

**NON-REMOVABLE MILLE LACS BAND OF OJIBWE INDIANS
COURT OF APPEALS**

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District of Nay-Ah-Shing

IN THE COURT OF APPEALS

No. 2015-APP-002

In the Matter of the Welfare of:

J.D-S, M.D-S, L.D-S,
Minor Children

**MEMORANDUM DECISION AND
ORDER**

BEFORE HONORABLE CHIEF JUSTICE CHURCHILL, ASSOCIATE JUSTICE
MOOSE AND SPECIAL MAGISTRATE JONES- JUSTICE BOYD RECUSES

PER CURIAM

The Mille Lacs Band filed this appeal asking that this Court reverse the decision of the lower court, the Honorable District Court Judge David Christensen presiding, denying the Band's motion for default judgment and dismissing a child protection proceeding involving the three minor children captioned above after the mother of the children failed to appear at the trial scheduled on the petition.

For the reasons stated herein the Court finds that although the lower court did not abuse its discretion in denying the default judgment the Court did err in dismissing the petition and restoring custody of the children to the mother in light of the circumstances in this case without issuing a show cause order to the mother to determine why she failed to appear for trial.

FACTS PRESENTED

The facts gleaned from the record indicate that the children were removed from their mother's home on July 27, 2015 due to allegations of illicit drug use by the mother

as well as by individuals the mother entrusted two of her children to. One of those individuals also had an active warrant for arrest and was arrested simultaneous with the removal of the children. The CHIPS petition also alleged that the mother left her children with individuals under the influence of alcohol and/or drugs without adequate food, diapers and supplies to provide for the children. There was an additional allegation that the mother had committed medical neglect by failing to follow up on medical care for one child who had a "massive infection" in the child's mouth. The petition finally alleged that a foreign substance was found with a syringe that was suspected to be an illicit drug.

The Court conducted an initial and thirty-day hearing on the petition and found sufficient cause to keep the children out of the mother's home and with the maternal grandmother, who was a licensed foster care provider. The mother denied the allegations contained in the petition throughout the course of the proceedings.

The mother was given an opportunity for the minor children to be immediately returned to her care by the Court on August 18, 2015 when it entered an order directing the mother to submit to a hair follicle test to show that she had not been using drugs and had she submitted a clean test the Court directed that the children be returned to the mother. The mother, however, never submitted a hair follicle test. Nor does it appear that she ever submitted to a Rule 25 assessment, another requirement for her to get her children back.

The mother was appointed counsel and the Court appointed a guardian ad litem, Dixie Kamimura, to represent the interest of the children. Trial on the petition was

scheduled for the 26th day of October 2015 and notice provided the mother, father¹, and the mother's counsel.²

The mother failed to appear for her trial on the CHIPS petition and the record below is lacking with regard to a showing of good cause for her failure to appear. Mille Lacs Band Law in that circumstance gave the presiding Judge several options.

Option one was to hold the mother in contempt of Court because the Mille Lacs Band statutes require notification of potential contempt penalties to parents who fail to appear in CHIPS proceedings. MLBSA requires that all notices in CHIPS proceedings carry the following advisement

(h) Contempt Warning. The summons issued by the court shall conspicuously display the words:

NOTICE, VIOLATION OF THIS ORDER IS SUBJECT TO PROCEEDINGS FOR CONTEMPT OF COURT PURSUANT TO MILLE LACS BAND STATUTE 1303-MLC-4, SECTION 17.05. THE COURT MAY FIND THE PARENT, GUARDIAN OR CUSTODIAN IN CONTEMPT FOR FAILURE TO APPEAR AT A COURT HEARING OR FOR FAILURE TO FOLLOW COURT ORDERS.

The presiding Judge opted not to issue a show cause to the mother for her failure to appear and the Band does not take issue with that choice in this appeal. The other option was to proceed to conduct a default hearing based upon 8 MLBSA§3153, which *provides in relevant part:*

§ 3153. Default Judgment

¹ The father was present for the hearing on the 26th day of October 2015 but the record does not reflect his involvement in the case and he has not participated in this appeal.

² At hearing before this Court counsel for the mother indicated that her client perhaps did not appear at the trial because she had not been given notice. It is not clear to this Court, however, that this issue of lack of notice was raised to the lower court because that Court did not address it in the order of dismissal. This Court thus concludes that the notice provided the mother's counsel was adequate notice to the mother.

