MEMORANDUM

To: David W
From: Rhonda L. Tuni
Re: Child Support
Date: August 19, 2014

INTRODUCTION

The general inquiry is how tribes within the state of Arizona implement child support obligations.

DISCUSSION

I. Navajo Nation

a. 9 N.N.C. § 404

The Navajo Nation Council on June 04, 1940 enacted a statute that mandates a divorce must provide for a fair and just settlement of property rights and provide for the custody and proper care of minor children.[1] The Navajo Supreme Courts in applying this statute have held, "it is a moral duty and legal obligation of a parent to provide and care for the minor children and the court's duty is to ensure that the obligation is enforced."[2] In subsequent cases, the Navajo Supreme Court has also held, "it is the father's absolute obligation established by Navajo tradition to provide support for one's children . . . continuing for as long as the child[ren] needs the support . . . or for the period indicated in the court order.[3] In addition, the court has also stated, "specifically, the courts require and fix child support payments to provide for the children needs, with adjustments based upon the assets, income, liabilities, and expenses of the parents.[4]

b. Child Support Enforcement Act of 1994 ("CSEA")

The **CSEA** authorized the establishment and adoption of the Navajo Nation Child Support Guidelines on July 25, 1996. The CSEA guidelines is used to calculate current and prospective support, but fails to address how arrearages are handled. However, the Navajo Supreme Court held previously, "payments must not be set at a level that would ruin the party to pay, or cause extreme hardship to that party's present family."[5] Therefore, the party seeking child support should request the court to enforce the child support order when there is a default, not thirteen years later when the children have become adults and the arrearage is at a level that would ruin the party to pay and subsequently cause the party hardship.

This ideal goes hand in hand with one paramount traditional teaching that, "each of us is responsible to do what is necessary to make or provide a decent life . . . meaning that we can[not] simply sit on our rights; at some point in time our inaction with the resultant delay will be

[1] 9 N.N.C. § 404
[2] *Arviso v. Dahozy*, 3 Nav. R. 84 (Nav. Ct. App. 1982).
[3] *Alonzo v. Martine*, 6 Nav. R. 395 (Nav. Sup. Ct. 1992).
[4] *Id.* At 396.
[5] *Notah v. Francis*, 5 Nav. R., 150, 151 (Nav. Sup. Ct. 1987).

deemed negligence and the asserted right will not be enforced by the courts."[6] The court also stated the "[r]esponsibility goes both ways – both the obligation to pay and the obligation to timely enforce your rights is imperative."[7]

In addition, the Navajo court mentioned, "the Navajo Nation does not have a statute similar to Arizona in establishing ten percent interest for all obligations not otherwise set by agreement.[8] Currently, there is no statutory default interest rate on the Navajo Nation and setting a default rate for arrearages is a role reserved for the legislature (lawmaking).[9] The CSEA, tolls the statute of limitations for establishment, modification and/or enforcement of parentage and/or child support actions from the child's birth until the child turns eighteen.[10]

The usage of life insurance as a remedy for arrearages is foreign to the Navajo way of life. In fact the court stated, "it would be uncouth and especially vulgar to demand that [Appellee] secure a life insurance policy against his will so that the insured amount would be used to pay the arrearages at his death."[11] According to Navajo perspective, the notion of wishing ill-will or early death on an individual by demanding life insurance as a remedy, goes against the Navajo mentality of reaching old age. Thus, the remedy of making someone apply for life insurance (preparation for death) goes against the Navajo tradition.

II. Hopi

The Hopi Court of Appeals in a recent case dealt with two issues: (1) whether the trial court erred in finding that inability to pay child support is an affirmative defense to an order to show cause action; and (2) whether the trial court misapplied the affirmative defense because the failure to pay child support was due to Respondent's unwillingness to final alternative employment.

