

1999

# Jayni Searle v. Boyd Searle : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS  
STATE OF UTAH

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JAYNI SEARLE,

Appellant,

vs.

BOYD SEARLE,

Appellee.

Case No. 990726-CA

Priority 4

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**BRIEF OF APPELLEE**

This is an appeal from a final order of the Third District Court dated July 26, 1999 entered by the Honorable Judge Timothy R. Hanson presiding.

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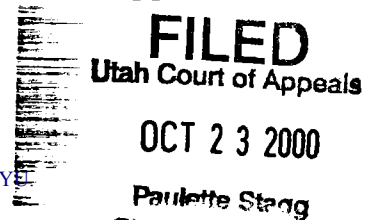
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PUBLISHED OPINION REQUESTED



## **PARTIES TO THE PROCEEDINGS**

The following are parties to the proceedings:

1. Petitioner/ Appellant Jayni Searle;
2. Respondent/ Appellee Boyd Searle;
3. Other persons and entities mentioned are the Fort Peck Assiniboine and Sioux Tribe and its counsel Gary Beaudry, whom are not parties in the Third District Court case. These persons and entities participated in the proceedings before the Third District Juvenile Court and the Fort Peck Tribal Court. While Appellant makes references to them in her brief and serves copies of the brief upon Mr. Beaudry, Appellee does not include them because they did not intervene in the Third District Court case.

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## JURISDICTION OF THE COURT

The Court of Appeals does not have jurisdiction over this appeal of a final order of the Third District Court involving domestication and enforcement of a foreign judgment. Appellant misstates the Court's jurisdiction in her Jurisdictional Statement asserting that the Court of Appeals has jurisdiction "pursuant to Utah Code Ann. § 78-2a-3(2)(a) and Rule 3, Utah Rules of Appellate Procedure." (**Appellant's Brief, 1**). That subsection of the statute deals exclusively with jurisdiction over final orders or decrees resulting from formal adjudicative proceedings of state agencies or from the district court review of informal adjudicative proceedings of those agencies. This appeal does not deal with an adjudicative proceeding.

There is no dispute that this matter concerns the enforceability of a foreign judgment. The Utah Supreme Court would have had jurisdiction over this matter under Utah Code Ann. § 78-2-2(3)(j) had the appeal been timely filed in the Supreme Court. Consequently, this appeal is improperly filed in the wrong court and must be dismissed.

## ISSUES PRESENTED FOR REVIEW

Appellee disagrees with Appellant's characterization of the nature of the issues presented for review. More particularly, Appellant erroneously designates factual issues as legal issues and thereby purports to apply an incorrect standard of review. Appellee will hereinafter recite the issues which



Appellant presents for review noting Appellee's position as to the nature of the issue and the appropriate standard of review.

**1. Did the trial court err in concluding that the Writ of Assistance did not comply with the Utah Foreign Judgment Act?**

Appellant agrees that this issue presents a question of law. Conclusions of law are reviewed for correctness. *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah App. 1991); *Pendeleton v. Pendeleton*, 918 P.2d 159, 160 (Utah App. 1996); *Smith v. Smith*, 793 P.2d 407, 409 (Utah App. 1990) (hereinafter "Standard of Review"). In determining the correctness of the trial court's determination, the Appellate Court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. *State v. Pena*, 869 P.2d 932, 935 (Utah 1994). Appellant disagrees that *Marguiles By and Through Marguiles v. Upchurch*, 696 P.2d 1195, 1199-2000 (Utah 1985) supports the designation of this issue as a question of law as the case provides no support for the designation.

**2. Did the trial court err when it determined that the Tribal Court's May 22, 1998 Order, which Transferred custody, lacked due process with respect to Appellee?**

Appellant disagrees with the designation of this issue as a question of law. This issue involves mixed questions of fact and law. Findings of Fact are reviewed under the clearly erroneous standard and will not be set aside unless they are so lacking in support as to be against the clear weight of the evidence. *Young v. Young*, 979 P.2d 338, 342, (Utah 1999); *Pennington v. Allstate Ins. Co.*, 973 P.2d 932, 937 (Utah 1998); *Johnson v. Higley*, 977 P.2d 1209, 1214 (Utah App.

1999); Rule 52(a), Utah R. Civ. P. (hereinafter "Standard of Review").

Conclusions of law are subject to the standard of review stated with respect to the first issue, *supra*.

### DETERMINATIVE AUTHORITIES

The legal authorities that are determinative of the appeal or of central importance to the appeal include:

#### Constitutional Provisions:

U. S. Const., Amend. 5, 14

Utah Const. Art. 1, § 7

Utah Const. Art. 1, § 24

#### Statutory Provisions:

Utah Code Ann. § 78-2-2(3)(j)

Utah Code Ann. § 78-22a-1 *et. seq.* (1998)

#### Rules of Procedure:

Utah Rules of Appellate Procedure, Rule 4

Utah Rules of Appellate Procedure, Rule 24(a)(5)

Utah Rules of Civil Procedure, Rule 52(a)

### STATEMENT OF CASE

In addressing the issues raised by the Appeal, Respondent/Appellee, Boyd Searle, will be referred to as "the grandfather" and Petitioner/Appellant, Jayni Searle will be referred to as "the mother."

**A. Nature of Case.**

This case concerns the enforceability of a foreign judgment entered by the Fort Peck Assiniboiné and Sioux Tribal Court (hereinafter “the Fort Peck Tribal Court”) located on an Indian Reservation in Poplar, Montana.

**B. Course of Proceedings.**

In February 1998, the grandfather filed in the Third District Juvenile Court (hereinafter “the Juvenile Court”) a Petition to Terminate the Parental Rights of the mother in relation her minor child. (R. 454). The Juvenile Court granted temporary custody of the child to the grandfather on March 3, 1998. (R. 454). The mother filed in the Juvenile Court a Petition to Transfer to the Fort Peck Tribal Court. The Juvenile Court transferred jurisdiction over the pending Petition to Terminate Parental Rights to the Fort Peck Tribal Court. (R. 454). On May 22, 1998, the Tribal Court issued an ex-parte order accepting jurisdiction and transferring custody of the minor child to the mother. (R. 454). On May 28, 1998 the mother filed a Petition for Writ of Assistance with the Third District Court, (hereinafter “the trial court”) Judge Timothy R. Hanson, presiding, seeking enforcement of the May 22, 1998 Fort Peck Tribal Court custody Order. (R. 1, 454). The mother later filed an Amended Petition for Writ of Assistance. (R. 103-104). The mother filed a Notice to Submit requesting the trial court rule on the pleadings. (R. 28-29). The grandfather filed an objection and requested a hearing. (R. 151-183). On March 8, 1999, the trial court convened a hearing and dismissed the Petition for Writ of Assistance on grounds that the action was not

properly filed under the Foreign Judgment Act and the Tribal Court order is not entitled to full faith and credit because the grandfather's due process rights were violated. (R. 334; 453-457).

