

IN THE COURT OF APPEALS  
FOR THE  
ROSEBUD SIOUX TRIBE

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IN RE THE BODY OF

ALOYSIUS TWO ELK, JR.,

Deceased.

CA87-06

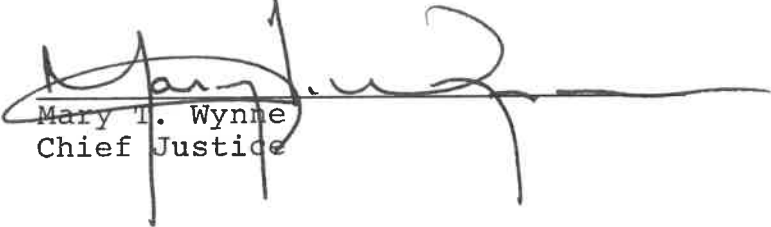
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O R D E R

This case having received complete appellate review, including oral argument, and the Court having issued opinion and being fully advised in the premises, it is hereby

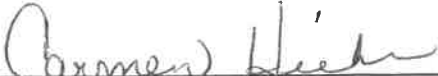
ORDERED AND ADJUDGED, that the judgment of the Tribal Court be, and the same is hereby, affirmed.

Dated this 5th day of April, 1988.

BY THE COURT:

  
Mary T. Wynne  
Chief Justice

ATTEST:

  
Clerk of Courts

Case No. CA87-06

WYNNE, Chief Justice

Appellant, Aloysius Two Elk, Sr., appeals an order of the Rosebud Sioux Tribal Trial Court entered July 7, 1987. The order of the Trial Court denied the petition for custody of the decedent's body filed by Appellant. We affirm.

Aloysius Two Elk, Jr. died on or about July 3, 1987. At the time of his death, decedent was a resident of the Rosebud Indian Reservation living at Parmelee, SD, 18 years of age, unmarried, had no children and left no will. During his 18 years of life, Aloysius had very little contact with either his mother or his father, although he occasionally stayed at her house in St. Francis, SD, also within the boundaries of the Rosebud Indian Reservation.

The record of the Trial Court discloses that the contacts between Aloysius and his father during the period of his life were even more limited. Appellant may have secured a guardianship over the deceased from the Oglala Sioux Tribal court in 1984. There was no specific evidence documenting this admitted into the Court record. This guardianship, by its terms, apparently expired one year after the date in which it was entered. In any event, it would have expired upon the deceased reaching the age of eighteen. The evidence further showed that Aloysius enrolled in school on the Pine Ridge Indian Reservation and lived with his father while attending school for a short period of time in 1984. The remainder of the time he spent in

school completing grades 1-12 was spent at school in St. Francis, South Dakota, within the boundaries of the Rosebud Indian Reservation. The record discloses that the father provided no money for support of the decedent during his minority, attempted no contacts through letters, cards, presents, or other types of contact and had no other contact with the decedent but was nurtured and cared for during the remainder of his life by his maternal grandmother, Hazel Hunts Horse, and his maternal aunt, Janice Hunts Horse, Appellees herein, along with his mother. Other than brief visits with the Appellant at Wanblee, South Dakota, the record is void of any other contacts.

A sister of the decedent testified that Aloysius had stated approximately two years before his death that he wished to be buried in Wanblee, South Dakota. Subsequent to that time, in statements made to his priest, Aloysius stated that he felt his ties were to the Rosebud Indian Reservation and that the Rosebud Indian Reservation was where he belonged. At the time of this death, Aloysius was living with his maternal aunt and maternal grandmother on the Rosebud Indian Reservation, was assigned a Rosebud Sioux Identification number and was pending enrollment in the Rosebud Sioux Tribe. As a consequence of proximity in location, the maternal grandmother and the maternal aunt collaborating with the mother of the decedent, Rita Plumman, took custody of the body and proceeded to bury Aloysius in the cemetery nearest to Parmelee, South Dakota, the place where he had spent nearly the entirety of this life. The Trial Court received

all of this testimony and viewed the witnesses. This Court does not find in the record any reversible error for the Trial Court's findings.

In regards to the Trial Court record, this Court notes that a more specific set of findings and conclusions, one which took testimony and determined applicable Lakota tradition to the fact situation, would have been preferable. Tribal tradition and custom are a vital source of tribal law and should apply in appropriate situations. However, the issue was neither raised nor argued before the Tribal Trial Court. Therefore, on the slender record before us, we do not rule on the possible applicability of tribal tradition and custom to the issue of the custody of a decedent's body. This may be appropriate in a future case, which raises the issue of tradition and custom, in similar circumstances, on a more complete record. However, in this case there is no tribal statute or case law directly on point and controlling principles of tribal tradition and custom were not raised before the Trial Court.

