IN THE COURT OF APPEALS OF PASCUA YAQUI

EDDIE SOTO, Appellant, vs. **LINDA SALOMON,** Appellee.	**Case No. CA-01-005** **FINAL ORDER**

This case raises issues of child custody and child support. Determining child custody and support is an essential function of any sovereign and the people it represents. It is also an extremely complex function, laden with cultural, religious, and social values. The arm of this government which has been delegated the authority to enact laws for the courts to follow — the Council — has not yet done so regarding some of the more specific issues raised in this case. While it is not uncommon for rules in such matters to evolve through the civil adjudicatory process, this Court is hopeful that the Council will legislate and enact more comprehensive laws on these matters in the very near future.

Consequently, in the case at hand, this Court has decided to take a pro-active approach, not only to render a decision on the matters raised in the instant case, but also to provide some rules of guidance for all cases involving child custody and child support before the trial courts of Pascua Yaqui. In the event the council should enact provisions that are inconsistent with this opinion, such provisions, of course, will control, unless, of course, they are challenged and determined to be unconstitutional.

FACTUAL BACKGROUND

In February of 2001, Appellant, Mr. Soto, filed to establish paternity over the two minor children at issue and to obtain visitation rights to see the two minor children. Appellee, Ms. Salomon, did not contest Mr. Soto's paternity but instead filed immediately for child support. In March of 2001, Appellee, Ms. Salomon, counter-filed for child support. On April 27, 2001, the Trial Court entered judgment regarding custody, visitation, and support awarding "sole custody" and the child support in the amount of five hundred dollars per month to Appellee, Salomon, and visitation to Appellant. On July 2, 2001, Mr. Soto filed an appeal to this Court and this Court agreed to hear the appeal. On January 18, 2002, this Court issued an interim order lowering child support to two hundred, sixty-five dollars per month. In the interim, Appellee Salomon

sought equitable relief in the form of restraining orders and garnishments, and the record then evidences some genuine attempts by both parties to settle some difficult issues. However, and unfortunately, the parties have failed to settle all issues with a semblance of finality.

CHILD CUSTODY

The Law and Order Code of Pascua Yaqui, Title I, Chapter 10, sets forth the laws that govern child custody and child support in this jurisdiction. Specifically, Chapter 10, Sec. 10.17 (*et seq.*) governs matters of child custody. Appellant has presented to the Court an impassioned and eloquent argument for reading the applicable chapters in accordance with broader notions of cultural and social policy, perhaps a broader reading that the Council intended when it adopted these provisions in the 1980s and 1990s. For various reasons, this Court is inclined to provide a liberal construction of the Code.[1]

Section 10.19 provides "The Court shall determine custody either originally or upon petition for modification, in accordance with the best interests of the child."[2] The "best interests of the child" is the widely accepted standard in American law." Uniform Marriage and Divorce Act of 1970. However, the intent of the code is clear that that standard applies when both parents are citizens of Pascua and members of the Pascua Yaqui Tribe. In a case such as this, Appellant urges this Court to read that standard against the much broader backdrop of Yaqui history, culture, and present social exigencies.

Perhaps no resource is more vital to the continued existence of any nation than its children. When determining child custody, courts of all nations and all jurisdictions give varying degrees of weight to all the various competing interests, especially in matters as vital to their existence as children. However, the best interests of the kingdom, the government, the church, the community, the father, the family, the parents, and the child have all held persuasion at varying stages of evolution of many jurisdictions, including America.

In determining child custody in general, such as when rights of both parents are terminated (Termination of Parental Rights or TPR), or where one parent is not a citizen or a member of the Tribe, at this juncture in the evolution of Pascua Yaqui, this Court is compelled to

---

[1] The legislative history of the "Code," specifically Title 1, Chapter 10, is dubious. The version available in the judiciary says "(revised 1991);" however, we can find no evidence of any such enactment in that year. Further, parts of the Code appear to have been adopted as early as 1981 and amended as recently as 1994, however several intervening amending resolutions evidently are no longer extant. The Court respectfully urges the Council to establish a comprehensive codification system and to adopt or re-adopt, if necessary, all parts of the code that the Council wishes the people and the court to adhere to.

[2] The remainder of Sec. 10.19 A. reads in its entirety: "The court may consider all relevant factors, including: 1. The wishes of the child's parent or parents as to his custody. 2. The wishes of the child as to his custodian. 3. The interaction and relationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's interests. 4. The child's adjustment to his home. 5. The mental and physical health of all individuals involved. B. Fees of attorneys or lay advocates and costs shall be assessed against a party seeking modification if the court finds that the modification action is vexatious and constitutes harassment."

give paramount consideration to the best interests of the Tribe, which is all-inclusive of culture, religion, family, and any other social institution or organization within the Tribe. It is especially important to explain this standard for the benefit of neighboring jurisdictions if the need should arise for them to interact with our child custody orders. Of course, in some instances the best interests of the Yaqui child, the parents, or a distinct community, for example, may be the same as the best interests of the Tribe; in other instances their interests may be vastly different. That determination is for the courts of Pascua Yaqui to make. Regarding domestic relations among the Pascua citizenry, this Court believes that social policy should dictate a presumption for consistency from case to case as to which interests should be considered paramount, and in what order, and the Court is hopeful that the Council will provide the clear guidance to the courts in this regard.

Thus, in determining child custody in general, such as when rights of both parents are terminated (Termination of Parental Rights or TPR), or when either parent is not a citizen or a member, the best interests of the Tribe dictate that the courts will accord primary custodial or placement consideration to the immediate family of the child(ren), and secondarily to the extended family of the child(ren). If the primary or secondary considerations are illegal, impossible, or impractical, the courts will accord tertiary consideration, in descending order, to more distant relatives living in Pascua Yaqui, resident citizens of Pascua Yaqui, relatives who do not live in Pascua Yaqui, Tribe members who do not live in Pascua Yaqui, citizens or members of neighboring Tribes, and then others. Even though a classic TPR proceeding is not squarely and focally before this Court in this case, nevertheless, the consistent application of these strictures will assist in determining the issues in this case.

The case before us raises child custody issues that arise in matters of divorce between parents who are each able and willing separately to provide custody. In essence, in such cases one parent may be seeking wholly or partially to "terminate parental rights" on the other parent. Thus, considerations similar to those in a conventional TPR case may arise. In a divorce case, especially where a non-member is seeking sole custody of a Yaqui member's child(ren), the Trial Court must look to the considerations and factors of a conventional TPR proceeding.

This case also involves the complicated turn that one parent is a Pascua citizen and a member of the Tribe and the other parent lives in Pascua but is not a member of the Tribe.[3] Nonetheless, this non-member parent may raise the child(ren) next door to Yaqui people, may have the child(ren) participate in Yaqui religious or other cultural events, and may have the child(ren) interact normally with their Yaqui relatives. All of this, obviously, would be much more difficult, and in some instances impossible, to accomplish if the non-member parent refused to live in Pascua among the Yaqui peoples. Indeed, it may be impossible to accomplish even for the Yaqui Tribe member parent who does not reside in Pascua. Therefore, it may well be that the best interests of the Tribe—and the child(ren)—are better served by the non-member who lives here than they would be by a member who does not live here. Nonetheless, those are

---

[3] It is important to note that a non-member parent who resides in Pascua is similarly situated to a "citizen" in many respects, if not exactly in the same form or substance of American law and polity.

determinations that are best left to the Council to make, but the Council and the people must be aware that the courts will necessarily encounter such issues in the civil adjudicatory process. For example, while residency is not dispositive of child custody disputes, the lower courts should consider each parent's ability and willingness to facilitate Yaqui children's participation in Yaqui cultural life, regardless of the parent's membership status.

Some common terms regarding custody in American laws are "sole custody," "split custody," "legal custody," "physical custody," "joint custody," "alternating custody," and "visitation." Until the Council provides otherwise, for purposes of this Opinion and for guidance to the lower courts, these terms shall carry the following general meanings:

- "Legal custody" refers to the parent who is authorized to make legal decisions for the child, such as whether to have braces on his/her teeth or to take a field trip to the zoo or which day care will be used. Legal custody may be granted with or without concomitant physical custody.
- "Physical custody" refers to the parent in whose home the child(ren) actually reside/s.
- "Sole custody" refers to one parent having both legal and physical custody.
- "Split custody" refers to each parent having custody of at least one child in a multiple child family.
- "Joint custody" refers to an arrangement where both parents retain legal authority or "legal custody" over the care and control of the child. In the context of joint custody, the exercise of legal custody (legal decision-making for the child(ren)) may or may not be restricted to when the parent has physical custody.
- "Alternating custody" refers to an arrangement where both parents retain sole custody for more or less equal and regular periods.
- "Visitation" refers to the rights of the parent who is without physical custody periodically to visit the child(ren) or even to have temporary physical control of the child(ren) without interrupting the legal custodial rights of the other parent.

The trial court awarded sole custody to Appellee Salomon. As its rationale, the trial court seems to have lent great weight to oral testimony regarding a special diet needed by one of the children. Apparently, no physical evidence was presented to substantiate these special needs. Also, the trial court apparently made no finding that Appellant was not equally capable of providing such a special diet to his child; the trial court should presume that Appellant is equally capable of providing a special diet to his children as Appellee. Furthermore, the record establishes that Appellant was denied reasonable visitation especially in that the children have been denied opportunities to witness, attend, or participate in Yaqui cultural activities with their Yaqui father. The trial court should give careful consideration to these issues that are so important to the Tribe and the children and should award custody based upon these considerations. In a divorce case, especially where a non-member is seeking sole custody of a Yaqui member's child(ren), the Trial Court must look to the considerations and factors of a conventional TPR proceeding.

CHILD SUPPORT

Title 1, Chapter Ten of the Code made available to the Judicial Branch also governs matters of child support. Specifically, "Sec. 10.10 CHILD SUPPORT, FACTORS" sets forth broad factors over which the courts then exercise broad discretion in awarding support. Indeed, the broadness of the factors in Sec. 10.10 A. and the discretion left to the courts beg a finding of unconstitutional vagueness and violation of civil rights due to the unpredictability and potential inconsistency of the law's application from case to case.

As a result, this Court will take this opportunity to provide some guidance for the trial courts so that the Pascua citizens and members may rest assured of some predictability and so that the courts may act with consistency in matters as important as child support. Of course, this court welcomes direction by the Council, the body elected to provide such laws and policy guidance over matters as important to the Tribe and its members as child support.

The Formula

The parent that is ordered to pay support (hereinafter "payor parent") shall pay fourteen percent (14%) of his/her gross income (income before taxes) for one child, fifteen percent (15%) if there is a second child, and nineteen percent (19%) if there is a third. At the discretion of the trial court, the designated percentages may go lower, but not more than two percentage points lower, and in no case shall the designated percentages be raised. If more than three children are at issue, in no case shall the income percentage exceed twenty-seven percent (27%).[4] For example:

Payee's Gross Income (PGI):	$29,000.00
15% of PGI (Two Children):	$ 362.50
Minus Housing Benefit:	$ 115.00
Monthly Child Support	$ 247.50

1. Housing Benefits as Income

The court must calculate into the child support formula any housing benefits that inure to the payee parent as part of the payor parent's income if the payee parent receives such housing benefits and is otherwise ineligible for such housing benefits. The value of such benefits shall be ascertained by comparison with similar housing in surrounding communities. The value shall be the difference between the cost of the Tribe subsidized housing and the cost of the compared housing. The trial court shall then deduct the difference from the amount ascertained using the formula, but in no instance shall such

---

[4] Any per capita payments or other payment of value from the Tribe to its members shall not be counted as income or calculated into the formula if the child is a Member and also receiving such benefits or if the child is not a Member.

deduction lower the support payments below ten percent (10%) of the payor parent's gross income.

2. Health Care

Health care expenses borne by the payor parent shall not be calculated into the formula; instead, the trial court shall separately order the provision of health care for the child. As a result, the fact that children are eligible for publicly provided health care shall not affect the final award of support. Nevertheless, health costs often exceed the coverage eligibility of even the Federal Indian Health Service, and thus, the trial court must include in its order which parent shall pay health care expenses that exceed what is publicly available. The trial court shall order that the cost of insurance may be shared or entirely borne by either party. Otherwise, the presumption shall be that the parent with legal custody shall provide full coverage including deductibles, and if the parents have joint custody (both have legal custody), then the presumption shall be that the parent with physical custody shall provide full coverage including deductibles.

3. Special Dietary Needs

As noted earlier, in the instance case the trial court seemed to rely heavily on the finding that a child had special dietary needs for purposes of both support and custody. Regarding custody (as opposed to support), special dietary needs for the child(ren) are presumptively irrelevant, unless it can be established by incontrovertible evidence that one party or the other simply cannot meet such special needs. Regarding support, special dietary expenses should be calculated separately from the formula and shared equally by the parties, meaning the payor parent must pay half the established special dietary expenses over and above the formula, and also meaning that the payee parent must pay half the expenses to the payor parent (or debit from the payor's payment) when the child is in the physical custody of or visitation with the payor parent. In other words, the parent without physical custody should be responsible for providing half the expense of a special diet to the parent with physical custody, for whatever length of time.

4. Tax Benefits

Tax benefits in the form of exemptions or deductions for the child(ren) shall inure to the parent with legal custody during the tax year unless otherwise agreed by both parties. If the parents have joint custody any tax benefits shall inure to the parent with physical custody of the child for over six months of the tax year, unless otherwise agreed by the both parties.

5. Day Care

If the child(ren) is maintained by a day care provider licensed by Pascua Yaqui or a neighboring jurisdiction, both parents shall share the costs of day care. While maintaining custody of one's own children may be burdensome at times, it also carries great benefits and blessings. Therefore, a parent with "physical custody" or "sole custody" shall bear three-

fourths (3/4) of the total day care cost and the other, non-custodial parent one-fourth (1/4). This formula should be applied in all cases except those where the physical custodial parent has shown extreme hardship to justify the non-custodial parent's paying a greater percentage for day care. If the child(ren) is maintained by a non-licensed day care provider, such as a family member, the courts must be able to ascertain with certainty the day care costs, from the provider's income tax records, in order to apportion the costs between the parents. If such costs are not readily ascertainable from tax records, then the custodial parent shall bear one hundred percent (100%) of the costs.

6. Residency

As a matter of both custody and support, the residency of each child shall remain in Pascua until that child has attained majority age unless a change of residency shall have been made with the written consent of the non-custodial parent prior to the change.

7. Jurisdiction

Pascua courts shall maintain jurisdiction over this matter until further notice or until both children have attained majority age.

8. Pending Judicial Matters

Matters of equitable relief sought by the parties in the context of these matters, such as restraining orders and garnishments, must be filed or re-filed, if continued necessity dictates, to the trial level courts of this jurisdiction.

This Court issued an Interim Order on January 18, 2002, and encouraged both parties to reach an agreement on some of the more contentious issues between them, and they have made substantial progress upon which the trial court may now rely. Consequently, this case is remanded to the trial court so that the trial court may, in manner consistent with this Opinion and supported by evidence, award custody and enter a final decree on custody, visitation, and support.

IT IS SO ORDERED.

Richard G. Monette

Richard Monette
Chief Justice

Carolyn Abeita
Associate Justice

Michelle Ereaux, J.D.
4930 N. Placita Santolina
Tucson, Arizona 8574
520-312-5378

Lay Advocate for Eddie Soto

CP/01-005

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION
TUCSON, ARIZONA

EDDIE SOTO, Appellant, vs. LINDA SALOMÓN, Appellee	)	NO. CA-01-005 SUPPLEMENT TO APPELLANT'S MEMORANDUM

COMES NOW the Advocate for the Appellant, Eddie Soto, and respectfully submits this Supplement to the Appellant's Memorandum filed on March 7, 2002, for this Court's further consideration. Appellant files this Supplement in support of Chief Justice Monette's comment during the status conference regarding this Court's concern and weighing of the interest of the Tribe in custody determinations.

I. DOES CHAPTER 10 OF THE PASCUA YAQUI CODE PROTECT THE TRIBE'S INTEREST IN PROTECTING THE STATUS OF MEMBER AND DESCENDANT CHILDREN AND THEREBY PRESERVING THE TRIBE ?

> Tribal leaders have been resisting the removal of their children for over two and a half centuries. For each time an Indian child is taken from their ranks, *their very existence as a culturally-distinct people is diminished and this* Nation's First American are threatened to the point of extinction. . .
>
> In sum, it is clear that for hundreds of years, Indian children have been the innocent victims of a cultural war waged against them by those who later *immigrated here. History has clearly demonstrated that the idea of separating* Indian children from their tribal communities is deeply embedded in the fabric

> of American society –placing Indian children at high risk for being removed from their families. *Amendments to the Indian Child Welfare Act: Hearings on H.R. 1082/S.569 Before the Senate Indian Affairs Committee* (1996) (Statement of Senator Daniel K. Inouye, Vice-Chairman of the Senate Indian Affairs Committee.)

In the original case, Soto v. Salomón, the Pascua Yaqui Trial Court awarded sole legal and physical custody of two Pascua Yaqui children to their non-Indian mother, Linda Salomón. Specifically, in its Order dated April 26, 2001, the Court stated, "The Court will grant sole custody of the children to the mother as she has been the primary caregiver for the children." Although Appellant, Eddie Soto, challenged this decision on the basis of judicial error, the problem originates in part in the language within Section 10 of the Pascua Yaqui Code.