(a) When Appropriate. If the parent, guardian or custodian fail to appear for the formal trial, the court may find the parent, guardian or custodian in default, and enter a default order of child / family protection and order necessary intervention and appropriate steps the parents, guardian or custodian must follow to correct the problem.

(b) Notice Determination. Prior to finding a parent, guardian, or custodian in default, the court must be satisfied actual notice has been given or that all reasonable steps have been taken to provide notice of the formal trial to the parent, guardian or custodian. The court must also find that the petitioner can prove the elements of the child / family protection petition.

(c) Written Order. If the parent, guardian or custodian is found in default, the court shall specify the facts, grounds, and statutory provisions upon which it relied to make the decision.

In general a Court, when contemplating the entry of default relief, would call upon the moving party to offer evidence in support of the petition and the Band contends on appeal that it was prepared to proceed with the testimony of a Family Service Investigator who was present at trial. Instead, the Court asked the Deputy Solicitor present to represent the Band's Family Services Department to make an offer of proof of what the Investigator would testify to in support of the default motion. The Deputy Solicitor did so and in her offer contended that the evidence would tend to prove that the mother was aware that the caretaker the child was left with had an active warrant and that she was aware of drug use in the home. The Court, however, indicated in its ruling that the Band would not have been able to prove that the mother was aware of these critical components of the petition.³ The Band also acknowledged during its offer of proof that the substance found with the syringe had been destroyed by the police.

³ Of course the fact that the mother failed to appear at her trial, apparently without good cause, effectively prevented the Band from calling the mother as an adverse party and asking her about her knowledge of what was going on in the home at the time of removal. The mother's counsel asserted at hearing that she could not have been called as an

In deciding whether a default judgment was an appropriate remedy for the mother's failure to appear, the Court did not rely upon its prior findings in the initial removal hearing and the 30 day hearing, apparently due to an argument made by the mother's counsel that Band law, 8 MLBSA §3151(b), prevented the Court from considering prior findings in a default judgment hearing on a CHIPS petition. That section reads as follows

§ 3151. Formal Trial on the Issues

(b) Admissibility. The records of the initial hearing and the thirty (30) day hearing shall not be admissible at the formal trial. This shall not be construed to prevent the admissibility of any evidence that was presented at these hearing(s) which would be admissible under the court's rules of evidence.

(f) Burden of Proof. The burden of proof lies with the petitioner. The petitioner must prove that the allegations raised in the child / family protection petition are more likely true than not, that is, by the preponderance of the evidence, and that the best interests of the child will be served by continued court intervention.

(g) Outcome of Hearing. The court will either find the allegations of the child / family protection petition to be true or dismiss the child / family protection petition, unless the hearing shall be continued to a date certain to allow for the presentation of further evidence.

The mother reiterated that argument in her brief and oral argument before this Court and objected to the Band Solicitor referring to those findings and evidence elicited in the earlier hearings. This includes reference to the mother failing to submit to a hair follicle test and a Rule 25 assessment as part of the agreement to return the children to her. The mother also filed a motion to strike that portion of the Band's brief that

adverse witness because of the Indian Civil Rights Act's restriction on self-incrimination. That right generally does not apply in a CHIPS proceeding unless the parent is facing criminal charges, which the mother was apparently not in the case at bar.

referenced those earlier proceedings based upon the Band not providing a transcript or recording of those proceedings.

This Court however notes that the mother was in default for not appearing at her trial and the evidence being submitted was in the form of an offer of proof of what the Band could show at a default judgment hearing, not a formal trial. Had the mother appeared, Band law clearly would have required the Band to prove up the factual findings that supported the continued removals of the children after the initial hearing and 30-day hearings anew without any deference granted those prior orders. However, Band law is not clear that the Court is barred from considering prior findings of the Court in deciding whether to grant a default judgment. In general when determining whether a default judgment should be granted the Court should consider all of the evidence presented as well as the file and all prior records submitted in the matter. This Court does not want to create an incentive for a parent of children involved in a CHIPS matter to refuse to cooperate with Band Family Services and fail to appear in Court for trial and then benefit from that. This is especially true since Band law makes it potentially contemptible for a parent to not appear for trial.

