2d 1141, 1143 (1977), reversed on other grounds, Markegard v. Markegard, 616 P. 2d 323, 325 (Mont. 1980); see also, Order (concerning visitation schedule), King, supra, July 22, 1992. These orders and cases set the requisite standards of review of the merits of child custody cases for which appeals have been properly taken and perfected. However, for the reasons stated below, the custody case of Jacob Paul, including the temporary visitation order, is not yet ripe for appeal.

requesting appellate court review of the lower court's temporary visitation order. On March 20, 1992, Judge Dupuis approved the Notice of Intent to Appeal and also granted a stay of the March 6 temporary visitation order, pending appeal. Judge Dupuis ordered the child custody case transferred to the Civil Court of Appeals for review, and stated that the Rules of Civil Appellate Procedure were to apply to all subsequent schedules and time limitations.[11] Petitioner complains that Judge Dupuis did not forward the Notice of Intent to Appeal to the Civil Court of Appeals, and thereby exceeded his discretionary authority and jurisdiction in violation of unspecified provisions of the Tribal Code.

On April 6, 1992 Judge Lozar issued an Amended Order reinstating his previous Temporary Visitation Order of March 6. Cajune contends Judge Lozar exceeded his authority and discretion on the alleged basis that there was a valid stay on the Temporary Visitation Order.

On April 22, Chief Judge Dupuis dismissed the appeal of the temporary visitation order with prejudice on the ground that the parties failed to file briefs in a timely manner. Judge Dupuis rested his decision on Ordinance 90-A (Tribal Court Appellate Procedures), and the interests of justice and efficient judicial administration. Cajune alleges Judge Dupuis exceeded his authority in dismissing the appeal in that the sole jurisdiction to hear the matter rested with the Civil Court of Appeals. To support this contention, petitioner cited Section 3.6 of the Tribal Court

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[11] See Petition for Writs, Exhibit 3.

Appellate Procedures which provides in relevant part that the Appellate Court has exclusive jurisdiction over "a final judgment entered in an action or special proceeding commenced in the Trial Court Division of Tribal Court..." (Emphasis added).

On May 15, 1992 Chief Judge Dupuis, in response to a motion and supporting brief filed by Harteis, issued an Amended Order dismissing with prejudice the appellate proceedings and the stay on the temporary visitation order. Judge Dupuis grounded his decision on a finding that Cajune did not respond to the motion within the required ten (10) day period. Cajune alleges Judge Dupuis lacked jurisdiction to decide the matter.

On June 1, 1992 Harteis filed a motion and supporting affidavit for an order for Cajune to show cause for refusing Harteis visitation of his son, alleging violation of the March 6 order of temporary visitation. On June 25, 1992 the Tribal Court granted Cajune's Motion for Substitution of Judge (filed on March 20) after a hearing was held on the matter. On July 23, 1992 Harteis filed a Notice of Intent to Appeal the order to substitute. On July 24, 1992, Acting Chief Judge Louise Burke issued an order denying Harteis' appeal. Judge Burke relied on Ordinance 36-B, as amended, Chapter I, Section 6, "Appellate Proceedings," paragraph 3 which provided in relevant part that "[if] the Chief Judge thinks the reasons show probable cause for review of the decision of the Trial Court, she/he shall permit the appeal..." Pursuant to this provision, Judge Burke ruled that the Trial Court had not been presented with reasons justifying the appeal.

On October 7, 1992, Cajune's counsel withdrew from the case. On October 15, Harteis renewed or refiled his motion and supporting affidavit for a show cause hearing alleging Cajune had refused him visitation of Jacob Paul in violation of the March 6 order of temporary visitation. At the request of Cajune, the Tribal Court advocates office assigned Cajune temporary counsel. While Cajune did not expressly state such in her petition, the temporary counsel assigned to her was Robert Hoe, counsel who filed the petition for the extraordinary writs at issue here. The record before us indicates that Hoe had taken on representation of Cajune at the latest by October 21, 1992, six days after Harteis filed the show cause motion.[12] The record further shows that on October 21 Hoe requested a ten (10) day continuance of the show cause hearing. The court granted the continuance and set the hearing for November 10, thus allowing counsel twenty (20) calendar days to prepare.

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[12] Petitioner further contends that she was unrepresented in this matter "for over a month," as a result of the withdrawal of her counsel, L. Ballinger, on what petitioner alleges to be September 28, 1992. However, the court record before us indicates that Ballinger withdrew on October 7, and that on October 21 Hoe, present counsel, took on representation of petitioner on a "temporary" basis, and on a "permanent" basis on November 9. Thus, Cajune was without counsel for a period of two weeks at the most. During the interim period, Harteis renewed his motion to show cause on October 15. The Court notes that October 15 was a Thursday and October 21 was a Wednesday. Therefore, Cajune was without counsel for a range of three to four business days at the most between the time Harteis renewed his show cause motion and the time she received temporary counsel. While petitioner appears to sub silentio distinguish the fiduciary duty owed a client as between "temporary" and "permanent" counsel, we are unaware of any ethical rule, and petitioner cites none, which would remotely suggest that "temporary" counsel has any less obligation than "permanent" counsel to zealously represent a client. We find no prejudice to Cajune in this matter.

The show cause hearing was held on November 10. On the same day Cajune, by and through counsel Hoe, filed a motion to set aside the March 6 temporary visitation order and amended order of April 6, and to restrain Harteis from any contact with Cajune or any members of her household. Cajune alleges the motion was made in defense of the allegations of contempt which were the subject of the November 10 hearing, and on "the ongoing fear that had premised the Sander's [sic] County Court's Restraining Order."