The Pascua Yaqui Tribal Code at Section 10.19, *Modification of Child Custody, Fees*, A., states, "The Court shall determine custody, either originally or upon petition for modification, *in accordance with the best interests of the child*." (Emphasis added) The paragraph includes as relevant factors for consideration: the wishes of the parents and the child, (§ 1., § 2), the interactions and interrelationship of the child with his parents, siblings and other persons, (§ 3), the child's adjustment to his home, school and community, (§ 4), and the mental and physical health of the individuals involved, (§ 5). In addition, § 2, A., Section 10.17 of the Code vests jurisdiction in the Court where, "It is in the *best interest of the child* that a Court of this Community assume jurisdiction because the child and his parents . . . have a significant connection with this Community and there is available in this community substantial evidence concerning the child's present or future care, protection, training and personal relationships; . . ." (emphasis added). As written, the Yaqui Code embodies a presumption that the best

interest of the child, as assessed within the sections of the Code and by the assumption of jurisdiction alone, is congruent with and protects the interest of the Tribe. Where the practical result – even a potential result - is the severing of the legal and physical custody of a member or descendant child from the member parent and the Tribe, the language of the Code must be insufficient.

It appears that the clauses cited above and others providing for the Yaqui Trial Court's jurisdiction are not unlike similar sections of codes of the various states of the United States. State laws are consistent with the monolithic and unitary cultural paradigm known as "American" or more correctly Euro-American society. Thus, the presumption of congruence between the best interest of the child, the state and the United States in weighing parental interest rests within the standards promulgated. Unfortunately, the reasoning of state custody statutes also appear to reflect some suppositions analogous to those of the *"Existing Family Doctrine"*. This facially neutral doctrine is adverse to a Tribe's interest in custody disputes involving foster and adoptive placements of member and descendant children. When a tribe simply transposes language from state statutes it also transposes the values and culture of the state.

Tribal cultures, including the Yaqui culture, differ from American culture Thus, the Tribal code should embody the values and culture of the Yaqui. Further, because of the long-standing policies of removal of children and the threat the removal poses to the integrity of the tribe, the Yaqui Code should include language that recognizes, protects and gives notice of the interests and values of the Yaqui nation. That is, the Code must address the tribe's interest and the special circumstances that arise in child custody

adjudication involving a child who is a member or a descendant of an Indian tribe, the tribe, and a parent who is a non- member or non-Indian. Codifying this assertion of the tribe's sovereignty would provide a clearer basis for judges to rule in ways that sustain the tribe's interest and would reduce the opportunity for judicial errors that contradict public policies, and harm tribal member parents and member and descendant children.

A. IS THERE EVIDENCE OF DISCONTINUITIES BETWEEN THE TRIBE'S INTEREST AND JUDICIAL DETERMINATIONS OF CHILD CUSTODY?

Yes. Lines 17 – 20 of the Visitation Order for Soto v. Salomón issued by the Pascua Yaqui Tribal Court on April 26, 2001, state, " . . .that the father states he has been denied reasonable visitation with the children since the separation and that the mother refuses for the children to observe or participate in cultural ceremonies, nor does she like residing on the Reservation, that the mother states . . .she does take the children to observe the cultural ceremonies. . ." There was no finding of facts that confirmed or refuted the allegations. Allegations of this kind should trigger strict scrutiny because they go straight to the heart of the problem of the tribe's interest in preservation and the custody of children. The Court should ascertain the facts of [1] the non-native parent's knowledge of the culture of the Tribe; [2] the non-native parent's involvement in, practice, and ability to teach the culture; and, [3] the non-native parent's evaluation and beliefs about the culture. Taking children to "observe" a cultural ceremony from the anthropological view of the "other" rather than integrating one's self into the ceremony by learning through observation is a profound difference. It is the difference that harms the child and harms the tribe.

Heightened protection of the tribal member parent's rights would serve as the corollary first step in the process of protecting a tribe's interest in a child. Where, as in this case, there is no finding of fact that establishes by the standard of clear and convincing evidence that the tribal member parent abused, molested, abandoned or neglected a child, there is no basis for termination of the tribal member's parental rights. Even where a tribal court may be satisfied that there is a problem with the member parent, a court should seek alternatives through the extended family that would sustain the member parent's interest as well as the tribe's interest. In the absence of either, the court might seek an alternative by designating a tribal member to act *in loco parentis* sharing legal and physical custody of the child with the natural non-native parent. The tribal mentor might be designated as "auntie" or "uncle"

In addition to the considerations above, the Code should protect the interests of the Tribe by retaining exclusive jurisdiction over the children until majority regardless of the residency of the parent. In Soto, it was alleged to the Court that the non-native parent did not like living on the Reservation. The Court should anticipate that this parent is likely to remove the children from the Reservation and this Court's jurisdiction. Once distant from the Reservation, the non-native parent can seek modifications through the courts where she resides. The language of jurisdiction must be unequivocal. Jurisdiction of the Tribe should not rest on domicile requirements like those of states but should remain exclusive until majority of the children. This type of provision would be analogous to and consistent with the jurisdictional sections of ICWA. Since the essential threat to tribal interest is parallel, custody disputes between member and non-member parents should have no lower standard than their counterpart in foster/adoptive placements.

II. WHAT LAW OF THE UNITED STATES DEFINES THE SOVEREIGN RIGHT OF THE TRIBE IN IN THE CUSTODY OF MEMBER AND DESCENDANT CHILDREN

Discussing the law that the defines the sovereign right of the tribe in the custody of member and descendant children requires bifurcation of the analysis positing [1] the tribe as a quasi-sovereign and domestic dependent nation within the federal system of the United States, and [2] the tribe as a self-defined and self-determining sovereign functioning comparably to independent nations under international law.

A. THE RIGHT OF A TRIBE AS A QUASI-SOVEREIGN AND DOMESTIC DEPENDENT NATION WITHIN THE FEDERAL SYSTEM OF THE UNITED STATES IN THE DETERMINATIONS OF CHILD CUSTODY INVOLVING MEMBER AND DESCENDANT CHILDREN.

Despite the five hundred year history of European expansion into the western hemisphere tribes have managed to retain a distinct political status. Within the United States this status was defined by the United States courts as that of a "quasi-sovereign" and "domestic dependent nation." Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v.Georgia, 31 U.S. 515 (1832)[1] The courts of the United States also held that, as a quasi-sovereign , a tribe's rights include the right to determine its own membership. This right is currently recognized by the imprimatur of the United States Supreme Court in Santa Clara Pueblo v. Martinez as, " A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community." In dicta the Court also noted, "Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the [federal] judiciary should not rush to create causes of action that would intrude on these delicate matters."

[1] Please note that this writer is not stating that this was correct either morally, politically, or in law.

Arguably, if a tribal court awards ***sole*** legal and physical custody to the non-member parent of member or descendant children the court has created a potential cause of action regarding the status of the children.

In addition to clarification of the existence of the right to determine membership within a tribe, the *status* of a tribe's interest in a child was recently addressed by the United States Supreme Court. In Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1988), the Court explained, ". . .the protection of this tribal interest is at the core of ICWA, which recognizes that the tribe has an interest in the child, which is distinct, but on parity with, the interest of the parents." A tribe's interest in a child should remain constant. It is illogical to presume that it could be different and particularly that it could be less. Therefore, by analogy, the protection of the tribe's interest is also distinct and on parity with the parents in cases involving disputes between natural parents.

Aside from the interest recognized in statute and common law, a tribe's standing to assert an interest is found and perhaps more fully explicated in the common law doctrine of *parens patriae.*

B. The Tribe and The Common Law Concept of *Parens Patriae*

" '*Parens Patriae,* ' literally 'parent of the country,' refers traditionally to the role of the state as sovereign and guardian of persons under legal disability." Black's Law Dictionary 1003 (5th ed. 1979) The original concept of *parens patriae* developed from the earlier common-law concept of the "royal prerogative." Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972); G. Curtis, The Checkered Career of *Parens Patriae*, 25 DePaul

L. Rev. 895, 896 (1976). The royal prerogative included the right or responsibility to care for persons who "are legally unable, on account of mental incapacity, whether it proceed from 1st nonage; 2. idiocy: or 3. lunacy: to take proper care of themselves and their property." J. Chitty, Prerogatives of the Crown, 155 (1820) quoted in Curtis, *supra*, at 896. Although by title the concept of royal prerogative connotes a power specific to the monarchies of Europe, the Supreme Court ascribed the same concept as including the authority of a legislature, i.e.,

> "This prerogative of *parens patriae* is inherent in the supreme power of every State, whether that power is lodged in a royal person or in the legislature [and] is a most beneficent function . . .often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves." Mormon Church v. United States, 136 U.S. 1, 57 (1890)

The current doctrine of *parens patriae* standing differs significantly from its early common law roots. Under existing American law, when the state is acting in behalf of those who cannot represent themselves and is only a nominal party without an independent and real interest of its own, the state will not have standing to pursue the claim. Pennsylvania v. New Jersey, 426 U.S. 660 (1976); Oklahoma ex rel. Johnson v. Cook, 304 U.S. 387 (1938); Oklahoma v. Atchison, T. & S.F. R. Co., 220 U.S. 277 (1911). In order to have standing under the doctrine of *parens patriae*, the State must assert an injury to a "quasi-sovereign" interest. This concept of a "quasi-sovereign" interest was distinguished from the sovereign and proprietary interests of a state by the U.S. Supreme Court in Louisiana v. Texas, 176 U.S. 1 (1900). In Louisiana, the Court found that, "the State is entitled to seek relief in this way because the matters complained of.affect her citizens at large."*Id.*, at 19, but ruled against the State for other reasons. The following term, the Court analogized the interests that a state could pursue under *parens*

patriae with interests that an independent country could similarly pursue. Missouri v. Illinois, 180 U.S. 208 (1901). Although the development of the interests necessary for standing under *parens patriae* is on a case by case basis, it is clear that the state must be more than a nominal party and the state must express a quasi-sovereign interest. A quasi-sovereign interest falls into two general categories: [1] the health and well-being, both physical and economic, of its citizens; and [2] the interest in not being discriminatorily treated within the federal system. Alfred L. Snapp & Son, Inc. Et Al. v. Puerto Rico Ex Rel. Barez, Secretary of Labor and Human Resources, 458 U.S. 592 Further,

> the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population. . .State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers . . .Distinct from but related to the general well-being of its residents, the State has an interest in securing observance of the terms under which it participates in the federal system . . .Similarly, federal statutes creating benefits or alleviating hardships create interests that a State will obviously wish to have accrue to its residents. *Id.*, at 607, 608

In Snapp, the Court also found that the Commonwealth of Puerto Rico is "similarly situated to a State in this respect;" *Id.*, at 608. In numerous federal acts, tribes have been regarded as holding the same status as states. Thus, by analogy, the doctrine would apply to tribes.

Although the Pascua Yaqui Tribe is not seeking standing here before a foreign court, the concepts and constructs developed in the doctrine of *parens patriae* can be construed to interpret the underlying logic for a tribe, as a sovereign, to have an independent interest – and, therefore, standing - in the disposition of the custody of the children or descendants of tribal members as a matter related [1]to the well-being of its members, [2] that the Tribe would –and has- addressed through its governing council, [3] that would constitute

an injury affecting a substantial segment of the tribe's population, and [4] that any sovereign would assert in courts of other states and tribes. Thus, under the Doctrine the tribal court should assume the presence of the tribe as a party in every child custody adjudication even though the tribe is not represented. Conversely, this interpretation of the Doctrine may seem unnecessary and strained when the tribal court is the judicial branch of that very same sovereign. However, where tribal courts are willing to infringe on the tribe's interest in a child by severing the child's ties with the member parent and so to the tribe, then perhaps, the tribe and its interest should be represented.

The second general category of a quasi-sovereign interest under the Doctrine - that is, the interest in not being discriminatorily treated within the federal system – raises an interesting dilemma by analogy. Specifically, where the Yaqui nation asserts an interest in a Yaqui child who is the the subject of a placement under ICWA, the Court fails to recognize the interest and the denial of the interest was purely because it was expressed by the Yaqui nation, then the Yaqui nation would have standing to argue that it was being treated discriminatorily under the federal system. By extension of the same principle, assuming that the Yaqui court would recognize the standing and interest of another nation in a determination by a Yaqui court of the custody of a child who is a member of that other nation, is the Yaqui Court acting discriminatorily by failing to recognize the interest of its own nation when severing the legal and physical ties of a Yaqui child from his/her Yaqui parent?

C. CHILD CUSTODY IN LIGHT OF ICWA

Appellant has previously filed comments regarding the parallels between child custody

determinations under the ICWA and in dissolution and custody proceedings between the natural native and non-native parent of a member child or descendant child. In order to uphold and sustain the arguments of native nations to the United States Congress in developing and improving this federal act, tribal courts should take responsibility for protecting the same interests of the tribe as a whole. Without the support of the same principles in tribal courts, the tribes position appears flawed and the advocacy for the legislation is seriously weakened. Failure of the tribal courts to sustain the tenor of ICWA is contrary to the public policy of tribes and the United States Congress.

III. WHAT INTERNATIONAL LAW APPLIES TO CUSTODY DETERMINATIONS OF MEMBER AND DESCENDANT CHILDREN?

International law is based on the concepts of "general customs" and "special customs".

> General customs are rules, norms and principles that are law because of their general acceptance. A special custom is one that is local to an area and involves the practices of identifiable groups. ANTHONY D'AMATO, THE CONCEPT OF SPECIAL CUSTOM IN INTERNATIONAL LAW,73 Am.J.Intnl. L. 211, 212 (1969) quoted in James W. Zion, COMING SOON TO A COURTHOUSE NEAR YOU – INTERNATIONAL LAW; INTERNATIONAL LAW IN FEDERAL, STATE, AND INDIAN NATION COURTS The 2002 Tribal, State, & Federal Judges Conference, University of Arizona (2002)

> There are two elements-the first is 'state practice' 'as evidence of a general practice accepted as law,' and the second is 'opinio juris'- where a given state accepts that a given custom is binding as law. ANTHONY D'AMATO, TRASHING CUSTOMARY INTERNATION LAW, 81 AM.J.INTNL.L. 101 (1987) *Quoted in Id.*

> The problem is that just because a custom is placed in a [international] charter, covenant or declaration, that does not take away its authority as a custom, and the independent custom can still apply. *Zion Id.*

Appellant's Memorandum filed to this Court on March 7, 2002, gave a cursory history of the laws of child custody recognized by European nations. For several centuries these views constituted what was known as international law. However, in accordance with the

well established rules of customary law, the United States has also long claimed that it recognized the customary laws of Indians. Nonetheless, with regard to the parental rights, education, and rearing of tribal children, the United States and the various states patently violated customary laws through public policies, acts, statutes and court decisions. These policies and decisions violated the substantive due process rights explicated as international law pursuant to the United States Constitution as well.

Since the founding of the League of Nations and, subsequently, the United Nations, the Inter-American Commission, and other multinational organizations, international law has become broader and more inclusive. Currently, international law recognizes the right of a tribe to determine its membership and to preserve its distinct political and cultural existence through retaining control over its children. For example, Part II, 6., of the Articles of the Draft Declaration On The Rights of Indigenous Peoples states,

> Indigenous peoples have the collective right to live in freedom, peace, and security as distinct peoples and in full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

Other documents that express international human rights norms specific to indigenous peoples include the International Labour Organization's Convention No. 169 on Indigenous and Tribal Peoples (1989) (Entered into force 1991), the Proposed American Declaration on the Rights of Indigenous Peoples (1996), the Vienna Declaration and Programme of Action (adopted by the United Nations World Conference on Human Rights, 1993), resolutions adopted at the Fourth World Conference on Women (1995), the International Covenant on Civil and Political Rights particularly the interpretations of Article 1 and Article 27, and the interpretations of the International Convention on the Elimination of All Forms of Racial Discrimination. These documents individually and

jointly provide a clear legal framework for the tribes, (indigenous peoples) of this continent to strengthen their assertions of interests including that of control over their children.

For a tribal court to terminate a member parent's rights and to freely release a child to the non-member parent is particularly problematic given the current transformations of international law. The changes in law, as this Court well knows, are hard won. Tribal courts, like their counterpart federal and states' courts, at a minimum should be cognizant of the changes and adopt them into their decision-making. If these courts fail to do so they violate international law and are subject to review on that basis.

IV. CONCLUSION

Appellant realizes that this Supplement is filed after the deadline for filing. This is simply submitted as a reflection of considerations of the Advocate. This Advocate would like to develop an article based on the themes of this response and would welcome comments from the Justices of this Court. I would particularly like to thank Justice Monette for his timely comment regardless of the future of the proposed article.

Respectfully submitted.

Dated this 8th day April, 2002.

By, _____
Michelle E. Ereaux, J.D., Lay-Advocate
Eddie Soto, Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing *Supplement To Appellant's Memorandum* to the Pascua Yaqui Tribal Court and the parties by personal service on April 8, 2002.

Michelle E. Ereaux, J.D.
Lay Advocate for the Appellant, Eddie Soto

Michelle Ereaux, J.D.
4930 N. Placita Santolina
Tucson, Arizona 8574
520-312-5378

Lay Advocate for Eddie Soto

CA-01-005

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION
TUCSON, ARIZONA

EDDIE SOTO, Appellant, vs. LINDA SALOMÓN, Appellee	)))))))	NO. CA-01-005 SUMMARY OF FINAL SETTLEMENT

COMES NOW the lay advocate for Appellant, Eddie Soto, and submits this summation of the Settlement Agreement reached by the parties, Appellant, Eddie Soto, and Appellee, Linda Salomón. This summary is presented in this form because Ms. Lopez contacted Ms. Ereaux at or about 9:00 p.m., April 4, 2002, to discuss the final Settlement. Because of other obligations and the lateness of the communication, I am unable to meet with Ms. Lopez, her client, and my client to provide the signed documents to this Court on April 5, 2002. I propose to provide the signed documents, incorporating this Court's order, by April 10, 2002.

I. PARENTING PLAN

Both parties agree to the Parenting Plan as submitted to the Court during the status conference held March 7, 2002.

