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

JOE VANDERBURG, Appellant, v. JODY JONES, Appellee.	)	AP-04-275-DV OPINION

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes, Honorable Sheryl Steele, presiding.

Appearances:

David C. Humphrey, Attorney for the Appellant, Joe Vanderburg.

Kathleen O'Rourke-Mullins, Attorney for the Appellee, Jody Jones.

Before Chief Justice Eldena Bear Don't Walk, Associate Justice Joey Jayne and Associate Justice Greg Dupuis. Justice Jayne delivers the opinion of the court.

INTRODUCTION

Petitioner/Appellant (hereinafter "Joe") filed a Motion to Amend Parenting Plan; Motion for *in Camera* Interview: and Brief in Support on October 16, 2012. Respondent/Appellee (hereinafter 'Jody") filed a Response to Motion to Amend Parenting Plan and Response to Motion for *In Camera* Interview on November 26, 2012. Without a hearing or an explanation,

the trial court issued an order on December 24, 2012 denying Appellant's Motion to Amend the Parenting Plan.

Joe appeals. Joe states that the issue on appeal is whether he failed to show changed circumstances sufficient to warrant consideration of his request to amend a parenting plan. We REVERSE and REMAND back to the lower court.

BACKGROUND

The trial court signed a Decree of Dissolution of Marriage on August 1, 2005. After seven (7) years, the Appellant filed a Motion to Amend Parenting Plan; Motion for *in Camera* Interview: and Brief in Support on October 16, 2012. Joe moved the Court for an Order to amend the Parenting Plan to provide for "the best interests of the children." In support of his motion to amend, Joe requested the children to be interviewed by the Court *in camera.*

Joe moved the lower court to rely on Montana law to amend their parenting plan based on M.C.A. 40-4-219 (Amendment of Parenting Plan) and -212 (Best Interest of Child). He used M.C.A. 40-4-214 (Interviews) as authorization for the trial court to interview the children *in camera* outside the parties' presence.

Joe attached an affidavit to his Motion to Amend in which he attests that Jody removed their 15 year old son (RJLV) from the Polson, Montana school district to the Ronan, Montana school district; that RJLV wishes to reside with the Joe in Arlee, Montana where his friends and cousins live and play sports; that Jody allowed RJLV to reside with a 22 year old college student next door; that all the children wish to reside with Joe; and that Jody had taken money due the children and spent it without an accounting.

Jody filed a Response with an affidavit on November 26, 2012. In her affidavit, Jody states that R JVL suffers from a slight learning disability, had a difficult time in school early in

2011 and that he dropped out of sports. RJLV's teachers developed an Individual Education Plan for him and that he was very upset over his grandma's death in December 2011. Jody allowed him to transfer to Ronan because the son thought he might do better in school there. She states that it would be detrimental to his siblings to remove them from their current schools, home environment, and extended family and friends.

Jody cites Joe's request to amend the parenting plan is based, in part, on Joe's motive to change his child support orders. She alleges that Joe is delinquent in paying his child support. Jody's position is that there is no basis to change the parenting plan and the children "are doing well in school and their attendance record is good. The children live a secure, safe, stable and happy life. It would be in their best interests to maintain that lifestyle."

Jody alleged that "Joe did not present sufficient facts to amend their existing parenting plan. She stated that there is "no material reason to alter or amend the parenting plan, nor would any amendment serve the best interests of the children."

Jody relied on M.C.A. 40-4-219 (best interest of child) as necessary to "complement tribal law." She states that since Joe relies on Montana statutes "Joe must show substantial and material changes in the parties or children's circumstances, which are having a negative impact upon the child's best interests" citing *In re the Marriage of Syverson,* 1997 281 Mont. 1, 931 P.2d 691; *R.L.S. v. Barkhoff,* 1983 207 Mont. 199, 674 P.2d 1082; and M.C.A. 40-4-219.

