No. SC-CV-37-18

NAVAJO NATION SUPREME COURT

Mun Kang,
Petitioner,

v.

Chinle Family Court,
Respondent,

And Concerning:

Chastity Kang,
Real Party in Interest.

OPINION

Before JAYNE, J., Chief Justice, SHIRLEY, E., Associate Justice, and TUNI, R., Associate Justice by Designation.

Original action against the Chinle Family Court concerning Cause No. CH-FC-292-17, the Honorable Rudy I. Bedonie, presiding.

James Nez, Kayenta, Navajo Nation, for Petitioner; Chris P. Benally, Chinle, Navajo Nation, for Respondent; David R. Jordan and Sandra Taylor, Gallup, New Mexico, for Real Party in Interest.

Opinion delivered by TUNI, Associate Justice.

This is an original action concerning divorce actions in the state of Virginia and the Navajo Nation. The Court clarifies service by publication requirements under the Navajo Rules of Civil Procedure.

I

Petitioner Mun Kang (Petitioner) and Real Party In Interest Chastity Kang (RPI) were married in the state of Virginia on December 27, 2006. The parties and their two daughters all lived in Virginia until March 18, 2017, when RPI left Virginia with the parties' children. On May 10, 2017, after a hearing concerning the removal of the parties' children, Virginia entered

an Order For Custody/Visitation awarding sole legal and physical custody of the parties' children to Petitioner pending further order.

On May 15, 2017, RPI with the assistance of legal counsel filed a petition for divorce with the Chinle Family Court in CH-FC-233-17. Petitioner through an entry of limited appearance moved to dismiss the action contending that the Chinle Family Court lacked jurisdiction because RPI failed to meet the 90-day residency requirement. Petitioner voluntarily withdrew her petition on June 19, 2017 and the action was dismissed.

On June 7, 2017, Petitioner filed a petition for divorce in Virginia. A copy of the petition was served on RPI's counsel and RPI appeared by telephone in that proceeding seeking a continuance. Thereafter, RPI did not participate any further and a Final Decree of Divorce was later entered, as discussed below.

On June 20, 2017, RPI re-filed her petition for divorce with the Chinle Family Court. RPI sought a dissolution of marriage, division of community property (including property located in Virginia), and sole custody of the parties' children. RPI's petition did not state that Petitioner filed an earlier-action for divorce in Virginia. RPI attempted but was unable to serve Petitioner by personal service and by certified mail. RPI then informed the court it served Petitioner by publication in the *Navajo Times*.

On November 2, 2017, Virginia entered a Final Decree of Divorce in favor of Petitioner. On November 3, 2017, RPI moved for entry of default judgment in the Chinle Family Court for Petitioner's failure to plead or otherwise defend against the action. On November 28, 2017, the Chinle Family Court issued an Entry of Default against Petitioner followed by a Default Judgment on February 6, 2018, dissolving the marriage, dividing property as proposed by RPI,

and awarding legal and physical custody of the parties' children to RPI with visitation to Petitioner.

On May 4, 2018, Petitioner filed a motion to set aside the default judgment claiming fraud and misrepresentation under Rule 60(c)(3) of the Navajo Rules of Civil Procedure. Petitioner also filed a motion for new trial under Rule 59(g). The Chinle Family Court summarily denied the motion for new trial on May 29, 2018, finding that Petitioner was served in CH-FC-233-17. No ruling was entered on the motion to set aside the default judgment. Meanwhile, RPI was arrested on a federal warrant on violations of Flight to Avoid Prosecution under 18 U.S.C. § 1073 concerning custody of the parties' children. On August 3, 2018, Petitioner through counsel filed an emergency motion for immediate temporary guardianship of the minor children to the maternal grandmother.

On August 17, 2018, Petitioner filed this action asserting the Chinle Family Court refuses to rule on the motion to set aside the default judgment leaving him with no plain, speedy and adequate remedy at law to address his jurisdictional arguments. This Court issued an Alternative Writ and set this matter for a hearing on September 12, 2018. This decision now follows.

II

The Court issued an Alternative Writ requiring Respondent to show cause why the writ should not be made permanent. The dispute concerns service of process requirements essential to the trial court's jurisdiction. Respondent must show it complied with service of process requirements under the Navajo Rules of Civil Procedure to substantiate its jurisdiction.

III

This Court has the authority to issue writs pursuant to 7 N.N.C. § 303. "Specifically, the Court's power to issue writs of prohibition, mandamus, and superintending control against a

lower court is based upon its supervisory authority over inferior courts." *Yellowhorse, Inc. v. Window Rock Dist. Ct.*, 5 Nav. R. 85, 86 (Nav. Sup. Ct. 1986). In cases where the trial court is proceeding without or in excess of its jurisdiction, it is possible to obtain a writ of prohibition based upon the sound discretion of the Court. *Id.* In certain cases, "[t]his Court will grant a writ of prohibition as a matter of right if the lower court clearly has no jurisdiction of the action originally and the petitioner has no other remedy available." *Id.* at 87.

The Court concludes that the Chinle Family Court failed to show it had jurisdiction over RPI's divorce action. RPI re-filed her petition for divorce with the Chinle Family Court on June 20, 2017. Prior to that date, RPI did not reside in the Navajo Nation for at least 90 days to meet the statutory residency requirement. See 9 N.N.C. § 402. On the other hand, on June 7, 2017, when Petitioner filed for divorce in Virginia, Petitioner was a resident of Virginia, where the parties previously resided. Petitioner in that action also served RPI, who afterwards voluntarily appeared and participated in the Virginia proceedings.