II. CHILD SUPPORT

This Court should note that Ms. Salomón did not submit receipts or any documentation for the extraordinary expenses she alleged. Because she ultimately withdrew the demands based on the expenses, by agreement of the parties, the extraordinary expenses are no longer a consideration in setting the amount of child support.

Both parties agree to a maximum child support level of two hundred and twenty-two dollars, ($222.00), per month. In addition, both parties agree that this Court should take into consideration and offset the child support by the contribution of the reduced cost housing provided by Mr. Soto. The rental market value of a three bedroom, two bathroom home of comparable size and design ranges from a low of $750 per month to a high of $1200 per month. Ms. Salomón currently pays $385.00 per month. Thus providing an offset will establish the child support amount within the range of $0 to $222.00 per month. The parties agree to leave the final determination of the amount to this Court.

III. MATTERS REMAINING BEFORE THE TRIAL COURT

A. COMPLAINT SEEKING GARNISHMENT OF MR. SOTO'S WAGES:

Appellant, Eddie Soto, paid all arrearages due as directed by this Court in its Order of January 4, 2002. In addition, Mr. Soto is current in his payments of child support to this date. For her part, Ms. Salomón agreed to withdraw the complaint. In conclusion of the matter, Mr. Soto asks that this Court find and order that child support in the amount of $500 was in error in order to preclude any future request for retroactive payment based on the amount and the time period.

B. COMPLAINT ALLEGING RESTRAINING ORDER VIOLATIONS:

Mr. Soto proposed two settlement offers regarding the restraining order violations during the past weeks. Ms. Lopez rejected both. However, among other things, Ms. Lopez provided a tentative counter-offer Thursday evening during our telephone conversation. She stated further that she would call on Sunday, April 7, 2002, to confirm the offer. Mr. Soto is willing to accept the offer as proposed. He is also willing to withdraw his complaint.

IV. ATTORNEY'S FEES

Pursuant to Section 10.13, Cost and Expenses, of the Pascua Yaqui Code, this Court may, "order a party to pay reasonable amount to the other part for the costs and expenses of maintaining or defending any proceeding under this chapter." Under this section the award may include the fees of a lay advocate and the amount awarded may be paid directly to the lay advocate.

This appeal was brought because the Pascua Yaqui trial court issued an order based on unsubstantiated allegations of expenses and special circumstances made by Ms. Salomón. In response, and in order to vindicate his position and find a fair and reasonable agreement for visitation and child support, Mr. Soto had to incur the expenses associated with this litigation.

Throughout the course of this appeal, Ms. Salomón continued to allege extraordinary expenses while failing to provide evidence for her allegations. Even when asked to produce some evidence by Justice Cary Vicente on January 4, 2002, and when

repeatedly asked to produce substantiation of both her income and expenses by this lay advocate during the ensuing weeks[1], Ms. Salomón did not respond. On or about March 29, 2002, Ms. Lopez finally notified us that Ms. Salomón had decided to absorb the expenses.

While this sounds admirable, Ms. Salomón's refusal to submit evidence of her expenses at the trial level, early in the appeal, and throughout the negotiation of this settlement leaves open to question the veracity of her allegations as well as her good faith in pursuing a timely settlement. At the least, it prolonged the time this advocate was engaged in pursuing a settlement. At the worst, it required Mr. Soto to pay an inordinate and unjust amount of child support and face garnishment proceedings wrongfully. Aside from the direct benefits, Ms. Salomón benefits under these circumstances by having a sister who is an attorney from whom she can receive free legal advice. In exacerbation of this disparity, Ms. Lopez neither initiated contact nor responded promptly to this advocate's calls in the course of seeking a settlement. Ms. Lopez also did not provide, either by writing or by conversation, original settlement proposals or a written statement as requested by this Court on January 4, 2002. In short, the burden of the negotiations, the writing of a proposed settlement, the search for substantiation of the facts, and the presentation of the legal framework for a determination in this matter have been provided solely by Ms. Ereaux.

For these reasons, and by incorporation here those presented to this Court previously, we respectfully ask that this Court grant the following relief:

---

[1] Consultation with the physician treating the eldest child's medical condition revealed that the special diet is simply what is commonly known as a low-fat diet.

1. A finding that the trial court erred in the award of sole legal and physical custody of the minor children to Linda Salomón without a finding of clear and convincing evidence of abuse, molestation, neglect, kidnapping or abandonment;
2. A finding that the trial court erred in the award of sole legal and physical custody of the minor children as contrary to the public policy of preservation of the Pascua Yaqui Tribe;
3. A finding that the trial court erred in establishing child support in the amount of $500 in the absence of substantiating evidence of the income and expenses of each party;
4. An order confirming the Parenting Plan agreed to by the parties;
5. An order providing for child support with the range recommended in paragraph II of this Summary and agreed to by the parties;
6. An order directing Ms. Salomón to pay no less than seventy-five per cent, (75%) of the fees of this advocate. Appellant asks no compensation for other expenses incurred in the prosecution of this action. The fees originally listed in the Appellant's *Memorandum* filed to this Court on March 5, 2002, totaled $3875.00. Although this advocate expended three additional hours and it appears that more time will be required to conclude this case, the maximum total fee requested is $4,200.00;
7. Appellant further asks that this Court retain jurisdiction over this matter for the forthcoming year;
8. If awarded, Appellant asks that this Court retain supervision of payments to his advocate; and,
9. Any further relief that this Court deems just and reasonable.

Dated this 5th day April, 2002.

Respectfully Submitted,

Michelle Ereaux, J.D., Lay Advocate
Appellant, Eddie Soto

CERTIFICATE OF SERVICE

I hereby certify that I notified the Pascua Yaqui Tribal Court and the parties of the *Summary of Final Settlement* in the Appeal of Soto vs. Salomón by personal service to the Court on April 5, 2002, and by certified mailing to the Appellee on April 5, 2002.

Michelle E. Ereaux, J.D.
Lay Advocate for Eddie Soto, Appellant

Michelle Ereaux, J.D.
4930 N. Placita Santolina
Tucson, Arizona 8574
520-312-5378

Lay Advocate for Eddie Soto

CA-01-005

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION
TUCSON, ARIZONA

EDDIE SOTO, Appellant,	)	NO. CA-01-005
	)	SCHEDULE
vs.	)	FOR
LINDA SALOMÓN, Appellee	)	FILING FINAL SETTLEMENT

COMES NOW the lay advocate for Appellant, Eddie Soto, and submits the following schedule for submission of the final settlement and other documents in the matter of Soto vs. Salomón as determined during the status conference with the Court on Thursday, March 7, 2002:

I. April 5, 2002: Settlement Agreement, Memoranda and notice of settlement of matters before the Pascua Yaqui Trial Court should be filed on or before this date.

II. April 8, 2002: Pascua Yaqui Court of Appeals will issue their final order regarding this Appeal.

Dated this April 3, 2002.

Respectfully Submitted,

Michelle Ereaux, J.D., Lay Advocate
Appellant, Eddie Soto

CERTIFICATE OF SERVICE

I hereby certify that I notified the Pascua Yaqui Tribal Court and the parties of the *Schedule for Filing of the Final Settlement* in the Appeal of Soto vs. Salomón by personal service on April 3, 2002.

Michelle E. Ereaux, J.D.
Lay Advocate for Eddie Soto, Appellant

Cc: Lourdes Salomón Lopez, Counsel for Appellee

Michelle Ereaux, J.D.
4930 N. Placita Santolina
Tucson, Arizona 8574
520-312-5378

Lay Advocate for Eddie Soto

CA-01-005

IN THE PASCUA YAQUI TRIBAL COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION
TUCSON, ARIZONA

EDDIE SOTO, Appellant,	)	Docket No. CA-01-005
vs.	)	Notice of Late Filing
LINDA SALOMÓN, Appellee.	)	

Comes now the Advocate for the Appellant, Eddie Soto, and requests that this Court accept the late filing of the enclosed Memorandum on Child Custody and Child Support, the Appendices and the Proposed Parenting Plan for Mr. Eddie Soto and Ms. Linda Salomón.

As stated in my verbal notification to the clerk of the Pascua Yaqui Court, I moved from my home one week ago. Since I am a single parent I had sole responsibility for completing all of the work involved in the move.

Finally, although the documents were completed on March 4, 2002, as I had stated in my phone call, I had to accompany another client to court on Monday, March 4, 2002, was delayed in returning, and could not get to the Pascua Yaqui Court prior to 5:00 p.m.

I submitted these papers promptly to the Court on Tuesday morning, March 5, 2002.

Dated this 5th day of March, 2002.

Michelle Ereaux, Lay Advocate
For Mr. Eddie Soto

Michelle Ereaux, J.D.
4930 N. Placita Santolina
Tucson, Arizona 8574
520-312-5378

Lay Advocate for Eddie Soto

IN THE PASCUA YAQUI TRIBAL COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION
TUCSON, ARIZONA

EDDIE SOTO, Appellant,	)	Docket No. CA-01-005
vs.	)	Memorandum
LINDA SALOMÓN, Appellee.	)	Child Custody & Child Support

This Memorandum accompanies the proposed Parenting Plan stipulated to *in part* by Appellant, Eddie Soto, and Appellee, Linda Salomón. The parties agreed to joint legal custody and on the visitation/parenting schedule. This Memorandum in part explicates the Parenting Plan itself and, in part, explicates the current law of the majority of states of the United States and of some Indian nations regarding child custody and child support. This Memorandum is not exhaustive, it is indicative.

I. INTRODUCTION:

> *[Indian children] are not simply children in a general population, but have special status as members of Indian tribes, and they are eligible for the protection of those tribes and their traditional social structures. There is no resource more vital to the continued existence and integrity . . . . Consequently, we have a special duty to ensure their protection and Well-being. In re Custody of S.R.T., 18 Indian L. Rptr. 6158, 6160 (Navajo Sup. Ct. 1991)*

The resolution of the status and custody of an Indian child is an essential function of a tribe's sovereignty. The dilemma for a tribal court in adjudicating child custody disputes is embedded within two issues [1] choosing the law that applies and [2] whether a tribal court's custody decree will be accepted and enforced beyond the territorial jurisdiction of

the tribal court. Although the two issues are inextricably intertwined, it would be erroneous to conclude that acceptance and enforcement by state and federal courts determines and delimits the substance of tribal law and judicial decisions.

The questions this Court raised focused on the first of the two issues; specifically, what are the parameters of the law of child custody and child support.

I. THE LAW OF CHILD CUSTODY

Currently all courts rely on the "best interests of the child" standard when adjudicating disputes over the custody of a child. Although the standard itself espouses the highest of values as the guiding principle for decisions, what constitutes the best interest of a child often remains undefined and difficult to determine.

Given that law is a reflection of societal values, the status in law of the children in the United States is a significant indicator of the society's intellectual, psychological, and spiritual health. Thus, tribes have both a great opportunity and a great responsibility to examine and compare the law and status of non-indigenous children in the context of their own law and values.

A. Historical Overview of Anglo-American Doctrines

Anglo-American child custody law evolved through three major doctrines prior to reaching its current "best interest of the child" standard. Under ancient Roman law the property right of a father in his children was so absolute as to permit him to sell or kill his children without concern for punishment.

Preserving the Roman roots of its law, early English law, addressed child custody, as well as control over wives and slaves, as a property right of the father. A father's property right in his child, like that of ownership of objects, was protected. Therefore, a father was *entitled* to *sole custody* of his child.

At the beginning of the twentieth century, as the courts acknowledged the nurturing skills of women, property rights of the father diminished as the standard for awarding custody of children. As the legitimacy of the arguments for the better nurturing skills of women for children from birth through adolescence developed into public policy, the courts developed the "tender years doctrine." In accepting the tender years doctrine, many states enacted a statutory presumption for *sole custody* to reside with the mother unless she was proved unfit. During this era some courts also asserted the doctrine of *parens patriae*. Although *parens patriae* was not formally incorporated into the law, the doctrine permitted judges to consider "the best interest of the child".

Following the end of World War II, the roles of American women shifted. Concomitant with the changes in the roles of women, public policies concerning gender bias, the roles of men, and attitudes toward parenting also changed. These changes led to the formal

adoption of the doctrine and standard of the "best interest of the child" in the Uniform Marriage and Divorce Act of 1970. Consequently, because the tender years doctrine was based on gender, the doctrine has been abolished either by statute or by judicial decision. Some courts held that the doctrine violates the equal rights amendments of state constitutions or the Fourteenth Amendment of the United States Constitution.

Notwithstanding the evolution in public policy and common law preferring the rights of mothers or fathers, the United States Supreme Court supported constitutional protection of an *individual's* rights to conceive and raise one's children. In fact, the Supreme Court held these rights to be "essential", "basic civil rights of man" and "rights far more precious . . . than property rights." *See for e.g., May v. Anderson, 345 U.S. 528, (1953); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); and Meyer v. Nebraska, 262 U.S. 390, 399 (1923)* In addition, in *Prince v. Massachusetts, 321 U.S. 158, 166 (1944)*, the Court declared that "cardinal with us [is] that custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Subsequently, in *Hodgson v. Minnesota, 497 U.S. 417, 484 (1990)*, the Supreme Court sustained a constitutionally protected liberty interest for parents to develop relationships with their children. Because each parent has a protected liberty interest in their child, reliance on awards of sole custody in the absence of evidence of abuse could be held unconstitutional.

Currently states, either by statute or by common law provide for awards of legal custody and physical custody. The term "legal custody" refers to decision-making authority regarding the child. The term, "physical custody" refers to the residential care of the child. Almost all states now also provide for "joint custody". Although not precisely defined, joint custody often involves arrangements of "joint legal custody" and "joint physical custody".

The following definitions contain the elements of the terms used by states:

B. Sole Custody

1. Definition: Sole custody is a parenting arrangement that places a child within the residence of one parent and gives that parent complete decision-making authority over the child's welfare.

2. Consultation with the Non-Custodial Parent: There is no requirement for consultation with the non-custodial parent in this arrangement. A non-custodial parent has very limited rights and status referred to as "visitation".

3. Visitation: A court may award visitation to a non-custodial parent or parents can informally agree to time spent with the non-custodial parent or to give notice to the non-custodial parent of major events in the child's life. Visitation agreements

are typically specific and in writing in order to avoid placing the child in the middle of conflicts between the parents.

4. Appropriateness:
   (a) when the parties agree due to geographic circumstances, economic reasons, or other limitations;
   (b) when there may not be parental cooperation; or,
   (c) when the child is young, particularly when the child is an infant;

C. Divided or Alternating Custody

1. Definition: A custody arrangement in which each parent is given sole physical and legal custody of the child for a specified period during each year, subject to visitation by the non-custodial parent.

2. Consultation with the Non-Custodial Parent: Decision making authority shifts when the child shifts residence. Therefore, there is no requirement for consultation with the non-custodial parent.

3. Visitation: A court may award visitation to a non-custodial parent or the parents can informally agree to time spent with the non-custodial parent or to give notice to the non-custodial parent of major events in the child's life. Visitation agreements are typically specific and in writing in order to avoid placing the child in the middle of conflicts between the parents.

4. Appropriateness:
   (a) when the child spends school terms with one parent and summers with the other;
   (b) when geographical distances are a factor;
   (c) when both parents are regarded as "fit" and desire the responsibility of parenting.

D. Split Custody

1. Definition: A custody arrangement in families with two or more children by which the children are divided between the parents; that is, each parent receives sole physical and legal custody of one or more of the children and visitation rights to the other children.

2. Consultation with the Non-custodial Parent: There is no requirement for consultation with the non-custodial parent in this arrangement. A non-custodial parent has very limited rights and status referred to as "visitation".

3. Visitation: A court may award visitation to a non-custodial parent or the parents can informally agree to time spent with the non-custodial parent or to give notice to the non-custodial parent of major events in the child's life. Visitation agreements are typically specific and in writing in order to avoid placing the child in the middle of conflicts between the parents.

4. Appropriateness:
   (a) a history of conflict between one of the parents and one of the children;
   (b) incest;
   (c) when the children interact destructively with each other[1]

E. Joint Custody

1. Definition: A custody arrangement in which both parents retain legal responsibility and authority over the care and control of the child. There are two components to joint custody:
   (a) joint legal custody refers to the equal rights and responsibilities of the parents to make major decisions about the child;
   (b) joint physical custody refers to time spent with the child and the day-to-day participation in the parenting of the child;

2. Consultation with the Non-custodial Parent: Required. This arrangement is flexible and can be adapted to the changing needs of the family.

3. Visitation: Parents and children determine the living schedules and parenting periods without judicial interventions.

4. Appropriateness:
   (a) unlike sole custody which exacerbates conflict between parents, this model encourages cooperation between parents;
   (b) provides an environment similar to that prior to the divorce;
   (c) easiest where parents are not outwardly hostile to each other;
   (d) reduces stress on single custodial parent;

The following chart[2] outlines a comparison of joint and sole custody.

---

[1] In applying the best interests of the child standard, courts are reluctant to separate siblings in the absence of agreements providing for continuing contact with each other even where a destructive relationship is at issue.

[2] This chart quotes and was adapted from information provided by Co-Parenting.com.

