

No. SC-CV-04-10

SUPREME COURT OF THE NAVAJO NATION

Lorenzo Shaw,
Petitioner,

v.

Shiprock Family Court,
Respondent,

and concerning Bessie Barber Lee,
Real Party in Interest.

OPINION

Before YAZZIE, Chief Justice, and GRANT and SHIRLEY, Associate Justices.

An original action for an extraordinary writ concerning Cause No. SR-FC-09-040-CV, the Honorable Judge Genevieve Woody, presiding.

Lorenzo Shaw, Crownpoint, Navajo Nation, Petitioner pro se, and Heather Anderson, Staff Attorney, Shiprock Family Court, Shiprock, Navajo Nation, for Respondent.

This matter concerns an application for a writ of prohibition or, in the alternative, a writ of superintending control against the Respondent Shiprock Family Court to prohibit the enforcement of a pro bono appointment of the Petitioner as counsel for a surviving spouse in a probate action or to require that Respondent conduct an indigency inquiry as to whether surviving spouse is eligible for pro bono services.

I

On October 6, 2009, at the final probate hearing, the surviving spouse made a verbal request to the family court to appoint her an attorney stating she was uneducated and had difficulty understanding the probate proceedings. The court granted her request from the bench, contacted the Office of Pro Bono Services for the name of counsel next on the pro bono list, and

issued an order the next day appointing Petitioner. The order stated only that the court “fully apprised of the matter and pursuant to 9 N.N.C. § 1107(e)¹ hereby finds it necessary to appoint Legal Counsel.” *Order, 10/6/2009, Resp’t’s Ex. 3*. Petitioner is a member of the Navajo Nation Bar Association (NNBA) and is full time employee with DNA-People’s Legal Services (DNA).

With Petitioner’s appointment, the family court ordered Petitioner to file a legal brief on a matter in the probate case by December 2, 2009. Petitioner sought and received an extension. Before the timeline for his brief expired, the Petitioner on December 21, 2009 filed a motion to withdraw as court appointed counsel on the grounds that: (1) the appointment was not made in conformity with the Navajo Pro Bono Rules and (2) he learned his client is ineligible for services from DNA and thereby his appointment places DNA’s federal funding at risk.² With no ruling on the motion, Petitioner filed another motion for additional time to file a brief. On January 13, 2010 the family court denied the motion to withdraw and granted Petitioner’s request for an extension to file a brief by January 29, 2010.

On February 3, 2010 Petitioner filed an application for a writ of prohibition or writ of superintending control with this Court. Petitioner requested of the Court (1) a writ prohibiting the family court from enforcing the order which appointed him to represent a non-indigent person or (2) in the alternative, a writ to mandate that the family court make the required explicit findings that the interest of justice requires a court appointment and require the court to complete a diligent inquiry into whether the client is in fact indigent pursuant to the Navajo Pro Bono Rules (NPBR), prior to requiring the Petitioner to provide pro bono representation.

¹ The order references 9 N.N.C. §1107 (e) of the Children’s Code apparently as authority for the appointment, but this statute deals with appointment of counsel for a child - it has nothing to do with a probate action.

² Petitioner also makes the argument that his appointment jeopardizes federal funding of his employer’s program. Given our decision on other grounds herein, the Court will not address the argument. Furthermore, any decision on this point requires further factual development which the trial court did not engage in.

The Court issued an alternative writ of prohibition on February 5, 2010 and ordered Respondent court to file a response brief. Respondent filed its brief on February 10, 2010. On February 23, 2010, the Court invited the NNBA to file an amicus brief. The NNBA filed its brief on March 15, 2010. This decision on the record now follows.

II

The issues are whether the family court's appointment of legal counsel was made in conformity 1) with the Navajo Pro Bono Rules and 2) the procedure of the Navajo Court Policy on Appointment of Counsel and Indigency.