## SUMMARY OF ARGUMENT

### I.

The appeal must be dismissed for lack of jurisdiction. This matter involves an appeal of a final order of the Third District Court involving domestication and enforcement of a foreign judgment. The Court of Appeals does not have jurisdiction over this matter. The Utah Supreme Court would have had jurisdiction over this matter under Utah Code Ann. § 78-2-2(3)(j) had the appeal been timely filed in the Supreme Court.

### II.

The mother's brief should be stricken and the appeal dismissed for noncompliance with Rule 24(a)(5) of the Utah Rules of Appellate Procedure by failing to cite to the record showing preservation in the trial court of each issue presented for review.

### III.

The mother's brief contains factual allegations that should be stricken for failure to cite where they are supported in the record.

### IV.

The mother's Writ of Assistance, by its very language, required compliance with the Foreign Judgment Act. The record is replete with

admissions that she did not comply with the statutory filing requirements and even conceded that the trial court's determination that the Foreign Judgment Act applied was correct. The issues related to the Foreign Judgment Act were not preserved for appellate review as a consequence of her admissions on the record. Moreover, the appeal of this issue is frivolous because the mother admits in her brief that the Foreign Judgment Act was not the vehicle for the enforcement she sought, yet she appeals the trial court's refusal to issue a writ containing language that it was issued pursuant to the Foreign Judgment Act.

## V.

The trial court's determination that due process was violated in relation to the Tribal Court order hinges on the factual finding that the grandfather was not provided any notice of a hearing or that there would be a ruling on custody. This is a mixed question of fact and law rather than a simply question of law as proposed by the mother. The mother's challenge of factual findings should be disregarded because of her failure to marshal the evidence and demonstrate the evidence is legally insufficient to support the finding. Even if the mother had marshaled the evidence, the evidence is legally sufficient to support the finding of lack of notice. In the absence of notice, the right to due process has been violated. The appeal is frivolous because the record is replete with the mother's admissions that due process requires notice and that the grandfather was not given notice.

## ARGUMENT

### I. THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

The Court of Appeals does not have jurisdiction over this appeal of a final order of the Third District Court involving domestication and enforcement of a foreign judgment. The mother misstates the Court's jurisdiction in her Jurisdictional Statement asserting that the Court of Appeals has jurisdiction "pursuant to Utah Code Ann. § 78-2a-3(2)(a) and Rule 3, Utah Rules of Appellate Procedure." (**Appellant's Brief, 1**). That subsection of the statute deals exclusively with jurisdiction over final orders or decrees resulting from formal adjudicative proceedings of state agencies or from the district court review of informal adjudicative proceedings of the those agencies. This appeal does not deal with an adjudicative proceeding. Further, Rule 3 confers no jurisdiction on a specific appellate court but provides the procedure by which the notice of appeal allows the appropriate court to take jurisdiction.

It is undisputed that this matter concerns the enforceability of a foreign judgment. The trial court found the action was one to domesticate a foreign judgment, the court clerk designated the action a "special matter," and the mother characterizes her petition as "An Action...to enforce a May 22, 1998 Order from the Fort Peck Assiniboine and Sioux Tribal Court." (**T. 31; R. 9, 11; Appellants' Brief, 3**). The Utah Supreme Court would have had jurisdiction over this matter under Utah Code Ann. § 78-2-2(3)(j), because it involves an order

over which the Court of Appeals does not have original appellate jurisdiction, had the appeal been timely filed in the Supreme Court.

However, the Supreme Court cannot take jurisdiction over an appeal, which is not timely brought before it, and an untimely appeal will be dismissed for lack of jurisdiction. *Burgers v. Maiben*, 652 P.2d 1320 (Utah 1982); *Bowen v. Riverton City*, 656 P.2d 434 (Utah 1982); *Nelson v. Stoker*, 669 P.2d 390 (Utah 1983). The thirty day period within which this matter could have been appealed to the Supreme Court pursuant to Rule 4 of the Utah Rules of Appellate Procedure has expired. Consequently, this appeal is improperly filed in the wrong court and must be dismissed.

## **II. THE MOTHER'S BRIEF SHOULD BE STRICKEN FOR NONCOMPLIANCE WITH RULE 24(a)(5).**

The mother's brief should be stricken and the appeal dismissed for noncompliance with Rule 24(a)(5) of the Utah Rules of Appellate Procedure by failing to cite to the record showing preservation in the trial court of each issue presented for review. The rule expressly mandates:

(a) *Brief of appellant.* The brief of the appellant shall contain under appropriate headings and in the order indicated:

(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and (A) citation to the record showing that the issue was preserved in the trial court; or (B) a statement of grounds for seeking review of an issue not preserved in the trial court.

Rule 24(a)(5), Utah Rules of Civil Procedure (Emphasis added.)

The mother's brief contains a statement of the issues presented for review, but does not provide citations to the record demonstrating they were preserved in the trial court or allege alternative grounds for seeking review of issues not preserved. The clear language of the rule makes it mandatory. Neither the Appellate Court nor the opposing party should bear the burden of fleshing out the record to determine the issues were properly raised and litigated or that timely objections and motions were made as required. *State v. Whittle*, 780 P.2d 819, 120-21 (Utah 1989) (specific and timely objections must be made before the lower court and then identified for the appellate court.). Consequently, the mother's brief is defective and should be stricken.