JOINT CUSTODY	SOLE CUSTODY
Children's Advantages	Children's Disadvantage
♦ Shows children they have a home with both parents. ♦ Reassures children that both parents want what is best for them. ♦ Allows children to develop lasting, meaningful ties with both parents. ♦ Allows children to learn from both parents all that life has to offer. ♦ Allows children easier access to both parents, no matter who they are with. ♦ Gives children the feeling that they are loved and wanted by both parents. ♦ Allows children more flexibility when wanting to spend time with a parent. ♦ Allows children to ask for extra time without feeling guilty or hurting the other.	♦ Children do not have easy access to the non-custodial parent. ♦ Children will lose the non-custodial parent being actively involved in their lives. ♦ Children have more of an aunt/uncle type relationship with non-custodial parent. ♦ Children feel guilty when they ask to spend more time with the non-custodial parent. ♦ Children are more likely to be caught in the middle of disagreements between their parents. ♦ Children have no extra time with the non-custodial parent unless the custodial parent agrees. ♦ Children, especially young ones, may not receive that crucial bond with the non-custodial parent. ♦ Children will experience significant loss because of the small amount of time allocated for them with their non-custodial parent.
Parents' Advantages	Parents' Disadvantages
♦ Allows major input on major decisions from both parents. ♦ Eliminates the artificial and "Disneyland" types of parenting. ♦ More evenly disperses the responsibility of raising the children. ♦ Will not make one parent feel that he/she has lost his/her own children. ♦ Allows parents enough time to have parenting time, not just visitation. ♦ Allows both parents to inquire about information concerning the children. ♦ Allows more flexibility on parenting times, without misinterpretation. ♦ Allows flexibility on parenting times, while having something to fall back on.	♦ Gives one parent only a few parenting rights. ♦ Gives one parent the feeling that one's love doesn't count. ♦ Gives one parent the feeling that one has lost one's children. ♦ Gives one parent the feeling that they are not good enough to be a parent. ♦ Gives one parent, at most, eighteen percent, (18%), of time to be with one's children. ♦ Gives one parent no meaningful parenting role to play in the children's lives. ♦ Gives one parent no rights to make decisions: medical, dental, school, and childcare.

Some theorists have recommended eliminating the use of the term and the win-lose dynamics of physical custody in favor of preparing parenting plans based on a two-home or one-home approach. A two-home approach provides the child with a bed or bedroom, clothes and personal items at each home. The one-home approach connotes the unequal, overnight or visiting status of the child in one of the parent's residence. The two-home approach is regarded as meeting the "best interest of the child" standard since it facilitates the child's sense of security, emotional stability, and greater comfort with each parent. A

two-home approach is possible even in parenting arrangements that define unequal time-sharing between parents. Thus an award would read, for example "two-home parenting" of the children.

Thirty-five states and the District of Columbia have explicitly authorized joint custody as a presumption or strong preference by statute.[3] For example, subparagraph (a) (5), 16-911, of the District of Columbia Code, states, "There shall be a rebuttable presumption that joint custody is in the best interest of the child or children, except in instances where a judicial officer has found by a *preponderance of the evidence* that an intrafamily offense . . ., an offense of child abuse, . . . an instance of child neglect . . . .or where parental kidnapping . . .has occurred. (Emphasis added)

F. An Emerging Role of the Indian Child Welfare Act in Custody Disputes Between Parents

Similarly, although the Indian Child Welfare Act is applicable to custody decisions regarding foster placements of Indian children, the California Court of Appeals relied heavily on the Act in a termination of parental rights case.

In the case, *In re Crystal K. (1990) 226 Cal.App.3d 655, 668*, a non-Indian mother petitioned to terminate the parental rights of her Indian former husband. The trial court found section 1912, subdivision (f) of ICWA inapplicable to the proceedings in part because the father had not recently had physical custody of the child. The appellate court found "this decision to limit the term 'custody' under section 1912(f) to physical custody of the child was erroneous . . . ."

Crystal K. explained:

> 'Custody' is not defined in the *[ICWA]*. But in defining 'Indian custodian,' the [ICWA] distinguishes legal custody from physical custody. Section 1903 (6) provides: " 'Indian custodian' means any Indian person who has legal custody of an Indian child under tribal law or custom or under state law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.' The Act thus recognizes different types of custody. And since an Indian parent is certainly afforded no less rights under the [ICWA] than an Indian custodian (cf. § 1903 (6) and (9)), the use of 'continued custody' in section 1912(f) must encompass more than simply actual physical custody. Such an interpretation is also consistent with the [ICWA]'s purpose to preserve the Indian child's link to his or her Indian family, tribal and cultural heritage."

The Court continued in citing:

---

[3] Please see Appendix A for other examples.

> "no termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (25 U.S.C.A. § 1912, subdivision (f).)

In support of its decision the California Appellate court also cited:

> "removal of an Indian child from his or her family must be based on competent testimony from one or more experts qualified to speak specifically to the issue of whether continued custody by the parents or Indian custodians is likely to result in serious physical or emotional damage to the child." (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67593 (Nov. 26, 1979)

Accordingly, *Crystal K.* was remanded for the trial court to determine "what, if any, legal custody [the father] may have under state law or tribal law or custom, "noting that although he did not have physical custody, the father had "some type of legal parenting relationship" with the child and that " in California, the term 'legal custody' is a wide-ranging concept encompassing a variety of parenting arrangements. (See Civ.Code, § 4600.6) (226 Cal.App.3d at p.668.)

In concluding this part of the discussion of custody, it is important to note that, in the claims at issue in this case, there is no evidence before this Court of any form of abuse on the part of Mr. Soto.

G. The Role of the Children in Determinations of Custody

As noted in the opening paragraphs of this Memorandum, Roman and early English law did not consider nor incorporate a normative principle for the rights of children. In fact, the law derogated children's rights. One indicator of the evolution of western civilization is that children now are ascribed with civil rights. In addition, state and federal courts are willing to accept testimony from children. Correspondingly, most state courts retain the option of in chamber interviews with children, particularly when custody is disputed. Although the age and the capacity of the child are significant factors in allocating importance to their comments and their choices, children are frequently consulted. In the absence of consultation with a child, a court may provide a guardian ad litem for the child when custody is disputed. Given that the mechanisms are provided, if a court fails to incorporate a child's, particularly an older child's, concerns and preferences, an action might be brought for denial of equal protection.

Tribal nations withstood continuous and horrific pressures to displace children from their families and their tribes. All tribes viewed their children as the future of the entirety of the tribe as well as the survival of the individual. Within many cultures, children were

regarded and respected as uniquely gifted and for providing insights and messages to their families, their clans, and their tribe. Accordingly, consultation with children about their parenting would be entirely congruent with tribal practices and customs. Section 10.21 of Chapter 10 of the Pascua Yaqui Code provides for interviews of children both by the court and by other professionals.

There is no indication in the record of this case that either Stephen or Gilbert were consulted about their parenting choices. This Court asked counsel to obtain the services of an independent party to assess the home situations of both parties and to interview Mr. Soto, Ms. Salomón, their parents, their children, and other individuals directly involved in the living situations of the children. After considering an inquiry by counsel, Mr. Glenn Johnson refused the position at the end of January. Counsel for Mr. Soto learned of a possible source for low-cost psychological services on February 20, 2002. If services through this organization are retained this week, it may be possible to file a report to this Court before a final determination the beginning of April.

In the absence of a full assessment as requested, counsel for Mr. Soto respectfully requests that this Court accept a report filed by a member of a firm that provides guardian ad litem services.

H. Parental Communication as a Factor in Awards of Custody

Under existing state common law the inability of parents to communicate well is weighed in the decision to award joint physical custody. In a society where "family" is narrowly construed as the relationship of parent and child, this is consistent. However, in a society where "family" is comprised of numerous individuals actively involved in each other's lives, communication patterns vary. For example, among the A'ananin, now of north-central Montana, there were strict rules defining who in a family could communicate and in what ways. While divorce was anomalous, it did occur. In the context of a deep cultural value for sustaining marriages, it is unlikely that the parties always separated as friends. In that event, other individuals took on the responsibility of mediating and communicating until harmony was restored. The understanding and the practice for restoring of harmony among and within clans are common to tribes. Again, tribal judges may see this as an opportunity to empower their customs.

In the case of Mr. Soto and Ms. Salomón, Mr. Soto requested and received the protection of the court to preclude continuing the acrimony between them. Although this is unfortunate and sad, it is neither irreparable nor irredeemable. In fact, eliminating the instances of acrimonious verbal exchange and giving time for each party to accept the changes in their life, might be wise. Ms. Salomón stated in court her acceptance of the injunction and her preference for her mother, Mrs. Juanita Salomón, to serve as the intermediary in their communication.[4] Although it is ironic and frustrating that Ms. Salomón rejects her own choices and admittedly violates the injunction, the attempt to

[4] The proposed parenting plan sustains the choice of Mrs. Salomón, gives more definition to her role and offers additional opportunities for alternative dispute resolution.

delimit communication appears consistent with tribal custom. Thus predicating an award of sole custody on the basis of not meeting a standard of Anglo-American communication would diminish what may be the expression of custom within an Anglophonic system of tribal law.

During recent negotiations, Appellant Eddie Soto, and Appellee, Linda Salomón agreed to share joint legal custody of their children, Stephen and Gilbert. Their parenting plan as a statement of the physical custody arrangement is still under discussion. The heart of the continuing negotiation in the physical custody arrangement is the nature and level of communication between Mr. Soto and Ms. Salomón. The proposed parenting plan structures the methods of communication for each of the aspects of their children's lives.

G. Conclusion of Part I

Tribes typically regarded child rearing as a responsibility of the extended clans to which the child belonged. Thus, the nexus of [1] the predominant logic in state law that there must be a *preponderance of evidence* or *clear and convincing evidence* provided by *a qualified expert witness* of abuse or other deviant behavior by a parent to rebut the presumption of joint custody; [2] the incorporation of, and option for, tribes under Section 104, (b) and (c) of the Uniform Child-Custody Jurisdiction And Enforcement Act, (1997); [3] tribal law; and, [4] federal Indian law or policy that might be invoked, creates both the opportunity and framework for tribes to apply their broader visions of custody. In this context, it would be illogical for tribes to retain the historic and currently diminished role of the Roman-Anglo construct of sole custody

An award of joint legal and physical custody would be a closer approximation to a tribal value of supporting the best interests of a child, for supporting a child's place within his/her entire extended family, and for supporting the restoration of harmony in the longer term between individuals, their clans, and the tribe.

II. States' Formulae for Child Support

Child support formulae lag behind the theoretical and practical changes in child custody law. That is, the formulae are not typically designed to address joint custody situations nor families in which there are dependents of one of the parents who are not subject to the custody order. Fifteen states do not mention shared custody in their child support guidelines. The absence of comment leaves the question of accounting for parenting time in child support unanswered. Seventeen states provide very generally, "that shared custody may be a reason for the court to adjust child support in a particular case." Because there are numerous factors that affect a child support order, a court cannot rely strictly on a child support award derived solely from a formulaic computation. This chart

States[5]. A "√" indicates the question is asked; a "------" indicates the question is not asked.

	Arizona	California	Colorado	Nevada	New Mexico	Oklahoma
Number of children Subject to pending Action	√	√	√	√	√	√
Number of children Age 12 or older	√	-------	---------	----------	----------	---------
Number of overnights with non-custodial parent	√	**Percentage Of time with non-custodial parent**	---------- -	----------	----------	----------
Gross Monthly Income of non-custodial parent	√	**Net Monthly** Income	√	√	√	√
Amount of monthly Child support paid for children from a prior marriage by non-custodial parent	√	√	√	----------	----------	√
Amount of monthly alimony paid to spouse from a prior marriage by non-custodial parent	√	----------	√	----------	----------	√
Amount of monthly support received for alimony from a prior marriage by non-custodial parent	√	√	----------	----------	----------	----------
Monthly cost of daycare paid by non-custodial parent	√	----------	√	----------	√	----------
Monthly cost of family group health insurance paid by non-custodial parent	√	√	√	----------	√	√
Gross Monthly income of custodial parent	√	**Net Monthly Income**	√	----------	√	√

[5] Two worksheet for computing percentage of child support obligations formulae are submitted as Appendix B.

Amount of monthly child support paid for children from prior marriage paid by custodial parent	√	√	√	----------	----------	√
Amount of monthly support received for alimony from a prior marriage by custodial parent	√	----------	----------	----------	----------	----------
Amount of monthly support paid for alimony from a prior marriage by custodial parent	√	----------	√	----------	----------	√
Monthly cost of day care paid by custodial parent	√	----------	√	----------	√	√
Monthly cost of family group health insurance paid by custodial parent.	√	√	√	----------	√	√
Does the Custodial parent qualify for the Federal Earned Income Tax Credit	----------	----------	----------	----------	----------	√

Another long-standing assumption of child support policy is that the non-custodial parent is the higher income-producing parent. Further, when a non-custodial parent requests greater parenting time, the assumption is that the non-custodial parent can afford the higher expenditures associated with the parenting time while continuing to pay the same amount of child support. While this assumption is generally supported by statistical data, it is not always accurate. Thus, the Court should ascertain the relative position of the parent's income level viz a viz the time spent with the parent. The Arizona guidelines support the incorporation of this thesis in its child support formula.

A. Tax Incentives Incorporated in Child Support Awards

Inasmuch as Ms. Salomón did not provide the requested information regarding her income and expenses to counsel during negotiations nor during the trial, it was not possible to resolve the question of child support. Both parties had initially agreed to Arizona's general recommendation for Mr. Soto's income level of child support for $265.00 per month. Mr. Soto paid the arrearages based on this rate as this Court directed. Nevertheless, this recommendation does not account for Ms. Salomón's financial information in determining the fairness of the award. Mr. Soto provided counsel and the court with his wage statements and W-2 forms during the trial. His current gross income is $29, 767.00. His tax burden for this year is $1500 in addition to the taxes deducted from his pay. His net annual income is $ 26, 403.00. His net monthly income is

approximately $2200.00. Mr. Soto does not claim the children as his dependents, claim the earned income credit, nor the credit for child independent care expenses. This Court should note that under the Arizona guidelines, the Court is authorized to award a deduction based on the percentage of his child support to the total cost of raising the children under an income shares model. (AZ. St. 25-320, Sec. 26, Federal Tax Exemption for Dependent Children.) This section of the code applies whenever there is an expenditure of $1200 per year or more. Mr. Soto clearly qualifies for the exemption. If Ms. Salomón does not elect to take the exemption because she won't derive a tax benefit from taking it, then Mr. Soto would be eligible for the benefit and the allocation should be awarded. For example, if his child support is forty-three percent, rounded-up to fifty percent, then it would be fair to award him one child deduction.

B. Other Possible Factors To Be Incorporated in Child Support Awards

In addition to considering the income and tax questions in light of the Arizona guidelines, we ask that the Court consider the questions of credit for reduced cost tribal housing and for tribal medical and dental benefits provided to non-Indians by an Indian parent.

In *Stewart v. Gomez, Cal.App. 4th, 55 Cal.Rept. 2nd 531, (1996)*, the Court held that the trial court did not abuse its discretion in considering the reasonable monthly value of Stewart's rent-free housing. Specifically the Court stated, "We see no reason to distinguish an employee housing benefit from an Indian reservation housing benefit." Mr. Soto respectfully requests that this Court consider the monthly value of the HUD housing which he provides through his tribal membership to his children and Ms. Salomón. The fair market rental of a house with three bedrooms and two bathrooms off the reservation would range from a low of $750.00 to several thousand dollars. Ms. Salomón currently pays $385.00 per month in rent.

In addition to the reduced cost of the tribal housing, Mr. Soto's tribal membership and that of his children entitle the children to medical care at the Indian Health Service facility. Moreover, Mr. Soto and Ms. Salomón are both eligible for health insurance through their tribal employment. Medical expenses for the children should be completely paid. Therefore, Mr. Soto requests that this Court evaluate Ms. Salomón's assertions regarding medical expenses in light of this information .

III.Award of Attorney's Fees and Expenses

The work expended by Mr. Soto's advocate in research, preparing this document and a ten page long detailed parenting plan totals 38.75 hours. It was agreed that this advocate would be paid at a rate of $100 per hour for her participation in the appeal. Because Ms. Salomón failed to respond to requests for information and failed to respond to the final draft of the proposed parenting plan, it is respectfully requested that Ms. Salomón be held responsible for the legal fees and expenses. Ms. Salomón's counsel did not assist in the drafting of the parenting plan or in the preparation of this Memorandum.

Respectfully submitted this 5th day of March, 2002.

Michelle Ereaux, J.D., Lay Advocate
For the Appellant, Eddie Soto

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Memorandum by personal delivery to the Pascua Yaqui Tribal Court and to the parties on March 5, 2002.

Michelle E. Ereaux

Michelle Ereaux, J.D.
4930 N. Placita Santolina
Tucson, Arizona 8574
520-312-5378

Lay Advocate for Eddie Soto

IN THE PASCUA YAQUI COURT OF APPEALS
PASCUA YAQUI RESERVATION
TUCSON, ARIZONA

EDDIE SOTO, Appellant, vs. LINDA SALOMÓN, Appellee	)	NO. CA-01-005 PROPOSED SETTLEMENT

THE PARTIES AGREE THAT:

I. Counsel for both parties met and began negotiations regarding the proposed *Settlement Agreement* on January 21, 2002.

II. Counsel for both parties now submit the enclosed *Parenting Plan* as the proposed settlement of the issues of child custody before the Pascua Yaqui Court of Appeals.

DATED this 27th day of February, 2002.

Michelle Ereaux, J.D.
Lay Advocate for Eddie Soto

DATED this 27th day of February, 2002.

Lourdes Salomón Lopez
Attorney for Linda Salomón

PARENTING PLAN FOR STEPHEN AND GILBERT SOTO

STIPULATED BY EDDIE SOTO AND LINDA SALOMÓN

I. OUR CHILDREN'S BEST INTEREST:

WE AGREE that Stephen and Gilbert's physical, psychological, and spiritual well being is more important than our differences of opinion.