During the November 10 hearing, Cajune orally moved the Court to continue the show cause hearing for a second time for another ten (10) days. The Court denied the motion. At the close of the hearing, Judge Moran found Cajune in contempt of the March 6 order of temporary visitation and ordered her to pay Harteis' attorney's fees. Cajune contends Judge Moran denied her the opportunity to adequately defend herself by not continuing the show cause hearing. She also asserts that Judge Moran subsequently denied her requests for a waiver of fees of the transcripts of the November 10 hearing, as well as the transcripts themselves. She contends, in effect, that Judge Moran exceeded his authority by denying her transcripts at no charge. There is no evidence in the record before us, nor does petitioner assert, that she offered to pay for the costs of the transcripts.

On November 17, 1992 Cajune filed a Notice of Intent to appeal Judge Moran's contempt order. On November 20 Judge Moran denied the appeal on the basis that the Notice of Appeal was from a temporary order of the trial court. He expressly cited and quoted

as authority Section 3.6(a) of the Tribal Court Appellate Procedures which, as noted above, limits the jurisdiction of the Civil Court of Appeals to final judgements or certain other orders of a permanent nature entered by the trial court. Nevertheless, Cajune asserts that Judge Moran exceeded the scope of his discretion and authority by denying the appeal and not forwarding it to the Civil Court of Appeals.

Cajune alleges that on November 17, 1992 she filed a Motion for a Writ of Prohibition asking the Civil Court of Appeals to prohibit Judge Moran from acting on any appeal of his own decisions. However, the record shows that she filed the writ in the trial court, asking the trial court, not the appellate court, to issue the writ. On November, 24, 1992, Judge Burke denied the motion on the basis that the matter dealt with a temporary order of the trial court which was pending further proceedings, and therefore, under the final judgment requirement of the Tribal Court Appellate Procedures, the order was not appealable. Cajune contends Judge Burke acted beyond her authority by denying the motion. She also contends the court clerks avoided their responsibility by not forwarding the Motion for the Writs to the judges of the Civil Court of Appeals. On November 30, 1992 Cajune refiled the same motion for a writ of prohibition in the trial court, asking the trial court to grant the precise relief she requested in her November 23 filing.

Also on November 24, 1992, Cajune reissued her Notice of Intent to Appeal the November 10 bench order which found her in

contempt and directed her to pay Harteis' attorney's fees. On December 7, 1992 Judge Burke dismissed the appeal with prejudice on the ground that it emanated from a temporary order of the trial court concerning a child custody issue which was still pending.

On December 4, 1992 Judge Moran, after a hearing, entered an order denying Cajune's motion to set aside the temporary visitation order and to restrain Harteis from any contact with Jacob Paul. In relevant part, Judge Moran rested his decision on the statutorily mandated best interests of the child test, and cited specific facts which in his discretion indicated it was in the best interests of the boy to be able to spend time with his father. Cajune contends the order misstates the law and facts, but does not provide any support for her contentions.

On December 8, 1992, Cajune attempted again to refile her Notice of Intent to Appeal the November 10 ruling. She complains that she was required to post filing fees, and that the document was not sent to the judges of the Civil Court of Appeals.

B. Law Governing Final Orders and Jurisdiction; Rulings

The core issue underlying virtually all of the contested actions of the trial court judges is whether the March 6 Order of Temporary Visitation is an appealable order. As stated above, the final judgment rule is the dominant principle in federal appellate jurisdiction. See 9 Moore's Federal Practice, ¶ 110.06 at 36. (1992). Ordinarily, to be appealable, a judgment must be final. Id. at 38. The policy behind the rule is to prohibit "piecemeal" disposal of litigation. The starting point in the articulation of

this policy against the "piecemeal" approach is that a final decision in the trial court is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Id. at 38-39.

Under the Federal Rules of Civil Procedure, which govern here, a final judgement, as to the disposition of the merits of the litigation, is one that disposes of the entire litigation and is entered under Rule 58, or one that disposes of a complete claim for relief or all claims of a party, and is entered under Rule 54(b). In either case, upon entry of the judgment it is appealable and the time for the filing of a notice of appeal begins to run. Id. at 45.

When an order deals with the merits, it generally is a final decision only if it is dispositive of the whole merits of the claim for relief. Id. at 47. Such orders as the following are interlocutory and therefore are not appealable: sustaining a motion to dismiss but not actually dismissing the action; denying a motion to dismiss; denying summary judgment, or granting partial summary judgment; granting or denying pretrial discovery and examination; and other orders that leave the cause of action pending. Such interlocutory orders normally are reviewable on appeal from final judgment. Id. at 47-54.

As noted above, Rule 3.6 of the Tribal Court Appellate Procedures vests the Civil Court of Appeals with exclusive jurisdiction over appeals by an aggrieved party from a judgment or order in the following cases, in pertinent part: (1) from a final

judgment entered in an action or special proceeding in the Tribal Court (Section 3.6(a)(1)); and (2) from such interlocutory judgments or orders in actions involving the custody or guardianship of minors which may have the practical effect of a permanent order (Section 3.6(a)(2)). Section 3.6(a)(2) further indicates that the Civil Court of Appeals does not have jurisdiction over temporary or emergency orders regarding child custody or guardianship matters where the underlying action is pending further proceedings.