### **III. FACTUAL ALLEGATIONS IN THE MOTHER'S BRIEF SHOULD BE STRICKEN FOR LACK OF CITATION OR SUPPORT IN THE RECORD.**

The mother's brief contains factual allegations that should be stricken for failure to cite support in the record. Facts that should be stricken are found in pages 21 through 24, where factual allegations are made regarding a June 8, 1998 telephonic hearing involving both the Juvenile Court and the Tribal Court.

Specifically, these pages make reference to a hearing cited in the mother's "Statement of the Case/Facts." (**Appellant's Brief, 5-6**). Those earlier citations are to a document stating, "On June 8<sup>th</sup>, 1998, the tribal court and juvenile courts issues [sic] stays of the proceedings pending hearing before an appeals or federal court on the issue of whether the juvenile court had any jurisdiction to enter such an order." (**R. 328**). Nothing more is revealed in that citation regarding the



purpose of the hearing, the substance of the issues addressed, or any other fact regarding what occurred at said hearing.

Notwithstanding the absence of additional facts, the mother's brief later expands on those meager references in the record and purports that

- a) the grandfather "had a fair opportunity to object and fight the issues raised by the order at the June 8, 1998 hearing;"
- b) the grandfather "was able to present his arguments;"
- c) the grandfather "had nearly a four month window in which to file pleadings before the Tribal Court to seek custody;"

Contrary to these unsupported factual allegations, the transcript contains argument that these things did not occur, but rather the grandfather was told he had no right to object to the lack of notice because he had no right to due process in the Tribal Court. The transcript indicates the grandfather was told that he already had his due process in the state court and the Tribal Court would do as it pleased. **(T. 24)**. There is absolutely no record supporting the factual assertion that the grandfather was given a hearing during the telephonic conference on the lack of notice prior to entry of the Tribal Court's May 22, 1998 order, or that he was given the opportunity to present his arguments regarding the transfer of custody. The only references in the record state otherwise—that the door was closed when the Tribal Court rejected the principle that the grandfather had due process rights in the Tribal Court in the first instance.

Regardless of the mother's position on those facts, there is no record indicating that the grandfather was given any kind of hearing to review whether the circumstances in the Tribal Court amounted to due process. There is no notice of hearing, no minute entry or transcript of the hearing supporting the mother's contentions.

The Utah Supreme Court in *Uckerman v. Lincoln Nat'l Life Ins. Co.* refused to consider any facts not properly cited to, or supported by, the record. 588 P.2d 142 (Utah 1978). Consequently, facts contained in pages 21 through 24 in the mother's brief should be stricken and not considered.

**IV. THE TRIAL COURT CORRECTLY RULED THE MOTHER DID NOT COMPLY WITH THE FOREIGN JUDGMENT ACT AND THAT COMPLIANCE WAS A PREREQUISITE TO ISSUING THE WRIT OF ASSISTANCE.**

The Foreign Judgment Act deals with three pertinent issues: the filing and commencing of an action on a foreign judgment; the foreign judgment debtor's right to a stay; and the foreign judgment creditor's right to a lien. Because this matter relates to a child rather than a money judgment, the only relevant issue is the filing requirements:

"(1) The judgment creditor or attorney for the creditor, at the time of filing a foreign judgment, shall file an affidavit with the clerk of the district court stating the last known post-office address of the judgment debtor and the judgment creditor.

"(2) Upon the filing of a foreign judgment and affidavit, the clerk of the district court shall notify the judgment debtor that the judgment has been filed. Notice shall be sent to the address stated in the affidavit. The clerk shall record the date the notice is mailed in the register of actions."

Utah Code Ann. § 78-22a-3(1)&(2) (Emphasis added) (**Addendum, 1**).

The trial court ruled the Fort Peck Tribal Court's Order is a foreign judgment that must be filed under the Foreign Judgment Act and the mother did not comply with the statute by simply filing a Petition for Writ of Assistance:

#### CONCLUSIONS OF LAW

1. The May 22, 1998 Order of the Fort Peck Tribal Court transferring custody from respondent to petitioner is a foreign judgment.

2. As a foreign judgment, the judgment must be filed in accordance with the Utah Foreign Judgment Act, Utah Code Ann. § 78-22a-1, et seq.

3. The Petition for Writ of Assistance does not comply with the Utah Foreign Judgment Act.  
(**Conclusions ¶ 1-3; R. 453-457; Addendum, 2-5**).

The trial court's ruling is a conclusion of law subject to the correctness Standard of Review. *Howell*, 806 P.2d at 1211; *Pendleton*, 918 P.2d at 160; *Smith*, 793 P.2d at 409. In determining the correctness of the trial court's determination, the Appellate Court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. *Pena*, 869 P.2d at 935.

**A. Noncompliance with the filing requirements of the Foreign Judgment Act constitutes noncompliance with the statute.**

The trial court correctly determined that the Writ of Assistance did not comply with the Foreign Judgment Act because the mother conceded noncompliance with the filing provisions of the statute. (**Appellant's Brief, 12-**

13). The question answers itself in the mother's brief, although she attempts to argue a different issue than the one presented for review. The mother frames the first issue presented for review as, *"Did the trial court err in concluding that the Writ of Assistance did not comply with the Utah Foreign Judgment Act?"* She then concedes she did not abide by the statute's filing requirements but proceeds to argue a different issue, namely that there are alternative ways to enforce a judgment and that noncompliance with the provisions of the statute should not have resulted in dismissal of the Writ of Assistance. **(Appellant's Brief, 10-13).**

The mother's arguments in regard to alternative ways to enforce a foreign judgment should be disregarded because it is not the issue presented for review and does not affect the determination of whether the court erred in concluding that the manner in which the Writ of Assistance was filed did not comply with the statutory provisions of the Foreign Judgment Act.

Even if the Appellate Court were inclined to reach an issue not specifically presented for review, the mother did not preserve for appellate review the issue of alternatives other than the Foreign Judgment Act. An issue is preserved for appellate review when three requirements are satisfied: i) the issue must be raised in a timely fashion; ii) the issue must be specifically raised; and iii) a party must introduce supporting evidence or provide relevant legal authority. *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 130 (Utah Ct. App. 1997). The three requirements are intended to "put the judge on notice of the asserted error and allow [ ] the opportunity for correction at the time in the course of the

proceeding.” *Borberg v. Hess*, 782 P.2d 198, 210 (Utah Ct. App. 1989). The rational for preservation of issues is that the trial court, in fairness, ought to have the chance to correct its own errors. *State v. Rudolph*, 970 P.2d 1221, 1225-26, 1227 (Utah 1998).