WE AGREE, further, in order to protect our children's well being, we will:

1. implicitly or explicitly, by act or statement, encourage our children to respect, be honest with, be loyal to, and be proud of themselves and of each of us;

2. implicitly or explicitly, by act or statement, respect Stephen and Gilbert's love for each of us by accepting their choice to include each of us independently in their lives, by supporting their relationship with each of us, and by trusting each other's parenting skills;

3. implicitly or explicitly, by act or statement, respect Stephen and Gilbert's love for their paternal and maternal grandparents and other members of their extended family by accepting their choice to include each of them independently in their lives and by supporting their relationships with them;

4. ask for and consider our children's desires in our decisions;

5. be attentive to the age of our child and the nature of the decisions when incorporating his desires into our decisions;

6. maintain predictable schedules;

7. be flexible enough to permit our children to participate in special opportunities, celebrations or events;

8. avoid acts or statements, implicit or explicit, by which we:

    a. make Stephen or Gilbert choose between us;
    b. question, or appear to question, either of the boys about each other's activities or relationships;
    c. make promises we do not keep;

d. argue with each other or verbally abuse the other parent in the presence or within the range of hearing of either one or both of the boys;
e. discuss our personal problems with Stephen or Gilbert or within range of their hearing;
f. use Stephen or Gilbert as a messenger, spy or mediator;
g. refuse visitation or access to Stephen or Gilbert because child support has not been paid;

II. LEGAL CUSTODY:

WE AGREE TO SHARE JOINT LEGAL CUSTODY of our children, Stephen and Gilbert Soto.

WE AGREE, further, that sharing joint legal custody means:

1. Each of us acknowledges and respects the presumption that the surviving parent shall have custody of the children in the event of the death of the other parent;

2. Each of us has an independent relationship with the various people and institutions who are involved in our children's lives and specifically:

   a. Each of us shall be consulted and shall give consent for major changes affecting our children's primary place of residence;
   b. Each of us shall be consulted and shall give consent for major changes affecting our children's religious practice and education;
   c. A ***school district administrator or a classroom instructor*** by writing, or by telephone when necessary, shall inform each of us prior to making major changes in our children's education. Further, consent in writing by each of us is required for major changes affecting our children's education. Notice of routine educational matters shall be sent to each parent.
   d. Each of us shall be consulted and shall give consent for major changes affecting our child's ***non-emergency*** medical and dental care. The ***medical and dental practitioners*** who treat the children shall provide independent notice in writing, or by telephone if necessary, to each parent of the diagnosis and prognosis of the child's

condition, and reasons for changes in non-emergency treatment;

e. Each of us shall be consulted and shall give consent for major changes affecting the recreational activities of our children. ***Coaches and other recreational program staff*** involved in the activities shall notify each parent of any proposed change in participation or of impending participation in an event.

f. Other ***major changes*** contemplated in any of the areas of life listed in this section in §a and §b shall be communicated ***in writing*** by the initiating parent to Juanita Salomón. Mrs. Salomón shall forward the proposal to the non-initiating parent. The proposal for change shall include what she or he wants to change, why, enough details to permit the other parent to investigate the change, and a reasonable time limit for responding. The proposal for change, at a minimum, shall include the names, addresses and phone numbers of persons or institutions involved;

g. Counsel shall prepare a letter stating the notification requirement to each of the third parties identified by bold face type in the preceding paragraphs. Eddie and Linda shall sign the letters, return them to counsel and counsel shall then also sign and mail the letters;

h. In the event of disagreement between us about a contemplated change, we agree to hire an intermediary to assist us with the decision. The expense of the intermediary shall be paid on a pro rata basis as defined below in § D., 1., of section VII of this Parenting Plan.

III. PHYSICAL CUSTODY:

WE AGREE that we shall co-parent and share time with Stephen and Gilbert according to the schedule defined below:

1. Stephen and Gilbert shall live primarily in their family home with Linda;

2. Linda shall have responsibility for day-to-day parenting during her parenting time;

3. Eddie shall have responsibility for parenting Stephen and Gilbert on alternate weekends beginning with the weekend of Friday, March 1, 2002, at 6:00 p.m., and ending on Sunday, March 3, 2002, at 7:00 p.m.

4. Stephen and Gilbert shall spend four weeks of their summer vacation with Eddie. Eddie shall provide fourteen days, (14), notice in writing of his anticipated schedule for parenting Stephen and Gilbert during the summer. The time allocated to Eddie shall have precedence over other holidays and the regularly scheduled periods of time the boys spend with Eddie. If Eddie does not provide the fourteen days written notice then Linda's vacation plans with the boys shall take priority. Each parent shall provide to Juanita Salomón the name and number of a contact person who has an itinerary of travel dates, the destinations and a telephone number where the children can be reached during these vacations. In addition, the children shall be free to call the other parent during these vacations.

5. Stephen and Gilbert's participation in Pascua Yaqui tribal cultural events is important. Eddie is responsible for ensuring their participation in these cultural events. Eddie will provide ten, (10), days, written notice to Juanita Salomón of forthcoming tribal cultural events whenever possible. When ten days written notice is not possible, Eddie shall contact Mrs. Salomón as soon as possible to inform her of the event, the date and the time. Whenever possible, Eddie shall then leave a note with Mrs. Salomón stating the event, the date, and the time period the boys will be attending the cultural event. Mrs. Salomón shall be responsible for conveying the necessary information to Linda. Cultural events have priority over other commitments of the boys unless they occur during school or school-related obligations.

7. The following schedule for holidays shall supersede the normal parenting schedule:

    a. During Holy Week, Eddie is responsible for parenting Stephen and Gilbert from Friday, 6:00 p.m. through Easter Sunday at 7:00 p.m.
    b. During Christmas vacations, Stephen and Gilbert will spend the first half in even years with Eddie and the second half with Linda; during odd numbered years the boys will spend the first half with their mother and the second half with their father;
    c. Stephen and Gilbert shall spend Mother's Day weekend with their mother. If this would be Eddie's parenting time, then Eddie shall have the two succeeding weekends;
    d. Stephen and Gilbert shall spend Father's Day weekend with their father. If this is normally Linda's scheduled time, then she shall have the two succeeding weekends;
    e. Stephen and Gilbert shall share Thanksgiving Thursday with both of their parents. They will spend the period from 9:00 a.m. until 2:00 p.m. with Eddie and from 2:00 p.m. through the

evening with Linda. The boys shall be picked up at Mrs. Juanita Salomón's home;

f. When a holiday falls on a three day weekend, Stephen and Gilbert shall spend the entirety of the three day weekend with the parent who is scheduled to parent;

g. In order to honor their parents, Stephen and Gilbert shall spend their mother' s birthday with their mother and their father's birthday with their father. Each parent is responsible for honoring the birth of each of the boys each year. Unless otherwise agreed upon in writing, beginning with the year 2002, Eddie shall be responsible for the boys on Stephen's birthday and Linda shall be responsible for the boys on Gilbert's birthday. In the year 2003 this shall reverse with Eddie parenting the boys on Gilbert's birthday and Linda parenting the boys on Stephen's birthday. This alternating schedule of celebration shall continue until the boys are eighteen years of age.

IV. COMMUNICATIONS BETWEEN THE BOYS AND THEIR PARENTS:

WE AGREE THAT COMMUNICATION BETWEEN THE BOYS AND EACH OF US IS OF CRITICAL IMPORTANCE TO THEIR HEALTHY DEVELOPMENT.

WE FURTHER AGREE that the boys may freely communicate with each of us by telephone, letter, cards or messages.

IN ADDITION, WE AGREE to respect the privacy of telephone calls, letters, cards or messages from the other parent to either Stephen or Gilbert.

V. GRANDPARENTS AND OTHER RELATIVES:

WE AGREE that Stephen and Gilbert's relationship with their grandparents and other extended family members is important to the development of their identity and to the well being of the boys.

WE AGREE that Stephen and Gilbert shall spend one afternoon every week with their grandparents. These visits may occur during otherwise noted parenting times. Eddie shall ensure that the boys visit with his mother. Linda shall ensure that the boys visit with her parents.

INASMUCH AS LINDA has asserted that she pays her mother to provide after school child care to the boys, one afternoon per week shall be construed as cost free "grandparent visitation".

WE AGREE that each parent shall respect the other parent's efforts to incorporate time for the boys with their respective extended family. This includes acknowledging the allocation of additional parenting time as needed and, of course, the absence of negative comments or judgments by or about the extended family to or within the hearing range of Stephen or Gilbert.

VI. REMOVAL FROM THE PASCUA YAQUI INDIAN RESERVATION:

WE AGREE that neither of us shall remove, cause to be removed, or permit removal of Stephen or Gilbert Soto from the Pascua Yaqui Indian Reservation, ***except for*** school attendance, visits and vacations which do not interfere with the parent time sharing schedule, without the written consent of the other parent, or resolution of any dispute by the method set forth in Section VII, below.

VII. EMERGENCIES:

WE AGREE that an "emergency" is a situation involving a serious accident, serious or life-threatening illness, or death.

IN THE EVENT OF AN EMERGENCY INVOLVING STEPHEN OR GILBERT, WE AGREE that a member of the attending medical staff shall call the other parent to provide notification of the child's condition. If the absent parent cannot be reached, any decision for emergency medical treatment shall be made in the best interest of the child by the available parent.

IN THE EVENT OF AN EMERGENCY INVOLVING A FAMILY MEMBER OTHER THAN STEPHEN OR GILBERT, WE AGREE that the parent with that period of parenting responsibility shall contact Juanita Salomón who will contact the other parent as to necessary changes in the parenting time with the children. If the emergency involves either Eddie or Linda, the nearest relative, a friend, or the attending medical staff shall notify Juanita Salomón as to the necessity for an emergency change in the parenting time. Mrs. Salomón is responsible for notifying the other parent.

VIII. CONTINGENT & UNFORESEEN CIRCUMSTANCES:

IN THE EVENT OF SOME CONTINGENT OR UNFORESEEN CIRCUMSTANCE NOT INCLUDED IN THIS PARENTING SCHEDULE, WE AGREE that:

1. We shall contact Mrs. Juanita Salomón. Mrs. Salomón is responsible for contacting the other parent as justification for the need of an unexpected temporary and short-term change in the parenting schedule.

2. In the event that Mrs. Salomón is not available, then the parent facing the dilemma shall contact either the designated intermediary, his or her counsel, or counsel for the other parent respectively. If one counsel is notified then that counsel is under an obligation to notify and discuss the situation with the other parent's counsel.

WE FURTHER AGREE:

1. This process shall only be invoked when the situation is extreme. A parent who abuses the process shall pay all costs incurred for the particular circumstance including but not limited to the fees of the intermediary, attorneys' time and expenses, and whatever other costs are documented; and,

2. If one of the parents asks for the assistance of the Pascua Yaqui Tribal Police in a non-emergency situation, that parent shall reimburse the cost and expenses of the officer's time to the Pascua Yaqui Police Department, shall pay attorney's fees and expenses for reviewing and clearing the record regarding the incident in an amount no less than $250.00, and shall pay to the Pascua Yaqui Court a fee of $500 for circumventing this agreement. Record of the incident by sworn statement with corroborating evidence, e.g., a police report or witness statement, is sufficient to establish a prima facie case. If a prima facie case is established, counsel for the other parent shall move under summary judgment for violation of a lawful court order and shall be entitled to an award of expenses and fees listed above. All fees and expenses shall be paid directly to the Pascua Yaqui Court. The Court shall disburse the payments as directed herein.

IX. DISPUTE RESOLUTION:

WE UNDERSTAND THAT CHANGES IN THIS PARENTING AGREEMENT MAY BE REQUIRED AS STEPHEN AND GILBERT GROW OLDER AND BY CHANGES IN CIRCUMSTANCES. WE, THEREFORE, AGREE that the following procedures define the methods for addressing required changes and for the resolution of disputes between us.

A. Written Proposal:

WE AGREE that if either of us wishes to ***permanently*** change this parenting plan, the parent who wishes to make the change shall send by certified mail a written proposal to his/her counsel. The written proposal shall include but not be limited to [1] what she or he wants to change; [2] why she or he thinks the change is needed; [3] why she or he thinks the change will improve the parenting of Stephen or Gilbert; [4] at a minimum the names, addresses, telephone numbers and descriptive information about the individuals or institutions involved in the proposed change; [5]

sufficient information and time for the other parent to investigate thoroughly the proposed change; and [6] no less than thirty days and with clearly sufficient time beyond the minimum of thirty days for the responding parent to investigate and reply in writing by certified mail.

WE FURTHER AGREE that the responding parent shall investigate the proposed change and shall respond through his/her counsel within a reasonable time in writing. If the responding parent does not agree with the proposed change, she/he must state the reasons for not agreeing with the proposed change. When appropriate she/he must offer a counter proposal in writing giving the same information as defined previously in this paragraph. The response shall be mailed to the proposing parent by certified mail.

B. Intermediaries:

1. **WE AGREE** that, if we are unable to negotiate and resolve a dispute or change as indicated in § A and §B of this Section, we shall retain the services of counsel to mediate the change or dispute.

3. **WE AGREE** that, if either parent cannot obtain counsel, then the services of a mediator shall be retained. Each parent shall meet independently with the mediator and state his/her position regarding the proposed change. The mediator shall convey options for the resolution of the dispute until both of us agree or we agree that we shall proceed to arbitration.

4. **WE AGREE** that, if mediation fails, our counsel shall seek an arbitrator. The arbitrator must provide written consent to us to use his/her services. **WE AGREE** that the arbitrator's decision will not be permanently binding, but will be followed by us until and unless the Pascua Yaqui Court orders otherwise based on findings of fact and the law of the Pascua Yaqui.

C. Litigation:

1. **WE AGREE** that, in the last resort, either parent may submit the matter to a Court of competent jurisdiction. The Court may order or deny the proposed change or choose among many options for resolution.

D. Payment of Costs of Dispute Resolution:

1. **WE AGREE** to pay any cost involved in our method of dispute resolution. The costs shall be divided equally unless it is demonstrated that one of us has abused the process. Abuse of

this process includes but is not limited to excessive and unreasonable contacts with the intermediary or a showing of lack of good faith in bringing an action under arbitration or as litigation.

2. If there is a showing of disproportionate and unreasonable contact by one parent, then that parent shall bear the expense of his/her pro rata share of the expenses. If there is a showing of lack of good faith, the offending parent shall pay all of the expenses incurred.

Dated this 27th day of February, 2002.

By_____ By_____

Eddie Soto Linda Salomón

Parenting Plan, February 27, 2002.

Appendix A

Joint Custody Laws In The U.S.

Thirty-five states plus the District of Columbia have statutes that explicitly authorize joint custody as a presumption or strong preference. The following are some of the best relevant statutes from States which provide a presumption.

DELAWARE: Title 13, Chapter 7, Subchapter I, 701. Rights and responsibilities of parents; guardian appointment.

(a) The father and mother are the joint natural custodians of their minor child and are equally charged with the child's support, care, nurture, welfare and education. Each has equal powers and duties with respect to such child, and neither has any right, or presumption of right or fitness, superior to the right of the other concerning such child's custody or any other matter affecting the child. If either parent should die, or abandon his or her family, or is incapable, for any reason, to act as guardian of such child, then, the custody of such child devolves upon the other parent. Where the parents live apart, the Court may award the custody of their minor child to either of them and neither shall benefit from any presumption of being better suited for such award.

DISTRICT OF COLUMBIA: D.C. Code 16-911. Alimony pendente lite; suit money; enforcement; custody of children. (a)(5) and 16-914. Retention of jurisdiction as to alimony and custody of children. (a)(2)

... Unless the court determines that it is not in the best interest of the child, the court may issue an order that provides for frequent and continuing contact between each parent and the minor child or children and for the sharing of responsibilities of child- rearing and encouraging the love, affection, and contact between the minor child or children and the parents regardless of marital status. There shall be a rebuttable presumption that joint custody is in the best interest of the child or children, except ininstances where a judicial officer has found by a preponderance of the evidence that an intrafamily offense as defined in D.C. Code section 16-1001(5), an instance of child abuse as defined in section 102 of the Prevention of Child Abuse and Neglect Act of 1977, effective September 23, 1977(D.C. Law 2-22;D.C. Code 6- 2101), an instance of child neglect as defined in section 2 of the Child Abuse and Neglect Prevention Children's Trust Fund Act of 1993, effective October 5, 1993 (D.C.

Law 10-56; D.C. Code 6- 2131), or where parental kidnapping as defined in D.C. Code section 16-1021 through section 16-1026 has occurred.... To determine the best interest of the child, for the purpose of making a joint or sole custody determination, the court shall consider all relevant factors, including, but not limited to:

- the willingness of the parents to share custody;
- the sincerity of each parent's request;
- the parent's ability to financially support a custody arrangement;
- the impact on Aid to Families with Dependent Children and medical assistance;
- the benefit to the parents;

D.C. Code 16-911(2)(A) In any custody proceeding under this chapter, the court may order each parent to submit a detailed parenting plan which shall delineate each parent's position with respect to the scheduling and allocation of rights and responsibilities that will best serve the interest of the minor child or children....

(D) The court may also order either or both parents to attendparenting classes.
(3) Joint custody shall not eliminate the responsibility for child support in accordance with the applicable child support guideline as set forth in section 16-916.1.

FLORIDA: Title VI, Chapter 61, 61.13. Custody and support of children; visitation rights; power of court in making orders.

5(2)(b)...It is the public policy of this state to assure that each minor child has frequent and continuing contact with both parents after the parents separate or the marriage of the parties is dissolved and to encourage parents to share the rights and responsibilities of childrearing....

2. The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child....

3.(3) For purposes of shared parental responsibility and primary residence, the best interests of the child shall include an evaluation of all factors affecting the welfare and interests of the child, including but not limited to:
(a) The parent who is more likely to allow the child frequent and continuing contact with the nonresidential parent.
(c) The capacity and disposition of the parents to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in lieu of medical care, and other material needs.
(j) The willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

(4)(c) When a custodial parent refuses to honor a noncustodial parent's visitation rights without proper cause, the court may:
1. After calculating the amount of visitation improperly denied, award the noncustodial parent a sufficient amount of extra visitation to compensate the noncustodial parent, which visitation shall be taken as expeditiously as possible in a manner which does not interfere with the best interests of the child: or

2. Award the custody or primary residence to the noncustodial parent, upon the request of the noncustodial parent, if the award in the best interests of the child.