The key trial court order which forms the basis of Cajune's petition for the extraordinary writs is Judge Lozar's March 6, 1992 Order of Temporary Visitation. The order provides in the title and in bold-face type in the text that it is an order of "temporary visitation." In the first paragraph it further expressly provides that the underlying "issue of Custody and Permanent Visitation" is "reserved for later determination." Based on the above law, which controls here, the Order of Temporary Visitation does not constitute a final order or an interlocutory order of a permanent nature because it did not finally dispose of the merits of the underlying child custody action.[13] Accordingly, the Civil Court of Appeals lacks jurisdiction to review any appeal of the temporary order until such time as the merits of the case are finally decided and the judgment is properly entered.

In light of the above, petitioner sought review of a

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[13] The Court notes that this matter has not yet been tried on the merits.

nonappealable order when she filed her Notice of Appeal of the March 6, 1992 Order of Temporary Visitation. Since the temporary order was not appealable in the first instance, Judge Dupuis erred when he granted the Notice of Intent to Appeal.[14] Because jurisdiction had not vested in the Civil Court of Appeals, the Rules of Civil Appellate Procedure did not then and do not now govern any disputes concerning the temporary order. That matter and other orders of a non-permanent nature properly remain within the jurisdiction and sound discretion of the trial court. In the final analysis, since this Court presently lacks jurisdiction to hear the matter, Judge Dupuis did not error when he failed to send the Notice of Intent to Appeal to the Civil Court or Appeals.

Petitioner alleges that Judge Lozar exceeded his discretion and authority when he reinstated the temporary visitation order pursuant to an April 6, 1992 order.[15] She argues there was a valid stay on the March 6 Order of Temporary Visitation. While Judge Dupuis had authority to grant a stay of the order, the stay, if it was to have been granted at all, should have been granted pending resolution of the merits in the trial court, not pending appeal. Since the stay was granted on an improper basis, it was not technically valid. Therefore, Judge Lozar did not error in reinstating the Temporary Visitation Order of March 6, 1992.

Petitioner alleges Judge Dupuis exceeded his authority when he

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[14] See Petition for Writs, Exhibit 3.

[15] See Petition for Writs, Exhibit 4.

dismissed[16] the appeal of the March 6, 1992 Order of Temporary Visitation, reasoning that the Civil Court of Appeals had exclusive jurisdiction to hear the matter. Judge Dupuis grounded the dismissal on a finding that the parties failed to file appellate briefs in a timely matter, and cited the Tribal Court Appellate Procedures as authority for the dismissal. Because the March 6 order was not an appealable order, Judge Dupuis did not error in dismissing the appeal. However, the appeal should have been properly dismissed as a nonappealable order, i.e., on the basis that the Civil Court of Appeals lacked jurisdiction to hear the matter because the order did not constitute a final judgment on the merits of the underlying child custody action. In short, the result was correct, but the reasoning was not. Because the trial court has the requisite jurisdiction and authority to dismiss a notice of intent to appeal nonappealable orders, Judge Dupuis did not error.

The Court notes that under the Tribal Rules of Civil Appellate Procedure, the Tribal Court (trial court) may dismiss an appeal if the notice of appeal is not timely filed (Rule 1(a)), and if an appellant fails to pay the clerk a $25 dollar fee for filing and transmitting the record on appeal (Rule 5(a)). Rule 9(b) authorizes the Chief Judge of the trial court for good cause shown to order an extension of the time prescribed by the Rules of Civil Appellate Procedure (including time extension of brief filing), except that the Chief Judge may not extend the time for filing a

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[16] See Petition for Writs, Exhibit 5.

notice of appeal. However, the rules are silent as to the authority of the Chief Judge to dismiss an appeal if an appellant fails to timely file a brief. Rule 10(f) provides that a respondent may move for dismissal of an appeal if the appellant fails to timely file a brief. Notwithstanding any application of this rule in the past, such motions shall prospectively be filed with the Clerk of the Civil Court of Appeals and forwarded to the Civil Appellate Panel. The Civil Court of Appeals will be the exclusive forum to hear and decide a respondent's motion to dismiss based on an appellant's failure to timely file an appellate brief.[17]

Petitioner further alleges that Judge Dupuis lacked jurisdiction to enter a May 15, 1992 Amended Order Dismissing Appellate Proceedings, which dismissed the appeal and stay of the March 6 Order of Temporary Visitation.[18] Judge Dupuis properly dismissed the appeal on the basis that the March 6 order was a temporary order, which is not appealable.[19] Therefore, the Civil Court of Appeals had no jurisdiction over the matter. Rather, jurisdiction to rule on the matter remained with the trial court.

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[17] The Court notes that Judge Dupuis' April 22 and May 15 orders (Petition for Writs, Exhibits 5 and 6) were entered under "Appellate Court" headings. While this was error, it was harmless for the reasons discussed above. The Court is confident that this error will not be repeated, and that all orders and decisions of the trial court will appear under "Tribal Court" headings, as is the case of subsequent orders in the record before us.

[18] See Petition for Writs, Exhibit 6.

[19] Pursuant to this May 15, 1992 ruling, Judge Dupuis, in effect, cured the error of his earlier (March 20) order wherein he granted the appeal and stay of Judge Lozar's March 6 temporary visitation order, pending appeal.

Accordingly, Judge Dupuis did not error in dismissing the appeal.[20] Nor did he error in dismissing the stay of the March 6 order because the trial court also retained jurisdiction over the stay since it was based on a temporary order which was not appealable. In short, it was well within the trial court's jurisdiction and discretion to lift the stay.