Contrary to this standard, the mother expressed through counsel to the trial court that she “wasn’t sure whether the Foreign Judgment applied or not,” to which the trial court respond, “of course it applies.” (T. 21). She further conceded she “wasn’t sure whether it applied just to sister states or to all foreign judgments,” and that she “wasn’t sure which was the proper way,” that she “allowed the Court to determine that” and that the trial court “probably determined it correctly.” (T. 21-22). By conceding that she left it for the trial court to determine whether the statute applied because she did not know and conceding that the trial court probably determined it correctly, she failed to provide the trial court relevant legal authority or the requisite opportunity to correct the alleged error. Consequently, the issue was not preserved and is improper for appellate review.

The mother’s admission that she did not file the action in accordance to the procedures set forth in the Foreign Judgment Act amounts to an admission that there was no compliance with the statute. She unabashedly admits that she did not file an affidavit stating the last known address of the grandfather. Instead she opted for filling out the civil action cover sheet and including the grandfather’s last known address. (Appellant’s Brief, 12-13). She further admits

that the clerk of the district court did not send notice to the grandfather's address or record the date in the register of actions. Instead she opted for mailing notice herself to the grandfather's attorney. (**Appellant's Brief, 12**). She argues this should be good enough.

Inasmuch as the mother admits in her brief that the mandatory statutory provisions were not adhered, the Appellate Court should accept her answer that she did not comply with the statute and should disregard further argument once the issue she presents for review, "*did the writ comply with the statute?*," has been determined.

**B. The appeal of the trial court's denial of the Writ of Assistance is frivolous because there is no dispute that the requirements of the Foreign Judgment Act were not adhered.**

The mother's brief fails to mention that this appeal is based on the trial court's denial of a request for entry of an "Amended Writ of Assistance" containing the following language:

"The Court hereby concludes that, pursuant to 25 U.S.C. 1911(d) and Utah Code Ann. § 78-22a-1 et. seq., the order of the tribal court is properly before the court for domestication. Based upon this conclusion, the Court hereby recognizes the Order of the Fort Peck Assiniboine and Sioux Tribal Court, gives it full faith and credit, and domesticates the order. Based upon good cause appearing in the record before the Court and in Plaintiff's Petition for Writ of Assistance, the Court hereby orders that the Sheriff, Law Enforcement, or Constable to use any and all necessary and reasonable means to secure the person of Chad Searle and deliver him to Jim C. Shirley at 9 Exchange Place, Suite 400, Salt Lake City, Utah for delivery to the natural mother. Any and all necessary and reasonable means shall include, but not limited to, entrance upon the premises located at; (1) the residence at 4885 South 3640 West,

Kearns, Utah; (2) the residence at 4906 South 4460 West, Kearns, Utah; or (3) Arcadia Elementary at 3461 West 4850 South, Kearns, Utah and execute upon the attached Order.” (Emphasis added.) **(R. 103-104; Addendum, 6-7).**

Despite the writ’s reliance on the Foreign Judgment Act (i.e. Utah Code Ann. § 78-22a-1 *et. seq.*) the mother raises the two arguments discussed *supra* challenging the trial court’s decision not to issue the writ on grounds that she did not comply with the provisions of the Foreign Judgment Act. a) She claims there are alternative means of enforcement besides the Foreign Judgment Act, and, b) that she substantially complied with the Foreign Judgment Act’s provisions. **(Appellant’s Brief, 10-13).**

First, the mother’s argument that there are alternatives to the Foreign Judgment Act is irrelevant because the Writ of Assistance she sought specifically requested a finding that “pursuant to Utah Code Ann. § 78-22a-1 *et. seq.*, the order of the tribal court is properly before the court for domestication.” She did not seek an order stating that the foreign order was domesticated by some *alternative procedure* but that it was properly domesticated under the *Foreign Judgment Act* or Utah Code Ann. § 78-22a-1 *et. seq.* The trial court had no choice but to deny the writ because the “alternatives” were incongruous with the language of the writ citing compliance with the Foreign Judgment Act.

Second, despite the mother’s argument that she “substantially complied” with the Foreign Judgment Act, the requirements of the statute related to the manner in which an action is filed, which she did not follow. Her failure to make

the designation on the civil cover sheet, her failure to file an affidavit, and the clerk's subsequent failure to send notice to the grandfather and record the notice in the register of actions circumvents the very heart of the statute. (R. 9; Appellant's Brief, 12-13).

Most importantly, the appeal of this issue is frivolous under Rule 33 of the Utah Rules of Appellate Procedure as demonstrated by the following statement contained in the mother's brief, "As argued above, the Foreign Judgment Act was not the vehicle for enforcement." (Appellant's Brief, 13). In essence, the mother argues the trial court committed error in denying the writ for noncompliance with the statute because she did not seek enforcement under the Foreign Judgment Act. The argument is not grounded in fact because the language of her own writ reveals she sought enforcement under the statute. Therefore, the mother's insistence that the Appellate Court determine the trial court should issue a writ containing language that the foreign order was properly domesticated pursuant to the Foreign Judgment Act when she admits employing alternative procedures and claims the Foreign Judgment Act was not the vehicle for enforcement renders the appeal frivolous because it is not grounded in fact or warranted by existing law. The Appellate Court should affirm the trial court's ruling and sanction the mother in the amount of attorneys fees and costs incurred by the grandfather in connection with responding to this frivolous appeal.



**V. THE TRIAL COURT'S RULING THAT DUE PROCESS WAS VIOLATED CANNOT BE REVERSED BECAUSE IT HINGES ON A FACTUAL FINDING THAT THE GRANDFATHER WAS NOT GIVEN NOTICE AND THE MOTHER HAS FAILED TO MARSHAL THE EVIDENCE TO DEMONSTRATE CLEAR ERROR.**

The trial court's ruling regarding the due process issue as contained in the Order of Dismissal states:

**FINDINGS OF FACT**

4. The Third District Juvenile Court, Judge Olof A. Johansson, presiding, transferred jurisdiction over a pending Petition for Termination to the Fort Peck Tribal Court.