IDAHO: Title 32, Chapter 7, 32-717B. Joint custody.

(1) "Joint custody" means an order awarding custody of the minor child or children to both parents and providing that physical custody shall be shared by the parents in such a way as to assure the child or children of frequent and continuing contact with both parents... If the court declines to enter an order awarding joint custody, the court shall state in its decision the reason for denial of an award of joint custody.

(2) "joint physical custody" means an order awarding each of the parents significant periods of time in which a child resides with or is under the care and supervision of each of the parents or parties.

(4) Except as provided in subsection (5), of the section, absent a preponderance of the evidence to the contrary, there shall be a presumption that joint custody is in the best interest of a minor child or children.

(5) There shall be a presumption that joint custody is not in the best interests of a minor child if one (1) of the parents is found by the court to be a habitual perpetrator of domestic violence as defined in section 39-6303, Idaho Code.

Section 1 of S.L. 1982. ch. 311 read: "Policy statement. It is the policy of this state that joint custody is a mechanism to assure children of continuing and frequent care and contact with both parents provided joint custody is in the best interest of said children."

LOUISIANA: Civil Code, Section 3,

Article 131. Court to determine custody. A. If there are children of the marriage whose provisional custody is claimed by both husband and wife, the suit being yet pending and undecided, custody shall be awarded in the following order of preference, according to the best interest of the children:
(1) To both parents jointly. The court shall, unless waived by the court for good cause shown, require the parents to submit a plan for implementation of the custody order, or the parents acting individually or in concert may submit a custody implementation plan to the court prior to issuance of a custody decree. A plan of implementation shall allocate the time periods each parent shall enjoy physical custody of the children and the legal authority, privileges and responsibilities of the parents....

(2) To either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex or race. The burden of proof that joint custody would not be in a child's best interest shall be upon the parent requesting sole custody.

D. For purposes of this Article, "joint custody" shall mean the parents shall, to the extent feasible, share the physical custody of children of the marriage... Physical care and custody shall be shared by the parents in such a way as to assure a child of frequent and continuing contact, with both parents. An award

of joint custody obligates the parties to exchange information concerning the health, education, and welfare of the minor child; and, unless allocated, apportioned, or decreed, the parents or parties shall confer with one another in the exercise of decision- making rights, responsibilities, and authority.

E. ... The court shall state in its decision the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order.

Article 132. Award of custody to parents
In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent.

SUBPART B. JOINT CUSTODY
335 Joint custody decree and implementation order. A. (1) In a proceeding in which joint custody is decreed, the court shall render a joint custody implementation order except for good cause shown.
(2)(a) The implementation order shall allocate the time periods during which each parent shall have physical custody of the child so that the child is assured of frequent and continuing contact with both parents.
(b) To the extent it is feasible and in the best interest of the child, physical custody of the children should be shared equally... B. (1) In a decree of joint custody the court shall designate a domiciliary parent....
(2) The domiciliary parent is the parent with whom the child shall primarily reside....
(3) The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise....
C. If a domiciliary parent is not designated in the joint custody decree and an implementation order does not provide otherwise, joint custody confers upon the parents the same rights and responsibilities as are conferred on them by the provisions of Title VII of Book I of the Civil Code.

MONTANA: Title 40, Chapter 4, Part 2. Support, Custody, Visitation, and Related Provisions
40-4-224. Joint custody -- modification -- consultation with professionals

(1) Upon application of either parent or both parents for joint custody, the court shall presume joint custody is in the best interest of a minor child unless the court finds, under the factors set forth in 40-4-212, that joint custody is not in the best interest of the minor child. If the court declines to enter an order awarding joint custody, the court shall state in its decision the reasons for denial of an award of joint custody. Objection to joint custody by a parent seeking sole custody is not a sufficient basis for a finding that joint custody is not in the best interest of a child, nor is a finding that the parents are hostile to each other. However, a finding that one parent physically abused the other parent or the child is a sufficient basis for finding that joint custody is not in the best interest of the child.
(2) For the purposes of this section, "joint custody" means an order awarding custody of the minor child to both parents and providing that the physical custody and residency of the child shall be allotted between the parents in such a way as to assure the child frequent and continuing contact with both parents. The allotment of time between the parents must be as equal as possible; however;
(a) each case shall be determined according to its own practicalities, with the best interest of the child as the primary consideration; and

(b) when allotting time between the parents, the court shall consider the effect of the time allotment on the stability and continuity of the child's education.
NEW MEXICO: Chapter 40, 40-4-9.1 Joint custody; standards for determination; parenting plan.

A. There shall be a presumption that joint custody is in the best interest of a child in an initial custody determination....

F. When joint custody is awarded, the court shall approve a parenting plan for the implementation of the prospective custody arrangement prior to the award of joint custody. The parenting plan shall include a division of a child's time and care into periods of responsibility for each parent....

G. Where custody is contested, the court shall refer that issue to mediation if feasible.

I. Whenever a request for joint custody is granted or denied, the court shall state in its decision its basis for granting or denying the request for joint custody. A statement that joint custody is or is not in the best interest of the child is not sufficient to meet the requirements of this subsection.

J. An award of joint custody means that:
(1) each parent shall have significant, well-defined periods of responsibility for the child;
(2) each parent shall have, and be allowed and expected to responsibility for the child's financial, physical, emotional and developmental needs during that parent's periods of responsibility;
(3) the parents shall consult with each other on major decisions involving the child before implementing those decisions; that is, neither parent shall make a decision or take an action which results in a major change in a child's life until the matter has been discussed with the other parent and the parents agree. If the parents, after discussion, cannot agree and if one parent wishes to effect a major change while the other does not wish the major change to occur, then no change shall occur until the issue has been resolved as provided in this subsection.

TEXAS: 153.131 Presumption that Parent to be Appointed Managing Conservator
(a) Unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.
(b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child.

The following are some of the best relevant statutes from states which provide a strong preference for joint custody:

ALASKA: Title 25, Chapter 20

Sec. 25.20.100 Reasons for denial to be set out.

If a parent or the guardian ad litem requests shared custody of a child and the

court denies the request, the reasons for the denial shall be stated on the record.

CALIFORNIA: Family Code Section

3040. Order of preference.

(a) Custody should be granted in the following order of preference according to the best interest of the child as provided in 3911: (1) To both parents jointly pursuant to Chapter 4 (commencing with 3080) or to either parent. In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent, subject to 3011, and shall not prefer a parent as custodian because of that parent's sex.

3080. Presumption of joint custody.

There is a presumption, affecting the burden of proof, that joint custody is in the best interest of a minor child, subject to 3011, where the parents have agreed to joint custody or so agree in open court at a hearing for the purpose of determining the custody of the minor child.

3082. Statement of reasons for grant or denial.

When a request for joint custody is granted or denied, the court, upon the request of any party, shall state in its decision the reasons for granting or denying the request. A statement that joint physical custody is, or is not, in the best interest of the child is not sufficient to satisfy the requirements of this section. IOWA: Title XV, Subtitle 1, Chapter 598

598.41 Custody of children

1.a. The court, insofar as is reasonable and in the best interest of the child, shall order the custody award, including liberal visitation rights where appropriate, which will assure the child the opportunity for the maximum continuing physical and emotional contact with both parents after the parents have separated or dissolved the marriage, and which will encourage parents to share the rights and responsibilities of raising the child unless direct physical harm or significant emotional harm to the child, other children, or a parent is likely to result from such contact with one parent.

c. The court shall consider the denial by one parent of the child's opportunity for maximum continuing contact with the other parent, without just cause, a significant factor in determining the proper custody arrangement.

2.b. If the court does not grant joint custody under this subsection, the court shall cite clear and convincing evidence, pursuant to the factors in subsection 3, that joint custody is unreasonable and not in the best interest of the child to the extent that the legal custodial relationship between the child and the parent should be severed.

KANSAS: Chapter 60, Article 16

60-1610. Decree; authorized orders. Neither parent shall be considered to have a vested interest in the custody or residency of any child as against the other parent, regardless of the age of the child, and there shall be no

presumption that it is in the best interests of any infant or young child to give custody or residency to the mother.

(4) Types of custodial arrangements. Subject to the provisions of this article, the court may make any order relating to custodial arrangements which is in the best interests of the child. The order shall include but not be limited to, one of the following, in the order of preference:

(A) Joint custody. The court may place the custody of a child with both parties on a shared or joint-custody basis. In that event, the parties shall have equal rights to make decisions in the best interests of the child under their custody. When a child is placed in the joint custody of the child's parents, the court may further determine that the residency of the child shall be divided either in an equal manner with regard to time of residency or on the basis of a primary residency arrangement for the child. The court, in its discretion, may require the parents to submit a plan for implementation of a joint custody order upon finding that both parents are suitable parents or the parents, acting individually or in concert, may submit a custody implementation plan to the court prior to issuance of a custody decree. If the court does not order joint custody, it shall include in the record the specific findings of fact upon which the order for custody other than joint custody is based.

(B) Sole custody....

(C) Divided custody.... (two or more children)

(D) Nonparental custody....

MICHIGAN: Chapter 722 Sec. 6a. (1) In custody disputes between parents, the parents shall be advised of joint custody. At the request of either parent, the court shall consider an award of joint custody, and shall on the record the reasons for granting or denying a request.

MINNESOTA: Chapter 518

518.17 Custody and support of children on judgment

The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of he child.

The court shall use a rebuttable presumption that upon request of either or both parties, joint legal custody is in the best interests of the child.

MISSISSIPPI: Title 93, Chapter 5

93-5-24. Types of custody awarded by court;joint custody;access to information pertaining to child by noncustodial parent.

(1)Custody may be awarded as follows according to the best interests of the child:
(a)Physical and legal custody to both parents jointly pursuant to subsections 2 through 7.

(b) Physical custody to both parents jointly pursuant to subsections 2 through

7 and legal custody to either parent.

(c) Legal custody to both parents jointly pursuant to subsections 2 through 7 and physical custody to either parent.

(d) Physical and legal custody to either parent.

NEW HAMPSHIRE: Title XLIII, Chapter 458

458:17 Support and Custody of Children

II. Except as provided in subparagraph (c), in the making of any order relative to such custody there shall be a presumption, affecting the burden of proof, that joint legal custody is in the best interest of minor children:

(a) Where the parents have agreed.... If the court declines to enter an order awarding joint legal custody, the court shall state in its decision the reasons for denial of an award of joint legal custody.
(b) Upon the application of either parent....

The following two states have case law which make joint custody a preference:

GEORGIA: Court of Appeals of Georgia, Case No. A93A0698, 7/2/93 IN the INTEREST of A.R.B., a child

In a unanimous opinion, presiding Judge Dorothy T. Beasley stated: Although the dispute is symbolized by a 'versus' which signifies two adverse parties at opposite poles of a line, there is in fact a third party whose interests and rights make of the line a triangle. That person, the child who is not an official party to the lawsuit but whose wellbeing is in the eye of the controversy, has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy is a recognition of the child's right to equal access and opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents' wisdom, judgment and experience. The child does not forfeit these rights when the parents divorce.

The A.R.B. case was subsequently heard by the Supreme Court of Georgia, which upheld the Court of Appeals' finding that, according to public policy of Georgia, joint custody was in the best interests of children when both parents are fit.

KENTUCKY: Chalupa v. Chalupa, Kentucky Court of Appeals, No. 90-CA-001145-MR; (May 1, 1992).
Judge Schroder, writing for the majority:

A divorce from a spouse is not a divorce from their children, nor should custody decisions be used as a punishment. Joint custody can benefit the children, the divorced parents, and society in general by having both parents involved in the children's upbringing.... The difficult and delicate nature of deciding what is in the best interest of the child leads this Court to interpret the child's best interest as requiring a trial court to consider joint custody first, before the more traumatic sole custody. In finding a preference for joint custody is in the best interest of the child, even in a bitter divorce, the court is

encouraging the parents to cooperate with each other and to stay on their best behavior. Joint custody can be modified if a party is acting in bad faith or is uncooperative. The trial court at amy time can review joint custody and if a party is being unreasonable, modify the custody to sole custody in favor of the reasonable parent. Surely, with the stakes so high, there would be more cooperation which leads to the child's best interest, the parents' best interest, fewer court appearances and judicial economy. Starting out with sole custody would deprive one parent of the vital input.

Appendix B

WORKSHEET A - BASIC VISITATION
MONTHLY CHILD SUPPORT OBLIGATION

	Custodial Parent	Other Parent	Combined
1. Gross Monthly Income	$_____ +	$_____ =	$_____
2. Percentage of Combined Income (Each parent's income divided by combined income)	_____% +	_____% =	100%
3. Number of children _____			
4. Basic Support from Table A (Use combined income from Line 1)		=	_____
5. Children's Health and Dental Insurance Premium	_____ +	_____ =	_____
6. Work-related Child Care	_____ +	_____ =	_____
7. Additional Expenses	_____+	_____=	_____
8. Total Support (Add Lines 4 [sic],5, 6 and 7 for each parent and for combined column)	_____ +	_____ =	$_____
9. Each Parent's Obligation (Combined Column Line 8 X each parent's Line 2)	_____	_____	
10. Enter amount for each parent from Line 8	-_____	-_____	
11. Each parent's net obligation (Subtract Line 10 from Line 9 for each parent).	_____	_____	Other Parent pays Custodial Parent this Amount

_____ PAYS _____ EACH MONTH $_____.

Use with Table A and instructions.

_____
Petitioner

_____
Respondent

or

_____
Attorney for Petitioner

_____
Attorney for Respondent

Date: _____

Adjusted Monthly Gross Income for Each Parent _____(12)_____

(add or subtract lines 9 through 11 from line 8)

COMBINED ADJUSTED MONTHLY GROSS INCOME (13)_____
BASIC CHILD SUPPORT OBLIGATION

Number of children for whom support is requested: (14)_____
(Explain on page 5)

Basic Child Support Obligation (from the Schedule) (15)_____

ADJUSTMENTS FOR NECESSARY EXPENSES

Medical Insurance Premium for Children paid by G Mother (16)_____
(You may also need to complete item 30) G Father

Child Care Costs G Mother (17)_____
(Explain on page 5) G Father

Extra Education Expenses (18)_____

Number of ___ Child(ren) 12 and Over (19)_____
(Explain on page 5)

Extraordinary Child (20)_____

Total Adjustments for Necessary Expenses (21)_____

TOTAL CHILD SUPPORT OBLIGATION

Total Child Support Obligation (add lines 15 and 21) (22)_____

EACH PARENT'S PERCENTAGE (%) OF COMBINED INCOME

Calculate for each parent:	**Father**		**Mother**
Adjusted gross income (from line 12)	_____	(23)	_____
Combined adjusted gross income (from line 13)	_____	(24)	_____
Adjusted gross income DIVIDED BY combined adjusted gross income EQUALS	_____%	(25)	_____%

EACH PARENT'S PERCENTAGE (%) OF THE TOTAL SUPPORT OBLIGATION

Calculate for each parent:	Father		Mother
Total child support obligation (from line 22)	_____	(26)	_____
Percentage of combined adjusted gross income (from line 25)	_____%	(27)	_____%
Percentage TIMES the total obligation EQUALS the amount of the parent's support obligation	_____	(28)	_____

ADJUSTMENT FOR COSTS ASSOCIATED WITH VISITATION

Requested Adjustment to be completed for paying parent ONLY

Number of Visitation Days _____ Per year (Explain on page 6)

Visitation Table Percentage _____ X Line 15 = _____ (29)

MEDICAL INSURANCE PREMIUM ADJUSTMENT	Father		Mother
Complete this item ONLY if the parent who will be ordered to pay support is also the parent who will pay the medical insurance premium. Enter the premium amount paid directly to insurance carrier by parent ORDERED to pay support from line 16.	_____	(30)	_____

NON-CUSTODIAL CHILD CARE ADJUSTMENT

Enter the annualized amount paid directly by the non-custodial parent for work related child care. _____ (31) _____

COURT APPROVED DISCRETIONARY VISITATION ADJUSTMENT

Adjustment for Additional Costs. NOT to exceed 16% of line 15 _____ (32) _____
(Explain on page 6)

ADJUSTMENTS SUBTOTAL _____ (33) _____
Add lines 29 through 32

PRELIMINARY CHILD SUPPORT AMOUNT

Deduct line 33 from line 28 _____ (34) _____

SELF SUPPORT RESERVE TEST

Paying parent's ADJUSTED gross income _____ _____(35)_____
minus -$645.00 = the resulting amount. (Line 12)

If this amount is less than the Preliminary Child Support Amount, the court SHALL order the resulting amount as child support order on line 35, absent a deviation.

AMOUNT TO BE ORDERED BASED ON THESE CALCULATIONS

	Father	Mother
Enter the lesser of the amounts shown on line 34 or line 35.	_____(36)_____	

DEVIATION FROM THE GUIDELINES SUPPORT AMOUNT

If you believe the Guidelines support amount is too high or too low in your case, enter the amount which you believe the court should order as child support in this case. Explain why on page 6. _____(37)_____

RESPONSIBILITY FOR VISITATION-RELATED TRAVEL EXPENSES

	Father	Mother
Enter on this line the amount or percentage you think each parent should pay towards the travel/transportation expenses associated with visitation. The allocation of travel expenses does not change the amount of the support ordered. Explain on page 5.	_____(38)_____	

RESPONSIBILITY FOR MEDICAL EXPENSES NOT PAID BY INSURANCE

Percentage of uninsured medical expenses that each parent should pay. _____%(39)_____%

I have read this document, and the facts are true and correct to the best of my knowledge or belief.

