IN THE APPELLATE COURT OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, PABLO, MONTANA

PEGGY S. KEELE KING, Petitioner/Appellant, vs. MICHAEL THOMAS KING, Respondent, In Re the Matter of MICHAEL LEO KING and ADRI MICHELLE ANTOINE, Minor Children.	* * * * * * * * * * * * *	Cause No. AP-01-92 **OPINION AND ORDER RE CUSTODY OF ADRI MICHELLE**

Appellant Peggy S. Keele King appeals a February 19, 1992 order of the trial court awarding custody of her daughter, Adri Michelle, to respondent Michael Thomas King, Adri's father. The sole issue on appeal is whether the trial judge erred in awarding custody of Adri to respondent.[1]

This Court will follow the rule that unless there is a clear abuse of discretion by the trial court, a custody decision will not be overruled on appeal. We are committed to the view that the welfare of the child is the paramount consideration in awarding custody and that it must of necessity be left largely to the discretion of the trial judge. He hears the testimony, observes the demeanor of the witnesses, and thus has a superior advantage in determining difficult problems. In re Marriage of Tweeten, 172 Mont. 404, 563 P.2d 1141, 1143 (1977), reversed on other grounds,

[1] Appellant asserted a second issue, namely whether the trial court improperly relied on evidence outside the record in arriving at its decision. This question will be considered as part of the custody issue.

Markegard v. Markegard, 616 P.2d 323, 325 (Mont. 1980). Unless there is a clear preponderance of evidence against the trial court's decision, it will not be disturbed. Id.

In reviewing custody issues, we first determine, in light of the entire record, if the factors set forth in § 40-4-212 MCA were considered by the trial court in its findings. That governing statute requires the court to determine custody in accordance with the "best interest of the child" based on, but not limited to, the following factors:

1. The wishes of the child's parent or parents as to his custody;

2. The wishes of the child as to his custodian;

3. The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

4. The child's adjustment to his home, school and community;

5. The mental and physical health of all individuals involved;

6. Physical abuse or threat of physical abuse by one parent against the other parent or the child; and

7. Chemical dependency, as defined in § 53-24-103 MCA, or chemical abuse on the part of either parent.

If these factors are properly considered by the court, appellant must show the following in order to prevail: (1) a clear preponderance of evidence against the findings, i.e., by clear error (Rule 52(a) M.R.Civ. P.)[2] that the record does not support

---

[2] Under Rule 52(a), a finding of fact by the trial court in an action tried without a jury may not be set aside unless it is "clearly erroneous." This term, defined by the United States Supreme Court in a 1948 decision, was reiterated in Anderson v. City of Bessemer, North Carolina, 470 U.S. 564 (1985):

the judgment of the trial court, and (2) a clear abuse of discretion in the court's conclusions. Otto v. Otto, 245 Mont. 271, 800 P.2d 706, 708 (1990); In re Marriage of Jacobson, 228 Mont. 458, 743 P.2d 1025, 1027 (1987).

The record in this case indicates that the trial court did not properly consider all of the factors in § 40-4-212 MCA in determining the best interest of Adri Michelle. The trial court's judgment was based on several findings of fact which are unsupported by the evidence, and is not supported by a clear preponderance of the entire evidence. Accordingly, the trial court abused its discretion in awarding custody of Adri Michelle to respondent. We therefore reverse.

This Court concludes that the first two factors under § 40-4-212 MCA (wishes of the child and parents) are not of controlling importance in this custody decision. As to the first, Adri Michelle is too young to evince a wish regarding her custody. As to the second, both parents testified as to their desire to have custody of Adri Michelle. Where both parents desire custody of the child, this factor loses its relevance, as the wishes of the parents are balanced against each other. In this regard, it is

---

Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's powers to overturn findings of a district court may be derived from our cases. The foremost of these principles...is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948).

important to keep in mind that the controlling test is the best interest of the child, not the best interest of or detriment to the parent. In re Marriage of Tweeten, 172 Mont. 404, 563 P.2d 1141, 1143 (1977), reversed on other grounds, Markegard v. Markegard, 616 P.2d 323, 325 (Mont. 1980). We find no error in the trial court's treatment of these two statutory factors.