5. The Fort Peck Tribal Court accepted jurisdiction and transferred custody of the minor child on May 22, 1998.

6. Boyd Searle was not provided notice that the Fort Peck Tribal Court would issue an Order on the issue of custody.

7. Petitioner filed a Petition for Writ of Assistance with this Court seeking assistance of this Court in enforcing the May 22, 1998 Fort Peck Tribal Court custody order....

**CONCLUSIONS OF LAW**

4. Petitioner was entitled to be heard at a hearing prior to the transfer of custody by the Fort Peck Tribal Court.

5. The failure to give respondent an opportunity to be heard at a hearing prior to transfer of custody constitutes a violation of respondent's due process rights.

6. As such, the May 22, 1998 Order transferring custody is not entitled to full faith and credit....  
**(Findings ¶ 4-7; Conclusions ¶ 4-6; R. 453-457; Addendum, 2-5).**

The trial court's legal conclusion that due process was violated hinges on a factual finding that the grandfather was not given notice of a hearing or that

there would be a ruling on custody. Findings of Fact are subject to the clearly erroneous Standard of Review and will not be set aside unless they are so lacking in support as to be against the clear weight of the evidence. *Young*, 979 P.2d at 342 (Utah 1999); *Pennington*, 973 P.2d at 937 (Utah 1998); *Johnson*, 977 P.2d at 1214 (Utah Ct. App. 1999); Rule 52(a), Utah R. Civ. P.

Conclusions of Law are reviewed for correctness. *Howell*, 806 P.2d at 1211; *Pendeleton*, 918 P.2d at 160; *Smith*, 793 P.2d at 409. In determining the correctness of the trial court's determination, the Appellate Court decides the matter for itself and does not defer in any degree to the trial judge's determination of law. *Pena*, 869 P.2d at 935.

- A. Because the trial court found there was no notice and concluded Due Process was therefore violated, the Standard of Review is a mixed standard of clear error on the facts and correctness on the legal significance of the facts.**

The mother's second issue asks, "*Did the trial court err when it determined that the Tribal Court's May 22, 1998 Order, which transferred custody, lacked due process with respect to Appellee?*" As discussed *supra*, this is a mixed question of fact and law rather than simply a question of law as proposed by the mother. As such, the mother must marshal the evidence to challenge the factual findings. The mother's brief is defective because of her failure to marshal the evidence and should be disregarded on this issue.

- B. Failure to marshal the evidence obligates the Appellate Court to assume the findings are correct.**

Appellate courts will not address challenges to factual findings unless the appellant has properly marshaled the evidence. *Child v. Gonda*, 972 P.2d 425, 433-34 (Utah 1998). Marshalling the evidence entails listing all the evidence supporting the challenged finding. *Tingey v. Christensen*, ---- (Utah 1999). "To show that the factual finding is against the clear weight of the evidence, an appellant must first marshal all the evidence supporting the finding and then demonstrate that the evidence is legally insufficient to support the findings even in viewing it in the light most favorable to the court below." *Pennington*, 973 P.2d at 937 (Utah 1998); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989). "To successfully challenge a trial court's findings of fact on appeal, '[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Valcarce v. Fitzgerald*, 961 P.2d 305, 312 (Utah 1998).

The mother's brief vacillates between challenging the trial court's finding that there was no notice, admitting there was no notice, arguing lack of notice was cured by a subsequent hearing, complaining the evidence was not considered, and requesting the Appellate Court "remand so that the District Court can make a determination based upon all the evidence." (**Appellant's Brief, 21-27**). These arguments are self defeating as they do not address the sufficiency of the evidence related to the factual finding that the grandfather received no notice.

C. The evidence is not legally insufficient to support the factual finding of no notice.

The mother makes a weak attempt in her brief to challenge the sufficiency of the evidence as follows, "The District Court had this evidence before it, but did not consider this evidence in making its ruling... Rather than considering the evidence, the District Court did not look at the surrounding circumstances at the entry of the Tribal Court's May 22, 1998 Order... However, a full review of the facts before the Court, the Tribal Court's order did not lack due process because Appellee had notice of the Invalidation Petition and had an opportunity to be heard on the issues raised therein." (**Appellant's Brief, 19**). This challenge falls short of listing all the facts supporting the findings and then demonstrating the evidence is insufficient.

Despite the mother's disagreement with the trial court's interpretation of the evidence, there is sufficient evidence the grandfather received no notice. By way of example, the mother confirms no notice in her brief saying, "While, ignoring the argument above regarding appropriate notice of the Invalidation Petition, Appellee did not have notice that the Tribal Court could enter an order accepting jurisdiction and changing custody, pursuant to the May 15, 1998 Juvenile Court order." (**Appellant's Brief, 21-22**). The transcript captured the mother's several other admissions of no notice:

The Court: Well, wait a minute. The juvenile court transfers this to the tribal court. The tribal court enters its order. Did they ever give Boyd Searle any notice so he could be heard before they decided to issue the order?

Mr. Shirley: Before they issued—the issue of accepting jurisdiction?

The Court: No. Taking custody.

Mr. Shirley: They did not have a hearing at that time, no.  
(T. 8).

\*\*\*\*\*

The Court: Well did somebody tell him when they were going to have a hearing so he could show up at the tribal court and say, “Wait a minute, I don’t want to do this?”

Mr. Shirley: They did not have a hearing at the time, Your Honor. However, on June 8<sup>th</sup>, there was a hearing which involved the petitioner. Petitioner, respondent and the tribal court and the juvenile court, as well as counsel for the tribe, Mr. Beaudry.

The Court: Those being to enforce an order in May of 1998?

Mr. Shirley: Yeah

The Court: One that was issued without notice to Mr. Searle?

Mr. Shirley: Yes, your honor.  
(T. 8-9).

\*\*\*\*\*

The Court: The tribal court accepts jurisdiction and changes custody.

Mr. Shirley: Yes

The Court: They didn’t give Mr. Searle notice.

Mr. Shirley: That they intended to take that action, no.

The Court: Then tell me how you get due process...  
(T. 14).

