

February 2013 MPT

▶ *FILE*

MPT-2: *In re Guardianship of Will Fox*

PINE, BRYCE & DIAL, LLP
1348 W. Main Street
Melville, Franklin 33521

MEMORANDUM

To: Examinee
From: Karen Pine
Date: February 26, 2013
Re: Fox Guardianship and Motion to Transfer

Our client, Betty Fox, is a member of the Blackhawk Tribe, lives on the Blackhawk Reservation, and is the paternal grandmother of Will Fox, age 10. Will's mother is dead, and his father (Betty's son) is incapacitated as a result of a recent automobile accident. When the accident happened, Betty moved into her son's house to care for Will. She has been planning to move Will to her home on the Reservation and was surprised to learn that Will's maternal grandparents, Don and Frances Loden, had filed a Petition for Guardianship and Temporary Custody in Oak County District Court.

After consultation with Betty, I filed a petition on her behalf in Blackhawk Tribal Court requesting that she be appointed Will's guardian. I also filed a motion to transfer the Lodens' state court proceeding to the tribal court. The state court has ordered simultaneous briefs on our motion to transfer.

Please prepare our brief in support of the Motion to Transfer Case to Blackhawk Tribal Court. Be sure to follow the firm's guidelines on persuasive briefs, but do not include a separate statement of facts. Make all the arguments needed to establish that the state court should transfer the case. Anticipate and respond to any arguments against the transfer to tribal court that the Lodens' attorney is likely to raise.

MEMORANDUM

To: All Lawyers
From: Litigation Supervisor
Date: August 14, 2009
Re: Persuasive Briefs

All persuasive briefs shall conform to the following guidelines:

Statement of the Case

In one paragraph, provide a succinct statement of the parties, the nature of the case (e.g., complaint for declaratory relief), and the matter or issue in dispute (e.g., lack of jurisdiction). When needed, note the posture of the case (e.g., discovery is completed). Finally, briefly explain the client's requested relief (e.g., grant the motion to dismiss). **For example: The patient has sued her physician for negligence in failing to diagnose colon cancer following the patient's colonoscopy. The patient's expert has testified that the cancer was readily detectable from the colonoscopy. The physician has filed a motion to dismiss, raising an issue involving the expert's qualifications. The patient objects and asks the court to deny the motion.**

Statement of Facts [omitted]

Body of the Argument

The body of each argument should analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefing. Be mindful that courts are not persuaded by exaggerated, unsupported arguments.

Break the argument into its major components and write carefully crafted subject headings that illustrate the arguments they cover. The argument headings should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. **For example, improper: It is not in the child's best interests to be placed in the mother's custody. Proper: Evidence that the mother has been convicted of child abuse is sufficient to establish that it is not in the child's best interests to be placed in the mother's custody.**

Do not prepare a table of contents, a table of cases, or an index.

**STATE OF FRANKLIN
DISTRICT COURT OF OAK COUNTY**

IN THE MATTER OF THE PETITION OF
Don and Frances Loden, Husband and Wife,
FOR GUARDIANSHIP AND TEMPORARY
CUSTODY OF

Case No. 2013- FA-238

Will Fox, a minor (DOB 1/3/03)

PETITION FOR GUARDIANSHIP AND TEMPORARY CUSTODY

Petitioners Don and Frances Loden allege as follows:

1. Petitioners are husband and wife, of lawful age and under no legal disability, and reside in the city of Melville, Oak County, Franklin. They are the maternal grandparents of Will Fox.
2. Will Fox is 10 years of age and was born in Melville, Franklin, on January 3, 2003, and has lived here his entire life.
3. Sally Loden Fox, Petitioners’ daughter, was Will’s biological mother. She died in childbirth. Will’s biological father, Joseph Fox, suffered an incapacitating brain injury in a car accident on November 21, 2012. Joseph is in a coma and unable to care for Will. Will has no court-appointed guardian and, since his father’s accident, has been cared for by Petitioners and by his paternal grandmother.
4. Petitioners are part of Will’s extended family. Will has resided with Petitioners periodically since the death of his mother. Will has attended school and has received medical care in Melville, near Petitioners’ home. Will has cousins and playmates in Melville.
5. Petitioners are reputable persons of good moral character with sufficient ability and financial means to rear, nurture, and educate Will in a suitable and proper manner.