8 MLBSA§3153(a) requires the Court in determining whether to grant default to first determine if the parent has failed to appear without good cause. If that finding is made then the Court may” *enter a default order of child / family protection and order necessary intervention and appropriate steps the parents, guardian or custodian must follow to correct the problem.*” This language is a strong indication that the Court can rely upon its prior findings finding fault with the parents in issuing a default order

because it refers to the Court's authority to address the problems that led to the petition being filed. That is not to say that §3153 can be read in isolation without also reviewing §3151, which lays out the burden of persuasion the Band is bound by at trial to justify an adjudication of a petition. The Band ultimately has this burden, even at a default hearing, but §3153(a) does not restrict the Court from considering its prior findings and orders in assessing whether a default order should be entered.

§3153(a) uses "may" instead of shall in directing how the Court should consider a parent's failure to appear. This use of language connotes that the presiding Judge is granted discretion in issuing a default order and need not enter a default judgment when the parent fails to appear without good cause. Thus, this Court finds that on appeal the Band has to demonstrate an abuse of discretion by the presiding Judge in denying the default judgment. This Court cannot find based upon the presiding Judge's order that he abused his discretion in denying the Band's motion for a default order under 8 MLBSA§3153.

However, the presiding Judge went on to conclude that because the Band was unable to carry its burden with regard to the motion for default that the petition should be dismissed and the children returned to their mother. It is in that action that this Court finds error. The Code apparently grants three options to the Court when a parent fails to appear for trial. The Court may continue the matter if it has concerns with the service upon the parent. The mother's counsel indicated she asked for this at hearing because she did not know if her client was aware of the trial date, but the Court apparently denied this

request.⁴The Court may grant a default judgment directing appropriate intervention by Family Services, which the presiding Judge did not do in this case apparently out of concern about the evidence the Band could present had the matter proceeded to trial. Lastly, the Court can issue a show cause order to the parent giving her a chance to show cause why she should not be held in contempt of Court pursuant to Band law mandating the appearance of parents at trial. Dismissing the petition without a formal trial does not appear to be a remedy under Band law when a parent fails to appear for trial under 8 MLBSA§3153(a).

This Court thus concludes that the lower court erred in dismissing the underlying petition and returning the custody of the children to the mother based upon its conclusion that the Band had failed to make a sufficient offer of proof on the motion for default judgment. This does not mean that this Court does not share the same concerns the presiding Judge had with the Band's preparation for trial or lack thereof. The removal of children from their parents is a matter of utmost concern especially since the Indian Civil Rights Act protects the rights of parents to raise their children free of governmental intervention. The Band needs to be prepared to present its entire case when these matters are presented for trial. The failure of the mother to appear in this case may have saved the Band from losing its case in chief had the matter proceeded to formal trial.

Equally disquieting however is the mother's apparent failure to appear for her trial, her failure to follow through with an agreement to submit to drug testing and her

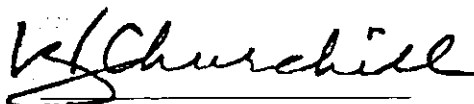
⁴ The order entered by the presiding Judge does not indicate that such a motion was made but this Court has no doubt that the counsel's assertions to the Court are correct and such a motion was orally made.

failure to obtain a Rule 25 assessment. Although the parent has no burden of persuasion in these CHIPS cases she does have a duty to appear at trial and her failure to appear needs to be addressed by the lower Court. CHIPS proceedings are primarily designed to protect children and when parents fail to appear for trials or hearings and there is no established track record of compliance by that parent a Court is not acting outside the scope of its jurisdiction to compel the parent to be present to explain herself.

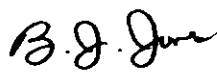
WHEREFORE IT IS HEREBY

ORDERED, ADJUDGED, AND DECREED that the District Court's order dated October 29, 2015 dismissing the CHIPS petition in this case is hereby REVERSED and the order granting temporary legal custody of the children to Band Family Services is reinstated until further hearing at which time the Court will give the mother the chance to show cause whether her failure to appear was justified and the Band is given the opportunity to call witnesses to testify in support of the petition at a hearing where the mother is present or she has knowingly waived her appearance with the permission of the Court.

So ordered this 9th day of December 2015.



Rayna Churchill
Chief Justice



Special Magistrate

Brenda Moose
Brenda Moose
Associate Justice

ATTEST: 