Petitioner Cajune asserts that Judge Burke acted beyond the scope of her discretion and authority on July 24, 1992 when she denied Harteis' appeal of an order granting a substitution of judge. The order to substitute was granted pursuant to Cajune's motion. Judge Burke relied on the Tribal Law and Order Code, Ordinance 36-B, as amended, Chapter I, Section 6, "Appellate Proceedings," paragraph 3 which in relevant part provided that "[if] the Chief Judge thinks the reasons show probable cause for review of the decision of the Trial Court, she/he shall permit the appeal..." Reliance on this provision to deny the appeal was misplaced. On June 7, 1991, the Tribal Council of the Confederated Salish and Kootenai Tribes expressly repealed Chapter I, Section 6 of the Tribal Law and Order Code. The repeal was effectuated

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[20] The Court notes that Judge Dupuis also grounded his dismissal on a finding that Cajune, who was represented by counsel, failed to respond to Harteis' motion to dismiss and supporting brief within the required ten day period. Rule 10(f) of the Rules of Civil Appellate Procedure provides in relevant part that "[if] a respondent fails to file a brief, he will not be heard at oral argument except by permission of the court." This rule contemplates, and indeed requires, that an appeal (which has been perfected and entered) not be dismissed if a respondent fails to file a brief. In any event, under Rule 10(f) the Civil Court of Appeals is the sole forum authorized to decide issues related to parties' failure to file or timely file appellate briefs.

pursuant to Ordinance 90A which established the Tribal Civil and Criminal Courts of Appeals and promulgated the Rules of Civil Appellate Procedure. Those rules control all civil appellate proceedings and do not authorize the Chief Judge of the trial court to dismiss an appeal which has been perfected and entered, although that is not the case here.

Notwithstanding, an order granting substitution or recusal is not a final order and is therefore not appealable. See 9 Moore's Federal Practice, ¶ 110.13(10), "Orders Respecting Disqualification of Judges, Counsel, Referees, and Others," (1992) at 169. An order granting a motion to recuse (substitute) does not terminate the litigation, nor does it fall within the collateral order exception to the final judgment rule. See e.g., In re Cement Antitrust Litigation, 673 F.2d 1020, 1022-23 (9th Cir. 1982), aff'd 459 U.S. 1190 (1983) (a party may not take an appeal until there has been a decision by the district court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment; "[a]n order granting a motion to recuse clearly does not terminate the entire litigation"). However, a successful motion to recuse may be reviewed on proper appeal of a final judgment which completely disposes of the merits of the underlying cause of action.

Accordingly, Judge Burke's denial of the appeal was within the bounds of her sound discretion and authority. In any event, Cajune, who advanced the motion to substitute, has not demonstrated that the granting of her motion has resulted in a denial of due

process, or prejudiced her in any way. The granting of her motion to substitute certainly will not suffice as a basis to grant her petition for the extraordinary writs.[21]

Petitioner also contends that Judge Moran denied her the opportunity to adequately defend herself at a show cause hearing held on November 10, 1992 on the basis that he denied her oral motion to continue the hearing for ten (10) days. She reasons that she needed the continuation to in order to prepare and advance certain defenses.[22] However, the record shows that Cajune, by and through counsel Hoe, requested a ten (10) day continuance of the show cause hearing on October 21, and that, in fact, a twenty (20) day extension was granted. This continuation allowed ample time for preparation of the show cause hearing. It is well within the sound discretion of the trial court to decide such matters. In light of the record before us, we find no abuse of that authority, nor do we discern that the denial of Cajune's request for a second continuation prejudiced her in any way.

Cajune next challenges Judge Moran's denial of her appeal of

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[21] The Court takes judicial notice of the fact that the underlying child custody action has been transferred to a tribal judge in the southwest who is not a regular judge of the Tribal Court of the Confederated Salish and Kootenai Tribes.

[22] As noted above, petitioner cited the Sanders County restraining order as the basis for the second continuation. Also as noted above, petitioner has misread the restraining order, asserting that it prohibited Harteis from "any contact" with his son Jacob Paul. It did not. It is therefore difficult, if not impossible, for the Court to discern the alleged "ongoing fear that had premised the Sanders County Justice Court's Restraining Order," as to Harteis' temporary visitation rights of Jacob granted pursuant to the March 6 order.

an order issued orally at the close of the November 10, 1992 show cause hearing.[23] Judge Moran found Cajune in contempt for refusing to honor Harteis' temporary visitation rights granted to him pursuant to the March 6, 1992 Order of Temporary Visitation, discussed above. As a result of the finding of contempt, Judge Moran ordered Cajune to pay Harteis' attorneys' fees concerning the show cause issue. Petitioner contends Judge Moran exceeded his authority and discretion by denying the appeal and not forwarding it to the judges of the Civil Court of Appeals, notwithstanding that Judge Moran's November 20, 1992 order expressly indicated that the trial court is vested with discretionary authority over appeals of temporary orders, and that this Court lacked jurisdiction over the matter because it was not a final judgment.

The general rule is that if a money sanction is imposed against a party, and is immediately payable, it is not immediately appealable because the party may appeal the sanction after final judgment. See e.g., 9 Moore's Federal Practice, ¶ 110.10, "Judgements That Are Final by Operation of the Collateral Order Doctrine--The Cohen Rule," (1992) at n. 98, page 85.[24] Accordingly, Judge Moran acted well within his authority and for

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[23] The oral bench order was subsequently entered into the written record pursuant to a minute entry made on December 4 at Cajune's request. See Petition for Writs, Exhibit 23.