Those admissions were followed by the grandfather's counsel reiterating his contentions found in the pleadings:

Ms. Santana: Because my client was not provided an opportunity to be heard, the tribal court then entered an order ex parte upon an oral motion made by the tribe, and there was a hearing, despite Mr. Shirley's representation that there was no hearing. There was a hearing and the only person that was invited was the attorney for the tribe. And then they entered an order...[and] transferred custody to [the mother].  
(T. 23).

After hearing the arguments and reviewing the pleadings, the trial court ruled on the evidence:

The Court: [ ] I'm satisfied that ...the materials that have been presented to me here, both in oral argument and with the file, indicate that Mr. Searle was given no notice and no opportunity to be heard with regard to the orders that were issued by the tribal court on May 22, 1998.  
(T. 35).

**D. Due Process cannot be satisfied in the absence of notice.**

The mother's argument that due process was afforded *despite the absence of notice* defies legal reasoning because notice is the fundamental element of due process. "Questions frequently arise as to the adequacy of a particular form of notice in a particular case... But as to the basic requirement of notice itself there can be no doubt...." *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (notice required where the judicial proceedings permanently deprived a parent of parental rights). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

and afford them an opportunity to present their objections. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Mulane v. Central Hanover Tr. Co.*, 339 U.S. 306, 314.; *Estate of Jones, Matter of*, 858 P.2d 983 (Utah 1993); *Holm v. Smilowitz*, 840 P.2d 157 (Utah 1993). “[A] foreign judgment rendered....under circumstances that amount to lack of due process is not entitled to full faith and credit in Utah.” *Holm*, 840 P.2d at 164 (Utah 1993) *Data Management Sysytems In. V. EDP*, 709 P.2d 377, 379 (Utah 1985).

The parties agree that the Tribal Court order, which awarded “temporary care, custody and control,” was final, although they disagree on the reasons for finality. **(Addendum, 8)**. The mother argues the order is final because the grandfather failed to appeal the order. **(Appellant’s Brief, 25)**. The grandfather argues the order is final because he was directly told during a subsequent telephonic conference with the Tribal Court that he had no due process rights in their court and because they continued to enforce the temporary order long after the underlying action had been dismissed. **(T. 23-24)**. The order was final as to the grandfather’s rights because of the Tribal Court’s unwillingness to allow him to meaningfully participate and the unprecedented action of enforcing a temporary order from a dismissed case, not because the order itself legitimately became final and absolute.

**E. A temporary order from an action that has been dismissed is not entitled to Full Faith and Credit.**

Notwithstanding the obvious unenforceability of an order entered without due process, another essential element for enforcement of a foreign order is that the order must be accorded finality. *Estate of Jones*, 858 P.2d at 985, (Utah 1993). As explained *supra*, this order was a temporary order from an action already dismissed in the Tribal Court. Consequently, the order was not final in any legal sense and was not subject to enforceability in Utah under the *Estate of Jones* standard.

**F. The appeal of the trial court's conclusion that Due Process was violated is frivolous because there is no dispute that the grandfather was not provided notice.**

Once again, the appeal of this second issue is frivolous under Rule 33 of the Utah Rules of Appellate Procedure as demonstrated by the following statement contained in the mother's brief, "**Appellant does not dispute that a fundamental requirement of due process is notice and an opportunity to be heard.**" (Appellant's Brief, 21). In essence, the mother argues the trial court must have committed error in reaching the legal conclusion that the right to due process was violated while admitting both that there was *no notice* and that *notice is a fundamental element of due process*. The argument is not grounded in fact or law because the lack of notice and the legal necessity of notice are undisputed. Therefore, the mother's insistence that the Appellate Court conclude that due process was satisfied in the *absence of notice* renders the appeal frivolous because it is not grounded in fact or warranted by existing law. The Appellate Court should affirm the trial court's ruling and sanction the mother in the amount of




attorneys fees and costs incurred by the grandfather in connection with responding to this frivolous appeal.

### CONCLUSION

The Court of Appeals should dismiss the appeal for lack of jurisdiction because the Supreme Court is the proper court wherein jurisdiction lay. Alternatively, on the merits of the arguments, the Appellate Court must affirm the trial court's ruling because it correctly applied the law and committed no clear error on the facts.

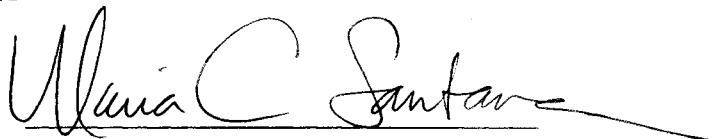
Respectfully submitted this 22 day of Oct, 2000.

  
Maria Cristina Santana  
Attorney for Appellee, Boyd Searle

### CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of Oct, 2000, I caused to be served a true and correct copy of the foregoing by US mail upon:

Jim C. Shirley  
10 E. Exchange Place, Suite 527  
Salt Lake City, Utah 84111



## ADDENDUM

filed and docketed in any court of this state and shall have the same force and effect as a judgment entered in that court.

(4) Prior to July 1, 1997, a judgment entered in the small claims division of any court shall not qualify as a lien upon real property unless filed and docketed in accordance with Subsection (3). This Subsection (4) shall apply to all small claims judgments entered on or after April 27, 1992. 1997

#### 78-22-1.1. Judgment against party dying after verdict or decision.

A judgment rendered where a party dies after a verdict or decision upon any issue of fact, and before judgment, is not a lien on the real property of the deceased party, but is payable in the course of the administration of his estate. 1953

#### 78-22-1.5. Definitions — Judgment recorded in Registry of Judgments.

(1) For purposes of this section, "Registry of Judgments" means the index where a judgment shall be recorded and searchable by the name of the judgment debtor through electronic means or by tangible document.

