

IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD INDIAN RESERVATION

IN RE THE MARRIAGE OF) Cause No. 09-014-DV
)
TACHINI PETE,)
Petitioner,)
)
)
vs.) OPINION
)
MALINA PETE)
)
Respondent.)
)
)
)

Decided 12/12, 2010

Robert J. Long, Esq., Long Law Office, P.C., 311 2nd St. East, Polson, MT 59860
for Petitioner.

Robin M. Turner, Esq., DOVES/CSKT Legal Assistance for Victims (LAV)
Program, P.O. Box 278, Pablo, MT 59855, for Respondent.

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes,
Judge David L. Morigeau presiding.

Before Cher Desjarlais, Chief Justice, Daniel D. Belcourt, Associate Justice, and Rob
McDonald, Associate Justice.

INTRODUCTION

Petitioner Tachini Pete appeals from the Tribal Court's Parenting Order.
Respondent Malina Pete cross-appeals the order of the Tribal Court's award of the family
home to Tachini Pete. We affirm in part and reverse and remand in part.

We restate the issues on appeal as follows:

1. Whether the Trial Court's determination that Malina would be primary residential custodian of the parties' two youngest children and that each residential parent had day to day decision making authority, including decisions regarding the children's education, was supported by substantial evidence;
2. Whether the Trial Court erred in issuing a child support order without specific findings regarding the parties' income available for support of the minor children and the parties' ability to pay such support;
3. Whether Malina's appeal of the Trial Court's award of the family home to Tachini was timely; and
4. Whether the Trial Court erred by awarding Tachini the family home.

SUMMARY OF FACTS

Tachini and Malena Pete were married on June 21, 1991 in Pablo, Montana. *Amended Decree of Diss. Of Marriage*, 1 (April 6, 2009). Malina is an enrolled member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation ("CSKT") Tachini is an enrolled member of the Navajo Tribe. *Id.* at 1. During the marriage, Malina and Tachini purchased a five bedroom home on the CSKT land in Arlee, Montana. *Petition for Dissolution*, January 13, 2009 ("*Petition*"). The couple has four children, only three are minors: K.K.P. (15), S.H.S.P. (12) and S.S.P. (9). All four children are enrolled members of the CSKT. *Petition* at 3.

Tachini filed a Petition for Dissolution on January 13, 2009. The Petition stated that the couple owned a home in Arlee, but did not state whether the home was located on trust land or on a homesite lease or other tribal property. On April 6, 2009, the Court

held a hearing in which both parties appeared pro se. After the hearing the Court issued a Decree of Dissolution of Marriage but then immediately issued an Amended Decree of Dissolution of Marriage (“Am. Decree”). In the Amended Decree, the Court gave the house to Tachini, but did not state the character of the property. The Court also ordered joint custody of the children and stated that it was in the children’s best interest “for the residential status and visitation to be agreed to by the parents.” Am. Decree.

On August 5, 2009, Tachini filed a Motion to Amend the Am. Decree and submitted a proposed parenting plan. On September 3, 2009, Malina filed a Proposed Parenting Plan. The Court held a hearing on August 24, 2009. On September 2, 2009, Tachini filed Affidavits from Stephen Small Salmon and Julie Cajune, regarding the Salish Language Revitalization Institute, which the children had attended. On September 3, 2009, Malina filed her own Affidavit and an Affidavit from Carrie Drye, an Arlee teacher who had worked with one of the children. Tachini filed an Affidavit on September 8, 2009 and Malina filed another Affidavit on September 14, 2009.

On September 22, 2009, the Court issued its final Order. The Order awarded custody of the oldest minor child to Tachini, with visitation for Malena on every other weekend and alternating holidays.

Custody of the two younger children was awarded to Malena. Tachini received visitation every other weekend. The Court also gave day to day decision making to each residential parent, including educational decisions. The educational decision-making authority is at issue because Tachini would like the children to attend the Salish Language Revitalization Institute and Malina would like them to attend public school.

STANDARD OF REVIEW

A trial court's custody decisions will not be overturned on appeal absent a clear abuse of discretion. *In re the Matter of Michael Leo King and Adri Michelle Antoine*, AP-01-92, 1 (CSKT App. 1992). Decisions over the welfare of minor children in parenting actions should be left to the discretion of the trial judge, who handles the case first-hand and has a "superior advantage in determining difficult problems." *Id.*

The question of whether an appeal is timely filed is a legal issue that this Court reviews de novo. This Court reviews the Trial Court's findings of fact to determine if they are clearly erroneous and it reviews the Trial Court's legal decisions de novo.

DISCUSSION

Issue #1

Tachini argues that the Trial court erred in granting Malina primary residential custody of the parties' two youngest children and by granting each residential parent day to day decision making authority, including decisions regarding the children's education, without making specific findings. Tachini argues that the Trial Court's September 22, 2009 Order "makes an about face" from its decision in the Amended Decree and that "[n]o findings or rationale at all is given by the trial court for this radical departure from its prior Decree." Appellant Brief, 3:12-18. This argument seems rather self-serving since, in fact, both parties requested the Court amend the Amended Decree and both parties submitted parenting plans that could be considered a "radical departure" from the Amended Decree, which simply directed the parties to cooperate in parenting and to agree between themselves what was in the best interest of their children.