[24] When a money sanction is imposed solely on counsel, as opposed to solely on a party, four circuits, including the Ninth Circuit Court of Appeals, have held that the order is immediately appealable. Id. See also, Aetna Life Ins. Co. v. Alla Medical Services, Inc., 855 F.2d 1470 (9th Cir. 1988).

the proper reasons in denying Cajune's notice of appeal.[25]

On November 24, 1992, Cajune filed a Notice of Intent to Appeal the November 10 order for a second time. On December 7, Judge Burke dismissed the Notice of Intent to Appeal with prejudice on the ground that it emanated from a temporary order of the trial court concerning the pending child custody dispute. For the reasons stated above, Judge Burke properly decided the matter.

On December 8, 1992, Cajune attempted yet a third time to file a Notice of Intent to Appeal the November 10 ruling. She complains the document was not sent to the Civil Court of Appeals. While the record before does not indicate that the trial court took any action on this third filing, the trial court acted well within its discretion when it did not to forward the papers to this Court, for the reasons stated above.[26]

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[25] Petitioner also seeks review of the show cause hearing and contempt order on the alleged basis that a show cause hearing is a "special proceeding" within the meaning of the Tribal Court Appellate Procedures. Under Rule 3.6(a)(1), exclusive jurisdiction is vested in this Court over a "final judgment entered in an action or special proceeding..." (Emphasis added). As held, the contempt order and sanction of attorney's fees did not constitute a "final judgement" within the meaning of the governing law. Nor was the show cause hearing a "special hearing." Rather, it was a hearing on the underlying child custody action. A special proceeding is one where, for example, condemnation issues are adjudicated, or over which magistrates preside. See e.g. Moore's Federal Practice, 1993 Rules Pamphlet, Part I, Chapter IX, "Special Proceedings," at 627-672.

[26] Cajune also complains that she was required to pay filing fees in order to trigger this third filing. She asserts that she had not been previously required to pay any filing fees in this matter. Rule 11.2 of the Rules of Practice in Civil Actions and Proceedings in the Tribal Court of the Confederated Salish and Kootenai Tribes vests any trial court judge with discretionary authority to waive a filing fee. The rules are silent as to waiver of transcript fees. Rule 11.3, however, provides that a fee of $5

Petitioner also challenges Judge Moran's December 4, 1992 order denying her motion to set aside the temporary visitation order, and to restrain Harteis from have any contact with his son. She alleges, without support, that the order "misstates the law and facts." However, the order appears solidly grounded on both fact and law. The Court notes that the state court restraining order, which petitioner has misread, does not prohibit Harteis from having "any contact" with Jacob Paul. Moreover, Judge Moran applied the requisite best interests of the child standard in arriving at his decision. In short, Judge Moran's order is a product of the sound exercise of discretion, and cannot serve as a basis for granting the extraordinary writs.

Petitioner asserts that the "most damaging aspect" of Judge Moran's December 4, 1992 order was a "threat" of Rule 11 sanctions to Cajune's counsel, Roberta Hoe, "for zealously representing Cajune and filing appeals of his decisions, which were filed as a matter of right." Petitioner relies primarily on Rule 1(a) and Rule 3.6(a)(1) for her proposition that she has "an automatic right

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per page for a typed transcript is to be paid "if the Court Clerks are to provide such transcript." We see no abuse of discretion on the part of the tribal court in enforcing the filing fee in this instance, given what appears to be vexatious filings. Nor do we see any transgressions in this matter where the trial court has required petitioner to pay for the costs of transcripts of the challenged proceedings, or where it has not furnished transcripts in the absence of payment. The rules do not require such. Indeed, an indigent party has have no absolute right to tax the court with costly requests in matters such as this. In short, the court clerks did not "avoid" any "duty" is this matter, as petitioner alleges.

to appeal any order of judgment."[27] Petitioner has misread the rules. As stated numerous times herein, under the Tribal Rules of Appellate Procedure and other governing law, a party may appeal only a final order or judgment, not temporary orders of the nature petitioner now challenges and has repeatedly attempted to advance to this Court. The Court emphasizes that the vast majority of the orders here at issue plainly indicate they are temporary and, therefore, are not appealable. It is the responsibility of a trial judge, and well within his or her discretion, to assure the proper and orderly administration of justice--which is disrupted by vexatious filings of appeals which cannot go forward under controlling law. In appropriate circumstances, Rule 11 sanctions may be imposed by a trial judge.[28] However, since such sanctions have not been imposed in this case, we need go no further.

Petitioner also alleges that she filed motions for writs of prohibition on November 23 and 30, 1992, asking the Civil Court of Appeals to prohibit Judge Moran from acting on any appeals from his own decisions. She challenges Judge Burke's November 24 denial of the first writ as beyond her authority, and contends the court clerks avoided their duty to forward the writs to the judges of the Civil Court of Appeals.

The long-established rule governing extraordinary writs is

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[27] See Petition for Writs, Exhibit 19.

[28] Petitioner's counsel would do well to properly distinguish "zealous representation" from frivolous filings which can give rise to Rule 11 sanctions.

that an appellate court has exclusive jurisdiction to review immediately the conduct of any court subject to its appellate jurisdiction. See 9 Moore's Federal Practice, ¶ 110.28, "Grant or Denial of Prerogative Writs by the Courts of Appeals," (1992) at 338. Since the purpose of extraordinary writs is to "confine a lower court to the lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so,"[29] the trial court lacks authority and jurisdiction to act on extraordinary writs directed to a judge or judges of its own court.[30]

Under Rule 21(a) of the Federal Rules of Appellate Procedure, which governs here, an application for writs of mandamus and prohibition directed to a judge or judges of the trial court must be filed with the clerk of the court of appeals. Upon receipt of the prescribed docket fee, the clerk is required to docket the petition and submit it to the appellate court. In this case, petitioner, contrary to her representations, filed her first two petitions with the trial court, not the Civil Court of Appeals.[31]

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[29] See Roche v. Evaporated Milk Ass'n., 119 U.S. 21, 26 (1943), discussed above.