The third factor requires scrutiny of the interaction and interrelationship of the child with her parents, siblings, and any other person who may significantly affect the child's best interest. As to this factor, the evidence is clear that Adri has a far better relationship and interaction with her mother and maternal extended family, than with her father and paternal extended family. Francine Van Maanen, who worked on this case for fifteen months as a social worker for the Tribes' Department of Family Services, testified that custody should be awarded to appellant on the basis, in part, that Adri has bonded with her mother, and with the family of her mother's sister, the Hammonds, with whom Adri spent significant time. Ms. Van Maanen further testified that respondent's conduct during one supervised visit of Adri "traumatized" the girl, which Van Maanen characterized as "child abuse." She also testified that respondent Mike King refused to allow visitations between appellant Peggy and their son Michael Leo, who is in respondent's custody.

Alice Tucker, another social worker for the Tribes who worked on this case until trial, testified that Peggy is a fit mother and should be given custody of Adri. Ms. Tucker further testified, as

did Ms. Van Maanen, that it would not be in Adri's best interest to be placed with her father.

Independent evaluations by social workers are important factors to be considered in child custody decisions. In re the Marriage of Tweeten, supra, at 1143. We hold accordingly. The trial court erred in not considering the evaluations of the tribal social workers in its findings and conclusions.

Janita Hammond, Peggy's sister, testified that Peggy and Adri have bonded as a partial result of Peggy spending time with Adri while Adri was living with the Hammonds. The evidence shows that the Hammonds have bonded and enjoy a close, healthy relationship with Adri as part of her extended Indian family. Ms. Hammond further testified that respondent Mike King did not visit Adri on a regular basis while she was living with the Hammonds, nor had he helped with any financial support of Adri. On the other hand, Peggy helped support her daughter while she was at the Hammonds.

Because the trial court did not include the foregoing in its findings of fact, we conclude it erred by not properly considering the third statutory factor of the best interest of the child test.

An analysis of the fourth factor, the child's adjustment to her home, school and community, reinforces this Court's decision to award custody of Adri to her mother. The transcripts of the June 8, 1992 hearing concerning visitation clearly indicate that Adri has been successfully integrated into Peggy's home and that she has grown very close to her mother and the homelife there. Those transcripts also indicate that Peggy's home is clean and furnished

with new furniture.

This Court is cognizant of the fact that Peggy had not taken physical custody of Adri prior to trial on the merits of this case in January of 1992, and that Adri had lived primarily with her maternal extended Indian family, the Hammonds. However, Peggy now has physical custody of Adri, and has had for at least six months. Physical custody of a child, including the time period a child spends with a parent pending an appeal of a custody case, is a factor to be considered in custody determinations. In re the Marriage of Tweeten, supra, 563 P.2d at 1144. Here the record reveals that Adri is well integrated into Peggy's home and has been for a considerable amount of time in her young, pre-school life.

The trial court found that appellant is sporadically employed and that no annual income projections were established. It then concluded that she "has no means to provide child support." The conclusion contradicts the finding and the evidence, which shows Peggy is able to support and provide for Adri, and in fact does so, although she does not have a full-time job. We therefore set aside the trial court's conclusion that Peggy has no means to provide child support.

The trial court found that respondent is a self-employed logging contractor with an estimated annual income of $30,000. The record is devoid of any evidence which would support this income figure, or any amount. The income aspect of the trial court's finding is therefore set aside.

As to the community aspect of the fourth statutory factor,

this Court is cognizant of the facts, as the trial court found, that Peggy is an enrolled member of the CS&KT, whereas respondent Mike King is non-Indian. Accordingly, Adri, as Peggy's daughter, is a part of the Indian community of the Flathead Reservation. The record indicates that Peggy attends the Arlee pow-wow and has made dancing outfits for her children. These type of activities are important for Indian children and their adjustment to the Indian community in which they live and are members.