_____ _____

[ ] Petitioner's [ ] Respondent's Signature Date

STATE OF ARIZONA)
)
County of _____)

SUBSCRIBED AND SWORN before me on _____ 20 ___

My commission expires: _____

_____ _____

Notary Public/Deputy Clerk Date

I have read this document, and the information provided is an accurate representation of the facts as supplied to me by _____.

Attorney Filing _____ Date _____

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

Docket No. CA-01-005

CA-01-005

Eddie Soto, Appellant	)	
v.	)	INTERIM ORDER
Linda Salomon, Appellee	)	

The parties in the above captioned matter filed a Stipulation for Extension of Filing Date. The parties stipulate and request a new deadline for settlement negotiations until February 22, 2002 in order to receive and review medical information relating to one of the parties.

This Court authorizes the extension of the deadline for parties to negotiate a settlement agreement in this matter until February 22, 2002.

IT IS SO ORDERED this 21st day of February, 2002.

Carolyn J. Abeita, Associate Justice

Michelle Ereaux, J.D.
4930 N. Placita Santolina
Tucson, Arizona 8574
520-312-5378

Lay Advocate for Eddie Soto

CA-01-005

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION
TUCSON, ARIZONA

EDDIE SOTO, Appellant,	)	NO. CA-01-005
	)	STIPULATION
vs.	)	FOR
	)	EXTENSION
LINDA SALOMÓN, Appellee	)	OF FILING DATE

THE PARTIES AGREE THAT:

I. On February 14, 2002, counsel for both parties were informed of health problems of one of the parties that might affect the tentative settlement agreement the parties had reached;

II. Counsel agreed to wait for the prognosis of the party's condition;

III. Since it appears that the necessary information will be available within the coming week, Counsel stipulate to an additional extension of one week for submission of a settlement agreement;

IV. Counsel further understand that, in the event that a settlement is not reached, the deadline to file the information requested by the Court in its January 18, 2002, Order, and reiterated in the Interim Order of February 4, 2002, remains as February 28, 2002.

V. An extension of the deadline of February 15, 2002, set in this Court's Interim Order of February 4, 2002, is necessary and we respectfully request a new deadline be set as February 22, 2002.

DATED this 14th day of February 2002.

Michelle Ereaux, J.D.
Lay Advocate for Eddie Soto

DATED this 14th day of February 2002.

Lourdes Salomón Lopez
Attorney for Linda Salomón

CERTIFICATE OF SERVICE

I hereby certify that I notified the Pascua Yaqui Tribal Court of the stipulation for an extension of this filing by telephone on February 15, 2002, and that I served the foregoing *Stipulation for Extension of Filing of Settlement Agreement to the Pascua Yaqui Court of Appeals* to the Court and the Parties on February 19, 2002.

Michelle E. Ereaux, J.D.
Lay Advocate for Eddie Soto, Appellant

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

Docket No. CA-01-005

Eddie Soto,)
Appellant)
)
v.) INTERIM ORDER
)
Linda Salomon,)
Appellee)

The parties in the above captioned matter filed a Stipulation for Postponement of Filing Date. The parties request an extension of the January 31, 2002 deadline established by this Court for the parties to try and reach a fair and reasonable settlement on the issue of child custody and support. The parties stipulate and request a new deadline for settlement negotiations until February 15, 2002.

This Court authorizes the extension of the deadline for parties to reach a settlement in this matter until February 15, 2002. In the event that the parties are unable to reach a settlement by that date, the parties will be required to file the information requested by this Court in its January 18, 2002 Order no later than February 28, 2002.

IT IS SO ORDERED this 4th day of February, 2002.

Carolyn J. Abeita, Associate Justice

Michelle Ereaux, J.D.
4930 N. Placita Santolina
Tucson, Arizona 8574
520-312-5378

Lay Advocate for Eddie Soto

CA-01-005

IN THE PASCUA YAQUI TRIBAL COURT
PASCUA YAQUI RESERVATION
TUCSON, ARIZONA

EDDIE SOTO, Appellant/	)	NO. CA-01-005
	)	STIPULATION
vs.	)	FOR
	)	POSTPONEMENT
LINDA SALOMÓN, Appellee	)	OF FILING DATE

THE PARTIES AGREE THAT:

I. Counsel for both parties met and began negotiations regarding the proposed *Settlement Agreement* on January 21, 2002.

II. Counsel for both parties discussed two persons as recommendations for the position of "*Intermediary*" in the ongoing affairs of the children and the parties. It was agreed that one of the persons, Mr. Glenn Johnson, M.A., should provide his resumé.

III. Counsel for both parties reviewed a suggested schedule for conducting an interview with the suggested *Intermediary* as well as completing the assessments of the living situations of each of the parties and other tasks preliminary to the filing of a proposed *Settlement Agreement* to this Court.

IV. On January 30, 2002, Mr. Glenn Johnson declined the position of *Intermediary.*

V. Counsel for both parties are seeking alternates for the position of *Intermediary.*

VI. An extension of the deadline of January 31, 2002, set in this Court's Order of January 18, 2002, is necessary and is hereby stipulated.

VII. Counsel for both parties respectfully request a new deadline of February 15, 2002.

DATED this 31st day of January, 2002.

Michelle Ereaux, J.D.
Lay Advocate for Eddie Soto

DATED this 31st day of January, 2002.

Lourdes Salomón Lopez
Attorney for Linda Salomón

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing *Stipulation for Postponement of Submission of Settlement Agreement to the Appellate Court of the Pascua Yaqui Nation* on to the Court and the Parties on January 31, 2002.

Michelle E. Ereaux, J.D.
Lay Advocate for Eddie Soto, Appellant

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

Docket No. CA-01-005

Eddie Soto, Appellant	)	
v.	)	INTERIM ORDER
Linda Salomon, Appellee	)	

This matter comes before the Court by an appeal submitted by Eddie Soto, Appellant. This Court also received the Appellant's Motion to Stay Judgment Pending Appeal on May 17, 2001. The Motion requests this Court to stay the tribal court's order granting sole custody of the Appellant's two minor children to Linda Salomon, Appellee in this matter, and ordering child support in the amount of $500 per month. This Court convened on January 4, 2002 to consider both the Motion to Stay Judgment Pending Appeal and hear oral arguments on the appeal. Appellant was not present at the hearing but was represented by lay advocate, Pilar Thomas. Appellee appeared pro se. It was later determined at the hearing that Appellee has the "informal" assistance of her sister who is a licensed attorney.

At the hearing, this Court encouraged the parties to begin open and good faith discussions in order to reach an agreeable settlement on the issues of child custody and child support. This allows the parties to determine what is best for their children without protracted litigation that is costly in terms of emotional and financial resources for the parties. The Court also recommended that the parties settle other pending matters that may prevent the open and good faith discussions of the child custody and support issues. All parties present agreed to make efforts toward settlement negotiations.

During the course of the hearing, the Court noted that the Pascua Yaqui Tribe has no financial formulas or guidelines as to what is a fair allocation of the costs of raising a child for purposes of awarding child support. This Court asked each of the parties for their thoughtful consideration and participation toward the development of a formulaic approach to child support calculations. We also asked for discussion of various types of child custody arrangements used by other jurisdictions. All parties, and their legal representatives (both formal and informal) agreed to consider alternatives for child support formulas and provide information on different types of child custody arrangements.

Based on discussions at the hearing, we order the following:

1. The Appellant's Motion to Stay Judgment Pending Appeal is granted in part and

denied in part. We grant the stay on the payment of child support in the amount of $500 per month but order Appellant to pay the amount of $265 per month until either a settlement on the matter of child custody and support is reached by the parties or this Court enters its final order in this case. Appellant's brief cited $265 as the Arizona State guideline amount for child support under similar circumstances. Although this Court is not compelled to rely on State child support guidelines, we see this as a reasonable alternative for Appellant while still providing child support income for the minor children. In the event that the parties agree to higher amount or there is an order for an amount higher than $265 per month, Appellant shall be required to pay the difference in the award amount retroactively to the date of May 10, 2001, the date the Tribal Court ordered that payment of child support begin. As to any outstanding amounts that Appellant may be owing as of the date of this Order, Appellant is directed to bring those payments current, understanding that if the Appellant brings those payments current at the amount of $265 per month, he will still be responsible for any subsequent difference in payment amounts.

2. We deny that portion of Appellant's motion to stay the grant of sole custody of the minor children to Appellee. The children are to remain in the sole custody of the Appellee with visitation in accordance with agreement currently in place pending either a settlement on the issue of child custody and visitation by the parties or the issuance of a final order by this Court.

3. In the event that parties are unable to reach a fair and reasonable settlement on the issue of child custody and support by January 31, 2002, the parties are directed to file the information requested by this Court no later than February 28, 2002.

IT IS SO ORDERED this 18th day of January 2002.

Carolyn J. Abeita, Associate Justice

IN THE PASCUA YAQUI COURT OF APPEALS
IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

02 JAN -4 AM 10:06

Docket No. CA-01-005 CA-01-005

Eddie Soto,
Appellant

v.

Linda Solomon,
Appellee

NOTICE OF APPEARANCE

Please take notice that the undersigned lay advocate appears in the above- entitled action for Appellant Eddie Soto, for the purpose only of oral argument in this appeal, and that I appear for that purpose only.

Dated: January 4, 2002

Pilar Thomas
2680 W. Saddleranch Pl.
Tucson, Arizona 85745

APPELLANT BRIEF

Introductory Narrative:

My name is Eddie Soto. I am Pascua Yaqui Indian. I have lived on the reservation for over 30 years. My children are Stephen Soto, and Gilbert Soto. They are also tribal members. My ex-girlfriend, the mother of my children, is Hispanic. In 1992 I rented a tribal house on our reservation for my children and my ex-girlfriend, Appellee. Appellee and I did not get along very well, but I wanted to be with Stephen and Gilbert and thought it would be best if they grew up with me there. Although Appellee and I have separated due to our enduring differences, the way I feel about my children and their importance to me has not changed. I want to be with them. However, I am concerned that the trial court's judgment may interfere with the relationship established between my children and me. I'll do my best to explain this.

I believe the process before and during the custody and support hearing was procedurally unfair. To begin, I did not receive proper notice of Appellee's claims prior to trial. The claims for which I did not receive notice were the claims to which the basis of the trial court's judgments. Because I didn't have notice of the claims, I didn't gather evidence to refute them. Yet, there is plenty of evidence. Witnesses, reports, and other documents were things that I could have easily produced, if I had prior knowledge of Appellee's claims. I found out, after the trial, that I should have been informed of these claims through discovery. In short, there was a snowball effect that went from no notice, to no evidence, to the

trial judge ordering judgments based on claims that were largely untrue. In the end, not having notice led to an unfair trial.

Moreover, I wasn't the only one without evidence, Appellee failed to present any evidence for the claims she asserted. So, the court did not get a good picture of how things are, only a "he said" "she said" version. The court made an order based solely on allegations that completely lacked any factual evidence such as doctor's reports, written prescribed diets, testimony from childcare providers, receipts etc... making it impossible for the trial court to render a fair judgment.

Other errors occurred that also affected the fairness of the proceeding. For example, neither attorney provided the court with a copy of the stipulated visitation agreement as noted in the trial record. This, of course, has caused problems and a lot of confusion. It also takes away the sole reason I first filed in court, to make sure that I could see my children on a regular basis.

I am a good parent. I do not drink after quitting nearly six years ago. I do not behave inappropriately. I filed for visitation because I love my children and miss them everyday. I have been losing contact with them, first because of denied visitations and now because of limited visitation. I only went through the court to make sure that my kids were a part of my life, a part of my family's life, and a part of my tribe's community. I have tried for over 12 months to establish a working relationship with Appellee that would be in the best interests of Stephen and

Gilbert, but I have failed. Now after a strange and unusual twist of procedural circumstances, and trial court error, I am here, praying for relief.

STATEMENT OF FACTS

1. I, Eddie Soto, am the father of Stephen and Gilbert Soto. We are enrolled members of the Pascua Yaqui Tribe.
2. As a sober and responsible parent, I have a good relationship with my children, Stephen and Gilbert.
3. Appellee and I separated in June 2000.
4. I signed my rental home over to Appellee in an effort to minimize the psychological impact separation would have on Stephen and Gilbert.
5. As stated above, I negotiated a way for Appellee to receive the tribal home because these are reserved for tribal renter and her available at a reduced rent of $385 for a three bedroom.
6. When we first separated I also understood Appellee would initially have extra expenses such as extra charges for changing the name for utility services and possibly additional deposits. So, I paid $600 a month for three months while I stayed at my mother's house giving Appellee a lot of financial help.
7. For the next 10 months I paid $400 a month, $100 every week, for child support. Sustaining this amount at my current income level proved to be a severe hardship.

8. Between June 2000 and April 2001 Appellee prevented me from seeing Gilbert and Stephen even during the peak of our tribal ceremonial season. .
9. In February, I filed to establish paternity and visitation rights in an effort to see my children regularly. It is important for me to maintain a good relationship with them because if I don't see them enough they may think that I don't love them.
10. Appellee counter filed for child support in March 2001.
11. April 27th, the trial court entered judgments in child custody, visitation and child support whose only basis was unsupported by factual evidence.
12. Appellee states in her response to my petition to establish paternity that I have a good and healthy relationship with my children.

Summary of Argument:

I am appealing these judgments on two grounds; the trial court abused its discretion in granting child support in an excessive amount without regard to the disparity in my income and that of Appellee, in denying joint legal custody, and my requested visitation without regard to my children's best interest. The trial court also abused its discretion by basing judgments on claims that were unsupported by any factual evidence or by any actual stipulations between the parties.

I. THE TRIAL COURT ABUSED IN DISCRETION BY NOT ACCURATELY ASSESSING THE FINANCIAL RESOURCES OF BOTH PARENTS WHEN ORDERING CHILD SUPPORT.

The trial court abused its discretion in ordering $500 child support payments because it did not properly assess the financial needs and resources of both parents. Although not binding, Arizona State child support guidelines would have been one-half of the trial court's support order.

Tribal guidelines for fixing child support amounts include consideration of

- The financial resources and needs of the child.[1]
- The financial resources and needs of the custodial parent.[2]
- The financial resources and needs of the non-custodial parent.[3]

The court did not correctly assess our comparable incomes where Appellee makes $38,100.00 per year.[4] I work as a laborer for housing at $29,000 a year, a difference of over $9,000.00. Appellee's resources also include a tribal rental home I signed over to her, which provides a monthly financial resource to offset financial needs of the household.[5] The trial court should have considered the reduced cost of tribal housing as a financial resource. The California Court of Appeals upheld a trial court ruling that calculated appellants housing benefits as a resource for the purpose of the child support calculation. *Stewart v. Gomez, 55 Cal.Rept.531.* The court confirms that it includes tribal housing benefits in

[1] Pascua Yaqui Judicial Titles and Codes §10.10(1)
[2] *id.* at (2)
[3] *id.* at (3)
[4] R.5
[5] PYTC,Visitation Order 1:12-13; R.5

determining child support income calculations. "We see no reason to distinguish an employee housing benefit from an Indian reservation housing benefit."[6] While the decision is not binding on tribal court, it is helpful in determining the appropriateness of such tribal resources when assessing the financial resources and needs of parents for child support calculations. Tribal three-bedroom rentals are $385 a month. My off reservation rent is $500 a month and there are no open rentals available on the reservation for me to live in.[7]

The trial court's judgment increases Appellee's income to $44,100 per year and reduces mine to $23,000. Trial court abused its discretion by not accurately assessing the financial needs and resources of both parents.

Appellee does not spend money for medical care, because it is free for the children.

Armenta: Now do you have any health insurance or health costs for...

Solomon: The children?

Armenta: Yes.

Solomon: Yes, their covered under the Yaqui insurance.

Armenta: And does that cost you anything?

Solomon: It doesn't cost me anything.[8]

---

[6] *Stewart v. Gomez, 55 Cal.Rept.531*

[7] R. 42 ¶ 8.

Appellee's tax deductions include:

- $6,450 head of household
- $5,600 for Gilbert and Stephen dependants
- Eligibility for nearly $3,000 childcare expenses of which a portion could be deducted had Appellee claimed them on the taxes.

In contrast, I am paying $150 per month from last years taxes because I relied on having either Stephen or Gilbert on my taxes, which do not in fact happen.
My offer of $200 a month is an appropriate amount for child support. The Arizona State guidelines while not binding show that the state court would order $265 per month with a reduced visitation schedule of 90 days. $200 is appropriate because I provide for my children and my ex-girlfriend, Appellee, supplementing their household costs by giving Appellee my tribal rental home.

The trial court abused its discretion in not accurately assessing the financial resources of both parents, not assessing tribal housing or free medical care as either a financial resource or as a factor offsetting the financial need of Appellee, and in setting payments at $500 a month.

[8] R.14

II. THE TRIAL COURT ERRED IN BASING JUDGMENTS ON CLAIMS THAT WERE UNSUPPORTED BY FACTUAL EVIDENCE.

A. The award for $500 child support is trial court error because it is based on allegations that are unsupported by factual evidence.

Tribal codes states that the burden of proving a civil claim shall be on the party who makes the claim.[9] Therefore, Appellee bears the burden of proving her claims which are: that she has extraordinary household expenses, that a low-fat diet is an extraordinary expense, that she pays $160 a month for school meals, that school meals are an extraordinary expense, and that she pays her mom for childcare.[10]

The trial court ordered child support "based on the special dietary needs of the child and other expenses of the household." (PYTC child custody and child support order, April 26, 2001). Appellee originally asked for $600 per month "based on the expenses of child care and the special diet required by the child's illness". Id.

1. Child Care

Appellee filed for child support on May 16th but failed to provide evidence at trial because "I didn't think I needed them [receipts]". Appellee failed to present any evidence that she pays her mom $400 to baby-sit Stephen and Gilbert although she says that such evidence is available.