III

This Court has the authority to issue "any writs...necessary and proper to the complete the exercise of its jurisdiction; ...or to cause a court to act where such court fails or refuses to act within its jurisdiction." 7 N.N.C. § 303. A writ is an extraordinary remedy and will be issued where there is no plain, speedy and adequate remedy at law. *In re Navajo Nation Election Admin. Determination of Insufficiency Regarding Two Initiative Petitions*, No. SC-SC- 24-09, slip op. at 4 (Nav. Sup. Ct. June 22, 2009). A writ of prohibition may be issued where the trial court is proceeding without or in excess of its jurisdiction, or has abused its discretion in exercising its function over matters within its authority to decide. *Yellowhorse, Inc. v. Window Rock District Court*, 5 Nav. R. 85, 86 (Nav. Sup. Ct. 1986) citing *McCabe v. Walters*, 5 Nav. R. 43 (Nav. Ct. App. 1985). Applicants for writs of prohibition at a minimum, must demonstrate to the Court that "(1) the lower court is about to exercise judicial power; (2) the exercise of such power by the lower court is not authorized by law; (3) the exercise of such power will result in injury, loss or damage for which there is no plain, speedy and adequate remedy of law." *Id.*

IV

The Navajo Pro Bono Rules and the Navajo Court Policy on Appointment of Counsel and Indigency (Indigent Policy or NCPACI) govern pro bono appointments. As a condition of membership in the Navajo Nation Bar Association, regular, non-exempt members and other persons permitted to practice in courts of the Navajo Nation are subject to and shall accept pro bono appointments. See Rule II(A) of the NPBR. The Navajo Nation courts have the power to appoint non-exempt members of the NNBA to represent persons in the following types of proceedings: (1) An indigent defendant in a criminal proceeding; (2) Parents in termination of parental rights proceedings; (3) A child in any proceeding concerning that child; and (4) Any party in any proceeding where the interests of justice require.³ Rule 3 of the NPBR. From the enumerated list, clearly the only possible type of proceeding the present probate case could be considered under is the latter category, if it could be demonstrated that the “interest of justice” required the appointment.

V

The family court appointed Petitioner without specific findings as to what constituted the required “interest of justice.” The Respondent court argues “there is not a standard that is set which limits the discretion of the courts to appoint counsel ‘where the interest of justice may require.’” *Resp. Br.*, 2/10/10, p. 4. Though the courts are without explicit guidance, courts are not relieved of their duty to specify findings or conclusions of law regarding how the interests of justice require such an appointment and courts are not relieved of their duty to comply with the

³ There is only one category of people who are entitled, as a matter of individual right, to appointment of counsel: indigent criminal defendants. See *Boos v. Yazzie*, 6 Nav. R. 211, 214 (Nav. Sup. Ct. 1990). All other court appointments are not done pursuant to any notion of entitlement, but even an appointment in a criminal case is still subject to a finding of indigency.

Navajo Pro Bono Rules. Rule 4(A)(1) of the NPBR states a court making an appointment of counsel shall make a diligent inquiry of the resources of the person requesting counsel pursuant to the Judicial Branch Indigent Policy.⁴ The Rule is explicit that the court making an appointment of counsel shall make a diligent inquiry as to the resources of the applicant requesting counsel pursuant to the Indigent Policy, otherwise known as the Navajo Court Policy on Appointment of Counsel and Indigency⁵.

