

**SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
COURT OF APPEALS**

In the Matter of S. D. and J. D.

APP-09-01

Decided August 10, 2009

BEFORE: HARPER, KRONK, MCKERCHIE, and WEISS, Appellate Judges.

ORDER AND OPINION

Kronk, Chief Appellate Judge, who is joined by Appellate Judges Harper, McKerchie and Weiss.

On January 21, 2009, Appellant, J. D., appealed from the trial court's June 2006 order terminating his parental rights. On February 9, 2009, this Court held that "although Appellant's appeal is not timely, there may be grounds for granting the late appeal." Order and Opinion, APP-06-04, 1 (February 9, 2009). This Court therefore remanded "the question of Appellant's negligence back to the trial court for findings and conclusions consistent with this opinion." *Id.* On June 3, 2009, Judge Elizabeth Eggert issued her Opinion and Order concluding that Appellant failed to meet his burden to show that it was not due to his own negligence that he filed a late appeal. This Court adopts the trial court's conclusions regarding Appellant's negligence in filing a late appeal and therefore rejects Appellant's untimely request for appeal.

DISCUSSION

As previously indicated, the trial court terminated Appellant's parental rights in June 2006. Tribal Code Section 82.113(1) provides that appeals in civil matters must be filed within 30 days of the trial court's decision. Given Appellant's appeal was received by the Court on January 21, 2009, approximately 2 ½ years after the trial court's decision from which Appellant seeks to appeal, Appellant's appeal was not timely. However, Tribal Code Section 82.113(5) gives this Court authority to grant late appeals under certain conditions. Specifically, "[t]he Court of Appeals may, at its discretion, grant leave to appeal from any order or judgment upon the showing by appellant, supported by affidavit, that there is merit in the grounds for appeal and that late filing was not due to appellant's negligence." Tribal Code Section 82.113(5). This Court therefore remanded to the trial court the question of whether Appellant's late filing was due to his own negligence.

In a very well reasoned and written Opinion and Order, Judge Eggert determined that Appellant failed to meet this burden following an evidentiary hearing on the matter. The trial court conducted a hearing to determine whether there was factual evidence to support or deny Appellant's negligence in submitting a late appeal. All parties present at

the trial court's hearing agreed that it was the Appellant's, as the moving party, "burden to prove by a preponderance of the evidence that the late filing was not due to his negligence." Opinion and Order, CW-05-40/41, 1 (June 3, 2009).

Following the hearing, the trial court concluded that Appellant was negligent. The trial court made several findings to support its conclusion. First, the trial court concluded that Appellant received timely notice of his right to appeal. Second, the trial court determined that "[a] delay of the magnitude in the instant case is inexcusable." *Id.* at 3. The trial court went on to explain that "[i]t is also clear to this court that although some efforts may have been made by J. D.'s father to determine whether J. D. could file an appeal, there was no attempt to hire counsel to represent him in an appeal, to seek or get free legal assistance, or to file an appeal on his own." *Id.* Finally, after an opportunity to show he was not negligent in his failure to file a timely appeal, the trial court expressed concern that "J. D. failed to call impartial witnesses to verify his attempts to have the case appealed, failed to seek free legal services, and failed to file anything on his own accord." *Id.* For these reasons, the trial court ultimately determined that Appellant had not met his burden and that it was through his own negligence that he failed to file a timely appeal.

Judge Eggert's finding that Appellant's negligence led to his untimely appeal is a finding of fact. Tribal Code Section 82.124(1) provides that "[a] finding of fact by a judge shall be sustained unless clearly erroneous." Nothing presently before this Court gives it reason to believe Judge Eggert's well-reasoned opinion and findings are clearly erroneous. This Court therefore adopts without modification the findings of the trial court below and finds that Appellant's negligence resulted in his untimely appeal. As previously explained, a late appeal may only be granted where "there is merit in the grounds for appeal and that late filing was not due to appellant's negligence." Tribal Code Section 82.113(5). Accordingly, given Appellant's appeal was untimely because of his own negligence, this Court may not grant his untimely request for appeal from the trial court's original decision to terminate his parental rights.

CONCLUSION AND ORDER

The 2 ½ year delay in filing an appeal from the trial court's termination of his parental rights was due to Appellant's negligence. Accordingly, under Tribal Code Section 82.113(5), Appellant's application for late appeal is hereby rejected. The trial court's original June 2006 order terminating Appellant's parental rights stands unchanged.

IT IS SO ORDERED.