---

[9] Pascua Yaqui Judicial Code, Chapter 9, Rule 17(a)
[10] R. 13, R. 9

Aguilar: Do you have any records?

Solomon: I have um..I pay my mother cash. She can make me receipts.

Aguilar Did she give you receipts?

Solomon: She gives me receipts and I don't pick them up, I leave them at her house. I don't think I need...I mean I didn't think I needed them so...[11]

It is unfair for the trial court to base a child support order including household expenses when Appellee fails to provide factual evidence to court to support such an award, and when Appellee has no reasonable explanation for this failure.

Assuming the truth of Appellee's child support claim, there was still a duty to mitigate child care expenses ($400 a month) and reduce out of pocket expenses through child care tax credit. Appellee lacks a reasonable explanation for failing to mitigate expenses.

Aguilar: ***Did you claim the childcare expense?

Solomon: No I didn't.

Aguilar: And why is that?

Solomon: Because I paid my mother cash, she didn't give me...I didn't think I would have to put her down as childcare.[12]

---

[11] R. 18

[12] R. 18

Appellee should be accountable for mitigating costs to reduce the child support amount. Appellee receives a cash refund if she claims these expenses on her taxes regardless of her mother's status as a licensed provider. Therefore, it is unclear why she did not file for this deduction when she asking the court order extraordinary expenses for childcare.

2. Dietary Expenses

Appellee provides no supporting evidence to show that Stephen's diet is an extraordinary expense. Appellee's description of Stephen's diet is limited in whole to the following statements.

"[The diet is a] very strict low fat diet"[13], "low refined sugar" [14],
"There's a very strong restriction with him he cannot only have low fat diets with..."[15]
"I have to buy a lot of special foods like fish and chicken breast a lot of things that have low fat."[16]
"[I buy] fruits and vegetables"[17]
"I have to buy a lot of special foods."[18]
"I have to buy a lot of fish and non fatty stuff."[19]
"A lot of lean meats."[20]
"Fresh fruits and vegetables"[21]

---

[13] R.10 ¶ 6
[14] id.
[15] id.
[16] id.
[17] R.10 ¶ 8
[18] R. 13 ¶ 6
[19] id.
[20] id.
[21] id.

These descriptions are common to a low-fat diet, indeed Appellee states that this is a low-fat diet. Representative of its title, a low-fat diet consists of foods that are low in fat, but Appellee fails to show that a low-fat diet is an extraordinary expense, or that she actually spends $400 on groceries in addition to school provided breakfasts and lunches. A low fat diet does not presumptively cost more, and foods can conform to the diet through preparation, such as removing the skin from chicken, removing fatty party from beef, but is not necessarily attained by spending more money.

Stephen's doctor told me how to provide a low-fat diet to Stephen of fruits, vegetables, and meats prepared as mentioned above.[22]

Assuming that there may be other factors of the diet that Appellee did not explain, there is no basis for raising the cost of child support so that the entire household can subscribe to Stephen's diet.

Solomon: ". . .We have changed our diets at home." [23]

Regarding the cost of school meals, Tucson Public School Policy set costs at $1 for elementary, $1.10 for middle school breakfasts, $1.50 for elementary, $2 for middle school lunches, rather than the $2 per meal, per child, a claim factually misrepresented by Appellee.[24] Furthermore, Appellee misrepresented the amount of meals my children actually eat at school. School cafeteria cashier at Lawrence Elementary told me last week that my son does not eat break fast at school.[25]

The trial court errs when it sets "the amount of child support [in part] based on the special dietary needs of the child" because the basis is presumptive and

---

[22] post trial meeting with Stephen's doctor
[23] R. 13
[24] R. 14

lacks any factual evidence. Evidence was readily available to Appellee. For example, provided by grocery bills, doctor's notes outlining extraordinary limitations, recommendations from a medical or dietary professional or published material.

B. The trial court erred in its visitation judgement because it bases it decisions on the claims unsupported by factual evidence.

1. Summer Visitation

Trial court erred in not allowing my six-week visitation because this visitation is not at odds with the best interests of the children and Appellee agreed to it during testimony. Appellee stipulates that I have a good and healthy relationship with my children in her response to paternity.[26]

Aguilar: would you agree to a six week, ah..but broken up into two-week segments?

Solomon: Yes.

[Appellee agrees to encourage and promote visits with their father.]

Aguilar: would you agree that it's in the best in..interest of the children that you encourage and promote such visits?

Solomon: I would promote it. I would promote it.[27]

While Appellee later recanted her agreement, there is no claim that this visitation is not in the best interests of my children.

---

[25] Conversation with Dolres Aldey Food Service Cashier at Lawrence School post trial

[26] Appellee's stipulation pg. 2 "Response to Paternity"

2. After school visitation

The trial court abuses its discretion by denying my request for after school visitation stating that ". . .the Court will deny the request as the children are used to the schedule provided by their mother".[28]

Trial court's conclusion is speculative, unsupported by any claims raised at trial and contradictory to statements made by both parties. This order is not presented by allegations or any other claims asserted by anyone at trial. After school visitation is not at odds with Stephen and Gilbert's best interests, nor is it against Appellee's wishes.

Aguilar: and ah..*would you be willing that this pattern continue*, where....*whereby the children's father would pickup the children after school*?

Solomon: if he wants to be responsible to pick um...to pick up Gilbert at three thirty when he gets off the bus, *I don't have a problem with that* . . .[29]

Solomon: . . . I didn't have to pay my mother since Eddie would stay with them after school, so I didn't have to pay my mother. [30]

Soto: I was always coming from work and cook, clean and whatever, take care of the kids . . .[31]

---

[27] R. 25
[28] Court Ordered Visitation line 23-24
[29] R. 19
[30] R. 9

Aguilar: [Regarding visitation] In terms of Stephen and his health problems, ah...are you prepared to assume responsibility for his diet?

Soto: Yes [32]

Trial Court's use of Stephen's children's health as a determining factor in deciding visitation, is an abuse of discretion, because it was not an issue presented at trial. Further more, an inhaler easily manages Gilbert's asthma. Stephen's diet requires special care, but the need for a low fat diet is not a good reason for limiting visitation between Gilbert, Stephen, and me. Appellee's response to paternity states I have a good relationship with the children. No claims are made that a reduced summer visitation schedule is in the best interest of my children, nor is this decision reconciled with Appellee's statement of a good and healthy father son relationship.

3. Restrictions on Summer Visit

The trial court order abused its discretion in the portion of its order stating that "the father shall contact the mother daily to inform her of the child's well-being and diet during the two week visit". The order is unreasonable and its purpose is unclear. The order does nothing to benefit Stephen and unreasonably interferes with my father-son relationship.

---

[31] R. 44
[32] R. 37

This requirement limits what activities I can do with my children. I planned on taking them camping during our visit, and phones are not readily available in the area I had planned to go. I had planned on taking my children out of town for a part of our visitation, and this requirement will limit our travelling plans, our accommodations, and daily routine unnecessarily. This requirement is not designed to benefit the children.

III. PROCEDURES AT TRIAL COURT WERE UNFAIR BECAUSE APPELLEE DID NOT PROVIDE ME WITH NOTICE OF ANY PRIMARY CLAIMS AND THIS PROCESS WAS COUNTER TO THE GOAL OF TRIBAL COURT PROCEEDINGS AND THE CLAIMS WERE NOT IN COMPLIANCE WITH DISCOVERY PROCEDURE.

> It is the policy of the Tribal Court that the truth will be revealed more readily if all parties in a civil case have access to all information and evidence related to the case in preparation for trial, therefore the parties may ask each other for and shall make available to each other all information in each other's possession or control which will be used as evidence in the case, or which can reasonable be used as evidence in the case, or which can reasonably be expected to lead to evidence. Pascua Yaqui Judicial Code, Title 9, Rule 11(A)

The Northern Plains Intertribal Court of Appeals reversed a trial court order, in part for a failure to notify a party of allegations. "It is virtually impossible for

mother to answer and defend against allegations if she does not know what the allegations against her might be." *N. Plns. Intertr. Ct. App., March. 5, 1992*[33].

A. Diet

I did not receive notice from Appellee at anytime since our separation in June until the day of trial that Stephen had a medical diet, and that this medical diet was an extraordinary expense on Appellee.

Stephen's health was a deciding factor in the child custody order, child support order, and visitation order. It was procedurally unfair to raise a claim that defines the foundation of the father-son relationship I share with both of my children without notice of such a claim. A medical condition of this magnitude and permanent impact should be accompanied by medical testimony or at least by the records of a medical professional. And, I believe that the court should not have restricted the relationship with my children absent factual evidence of any kind from Appellee to corroborate such heightened and extraordinary circumstances. I believe the trial court abused its discretion in basing its findings on a medical condition where no qualified medical professional input was provided to the court. Had I prior knowledge of this claim, I would have requested the presence of the doctor myself. Only after the court has an accurate understanding of Stephen's health can the court properly assess his best interests and make an informed decision on how his interests are best protected and provided for.

[33] In the Matter of M.H., 20 ILR 6040, N. Plns. Intertr. Ct. App. (Mar. 1992)

B. Childcare

I had no prior knowledge that Appellee claimed to pay her mom $400 a month for child care until 48 hours before court. Because I work full time, I did not have time to do any independent fact finding in connection with this claim. I think it is unlikely that Appellee really makes such payments, because during the years that she was my girlfriend, her mother never charged us for watching the boys. Appellee's lack of evidence reinforces my belief that the claim lacks merit. Appellee has never been shy about asking me for money, and if these extraordinary costs were actually incurred, I would have known about them from the very start.

I am asking for a new trial because the procedural process at the trial court level was unfair. Initial problems arising from the lack of notice for Appellee's claims was compounded by the trial court basing its decisions on unsubstantiated testimony about those claims. This strategy, whereby one party, by a lack of pretrial notice, impedes the other party's ability to be adequately represented at trial gives the non-disclosing party an unfair advantage. These tactics do not comport with traditional notions of fair play and substantial justice, and are contrary to tribal civil procedures and their purpose.

IV. PROCEDURAL UNFAIRNESS RESULTED IN A VIOLATION OF MY DUE PROCESS RIGHTS

The procedural of unfairness at the trial court level, which involves a lack of notice, abuse of discretion, erroneous identification of parties, has resulted in a violation of due process.

> "...when it comes to ideas of due process, which is basic fairness, or equal treatment of persons, Indian values most often give far more protections and consideration than Anglo values. To often, it seems that "due process" in non-Indian court systems means power and money. To Indians, it means respect, talking things out, listening to everyone's point of view, and using your values".[34]- Robert Yazzie

I would like the trial court to render a judgment based on evidence, rather than unsubstantiated allegations. The process has been unfair for the reasons stated so far.

V. THE TRIAL COURT ERRED IN NOT CONSIDERING THE UNIQUE CULTURAL NEEDS OF NATIVE AMERICAN CHILDREN WHEN GRANTING CUSTODY AND VISITATION.

> Tribal courts alternative worldview may add a dimension to legal disputes which includes "customs regarding the role of extended family members in child rearing, the respective roles of mothers and fathers, and the importance of preserving knowledge of the tribe's history, spiritual practices, myths, art forms, or traditional ways of life." *Barabara Ann*

[34] Robert Yazzie March 22, 1999

Atwood, Minnesota Law Review, Volume 83, April 1999, Number 4.

A. Our relatives and community identity

"Tribal communities are wholly defined by the family relationships;" -Vine DeLoria. [35]

The trial court should have considered the cultural education of Stephen in Gilbert in granting custody. Other tribe's address this issue through judicial code, including the Lummi Nation[36] and the Colorado River Tribes[37] (colorado river tribes domestic relations code preamble 1995). But, even without such a provision, the tribal court should take the cultural education of Indian children into account.

Other tribes have referred to the child's cultural education as a factor to consider, in adjudicating a custody dispute, and have recognized the importance of tribal heritage in determining child custody.[38]

Other tribal courts embody the nature of the Indian extended family in rendering its decisions. For example, in *Means v. Davis*[39], the court held that "Navajo common law on the family extends beyond the nuclear family to the child's grandparents, uncles, aunts, cousins and the clan relationships." The court

---

[35] Deloria, Vine, God is Red
[36] Lummi Code of Laws, § 11.4.02(g)(h)
[37] Colorado Tribes Domestic Relations code Preamble (1995)
[38] *Miner vs. Banley* 22 ILR 6044, Cheyenne River Sioux Court of Appeals, (1995)
[39] Davis v. Means 21, ILR 6125 (November 1994)

further states that the maxim focuses on the identity of a person, and is a crucial component of family cohesion.[40]

I requested visitation to also allow my children to maintain contact with their extended Indian family. My children are tribal members, but they have not been around their Yaqui family much lately. My children were not with their Yaqui relatives during our ceremonies. They need to be in contact so that they are a part of the community, so that they know their own history, and their place in the world.

I know that a lot of courts don't consider "extended family" as part of the visitation needs, but I think it should be considered if the children are Yaqui. To the Yaqui, family is everyone, not just the nuclear family that Anglo people refer to.

I want my children to know their culture and their family. If I am slightly late to pick them up after work, I want them to go to the Boys and Girls Club, near their grandma's house, after school because this will give them an opportunity to be around their Indian family. Since I cannot be with them everyday, this will be a good way for them to maintain these family relationships.

Aguilar: And ah...is..is your suggestion just they go to the Boys and Girls Club in the event that you are no there when they arrive?

---

[40] *id.*

Soto: Yeh, if I'm a little late. It's right next door to the bus stop, right where they get off. I have a cousin who works there as Director. And my nephew and my brothers who's ah..like...goes over there and helps.[41]

Aguilar: They work at the ah...boys and girls Club?

Soto: Yes.[42]

B. Our practices

Ceremonies give us our place in the world. My children were not with their Yaqui family during our most important ceremonies of the year. Appellee prevented me from taking my sons to our ceremonies.[43] This fact is acknowledged by Appellee.[44] While Appellee claims to have taken them to a different location, this alternative is insufficient. My children are from the Pascua Yaqui community. Their Yaqui relatives attend and participate in our local ceremony. It is this type of circumstance that makes it imperative that I retain joint custody of Stephen and Gilbert so that I can exercise some control in raising them. If not, they will be lost to our people. Our tribe is dependent on the children. They are our greatest resource.[45]

There was confusion at the trial court level as to what a "cultural activity" really is. Appellee's counsel implied that a "cultural activities" was an interchangeable term for "a ceremony". As a Yaqui Indian, our lives are centered on our cultural

---

[41] R. 36
[42] R. 37
[43] R. 39
[44] R. 52

beliefs, the importance of our families, and the responsibilities we have to the community. These are shaped by our unique identity, and our activities within the community and with each other are all cultural, in that they are connected to our culture. This lack of understanding of Yaqui culture, demonstrates why Stephen and Gilbert's connection to their Yaqui family needs to be preserved. My children need to know their Indian family. They need to be at their grandma's home on Sunday afternoons when their relatives are outside cooking menudo talking about "this and that". These are the times that they learn. They need to know their Yaqui cousins, all 100 of them. And they need to be around to listen to their aunties and uncles when they talk and talk and talk full of advice, whether they take it or not is up to them, but they should not be deprived of the opportunity to learn. Since I am no longer at home with them, this part of their lives needs to be supplemented with the extended visitation that I requested. I ask you to help ensure that these two boys, Stephen and Gilbert Soto, grow up knowing and understanding who they are, and their place in the Yaqui family and community.

VI. OTHER PROCEDURAL ERRORS

A. The trial court erroneously identifies me as "respondent" rather than "petitioner", during the trial court process, and in the order establishing paternity and the visitation order.

Trial court occurred in reverse order of what it was supposed to. Appellee was erroneously identified and acted in a role of the petitioner. Rather than asserting my own claims, I was limited to responding to Appellee's claims.

---

[45] Tribal flier from PYT foster parent program, seeking Yaqui foster parents in order to place Yaqui within the community.

B. The trial court erroneously entered into the record a letter from Appellee, which was not the stipulated visitation agreement.

The trial court erroneously accepted a letter from Appellee into the record. The letter contains a list of visitation days, and asserting that the list reflected the stipulated agreement. They do not. A quick review of the letter compared to the record shows why it is not the stipulated agreement. The trial record refers to a stipulation that includes:

Armenta: [stipulates visitation days which]... at least include Easter, Christmas, Fathers Day, Well. Fathers Day, Mothers day, with the respective parents, Thanksgiving, three weekend, ... three day weekends and birthdays. R.2

Specifically, Appellee's proposal lacks Father's Day, Mother's Day, and is unclear on almost every holiday, whereas the stipulation, by definition is a list of holidays that are already agreed on. Also, Appellee's letter offers visitation for 9 months out of the year.

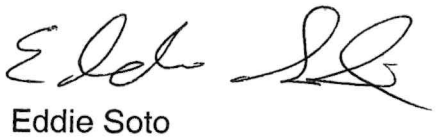
REQUEST FOR RELIEF

I ask the Appellate court to grant a new trial in the interest of due process and fairness. Trial court procedural errors, abuse of discretion, and lack of notice have resulted in an unfair judgement that is unsupported by factual evidence. I believe that the Trial Court's orders are unreasonable and excessive in light of the circumstances. Furthermore, the judgments unduly interfere with the father-son relationship that I have with my children, and impede the relationship Stephen and Gilbert have with our community. I believe the trial was unfair and would like a new trial so that I would have an opportunity to present factual

evidence to the court. Then, the trial court can render a judgement based on evidence rather than allegations.

In the alternative, I ask this court to make a determination based on the evidence submitted at trial and lower the child support award to $200, increase my visitation to include a 6 week summer visit, release me from the unnecessary restrictions of visitation. Also, award me joint legal custody so that I can continue to make parental decisions regarding my children's best interests and cultural needs.

Respectfully Submitted by,



Eddie Soto
Appellant, Pro Se

Submitted July 2, 2001