[30] Of course, the trial court may issue all writs, including mandamus and prohibition, necessary or appropriate in the aid of its jurisdiction. Such writs include mandamus to compel an officer or employee of the Confederated Salish and Kootenai Tribes to perform a duty owed to a plaintiff. See e.g., 9 Moore's Federal Practice, ¶ 110.29, "Grant or Denial of Prerogative Writs by the District Court," (1992) at 357-60.

[31] By virtue of filing in the lower court, petitioner did not then in fact ask the Court of Appeals to review the matter, as she contends.

See Petition for Writs, Exhibit 19.

In light of the above controlling law, the trial court did not have jurisdiction to hear and decide the motion for the extraordinary writs which petitioner attempted to advance on November 23 and 30, 1992. The jurisdiction to review such motions rests exclusively with the Civil Court of Appeals. However, we find no error, prejudicial or otherwise, in the dismissal of the motion(s) for the extraordinary writs by the trial court. Because the trial court lacked jurisdiction to hear the matter, the end result of dismissal was proper, although the reasoning was incorrect. And since petitioner filed the two petitions for writs in a court which lacked jurisdiction over the matter, the trial court clerks had no duty to forward the improper filings to the Civil Court of Appeals.[32]

VI. ISSUES AND RULINGS CONCERNING INACTION, DELAY AND EX PARTE CONTACTS

Petitioner asserts that she filed a motion on May 21, 1992 requesting a hearing on the Petition for Joint Custody "as soon as possible." She alleges that the request for such hearing "was never acted on by anyone." Her claim is entirely without merit.

The record shows that Judge Dupuis issued an order for a pre-trial conference on June 26, 1992, and scheduled the conference for July 23, 1992. On July 17, 1992, L. Ballinger, then counsel for petitioner, filed a motion to continue the pre-trial conference.

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[32] It is the duty of counsel to read and follow applicable rules of procedure and file papers in a court of competent jurisdiction, as was finally done on December 18, 1992 in the instant matter.

Judge Moran granted the motion the same day. The record further shows that on August 7, 1992 counsel for Cajune and Harteis filed a stipulation for a continuance. On August 17, 1992 the court issued an order scheduling a pre-trial conference for September 1, 1992.

On October, 7, 1992, Cajune's counsel, Ballinger, withdrew from the case. The record reveals that counsel Hoe had taken on representation of Cajune, at least temporarily by October 21, and permanently by November 9. Between October 21 and December 4, Hoe, on behalf of Cajune, filed the various motions, discussed above, concerning the temporary visitation order, show cause and contempt issues, and the guardian ad litem matter (discussed below). On December 4, Judge Moran issued an order of time and date of bench trial. The same day, petitioner, by and through Hoe, moved to continue the trial and pre-trial order. On December 15, pre-trial memoranda were filed by all counsel. On December 18, 1992 Judge Moran recused himself, and assigned the matter to another judge, the Honorable Maylinn Smith, who is not a member of the bench of the Confederated Salish and Kootenai Tribes.

In light of the above, petitioner will not be heard to complain that her "request for a hearing on the Petition was never acted on by anyone." The record belies this insupportable assertion. Plainly, action was taken several times on petitioner's request for a hearing on the merits of the petition for joint custody. Further, it was petitioner who, on at least three occasions, successfully moved the court to continue the matter,

i.e., delay it.

Petitioner also complains that the court delayed ruling on Harteis' motion for substitution of judge for a period of two months. This contention is also without merit. Cajune filed the motion to substitute on March 20, 1992. The ruling, in Cajune's favor, was issued on June 25, 1992. The record shows that the interim comprised the briefing schedule, and that Harteis' brief was accepted for filing on June 20, 1992--twenty (20) days before the court ruled on the matter. Such is a reasonable time frame. It certainly cannot serve as a basis to grant the extraordinary writs for which petitioner has applied. Further, Cajune has failed to demonstrate how this reasonable time frame has prejudiced her.

Cajune next complains that the trial court never took any action, including holding a hearing, on the show cause motion filed by Harteis on June 1, 1992. This claim is absurd.[33] Again, the

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[33] As discussed above, the record shows that Cajune moved the trial court on March 20, 1992 for a substitution of judge. Shortly thereafter, Harteis filed his original motion to show cause on June 1. On June 25, 1992, Cajune's motion to substitute was granted which effectively removed the underlying case and attendant motions, including the motion to show cause, from Judge Lozar's docket to Judge Moran's. Because the underlying case was removed from Judge Lozar's docket, he thereafter had no authority to act on motions pending at the time of his removal, including the show cause motion originally filed on June 1. Between June 25 and October 15, a period of less than three months, significant other events occurred in the case, including an order for a pre-trial conference, a grant of a motion by Cajune to continue the conference, a denial of Harteis' motion to appeal the order of substitution, a stipulation of the parties for a continuation of the pre-trial order and trial, another order scheduling the pre-trial conference, and withdrawal of Cajune's counsel, Ballinger. On October 15, Harteis renewed his previous motion to show cause. On the same day, Judge Moran promptly set the show cause hearing for October 22, but continued it to November 10 at the request of Cajune, by and through Hoe. It is not unusual in the normal course

record, as well as Cajune's petition for the extraordinary writs, belies this allegation. As discussed above, and as Cajune sets forth elsewhere in her statement of facts in the instant petition, the hearing took place on November 10, 1992. It followed an October 15, 1992 renewal of the motion and supporting affidavit filed by Harteis regarding his June 1 motion to show cause, and a continuance requested by and granted to Cajune, through Hoe, on October 21. Also as discussed above, the show cause hearing resulted in a finding that Cajune was in contempt of the court's March 6, 1992 order of temporary visitation, which resulted in the sanction of attorneys' fees--a decision which she vigorously contests.