(2) On or after July 1, 1997, a judgment rendered or recorded in a district court does not create a lien upon or affect the title to real property unless the judgment is recorded in the Registry of Judgments of the office of the clerk of the district court of the county in which the property is located. 1997

#### 78-22-2. Judgment against sheriff — When conclusive against sureties on indemnity bond.

If an action is brought against a sheriff for an act done by virtue of his office and he gives written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein is conclusive evidence of his right to recover against such sureties; and the court, or judge in vacation, may, on motion, upon notice of five days, order judgment to be entered against them for the amount so recovered, including costs. 1953

#### 78-22-3. Judgment by confession authorized.

A judgment by confession may be entered without action, either for money due or to become due or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by law. Such judgment may be entered in any court having jurisdiction for like amounts. 1953

#### 78-22-4. Mileage allowance for judgment debtor required to appear.

Every judgment debtor legally required to appear before a district court or a master to answer concerning his, her, or its property is entitled, on a sufficient showing of need, to mileage of 15 cents per mile for each mile actually and necessarily traveled in going only, to be paid by the judgment creditor at whose instance the judgment debtor was required to appear, but the judgment creditor is not required to make any payment for such mileage until the judgment debtor has actually appeared before the court or master. 1953

### CHAPTER 22a

#### FOREIGN JUDGMENT ACT

##### Section

- 78-22a-1. Short title.
- 78-22a-2. Definition — Filing and status of foreign judgments.
- 78-22a-3. Notice of filing.
- 78-22a-4. Stay.
- 78-22a-5. Lien.
- 78-22a-6. Optional procedure.

##### Section

- 78-22a-7. Repealed.
- 78-22a-8. Uniformity of interpretation.

#### 78-22a-1. Short title.

This chapter shall be known and may be cited as the "Utah Foreign Judgment Act." 1997

#### 78-22a-2. Definition — Filing and status of foreign judgments.

(1) As used in this chapter, "foreign judgment" means any judgment, decree, or order of a court of the United States or of any other court whose acts are entitled to full faith and credit in this state.

(2) A copy of a foreign judgment authenticated in accordance with an appropriate act of Congress or an appropriate act of Utah may be filed with the clerk of any district court in Utah. The clerk of the district court shall treat the foreign judgment in all respects as a judgment of a district court of Utah.

(3) A foreign judgment filed under this chapter has the same effect and is subject to the same procedures, defenses, enforcement, satisfaction, and proceedings for reopening, vacating, setting aside, or staying as a judgment of a district court of this state. 1997

#### 78-22a-3. Notice of filing.

(1) The judgment creditor or attorney for the creditor, at the time of filing a foreign judgment, shall file an affidavit with the clerk of the district court stating the last known post-office address of the judgment debtor and the judgment creditor.

(2) Upon the filing of a foreign judgment and affidavit, the clerk of the district court shall notify the judgment debtor that the judgment has been filed. Notice shall be sent to the address stated in the affidavit. The clerk shall record the date the notice is mailed in the register of actions. The notice shall include the name and post-office address of the judgment creditor and the name and address of the judgment creditor's attorney, if any.

(3) No execution or other process for the enforcement of a foreign judgment filed under this chapter may issue until 30 days after the judgment is filed. 1997

#### 78-22a-4. Stay.

(1) If an appeal from a foreign judgment is pending, the time for appeal has not expired, or a stay of execution has been granted, the court, upon proof that the judgment debtor has furnished security for satisfaction of the judgment in the state in which the judgment was rendered shall stay enforcement of the judgment until the appeal is concluded, the time for appeal expires, or until the stay of execution expires or is vacated.

(2) If the foreign judgment debtor, upon motion, shows the district court any ground upon which enforcement of a judgment of a district court of this state would be stayed, the court shall stay enforcement of the foreign judgment upon the posting of security in the kind and amount required to stay enforcement of a domestic judgment. 1997

#### 78-22a-5. Lien.

(1) A foreign judgment filed under this chapter becomes a lien as provided in Section 78-22-1 if a stay of execution has not been granted.

(2) If the requirements of this chapter are satisfied, the foreign judgment becomes a lien upon the judgment debtor's property on the date it is docketed. 1997

#### 78-22a-6. Optional procedure.

This chapter shall not be construed to impair a judgment creditor's right to bring an action in this state to enforce the creditor's judgment. 1997

JUL 26 1999

By E. Thompson SALT LAKE COUNTY  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

-----

IN THE MATTER OF CHAD SEARLE,	:	ORDER OF DISMISSAL
<u>A MINOR INDIAN CHILD</u>	:	
	:	CASE NO. 980905344
JAYNI SEARLE,	:	
	:	
Petitioner,	:	
	:	
vs.	:	
	:	
BOYD SEARLE,	:	
	:	
Respondent.	:	

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The above-entitled matter came before the Court on March 8, 1999 for hearing on petitioner's Petition for Writ of Assistance. Jim C. Shirley appeared representing petitioner, Jayni Searle. Maria Cristina Santana appeared representing respondent, Boyd Searle. Boyd Searle personally appeared. The parties have filed extensive pleadings regarding the issues before the Court, the parties made their respective arguments. The Court having reviewed the file, having properly considered all the oral and written arguments submitted to the Court by the parties, the Court hereby makes the following:

**FINDINGS OF FACT**

1. In February of 1998, respondent filed in the Third District Juvenile Court a Petition to Terminate the Parental Rights of Jayni Searle in relation to Chad Searle.

2. Subsequently, respondent filed an Ex Parte Motion for Custody and obtained an Ex Parte Order of Temporary Custody on March 3, 1998.

3. Petitioner filed a Petition to Transfer to Tribal Court in March of 1998.

4. The Third District Juvenile Court, Judge Olof A. Johansson, presiding, transferred jurisdiction over a pending Petition for Termination to the Fort Peck Tribal Court.

5. The Fort Peck Tribal Court accepted jurisdiction and transferred custody of the minor child on May 22, 1998.

6. Boyd Searle was not provided notice that the Fort Peck Tribal Court would issue an Order on the issue of custody.

7. Petitioner filed a Petition for Writ of Assistance with this Court seeking assistance of this Court in enforcing the May 22, 1998 Fort Peck Tribal Court custody Order.

8. The parties have subsequently filed numerous pleadings regarding the appropriateness of the issuance of a Writ of Assistance.

9. Petitioner also subsequently filed a Motion to give Full Faith and Credit to two subsequent Tribal Court Orders.

Based upon the foregoing Findings of Fact, the Court hereby enters its:

#### CONCLUSIONS OF LAW

1. The May 22, 1998 Order of the Fort Peck Tribal Court transferring custody from respondent to petitioner is a foreign judgment.

2. As a foreign judgment, the judgment must be filed in accordance with the Utah Foreign Judgment Act, Utah Code Ann., Section 78-22a-1, et seq.

