

No. CA-07-011
Pascua Yaqui Tribe Court of Appeals

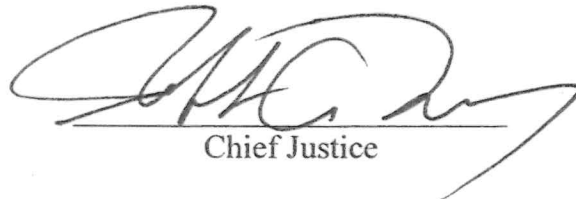
In the Matter of S.G.,
A Minor.

ORDER

Yancy A. Jencsok, Esq., Pascua Yaqui Tribe Office of the Prosecutor, for the Tribe, Tucson, Arizona.

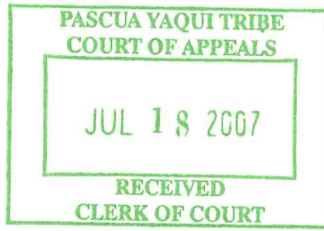
The Tribe filed a motion to dismiss its appeal on September 14, 2007. After review, the Court finds good cause to grant the motion. Accordingly, the Tribe's notice of appeal in this case is dismissed; the case can be filed again in the trial court.

So ORDERED this 18th day of September, 2007.



Chief Justice

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
7474 S. Camino de Oeste
Tucson, AZ 85757
(520) 879-6251



PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME

07 JUL 17 PM 4:21

DOCKET NO. CA-07-011

CLERK JS

Yancy A. Jencsok
Deputy Prosecutor

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

IN THE MATTER OF S.G.,)	Trial Court Case No. CW-07-007
)	
A Minor.)	Appeals Court Case No.
)	
_____)	CERTIFICATE OF SERVICE
)	(supplemental)

I certify that I mailed a copy of the Notice of Appeal to Brandyon Hunter (father) at 2049 Triviz Dr., Las Cruces, NM 88001, which I understand to be Mr. Hunter's most current address, on July 9, 2007. Previously the Notice of Appeal was mailed to Mr. Hunter at 626 Washington Street, Abilene, TX 79603, on June 22, 2007 (it has not been returned).

RESPECTFULLY SUBMITTED this 17th day of July, 2007.

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR

Yancy A. Jencsok
Deputy Prosecutor

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR
7474 S. Camino de Oeste
Tucson, AZ 85757
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Yancy A. Jencsok
Deputy Prosecutor

PASCUA YAQUI TRIBAL COURT
FILED DATE AND TIME

07 JUN 22 PM 1:42

DOCKET NO. CA-07-011

CLERK TS

IN THE PASCUA YAQUI TRIBE COURT OF APPEALS

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

IN THE MATTER OF S.G.,) Trial Court Case No. CW-07-007
)
) Appeals Court Case No.
A Minor.)
) **NOTICE OF APPEAL**
)
_____)

NOTICE IS HEREBY GIVEN that the Pascua Yaqui Tribe appeals from the **Order Dismissing Petition for Child in Need of Protection as to Father and for Review Hearing** of the trial court dated May 25, 2007 (attached). Specifically, the Tribe appeals the dismissal of the child in need of protection petition against the father. The allegations made against the father were that he neglected his child. At the time the petition was filed, paternity had not been established; however, at the initial hearing, the father acknowledged paternity and the court ruled that he was the natural father of the child. After a formal trial on the neglect allegations, Tribal Court Judge Melvin Stoof ruled that because there had been no paternity determination prior to the filing of the petition, the father had no legal duty toward the child and therefore could not have neglected the child. The Tribe's position is that in the context of a child protection proceeding, an alleged or putative father who is later ruled to be the natural father does have certain legal obligations toward the child, which would allow a finding of neglect.

The Tribe requests oral argument before a three Justice panel.

///

RESPECTFULLY SUBMITTED this 22nd day of June, 2007.