Essentially, Tachini's argument is that the Court could not rely on Affidavits alone to support its Order. We find this argument unconvincing for the simple fact that Tachini did not object to the use of affidavits at the trial court level. Tachini entered his own affidavit and two supporting affidavits. He did not request a hearing after entering these affidavits or after Malina submitted her own affidavits, or indeed, after Malina submitted a Motion requesting a hearing on September 14, 2009 noting that the parties had submitted conflicting affidavits. The affidavits that the parties submitted each addressed the best interests factors set forth in § 40-4-212, MCA. The Court stated that it reviewed the record and the parties' respective parenting plans in issuing its final Order. In addition to the affidavits submitted, the trial court had the opportunity to hear and observe the parties at two hearings and judge their credibility. "A trial court is in a superior position to weigh the evidence," and to judge the credibility of the parties. [cite]. The Trial Court had sufficient evidence to make its decision. Tachini has not overcome the presumption that the Trial Court's decision on the parenting plan was correct. We AFFIRM the Trial Court's parenting plan.

Issue 2

Tachini appeals the Trial Court's order requiring him to pay Malina \$800.00 per month in child support. Tachini argues that no evidence was presented to support the award. Malina concurs that neither party submitted income information to the Court.

Child support must be set in a just and proper amount. CSKT Laws § 3-1-104. Parties are not required to submit Montana Child support calculations to the court for child support to be established but there must be specific findings regarding the income

available from the parties for support and their ability to provide that level of support to the children. *Marriage of Adamson*, AP-00-317-DV at 4-6.

Because there is insufficient evidence to support the award of child support, we REVERSE the child support order of the Trial Court and REMAND this issue to the Trial Court. We note that Malina has filed a “Notice of Issue Regarding Motion to Show Cause for Non-Payment of Child-Support” in this Court. This Court does not have jurisdiction to hear the matter regarding non-payment of child support. Additionally, since the child support order is reversed and remanded to the Trial Court, the Trial Court is instructed that any child support ordered shall be assessed from September 22, 2009 forward.

Issue 3

Malina appeals the Trial Court’s award of the family home to Tachini. Malina argues that the family home is located on a tribal homesite lease and that under CSKT Laws, tribal property cannot be awarded to a non-tribal member.

Tachini argues in response that Malina’s appeal is untimely because the Trial Court’s decision on distribution of property was issued on April 6, 2009 and her appeal was not filed within 20 days as required by Rule 1, CSKT Rules of Appellate Procedure. Malina responds that the appeal could not be filed until a final order was entered and the Trial Court’s September 22, 2009 order was the final order in this matter.

CSKT Laws § 1-2-817 grants jurisdiction to the Court of Appeals “from a final judgment entered in an action . . . in the Tribal Court.” Rule 1 of the CSKT Rules of Appellate Procedure states that “an appeal shall be taken by filing notice of appeal with the Appellate Administrator . . . within 20 days of the date of the final judgment or order of the trial court. Failure of an appellant to timely file a notice of appeal is grounds for dismissal of the appeal.”

Pursuant to CSKT Laws § 3-1-103(3), in a dissolution proceeding, the Tribal Court has the power to impose judgment for the future custody and care of the minor children of the marriage as well as for the equitable distribution of marital property. In other words, CSKT Laws state that property distribution and parenting matters are to be considered in one case and not as separate actions.

Based on our reading of the above law, we hold that a final order in a dissolution action must include resolution of both property issues and parenting issues. In this case, we conclude that the April 6, 2009 Am. Decree was not a final order and was thus not appealable. Malina’s appeal of the Trial Court’s decision to award the family home to Tachini is timely.

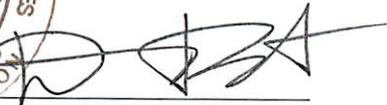
Issue 4

Malina argues that the Trial Court did not determine whether it was proper under the CSKT Land Ordinance and federal regulations to award ownership of a home located on a tribal homesite lease to a non-tribal member. The award of the home to Tachini prevents Malina from pursuing a homesite lease from the Tribe.

We agree that the award of the homesite lease to Tachini without any consideration of the state of the title of the land was error. We REVERSE the Trial Court's award of the family home to Tachini and REMAND for a hearing wherein the Trial Court will consider the state of the title of the land and ensure that the disposition of the marital home is in conformity with the CSKT Land Ordinance and other applicable tribal and federal law.



IT IS SO ORDERED THIS 12 DAY OF December, 2010.


Daniel Belcourt
Associate Justice

We concur:


Cher Stewart
Chief Justice


Rob McDonald
Associate Justice

Certificate of Mailing

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed a true and correct copy of the **OPINION** to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, this 4th day of January, 2011.

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