Cajune challenges the tribal court for not appointing a guardian ad litem for Jacob Paul for ten (10) months and asserts that Judge Moran shirked his alleged duty to "immediately" appoint one when she filed a petition for that purpose. Again, petitioner's argument is misplaced. In the first instance, there is no requirement under the governing law that the tribal court appoint a guardian ad litem, either upon motion or otherwise. As petitioner points out, the Tribal Children's Code, Section 3, "Youth in Need of Care," paragraph 8 at VI-13 contains one of the few references to the appointment of a guardian ad litem:

> Upon the filing of a petition, the Clerk of the Tribal

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of litigation where a case is transferred to another judge for counsel to renew pending motions, particularly where, as here, there was a flurry of other motions and rulings which consumed the court's time and prevented earlier action on the then pending motion instantly at issue.

> Court shall immediately notify a Court judge, and the Court may appoint a Guardian ad Litem if one has not already been appointed, or other qualified person to act as a Tribal advocate in the proceedings upon the petition and represent the youth.

Under this provision, appointment of a guardian ad litem is within the sound discretion ("may") of the trial judge. Contrary to Cajune's assertion, it does not require the court to "immediately" appoint a guardian ad litem, nor does it require such appointment at all. The only requirement ("shall") of immediacy is for the clerk to "immediately" notify a judge of the filing of a petition to appoint a guardian ad litem. There is nothing in the record before us to indicate, nor does petitioner assert, that this requirement was not met. Moreover, Judge Moran in fact appointed a guardian ad litem eleven (11) days after Cajune filed her petition. Such is a reasonable period. In any event, Jacob Paul has had a guardian ad litem since November 24, 1992, which will long pre-date trial on the merits of his custody. Accordingly, the trial court soundly and timely exercised its discretion in this matter to assure that Jacob Paul's interests are fully represented.

Petitioner alleges that there were "significant" ex parte contacts between Judge Lozar and Harteis, including telephone communications and a confidential envelope found in the file. The record shows that Harteis first phoned the court on February 17, 1992 to request a hearing in response to a motion or request for a temporary visitation order. Petitioner contends that as a result of this telephone request, on February 18 the court issued a notice for a hearing to be held on March 3. Cajune alleges that since no

formal motion for the hearing was filed, she was "denied the opportunity to respond to such motion." This contention, like the others, lacks merit.

The record before us indicates that it was Cajune who requested the issuance of a temporary order of supervised visitation during pendency of the underlying cause of action. This request was advanced by petitioner on February 14, 1992, as part of her response to Harteis' petition for joint custody.[34] The record further shows that the purpose of Harteis' phone call to the court on February 17 was to request a hearing on Cajune's request for the temporary visitation (supervised) order. On February 18, the court issued a written notice of the hearing and therein requested "[a]ll interested parties to be present and to be prepared to begin" at the scheduled time.[35] If Cajune, who was represented by counsel, truly wished to respond or object to a proceeding called for the purpose of hearing her request for a temporary visitation order, she had ample opportunity to do so when the court noticed the hearing in written form. The record indicates no such response or objection. Accordingly, Cajune slept on her rights, if in fact she wished to exercise them, and will not now be heard to complain that she did not have an opportunity to respond to the oral request for a hearing on what amounted to her motion.

The only other ex parte phone call involving Harteis and court personnel in the record before us occurred on February 19,

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[34] See Petition for Writs, Exhibit 17.

[35] See Petition for Writs, Exhibit 2.

1992 when Harteis apparently phoned a court clerk to inquire about the date of the hearing on Cajune's request for a temporary visitation order. The record indicates the clerk informed Harteis about the hearing and instructed him to thereafter communicate with the court through his attorney.[36] The record indicates no further ex parte phone calls by Harteis to the court.

Petitioner also alleges that the official court file in this case contains a "confidential" envelope, which she characterizes as another "significant" ex parte contact between Harteis and Judge Lozar. However, petitioner has failed to describe the contents of the envelope, or to include it as an exhibit to her petition. She has further failed to allege or specify how this mysterious envelope, or any other alleged ex parte contact, may have prejudiced her. There is nothing in the record before us which would enable us to discern any prejudice or denial of due process as a result of such alleged ex parte contacts.[37]

Rule 21(a) of the Federal Rules of Appellate Procedure requires an applicant for an extraordinary writ to submit "a statement of the facts necessary to an understanding of the issues presented by the application." It further requires the petition to be accompanied by copies of any "parts of the record which may be essential to an understanding of the matters set forth in the petition." Cajune has failed to comply with this rule as to

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[36] See Petition for Writs, Exhibit 17.

[37] The Court emphasizes that Judge Lozar was removed from the case on June 25, 1992 pursuant to a motion by Cajune.

allegations of improper, "significant" ex parte contact. Accordingly, her unsupported conclusory allegations cannot serve as a basis to grant the writ.[38]

Petitioner next complains that the trial court clerks failed to file a minute entry for the November 10, 1992 show cause hearing. However, petitioner concedes the entry was made when her counsel brought the matter to the attention of the clerks. Notwithstanding, petitioner complains of the clerks' alleged neglect of duty "in this instance," yet fails to specify if or how Cajune was prejudiced by this oversight. We certainly discern no harm to petitioner. Such picayune, innocuous matters simply cannot justify the granting of the extraordinary relief petitioner seeks.