PASCUA YAQUI TRIBE
OFFICE OF THE PROSECUTOR



Nancy A. Jencsok
Deputy Prosecutor

Original and 5 copies delivered to:

Clerk of Court, Pascua Yaqui Tribe Court of Appeals

Copies delivered/mailed to:


Pascua Yaqui Tribal Court

Pascua Yaqui Tribe
Office of the Attorney General

Elizabeth San Jose
Pascua Yaqui Social Services

Brandyon Hunter (father)
626 Washington Street
Abilene, TX 79603

Shawn Garcia (mother)
701 W. Calle Sur
Tucson, AZ 85705

By  6-22-2007

IN THE PASCUA YAQUI JUVENILE COURT

IN AND FOR THE PASCUA YAQUI INDIAN RESERVATION

IN THE MATTER OF:

CASE NO. CW-07-007

GARCIA, SAVANNAH, DOB: 11/19/06,
A Minor Child.

ORDER DISMISSING PETITION
FOR CHILD IN NEED OF
PROTECTION AS TO FATHER
AND FOR REVIEW HEARING

On May 25, 2007, the above matter came before this Court on a formal hearing for the father, Brandyon Hunter. Appearing were Tribal Social Services' Elizabeth San Jose, and Yancy Jencsok for the Tribe. Mr. Hunter appeared without an attorney. Also appearing was the child's mother, Shawn Garcia, who appeared for a show cause hearing.

The court finds that the Tribe has not met its burden of proof and it has not proven by a preponderance of the evidence the allegations filed against the father, based on the allegations that he "neglected his daughter by not being willing and/or able to protect her, meet her financial needs, provide stable housing, as well as attend to her health needs." 3 PYT R.Juv.P. Rule 260(F). However, based on the children's removal from the mother's home, the child should be maintained as a ward of court until further court review.

At the time of the filing of the petition, Mr. Hunter had not been adjudicated as the biological father of the children. He was considered the alleged or putative father of the child born to Ms. Garcia out of wedlock as of the date of the filing of the petition. The alleged father and mother were never married. It was not until February 22, 2007 that the alleged father was adjudicated as the biological father.

Under the juvenile code, a putative father is one:

not deemed or adjudicated by a court of competent jurisdiction to be the father of genetic origin of a juvenile who claims or is alleged to be the father of genetic origin of such juvenile. 5 PYTC § 7-20(FF).

A "parent" is defined as:

a natural or adoptive parent but does not include persons, whose parental rights have been terminated nor does it include the unwed father whose paternity has not been acknowledged or established. 5 PYTC § 7-20(AA).

Because he had not established paternity as of February 22, 2007, Mr. Hunter was not a parent who had the authority to take physical custody of the child. Paternity means fatherhood. Both legally and biologically, the word paternity means who is the father of the child.



Handwritten initials or signature.

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1 A birth mother is presumed to be the mother with legal custody rights and duties to the
2 child, but for a man who was not married to the mother when the child was born, it is
3 different. The Pascua Yaqui Code does not give an alleged or putative father any rights or
4 require of him any duties to the child as the child's father. To have these rights, he must be
5 legally recognized as the father. He has no legal rights until he is adjudicated as the
6 biological father of the child.

7 When a mother gives birth to a child she is presumed to be the legal mother of that
8 child. She has the rights and duties to the child as the mother's child. For example, the Pascua
9 Yaqui criminal code defines "custodial interference" as:

10 A person commits custodial interference if, knowing or having reason to know that he
11 or she has no legal right to do so, such person knowingly takes, entices, or keeps
12 lawful custody any child less than 18 years of age or incompetent, entrusted by
13 authority of law to custody of another person or institution. 4 PYTC §1-90.

14 Additionally, the criminal statute establishes that an unwed mother has the custodial right to
15 children:

16 **If a child is born out of wedlock, the mother is the legal custodian of the child for
17 the purposes of this section until paternity is established and custody is
18 determined by a court. 4 PYTC § 1-90(A). (emphasis added).**

19 When a child is born to parents who are not married the law gives sole and legal
20 physical custody to the mother. If either parent wants different custody arrangements the
21 parent will need to go to court. A father whose paternity has been established through court
22 can ask for parenting time, and legal or physical custody. Once adjudicated as a father, he
23 also then has duties to provide for support, medical care, and a duty to protect the child.
24 Unless he has been adjudicated as the biological father by a court of competent jurisdiction,
25 an alleged or putative father has no legal rights to affect custody and no legal duty to provide
26 support or care for the child.