The evidence indicates that respondent has derogatorily referred to Peggy as his "squaw" on numerous occasions. It further reveals that Mike Sr. has told Mike Jr. that Peggy is not his mother, but rather "some drunken old Indian woman." Such references can undermine the self-esteem of an Indian child, retard the development of a healthy self-concept, and militate against a child's positive adjustment to his or her community, when that community is Indian. In short, we conclude that the evidence as to the fourth statutory factor weighs heavily in favor of awarding custody of Adri to her mother.

The fifth factor requires the court to consider the mental and physical health of all individuals involved. The trial court correctly found that the physical health of appellant and respondent is good.

The trial court also entered the following finding:

> There was expert testimony that a child of Petitioner's [appellant Peggy] who resided with Respondent [Mike Sr.] for a time had been sexually abused. It was not proved by a preponderance of the evidence that Respondent was the abuser.

The clear preponderance of the evidence indicates respondent

was the abuser. Two experts testified indicating such. Gyda Swaney, the clinical supervisor of the Tribal Mental Health Program, works with sex abuse victims and offenders. She spent two hundred hours over a two year period with appellant's daughter Nicolle and testified that she was "absolutely confident" that the young girl had been repeatedly sexually abused by Mike King. Psychologist Swaney further testified that she was "very strongly opposed" to an award of custody of Adri to respondent.

Dr. Jacelyn Wedell is a licensed pediatrics psychologist with a Ph. D. in developmental psychology, and specializes in working with victims of child abuse. Since 1985 she has worked on 250 child sex abuse cases in her practice. Dr. Wedell testified that there was clear disclosure to her by Nicolle of anal, vaginal and oral penetration of Nicolle by Mike King, and that he drank alcohol before sexually abusing Nicolle. Dr. Wedell further testified that she had "absolutely no doubt" that Nicolle was being truthful when relating the incidents of sexual abuse to her. The evidence also indicates that there is an "extremely high risk" that a sex offender will sexually abuse a "new" child placed in the home. Dr. Wedell opined that it would not be in Adri's best interest to be placed in Mike King's custody, and that if she was, she would be in a "position of extreme risk."

The clear preponderance of the evidence indicates that Nicolle was sexually abused by Mike King. The trial court's finding that Mike was not the perpetrator is therefore set aside. The evidence also indicates that there is a high probability of sexual abuse of

Adri, should she be placed in Mike King's custody. The trial court erred further in not finding such. The probability of sexual abuse of Adri, if she is placed with respondent, is sufficient, substantial, credible evidence to support the reversal of the trial court's decision. See e.g., In re the Matter of B.T., B.T., M.T. & M.T., 725 P.2d 230, 232 (Mont. 1986).

The trial court also found that petitioner allowed her older daughter to view pornographic movies. The record is devoid of any evidence that would support this finding. It is therefore set aside.

The trial court also found that petitioner allowed her older daughter to view sex acts in her home. However, the record indicates that if the child did in fact view sex acts, it was clearly unintentional on appellant's part. This finding is therefore set aside.

The trial court also found that Peggy "provided minor children with marijuana and alcohol." The evidence does not support a finding that appellant affirmatively and intentionally provided minor children with marijuana, nor does it support a finding, as implied, that she provided her children with alcohol at any time. It is therefore set aside.[3]

The sixth factor under § 40-4-212 MCA requires the court to consider "physical abuse or threat of physical abuse by one parent

---

[3] The record does show that appellant was convicted of a misdemeanor in 1986, at age 26, for providing alcohol to minors aged 16 and 17. There was no testimony that she allowed her children to have alcohol.

against the other parent or the child."[4] The trial court limited its finding to respondent is "aggressive when drinking." While this finding is correct, it does not adequately or properly reflect the record. The preponderance of the evidence indicates that Mike King physically and sexually abused Peggy on a somewhat regular basis. On one occasion he knocked her down, threw her against the wall, and dragged her by her hair across the room. This abuse caused her to have a miscarriage. Since the time she and Mike King parted, he has subjected her to threats and intimidation. At times he has demanded that she "put out" for him as a condition for her visiting their son who is in respondent's custody. As a result of this violence, Peggy sleeps with a loaded gun.