3. The Petition for Writ of Assistance does not comply with the Utah Foreign Judgment Act.

4. Petitioner was entitled to be heard at a hearing prior to the transfer of custody by the Fort Peck Tribal Court.

5. The failure to give respondent an opportunity to be heard at a hearing prior to transfer of custody constitutes a violation of respondent's due process rights.

6. As such, the May 22, 1998 Order transferring custody is not entitled to full faith and credit.

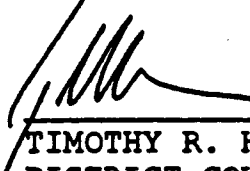
7. The subsequent Tribal Court Orders are not before the Court under the Utah Foreign Judgment Act.

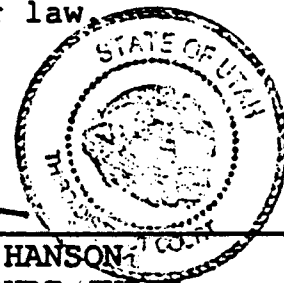
Based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby enters the following:

**ORDER**

1. The Petition for Writ of Assistance is denied.
2. The action is dismissed with prejudice as to the Fort Peck Tribal Court May 22, 1998 Order.
3. The above-entitled action is dismissed without prejudice as to any Order entered subsequent to the May 22, 1998 Order which has been entered by the Fort Peck Tribal Court and the dismissal of this action in no way precludes subsequent enforcement of subsequent Orders through a filing under the Utah Foreign Judgment Act, and which are otherwise enforceable under law.

Dated this 26 day of July, 1999.

  
TIMOTHY R. HANSON  
DISTRICT COURT JUDGE



JIM C. SHIRLEY (#7100)  
ATTORNEY FOR PLAINTIFF  
9 EXCHANGE PLACE, SUITE 400  
SALT LAKE CITY, UTAH 84111  
TELEPHONE: (801) 359-8003

---

IN THE THIRD JUDICIAL DISTRICT COURT  
OF SALT LAKE COUNTY, UTAH

---

IN THE MATTER OF CHAD SEARLE )  
A MINOR INDIAN CHILD )

JAYNI SEARLE, )

Petitioner, )

vs. )

BOYD SEARLE, )

Respondent. )

AMENDED WRIT  
OF ASSISTANCE

Case No. 980905344

Judge Timothy R. Hanson

---

The above-entitled matter came before the Court on Petitioner's Petition for Writ of Assistance on the \_\_\_\_ Day of \_\_\_\_\_, 1998, Judge Timothy R. Hanson presiding. The Court having reviewed the Objection submitted by Respondent, Boyd Searle and having reviewed the Response submitted by Petitioner. The Court hereby finds:

1. Respondent has failed to appropriately raise the due process issues before the tribal court in a timely manner.
2. More than 30 days have passed since Respondent was placed on notice that Petitioner was seeking to enforce the judgment in the State of Utah.
3. The Court of Appeals having ruled that tribal court has exclusive jurisdiction.



No grounds now exist that would prohibit the Court from entering the Writ of Assistance.

The Court hereby concludes that, pursuant to 25 U.S.C. 1911(d) and Utah Code Ann. §78-22a-1 (*et. seq.*), the order of the tribal court is properly before the court for Domestication. Based upon this conclusion, the Court hereby recognizes the Order of the Fort Peck Assiniboiné and Sioux Tribal Court, gives it full faith and credit, and domesticates the order. Based upon good cause appearing in the record before the Court and in Plaintiff's Petition for Writ of Assistance, the Court hereby orders that the Sheriff, Law Enforcement, or Constable to use any and all necessary and reasonable means to secure the person of Chad Searle and deliver him to Jim C. Shirley at 9 Exchange Place, Suite 400, Salt Lake City, Utah for delivery to the natural mother. Any and all necessary and reasonable means shall include, but not be limited to, entrance upon the premises located at: (1) the residence at 4885 South 3640 West, Kearns, Utah; (2) the residence at 4906 South 4460 West, Kearns, Utah; or (3) Arcadia Elementary at 3461 West 4850 South, Kearns, Utah and execute upon the attached Order.

DATED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 1998.

THIRD DISTRICT COURT

\_\_\_\_\_  
JUDGE TIMOTHY R. HANSON

CERTIFICATE OF MAILING

On this 7<sup>th</sup> day of September, 1998 I mailed, postage pre-paid First Class,

a copy of the foregoing Amended Writ of Assistance to:

Maria Christina Santana  
Santana Law Firm  
Attorney for Petitioner  
2159 South 700 East, Suite 100  
Salt Lake City, Utah 84106

FORT PECK TRIBAL COURT  
ASSINIBOINE AND SIOUX TRIBES  
FORT PECK INDIAN RESERVATION  
P.O. BOX 1027  
POPLAR, MONTANA 59255  
(406) 768-5557

---

State of Utah, Third District Juvenile Court	)	Order Accepting Jurisdiction
	)	
In the Matter of Chad Searle,	)	
	)	
A Minor Indian Child	)	(Utah case # 948405)

---

Upon Motion of Gary M. Beaudry, ICWA Attorney for the Fort Peck Tribes and upon review of the court order issued by Judge Olof A. Johansson of the Third District Juvenile Court, Salt Lake City County, State Utah, in accordance with the Indian Child Welfare Act of 1978 and good cause appearing this court issues the following:

Findings

1. This matter is an Indian Child Welfare Act Proceeding as defined under the Indian Child Welfare Act of 1978 as it pertains to a Termination of Parental Rights;.
2. The child subject to this proceeding is an Indian Child as defined under the Act and the Fort Peck Tribes is the Indian Child's Tribe as defined under the Act;
3. The State court after due process issued an order transferring jurisdiction of this matter to this Tribal court;
4. This court enjoys jurisdiction exclusive of any state court under 25 U.S.C. 1911(a).

NOWHEREFORE it is the order of this court that:

1. The Fort Peck Tribal Court hereby accept jurisdiction and allow the child to be transported from the State of Utah to the Fort Peck Indian Reservation by his Natural Mother, Jayni Searle and
2. That the child shall remain under the temporary care, custody and control of his natural mother Jayni Searle until further order of this court.

Issued and dated this 22<sup>nd</sup> day of May 1998.

Attest Clerk of Court

Chief Judge, A.T. Stafne