27 Once paternity has been established, the man becomes the legal father of the child. If
28 he does not live with the child, the court can order that he has all of the rights and duties with
respect to the child as a non-custodial parent. He must get a court order giving him those
rights. The child will be eligible for government dependent benefits, tribal rights benefits, and
inheritance rights from him. His name can also be listed on a birth certificate as the father.

When the child in this case was removed from the home of the mother, Mr. Hunter
was not adjudicated a biological father because paternity had not been established. He had no
vested legal rights, nor did he have any legal duty as a parent to provide for support,
protection, or to provide for housing and the child's health needs. Had he been established as
the biological and legal father at the time of the removal, these duties and responsibilities
would have been his to follow and abide by.

The court finds that based on the surrounding circumstances of this case, Social
Services has the primary responsibility as temporary guardians and custodians to file a

1 petition for paternity as to the father to establish a parent-child relationship. This is
2 consistent with the preferred practices of child welfare agencies. The National Council of
3 Juvenile and Family Court Judges published a *Resource Guideline, Improving Court
4 Practices in Child Abuse and Neglect Cases*, and in its section as to adjudication hearings in
5 removal actions notes:

6 Case outcomes are improved when all interested parties receive timely notice of the
7 adjudication. Parties include not only the parent allegedly committing the abuse or
8 neglect, but also non-custodial parents, **putative fathers**. . . . when parties are
9 provided with early notice, **they may make essential contributions to resolving the
10 case, by (a) giving important information to the court, (b) providing a placement
11 for the child, (c) paying child support, and (d) offering additional support for the
12 child** When parties are not provided with notice prior to the adjudication, this
13 often prolongs children's placement in foster care. For example, when a non-
14 custodial parent or putative father is first notified after efforts to work with the
15 custodial parent are exhausted, new efforts must be initiated to work with the
16 noncustodial parent or putative father. . . . **It may be necessary to resolve paternity in
17 order to determine such questions as whether the putative father should be
18 admitted as a party to the litigation.** ID. At p. 46. (Emphasis added).

19 The *Resource Guidelines* further provide that judges should ensure that Social
20 Services agencies be exacting concerning the presence of putative fathers:

21 . . . putative fathers should be encouraged to attend preliminary protective hearings. . .
22 additional pre-trial hearings should be convened to give them further opportunity to
23 appear **or for the agency to provide an explanation of their absence. If an agency
24 is unable to locate and personally serve a . . putative father prior to adjudication,
25 the agency should be required to submit an affidavit describing its efforts to
26 locate and serve the . . putative father.** . . . [I]f there is more that can be done to
27 locate a missing party, the judge should provide instructions to the petitioner and
28 should then monitor the ongoing search. **If it is agreed that the putative father is
the actual father and there are supporting facts, this individual should be
accepted as a party to the litigation.** Id. At p. 48-49. (Emphasis added).

Implicit in a Social Services agency's duty to locate putative fathers is a concomitant duty to
file for establishment of paternity to develop a parent child relationship and also for practical
reasons of providing child support and other factors as set out above. Social Services' child
welfare investigators or Social Workers have responsibilities in serving the child's best
interests to file actions for paternity. Such an action is a common one for state agencies who
regularly file for paternity and child support against alleged fathers in state removal actions.
Such actions are mandated under numerous federal-state programs as a condition of obtaining
foster care monies.

In this particular case, the alleged father was willing to stipulate to parentage, as
evidenced by his admission in the uncontested paternity hearing on February 22, 2007. This
could have been easily accomplished had the Tribe undertaken the task of filing for paternity
against the father.

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Based on the foregoing, the court finds that the alleged or putative father, Mr. Hunter, at the time of the filing of the petition for child in need of protection, did not commit neglect of a legal duty by failing to protect the child, or to meet her financial needs, or provide stable housing, to attend to her health needs, because he had no legal obligation to follow such duties as an alleged or putative father.

Social Services agency had such a legal duty to file as the child's temporary guardians and custodians. In their custodial role, the agency had the responsibility to ensure the alleged father was either made a party to the litigation through a paternity action, based on its preliminary investigation in which the investigation disclosed that the alleged father was willing to establish paternity by consent and he was willing to take the children into his care, but for his misunderstanding the advice of the child welfare investigator as to what paperwork needed to be filed. The Social Services agency should have undertaken its duty to file for paternity as to the alleged father.