The Appellant seeks custody of the body of Aloysius Two Elk, Jr. arguing that:

1. Aloysius Two Elk, Sr., as father of the deceased, has a legal entitlement to the body of the deceased which is superior to the legal entitlement to that of an aunt;

2. The Oglala Sioux Tribal Court Order awarding guardianship to the Appellant vested in the father superior custodial rights and legal entitlement to the body of the deceased child. The controlling law to determine the superior rights of custody to a dead body in this fact situation is S.D.C.L. § 34-26-1, which clearly states that if the decedent has expressed preference for a specific burial site, the wishes of the decedent will be followed even though they may be contrary to the preferences of the person or persons who have legal custody over the decedent's body. We disagree with each of these contentions.

With regards to the first issue, the Court does not dispute the sensibility of a clear and unequivocal general rule giving superior rights to custody of the dead body to the parents of the decedent when the decedent is unmarried, has left no Will designating another custodian, and has left no surviving children, as in this instance. However, in this case, some of the facts found by the Trial Court were that the mother of the decedent collaborated and participated in the burial of the decedent, thereby making the burial a completed act of a parent exercising control and custody of the body of her deceased child. The relevant issue then becomes who between the parents had the superior right of custody and control over the decedent's body. Review of the facts in this case indicate that the decedent's ties with the Rosebud Tribal Community are convincingly reflected in the significant personal and maternal contacts involving the

deceased with Rosebud, as compared to the less significant personal and paternal contacts with the Pine Ridge Tribal Community.

This Court, in determining superiority over custodial rights of a deceased body, must look at many factors and conditions. Those factors which this Court looks at must initially entail a review of the Tribal interests involved in the sanctity of a deceased's remains. The relationship that the deceased had during his lifetime with the Rosebud Sioux Reservation was significant, lasting and intended to continue in the mind of the deceased. His contacts outside the Rosebud Sioux Reservation were minimal and fleeting. The Court then must look at the particular ties and relationship that the deceased had with the respective paternal and maternal sides of his family. The record entered at Trial Court shows that the contacts and relationship that the deceased had with his parental side of his family, more specifically with his father, were minimal at best. His entire life was spent with the maternal side of his family. It is true his mother did not have an extensive relationship with her son, however, she did have a relationship at least as close and as involved as the father. It is that maternal aunt's significant and lasting involvement in the life of Aloysius that clearly establishes the maternal rights of custody in the deceased body.

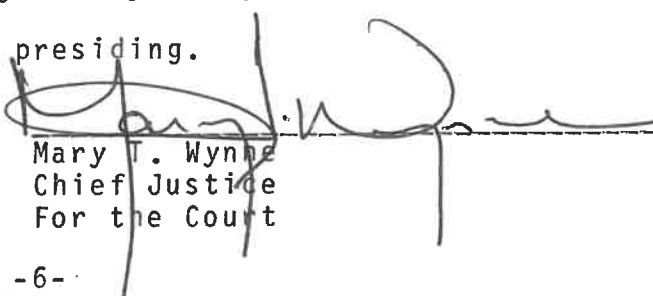
The expressed desires of the deceased, after an attempted suicide over two (2) years ago, was given little, if any, weight by the Trial Court. This Court is not going to overturn the

experienced judgment of the Trial Court in viewing of the witnesses and establishing the credibility and weight to be given certain testimony. The weight of an expressed desire of a deceased as to the place of burial must be considered in light of length of time prior to the death of the deceased. The greater the length, the less credibility or weight must be given to that expressed desire. Less weight should be given to a verbally expressed desire than a written, formal request. Finally, the condition and state of mind of the individual at the time that the wishes are made must be scrutinized closely. If the individual is in a disturbed or extraordinarily stressful situation, the weight most certainly must be less than other contributing factors.

The record below clearly establishes a significant governmental interest in preserving the sanctity of the body of Aloysius Two Elk, Jr. By necessity, there must be a greater burden in establishing the custody of a deceased body once burial has taken place. This Court can only hope that situations similar to the one on appeal here can in the future be resolved without such litigation and interfamily fighting. The spirit and the soul of Aloysius Two Elk, Jr. deserves a peaceful resting.

Based upon the foregoing, this Court does affirm the Lower Court's decision.

By a unanimous Court, Judges Mary T. Wynne, Frank Pommershiem and Marvin Amiotte presiding.



Mary T. Wynne  
Chief Justice  
For the Court