YOUR PETITIONERS PRAY THE COURT to appoint Petitioners as guardians and temporary custodians of the minor, Will Fox.

Frank Byers

Frank Byers
LAW OFFICES OF FRANK BYERS
Attorney for Petitioners Don and Frances Loden

Filed: February 1, 2013

**STATE OF FRANKLIN
DISTRICT COURT OF OAK COUNTY**

IN THE MATTER OF THE PETITION OF
Don and Frances Loden, Husband and Wife,
FOR GUARDIANSHIP AND TEMPORARY
CUSTODY OF

Case No. 2013-FA-238

Will Fox, a minor (DOB 1/3/03)

MOTION TO TRANSFER CASE TO TRIBAL COURT

Betty Fox moves the Court to transfer this action to the Tribal Court of the Blackhawk Tribe, pursuant to the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901 *et seq.*, and states:

1. Will Fox is an “Indian child” as defined by ICWA, is under 18 years of age, and is a member of the Tribe.
2. Will is the biological son of Joseph Fox, a member of the Blackhawk Tribe, and Sally Loden Fox. Sally died on January 3, 2003. Joseph is incapacitated as the result of a car accident that occurred on November 21, 2012. Betty Fox is the mother of Joseph and the paternal grandmother of Will.
3. The Blackhawk Tribe is an “Indian tribe” as defined by ICWA, 25 U.S.C. § 1903.
4. The Blackhawk Tribe is “the Indian child’s tribe” as defined by ICWA, in that the child is a member of the Tribe.
5. This is a “child custody proceeding” subject to transfer to the Blackhawk Tribal Court under ICWA.
6. ICWA requires that the state court transfer a child custody proceeding involving an Indian child to the jurisdiction of the tribe when the Indian custodian petitions the state court to do so, unless there is good cause not to do so. 25 U.S.C. § 1911(b).
7. In accordance with Blackhawk tribal custom, Betty Fox is the Indian custodian of the child in that she is the only living Indian grandparent and that she has physical care, custody, and control of the child. Betty Fox has been the principal caregiver of Will since the incapacitation of his only living parent, Joseph.

8. Good cause does not exist to deny transfer of this proceeding.

9. Betty Fox filed a Petition for Guardianship of Will in the Blackhawk Tribal Court on February 11, 2013.

WHEREFORE Betty Fox asks the Court to transfer the above-captioned proceeding to the Tribal Court of the Blackhawk Tribe and to grant such other relief as the Court deems just and proper.

Karen Pine

Filed: February 11, 2013

Karen Pine
LAW OFFICES OF PINE, BRYCE & DIAL, LLP
Attorney for Petitioner Betty Fox

IN THE TRIBAL COURT OF THE BLACKHAWK TRIBE

IN RE THE GUARDIANSHIP OF)	
Will Fox, a minor)	
Betty Fox,)	Case No. FAM 13-3
Petitioner)	

PETITION FOR GUARDIANSHIP

Betty Fox petitions this Tribal Court to permit her to become guardian of the minor child Will Fox (DOB 1/3/03) and states as follows:

1. Betty Fox is of lawful age and under no legal disability. She is a member of the Blackhawk Tribe and resides on the Reservation of the Blackhawk Tribe within the borders of the State of Franklin. She has resided on the Reservation from birth to the present.

2. Betty Fox desires to be appointed the guardian and custodian of Will Fox, a male minor child who is 10 years of age. Betty Fox is the paternal grandmother of Will.

3. The biological mother of the child was Sally Loden Fox, a non-Indian, who died in childbirth on January 3, 2003. The biological father of the child is Joseph Fox, who was severely injured in an automobile accident on November 21, 2012, and remains in a coma. He is unable to care for Will.

4. Both Joseph Fox and Will Fox are members of the Blackhawk Tribe, as demonstrated by the letter from the Tribal Court of the Blackhawk Tribe, attached.

5. Will resided with his father in Melville, Franklin, approximately 250 miles (a three- to four-hour drive) from the Reservation, from his birth to the date of his father’s accident. He has continued to reside there in the care of Betty Fox since his father’s accident, visiting occasionally with his maternal grandparents, Don and Frances Loden. Since the age of six, Will has attended the annual powwows on the Reservation with Betty Fox.