Perry Mock, a police officer who has known Mike King for 32 years, testified that Mike has a reputation for violence against women, and that women are physically afraid of him. Based on this, officer Mock testified that Mike King is not a fit and proper person to have custody of young Adri. Reputation evidence concerning a former husband's violent conduct is relevant and admissible in child custody proceedings as affecting the relationship of the violent person with his children. Schiele v. Sager, 571 P.2d 1142, 1146 (Mont. 1977).

Dr. Wedell also testified that Mike King has a tendency to intimidate, coerce and threaten powerless people. The evidence further indicates that respondent has a tendency to deny or

---

[4] The issue of sexual abuse, discussed under the fifth statutory factor, may also be properly considered under the sixth factor.

minimize his actions, and blame others rather than accepting responsibility for his conduct.

In short, the trial court failed to consider relevant evidence and the preponderance thereof in considering the fifth factor under § 40-4-212 MCA. It therefore erred by failing to properly consider this factor.

The seventh and final factor requires the court to consider chemical dependency or chemical abuse on the part of either parent. The trial court properly found that appellant successfully completed an alcohol treatment program, and that she enrolled in Salish Kootenai College to increase her job skills and self-esteem. The evidence shows that she has admitted and accepted her problem with alcohol, and that she continues to receive counseling and therapy. We find no error in the trial court's finding under the seventh factor with regard to appellant.

As to respondent, the trial court found under the seventh factor that:

> The Respondent frequents bars, and is aggressive when drinking. He has had custody of Michael and takes Michael with him whether it is for fishing or to the bars when he socializes.

The clear preponderance of evidence dictates a more thorough finding. The evidence shows that Mike King on at least two occasions has been in car accidents with one or more of his children when drinking. The evidence further shows he continues to drink and drive with Mike Jr. in the car. On one occasion he had little Mike with him when he got in a fight in a bar and drove home in a daze. On another occasion in October of 1989, he left little

Mike in the car while he was drinking in a bar until closing time.

The clear preponderance of the evidence shows that respondent becomes violent and engages in physical, emotional and sexual abuse when drinking. The evidence further reveals that Mike King denies that he has an alcohol problem, that he does not view drinking and driving with his children as endangering their welfare, and that alcohol abuse is a major source of his problems. The trial court failed to properly consider the clear preponderance of the evidence in evaluating the seventh factor under the best interest of the child test, as applied to respondent. It accordingly erred.

This Court is obligated to decide this appeal based on the best interest of Adri Michelle. A fundamental tenet of the best interest of a child is that the child has a basic right to be safe and protected from harm. In this context, a child has a right and need not to be used, abused or offended by another individual in a family relationship. Parents don't own children; rather, they are like a trustee or steward responsible for the well-being of the child because the child is unable to care for itself or its welfare. Our decision is guided by this rationale underlying the statutory best interest of the child test.

Based on the foregoing, we conclude that there is a clear preponderance of the evidence against the trial court's custody decision. The trial court therefore clearly abused its discretion in awarding custody of Adri Michelle to respondent. That judgment is reversed. Pursuant to § 40-4-212 MCA, we hold that it is in the best interest of Adri Michelle that her care, custody and control

be placed with her mother Peggy, appellant in this action.

We further hold that respondent shall have reasonable visitation rights. Consistent with this Court's order dated July 22, 1992, all visits between Adri and respondent shall be supervised at all times. This Court does not intend that such supervised visits include the presence of tribal court or family services personnel on each and every visit between Adri and her father. A responsible family member of Mike King will generally be sufficient. However, appropriate tribal personnel shall monitor such visits on a reasonable, periodic basis.

Further, respondent is prohibited from consuming alcohol or controlled substances at all times Adri is visiting him, and respondent shall not take Adri in his car when he has been drinking.

The trial court's jurisdiction over matters of child custody is of a continuing nature. See In re the Matter of B.T., B.T., M.T., & M.T., 725 P.2d 230, 231 (Mont. 1986). The trial court shall therefore continue its jurisdiction over the matter of the custody of Adri Michelle.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

SO ORDERED THIS 8th day of December, 1992.

Robert M. Peregoy, Chief Judge
Civil Court of Appeals