Finally, petitioner complains that Judge Moran issued an order "delaying the trial and pre-trial order," and that he "refused to take any action" on the matter the day Cajune submitted the pre-trial order. Cajune, in effect, represents in her statement of facts that both Judge Moran and the court clerk on duty refused to accept the pre-trial order for filing on the prescribed day, December 15, 1992.

This matter, like many others asserted by petitioner, is

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[38] This Court simply will not tolerate significant ex parte contacts, particularly where they are prejudicial to a party. Such contacts undermine the integrity of the court and frustrate the administration of justice. Even seemingly innocuous ex parte contacts can create the appearance of impropriety. It is the duty of the Chief Judge to supervise trial judges and assure that their conduct is proper, ethical and lawful. If in fact "significant" ex parte contacts are occurring between any trial judge and any party to a proceeding before that judge, it is the duty and responsibility of the Chief Judge in the first instance to monitor, investigate and resolve the matter.

frivolous. The record before us expressly shows that on December 4, 1992 Cajune, through counsel Hoe, filed a motion to continue the trial and pre-trial order. Judge Moran granted the motion the same day. Petitioner simply will not be heard to complain that Judge Moran "delayed the trial and pre-trial order" when such was done at her request. Petitioner has again failed to state if and how she has been prejudiced by the "delay" she successfully sought.[39]

In any event, the scheduling and ordering of pre-trial and trial matters, and action thereon, are matters within the sound discretion of the trial judge. Further, it is the Chief Judge's prerogative to administer his or her office, including supervision of court personnel, the way he or she sees fit, so long as it conforms to law and prescribed procedure. There is nothing in the record before us to indicate that Judge Moran abused his discretion, or that either he or the court clerks were derelict in the performance of their duties, much less anything which could serve as a basis for granting the extraordinary writs which petitioner seeks.

VII. SUMMARY OF RULINGS AND ORDER

Jurisdiction over writs of mandamus or prohibition directed to a judge or judges of the trial court division of the Tribal Court of the Confederated Salish and Kootenai Tribes rests exclusively with this Court. The extraordinary writs may be granted or withheld in the sound discretion of this Court. See Roche v.

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[39] Contrary to Cajune's representations, the record shows that the pre-trial order (memorandum) was filed by all counsel on December 15, 1992.

Evaporated Milk Ass'n., 319 U.S. 21, 25-26 (1943); See also, Rule 21, Federal Rules of Civil Appellate Procedure.

While a function of mandamus in aid of appellate jurisdiction is to remove obstacles from appeal, it may not appropriately be used as a substitute for the appellate procedure prescribed by statute, here the Tribal Rules of Civil Appellate Procedure. The traditional use of the writ in aid of appellate jurisdiction has been to confine a lower court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it has a duty to do so. See Roche, supra, at 26. "Even in such cases, appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions it was competent to decide and which are reviewable in the regular course of appeal." Id.

Where appellate statutes establish the conditions of appellate review, a court of appeals cannot exercise its discretion to issue to the trial court a writ of mandamus or prohibition where the only effect would be to avoid those conditions and thwart the legislature's (Tribal Council) policy against piecemeal appeals. Id. at 30. The extraordinary writs do not lie to control the discretion of the trial judge. Where the action complained of rests in the jurisdiction and exercise of this discretion, the remedy fails so long as the discretion was sound and according to law. Ex parte Bradley, 7 Wall 364, 376-77, 19 L. Ed. 214 (1868). A writ will lie only in the supervision of the proceedings of lower courts in cases where there is a legal right without any existing

legal remedy. Id.

In the instant case, the trial court had jurisdiction to dismiss all the appeals which petitioner attempted to advance to this Court, and of which she complains. Under the Tribal Rules of Civil Appellate Procedure and other controlling law, those appeals were from interlocutory orders which are nonappealable because they did not finally and completely dispose of the merits of the underlying child custody action.[40] The record before us plainly indicates that the trial court properly and soundly exercised its discretion in dismissing the challenged appeals. It thereby upheld the final judgment rule and advanced the Tribes' policy of avoiding "piecemeal" appeals.

Petitioner's contention that she has no other adequate remedy than the granting of the extraordinary writs is without merit. If she chooses, she may advance the contested matters as part of a perfected appeal of the merits of the underlying child custody action upon entry of final judgment.[41]

Petitioner has failed to meet her burden to show that her

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[40] Petitioner seems to think the trial court's dismissals of her notices of intent to appeal the various interlocutory orders constituted a hearing on the merits of the appeal. She accordingly alleges that the trial judges should be disqualified for "bias" for hearing appeals of their own decisions. As should be abundantly clear, the trial judges did not hear or decide appeals of their own decisions. They simply, as a procedural matter within their sound discretion and jurisdiction, denied appeals of interlocutory orders from going forward to this Court until final judgment is entered on the merits of the underlying child custody action.

[41] The Court notes that it may award double costs for frivolous appeals, pursuant to Rule 38 of the Federal Rules of Appellate Procedure. See also, Gilles v. Burton Const. Co., 736 F.2d 1142, 1145 (7th Cir. 1984).

right to issuance of the extraordinary writs is "clear and indisputable." As discussed and held above, all of the grounds she asserts are simply insufficient as a matter of fact and law to warrant issuance of the extraordinary relief she seeks. Cajune's petition in all respects is therefore DENIED AND DISMISSED WITH PREJUDICE.

SO ORDERED THIS 22nd day of March, 1993.

Robert M. Peregoy, Chairman
Civil Appellate Panel