In *John v. Lewis*, the court recognizes the payor's inability to pay is an affirmative defense in an order to show cause of action. The *Lewis* case held, "that once the party seeking enforcement of an order for support satisfies the burden of showing the order to pay and the fact of non-payment, the burden shifts to the respondent to show "that he has paid support or that he is *unable to pay.*"[12] The court stated, in deciding not to find alternate employment while his pay for village employment was suspended due to conflict between village and tribe is not reasonable under the totality of circumstances, as required to establish that he was unable to pay child support ordered by court in protection order.[13] Thus, he was not able to show he was looking for alternative employment and was unable to find work and accordingly did not fulfill his child support obligation.[14]

The preamble to Ordinance 53 is a statement of the policy of the Hopi Tribe to support Hopi children. It notes that "[c]hildren shall be maintained as completely as possible from the

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[6] *Watson v. Watson*, SC-CV-40-07, 1, 16 (Nav. Sup. Ct. January 21, 2010).
[7] *Id.* at 16
[8] A.R.S. § 44-1201
[9] *Watson* at 7.
[10] *Id*. at 12.
[11] Id. at 17.
[12] *John v. Lewis* (No. AP–001–89, 1995); *Anderson v. Keevama*, 01AP000014, 2002 WL 34463027 (Apr. 15, 2002).
[13] Hopi Ord. 50, 53. Anderson v. Keevama, 01AP000014, 2002 WL 34463027 (Apr. 15, 2002).
[14] *Id.* at 413.

resources of their parents" and that the "Ordinance establishes a judicial process for ... the establishment, modification and enforcement of child support obligations; and adds remedies to those already existing for child support enforcement."[15] Ordinance 53 indicates, "delinquent child support payments may be enforced by withholding of income, bond requirements, criminal sanctions, seizure of property, and suspension or denials of licenses."[16] However, counsel in the case at hand did not file for child support pursuant to Ordinance 53.

III. Fort McDowell Yavapai Nation

The Fort McDowell Yavapai Nation Supreme Court in has held, a father's obligation for child support is not retroactive to the child's birth, but appropriate to count from the date the parents' separated because it is presumed the father was supporting the child prior to their separation. In addition, an adjustment of child support to equal the same amount paid to another child by a different mother was not warranted without evidence showing the amount being paid to the other child.[17]

In a separate criminal proceeding an issue arose regarding per capita distribution when a defendant has been convicted of a crime and is arrested, charged, convicted, or sentenced for any of the enumerated crimes listed by the tribe would be subject to the Revenue Allocation Plan of 2003 ("RAP").[18] RAP was enacted by the tribal council in an effort to curb unlawful conduct that "threatens the health and safety of the Nation and its members by removing a substantial benefit of membership until the defendant has fully served their sentence.[19] Accordingly, the defendant's per cap distribution would provide for payments for child support, tribal loans, and any other tribal payments.[20] The Court further stated, the Fort McDowell Yavapai Nation Council sought to protect vulnerable parties (e.g. defendant's spouse and dependent children) from the financial consequences of the defendant's wrong doing and is consistent with the purpose of RAP.[21]

Although, the discussion regarding a criminal issue in regards to per capita distribution and forfeiture, the overall goal of the Fort McDowell Yavapai Nation Council recognizes the concern for those who are affected while the defendant's is in custody serving his sentence.

CLOSING

The tribes that have cases open to the public have enacted statutes and ordinances to address the importance of child support and the need for child support. The Hopi tribal ordinance shows what types of remedies are available to the court in collecting child support that fall into arrearages. Although, The Navajo court has unique case law in recognizing an exception by not allowing collection of arrearages if the recipient does not act within a timely manner. The Hopi

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[15] *Id*. at 413.
[16] *Id.* at 414.
[17] *Smith v. Nunez*, 5 Am. Tribal Law 133, 133 (Fort McDowell Yavapai Sup. Ct. 2004).
[18] *Fort McDowell Yavapai Nation v. Haynes*, 4 Am. Tribal Law 217, 220 (Fort McDowell Yavapai Sup. Ct. 2003); quoting F.M.L.O.C. § 8 – 3(b).
[19] F.M.L.O.C. § 8 – 3(b).
[20] *Haynes* at 219.
[21] Id. at 221.

court system depends solely on the tribal ordinances and rules of the court, in comparison the Navajo court applies statutory laws and traditional teachings. The Fort McDowell Yavapai Nation is a tribe unlike Navajo and Hopi distribute per capita to their tribal members. Their concern is not only for their tribal members but also regarding what per capita is meant for and the manner in which it is utilized by their members.