6. On February 1, 2013, Don and Frances Loden filed a petition in the District Court of Oak County, State of Franklin, Case No. 2013-FA-238, seeking guardianship and temporary custody of Will. No orders have been entered in any court affecting the custody or guardianship of Will or the parental rights of Joseph.

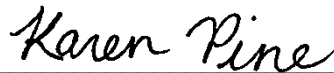
7. Don and Frances Loden are not members of any tribe.

8. On February 11, 2013, Betty Fox filed a motion in the District Court of Oak County, State of Franklin, seeking to transfer the state court proceeding from state court to the Tribal Court of the Blackhawk Tribe, pursuant to the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.*

9. Betty Fox is a reputable person of good moral character with sufficient ability and financial means to rear, nurture, and educate the child in a suitable and proper manner. She is part of Will's extended family and is Indian.

Wherefore, Petitioner Betty Fox asks the Tribal Court:

- A. To accept transfer of jurisdiction of Case No. 2013-FA-238 from the District Court of Oak County, State of Franklin, to this Tribal Court and deny the Lodens' petition.
- B. To appoint Betty Fox guardian of Will Fox.
- C. For such further relief and for the entry of such additional order or orders as may be necessary or appropriate in this proceeding.



Filed: February 11, 2013

Karen Pine
LAW OFFICES OF PINE, BRYCE & DIAL, LLP
Attorney for Petitioner Betty Fox

BLACKHAWK TRIBAL COURT
P.O. Box 752
BLACKHAWK AGENCY, FRANKLIN 33912-0752

Re: Will Fox

Date: February 10, 2013

TO WHOM IT MAY CONCERN:

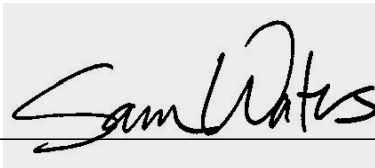
This letter confirms that the following persons are members of the Blackhawk Tribe:

Betty Fox (DOB July 31, 1959)

Joseph Fox (DOB October 6, 1982)

Will Fox (DOB January 3, 2003)

This letter attests that the Blackhawk Tribe is a recognized tribe under the Indian Child Welfare Act (ICWA) and that the Blackhawk Tribal Court is a recognized instrumentality of the Tribe. The Tribal Court has a family court unit, with power and authority over any family matter. I am the ICWA Director.

A handwritten signature in black ink that reads "Sam Waters". The signature is written in a cursive style and is positioned above a horizontal line.

Sam Waters
ICWA Director

Email from Joseph Fox to Betty Fox

From: Joseph Fox
Sent: August 23, 2011
To: Betty Fox
Subject: Will's Visit

Mom,

Will loved attending the powwow on the Reservation last week. This was his third powwow—he can't stop talking about it. And he loved spending the week with you. He is already talking about going to the powwow next year, and of course, we will both be with you for the holidays. I know that the long drive is tiring, but it's worth it to see how much Will loves being on the Reservation. I hope he always remembers that he is a Blackhawk. Will loves visiting Sally's parents as well. I hope nothing ever happens to me, but it is great to know that Will has grandparents who love him.

Love,
Joseph

Excerpt from *Journal of Native American Law*, Vol. 8 (2003)

Native American Customs Regarding Care of Children

The Indian Child Welfare Act (25 U.S.C. §§ 1901 *et seq.*) was enacted to address abuses in the removal of Native American (“Indian” as the Act calls them) children from their homes and therefore from their tribes and reservations. The Senate hearings revealed a lack of understanding of Native American customs among those officials entrusted with placement of children.

Almost all Native American tribes have a long-standing custom or practice of caring for their children within the extended family. Even where Native American parents have not appointed a custodian, tribes expect that an extended family member will become the custodian of the child. In most tribes, it is expected that the maternal grandparents, if available, will be the custodians if the natural parents are deceased or unable to parent the children. A few tribes, such as the Blackhawk, expect that the Native American grandparents, maternal or paternal, will become the custodians.

Although guardianship is established by native custom and practice, it is not unusual for those who have become guardians through native custom or practice to seek tribal court appointment as guardians. This step is taken for practical reasons because the tribal court’s order appointing the guardian avoids disputes with various entities, such as schools, medical providers, and the like.

* * * *