The Indigent Policy, which Respondent fails to mention, sets the standard which limits the court's discretion. The Indigent Policy sets eligibility and indigency standards at 125% of the federal poverty level. Part Three of NCPACI. Furthermore, the Indigent Policy requires that the District Office of Probation and Parole Services *shall* determine and verify indigency through the receipt of certain documents. *See* Rules 3.13 and 3.14 of NCPACI (emphasis added). Accordingly, Rule IV(A) of the NPBR provides that “[n]o pro bono appointment shall be made if the person for whom the appointment is sought has resources which, if used, would enable the person to hire his or her own counsel.” This Rule explicitly uses the mandatory language “shall” to prohibit the appointment of pro bono counsel to a person with resources to hire his/her own counsel. The discretion of the court is not to be used to remove the restrictive nature of court appointments. Furthermore, we have upheld the long-standing rule that each party is responsible for their own attorney's fees unless there are special set of circumstances that justify otherwise. *See Shirley v. Morgan*, No. SC-CV-02-10, slip op. at 46 (Nav. Sup. Ct. May 28, 2010) *citing Yazzie v. Herrick*, 5 Nav. R. 129, 131 (Nav. Sup. Ct. 1987); *Brown v. Todacheeny*, 7 Nav. R. 37, 43 (Nav. Sup. Ct. 1992); *Begay v. Navajo Election Admin.*, 7 Nav. R. 139, 141 (Nav. Sup. Ct. 1995).

⁴ The mandatory nature of this Rule is further exemplified by Rule 4(B), which requires that even in the pro bono appointment for a child, the parent and relatives of the child shall be responsible for payment of compensation of appointed counsel.

⁵ Adopted by this Court on June 25, 1993 and amended August 15, 1994.

We hereby find there is no reasonable indication that the court conducted a diligent inquiry pursuant to the Indigent Policy and as required by the NPBR. The court mistakenly made its indigency assessment “through speaking with Ms. Lee, and considering her daughter’s supportive testimony that her mother is on a fix income, and can not [sic] afford an attorney.” *Resp. Br., 2/10/10, p. 5.* The court does not indicate the amount of the fixed income or related living expenses. The court merely takes judicial notice that lawyers are expensive. The discretion of the court in the appointment of pro bono counsels must be exercised in strict compliance with the established rules and policy of the courts.

Therefore, it is error for the court to appoint counsel without the diligent inquiry as to indigency. While the personal circumstances of an individual caught in an unfamiliar world of legalese may suggest that a court appoint counsel, the rules still requires a finding of indigency. The court in this case did not comply with this requirement and thus abused its discretion.

VI

The Court also did not follow the proper procedure in entering its court appointment order. No pro bono appointment may be made except in conformity with the NPBR, nor may any appointment be made except by persons authorized to do so by these rules. Rule VIII (C)(9) of the NPBR. The Indigent Policy explicitly requires the District Office – specifically the District Office of Probation and Parole Services – assess indigency. Rule 3:13 of the NCPACI. The rule requires that the Office of Probation and Parole Services shall determine the applicant’s indigency through the receipt of information which shows the applicant’s financial status. The office is to then complete the verification and report back to the court. The court failed to follow this mandatory procedure. Instead, the court itself made the assessment from the bench. We hereby conclude the family court in the exercise of its judicial power in ordering an appointment


of pro bono counsel failed to use the services of the Office of Probation and Parole Services in contravention of the explicit requirements of the Indigent Policy as required by Rule 4(A)(1) of the NPBR. Furthermore, Petitioner argues that he may now be held in contempt of court for his non-compliance in filing court-ordered brief(s) because his motion to withdraw has been denied. Under these circumstances, we find the Petitioner has no plain, speedy, and adequate remedy at law without this Court's intervention.

VII

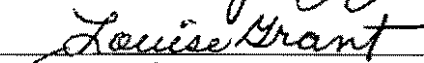
For the foregoing reasons, the Court hereby makes permanent the writ and VACATES the Shiprock Family Court's order of appointment of the Petitioner as legal counsel. Petitioner's name shall be returned to the top of the pro bono list.

Furthermore, the Court hereby ORDERS, pursuant to this opinion, that the Office of Pro Bono Service shall, from this day forward, require of the district Court Administrator the submission of a copy of the indigency assessment made by the Office of Probation and Parole Services for all pro bono appointments before the name of the next eligible counsel is provided to the court.


Dated this 11th day of June, 2010.



Chief Justice



Associate Justice Grant



Associate Justice Shirley