The Chinle Family Court attempts to justify its jurisdiction in CH-FC-292-17 by finding Petitioner was served in CH-FC-233-17, which was dismissed for lack of subject matter jurisdiction. Service in a previously-filed action, has no bearing on service of process requirements in a later-filed action. Here, service in CH-FC-233-17 has no bearing on service of process in CH-FC-292-17, which is now before the Court.

The Chinle Family Court also attempts to justify its jurisdiction by arguing it complied with Rule 4(e)(3) of the Navajo Rules of Civil Procedure. Rule 4(e)(3) states, "Service by publication shall be made by publication of the summons in the *Navajo Times* or in the newspapers where the person resides, or in the newspapers of the person's last known residence for at least once a week for four successive weeks." The Chinle Family Court interprets the use

of "shall" to mean service by publication in the *Navajo Times* is mandatory and that the use of "or" means service by publication by the other two means is optional. We disagree. Rule 4(e)(3) means service by publication shall be made in one of three ways: 1) by publication of the summons in the *Navajo Times*, or (2) in the newspapers where the person resides, or 3) in the newspapers of the person's last known residence for at least once a week for four successive weeks. Before service by publication is ordered by the trial court, a motion for publication is required. Nav. R. Civ. P. 4(e)(3)(A).

In the re-filed divorce action now before the Court (CH-FC-292-17), the Chinle Family Court failed to show it complied with the service of process requirements of Rule 4(e) of the Navajo Rules of Civil Procedure. Based on the supporting documents and arguments of the parties, RPI was unable to serve Petitioner by personal service. RPI was also unable to serve Petitioner by certified mail. Although RPI asserts she accomplished service by publication in the *Navajo Times*, RPI did not file a motion for publication as required by Rule 4(e)(3)(A), and the Chinle Family Court failed to show it ordered service by publication upon due consideration of the required motion.

Furthermore, despite facts of Petitioner's residence in Virginia, the Chinle Family Court failed to show how service by publication in the *Navajo Times* rather than in a newspaper where Petitioner resides was adequate to meet procedural due process requirements. We are mindful that the concept of due process was not brought to the Navajo Nation by federal law or codified-Navajo law for "the Navajo people have an established custom of notifying all involved parties in a controversy and allowing them, and even other interested parties, an opportunity to present and defend their positions." *See Begay v. Navajo Nation*, 6 Nav. R. 20, 24 (Nav. Sup. Ct. 1988). "This is Navajo customary due process and it is carried out with fairness and respect." *Id.* "The

heart of Navajo due process, thus, is notice and an opportunity to present and defend a position." *Id.* at 24-25. A court of the Navajo Nation must implement service of process requirements in light of these concepts. This Court has also recognized the primary principle that informs this Court's interpretation of procedural due process is *k'e*, which fosters fairness through mutual respect. *See Shirley v. Morgan*, June 2, 2010). In this case, fairness required publication in the newspaper where Petitioner resides, not in the *Navajo Times* where it is highly unlikely that Petitioner would ever see the publication. *K'e* also required Petitioner as a *hadane* (in-law to the *Diné*) to be treated with fairness and respect to ensure notice and an opportunity to defend.

"Our courts, like other courts, must have both subject matter jurisdiction and personal jurisdiction to properly hear a case." *Nelson v. Pfizer*, 8 Nav. R. 369, 377 (Nav. Sup. Ct. 2003). Because the Chinle Family Court failed to show it complied with service of process requirements and Navajo concepts of due process, we find that service of process was insufficient to establish personal jurisdiction over Petitioner. In the absence of personal jurisdiction, the Chinle Family Court is proceeding without jurisdiction and Petitioner has no plain, speedy and adequate remedy at law. *Yellowhorse*, 5 Nav. R. at 87 (requirements for writ of prohibition). Moreover, while child custody has not been raised by either of the parties in this action, an appeal is not suitable remedy in light of competing child custody decisions, RPI's incarceration, and the uncertainty surrounding the care of the parties' children.

The Chinle Family Court is not solely in error in this action. RPI was represented by legal counsel since its onset. Despite service of Petitioner's petition for divorce on RPI's counsel, RPI did not disclose the earlier-filed Virginia action in her petition for divorce. RPI also failed to inform the Chinle Family Court that Virginia issued a Final Divorce Decree on November 2, 2017. As a matter of fact, when questioned, counsel for RPI stated she did not disclose the entry

of the Virginia decree because she was unaware of the action. Supporting documentation from the record, however, confirms by affidavit that RPI's counsel was served with Petitioner's petition for divorce by mail on November 2, 2018, and by fax (with a confirmation page) on November 3, 2018. Petitioner's Ex. J. The Court finds RPI's counsel was less than truthful to the direct inquiry. Under the Rules of Professional Responsibility, counsel has a duty of candor and this Court will not condone any conduct unbecoming of an officer of the court.

Based on decisions above, we take judicial notice of Virginia's award of sole legal and physical custody to Petitioner dated on May 10, 2017 and Virginia's Final Divorce Decree of November 2, 2017.

IV

Rather than issue a permanent writ of mandamus or writ of superintending control as though the Chinle Family Court has jurisdiction, pursuant to this Court's discretionary authority, we hereby issue a Writ of Prohibition against the Chinle Family Court. The Default Judgment entered by the Chinle Family on February 6, 2018 is *void ab initio*. The Chinle Family Court is ORDERED to dismiss CH-FC-292-17 for lack of jurisdiction.

Dated this 21st day of September, 2018.

Chief Justice

Associate Justice

Associate Justice