The Court, after reviewing the status report and after hearing from the Social Worker and the Juvenile Presenting Officer, finds that it is in the best interest of the minor child that she continue under wardship of the Pascua Yaqui Juvenile Court, as there continues to be no parent capable or willing to care for the minor children as required by 3 PYT R.Juv.P. Rule 260(I). Social Services is responsible for the minors' educational and medical needs and are also authorized to place the minor child where they deem necessary and in the minor's best interest.

Ms. Garcia failed to show good cause due to her absence from court on March 22, 2007 and on April 13, 2007, based on her explanation that Social Services did not provide her transportation to appear for her hearing. The court finds that Social Services continues to make reasonable efforts by affording the mother access to services, and it is not the Social Services' Social worker's duty to act as a taxi service. The court should fine Ms. Garcia \$50.00 for each failure to appear, but the court should suspend the \$100.00 fine, so long as the mother complies with all court orders. Ms. Garcia has been advised that continued failure to comply with her case plan could result in contempt of court, a \$500.00 fine, a 60 days jail term, or both jail and fine. The court should review her compliance at the next hearing scheduled for August 10, 2007 at 9:00 a.m..

Because the child is still in need of protection, based on the mother's pending case, the child should remain a ward of the court and in her current placement. The father's custody request should be reviewed at the same date and time as the mother's next hearing.

The father requested custody of the child, but he has failed to show good cause in this hearing as to why the court should award him the child. Because the Social Services reports that he has not been active in his role as parent and the Social Worker and investigator have raised concerns as to his parenting ability, the court should set a custody hearing for review. Based on the father's statement in open court that he still wants to care for his child in his home, the Tribe and Social Services shall perform a follow up investigation as to the father's home environment to determine whether his home may be an appropriate placement for the child, and the matter should be reviewed at the next scheduled hearing on August 10, 2007 at

1 9:00 a.m.. The father should arrange for visitations with the child through Social Services,
2 who shall remain the child's guardian and legal custodian until further court review.

3 **IT IS ORDERED** that the minor child shall continue as a ward of the Pascua Yaqui
4 Juvenile Court, in the legal care, custody and control of Pascua Yaqui Social Services who are
5 responsible for the minors' educational and medical needs and who are authorized to place the
6 minor child where they deem necessary and in the minor's best interest as there continues to
7 be no parent capable or willing to care for the minor child as required by 3 PYT R.Juv.P. Rule
8 260(I).

9 **IT IS FURTHER ORDERED** that the petition for child in need of protection shall be
10 dismissed as to the father. The father, Brandyon Hunter, shall contact the Social Services
11 Department to make arrangements for visitations with the child, and he shall allow the agency
12 to perform a home study on his new home, so that the agency may make recommendations as
13 to whether placement in his home would serve the child's best interests and whether he should
14 participate in other services as a condition of obtaining custody. Mr. Hunter shall continue
15 to pay \$100.00 per month as child support, as ordered on April 13, 2007.

16 **IT IS FURTHER ORDERED** this matter shall be reviewed on August 10, 2007 at
17 9:00 a.m., on the same date and time as the mother's current four month review hearing.

18 **IT IS FURTHER ORDERED** that Social Services shall perform a home study as to
19 Mr. Hunter's home to determine whether it would be an appropriate placement for the child,
20 and it shall make recommendations to the Court as to what services for the father and child
21 may be available to address the concerns raised as to his parenting abilities.

22 **Social Services' report as to the father's request for custody shall be due no later**
23 **than August 3, 2007.**

24 **IT IS FURTHER ORDERED** that Shawn Garcia shall be held in contempt of court
25 for her failure to appear for hearing on March 22, 2007 and on April 13, 2007, she shall be
26 fined \$50.00 for each failure to appear, and the \$100.00 fines shall be suspended, so long as
27 she complies with her case plan.

28 **The court shall review her continued compliance at her 120 day review hearing**
on August 10, 2007 at 9:00 a.m..

SO ORDERED THIS 25th DAY OF MAY, 2007.



Judge, Pascua Yaqui Juvenile Court

Cc: Date: 06-06-07

Tribe Parent(s) Social Worker Other



Clerk