In regards to Joe's request for an *in camera* interview, Jody responds that "the guiding factor in the parties and the court's considerations should remain what is in RJLV's bests interests, and when his wishes are in conflict with what is his best interests, his best interests must control" citing the factors in *Schiele v. Sager*, (1977), 571 P.2d 1141, 1146, 174 Mont. 533, 539.

Both sides submitted briefs on these issues and painted very different pictures of what the best interest for the children should be.

Without a hearing, the trial court issued an order on December 24, 2012 summarily denying Appellant's Motion to Amend the Parenting Plan based solely on the Appellant and Appellee's affidavits. The trial court stated, "After examining the record and considering the Respondent's filing in this matter, the Court finds that it must deny the motion because the Respondent has failed to show changed circumstances sufficient to warrant consideration of a request to amend."

STANDARD OF REVIEW

Custody decisions will not be overturned absent a clear abuse of discretion. *In re Marriage of Pete*, AP 09-014, 4 (CSKT App., 2010).

DISCUSSION

Joe first argues that the lower court "violated fundamental statutory principles of family law, in not allowing a hearing on the issue of an amended parenting plan when the Trial Court summarily dismissed his Motion without findings of fact and conclusions of law to support its Order." He cites the "dichotomy" of Joe and Jody's conflicting affidavits, and his request to have his son testify *in camera* to allow the Court to hear their children's positions on custody.

This Court will not rely on Montana law for the issue at hand. In the lower court, Joe relied on Montana law to move for an amended parenting plan based on M.C.A. 40-4-219 (Amendment of Parenting Plan) and -212 (Best Interest of Child). He used M.C.A. 40-4-214 (Interviews) as authorization for the trial court to interview the children *in camera* outside the parties' presence. However, this Court agrees that, at a minimum, the lower should have allowed

the parties the opportunity to cross exam the other party's factual basis of their affidavits at a hearing.

Because the lower court made a summary judgment on the affidavits, the parties did not have an opportunity to present witnesses, exhibits, or other evidence in support of their positions and cross-exam same at a hearing. Fundamental due process rights encourage holding a hearing so long as there is a factual basis provided in the affidavit accompanying the motion which could support a court finding there is a substantial change in circumstances justifying modification of a previous court order. CS&K Tribal Code §3-1-315(1)(b)(iv). Given the absence of specific "modification of parenting plan" statute in the Code, it appears, at a minimum, that there must be some finding there has been or has not been "changed circumstances" (language used by trial court) in regard to the provisions of the Code annunciated with this opinion.

This Court is persuaded by tribal court decisions for modification of custody or parenting plans. The Navajo Supreme Court addressed a similar issue when it ruled that "the (lower) court is obligated to review circumstances since the last order. Selective testimonial facts to justify findings of a substantial change in circumstances is not in accordance with the requirement that the court consider "a complete review of the circumstances surrounding the child." *Lente* v. *Notah,* 3 Nav. R. 72, 79 (Nav. Ct. App. 1982). That Court, in *Grass v. Yazzie*, SC-CV-52-09 (Nav. Sup Ct. May 12, 2010), relied on *Lente* in its order that, for a modification of a prior child custody order, that there must be a "showing of a substantial change of circumstances." Id. In that case, the lower held two hearings which did not find substantial change of circumstances to warrant a change of child custody; however, it noted that, at a minimum, a parent "has a due process right to respond...a parent should be extended a basic procedural due process because of

a parent's fundamental interest and responsibility for the welfare of his or her child." The Court, in *Lente*, placed emphasis on "facts to justify findings..." Id.

This Court agrees with *Lente* and *Grass* that there must be findings of facts to determine whether there are changes in circumstances to warrant a change in the parties' parenting plan. This Court is persuaded by the Navajo Nation Supreme Court who ruled that "written factual findings supporting legal conclusions are required in an order." *Charlie v. Benallie*, No. SC-CV-19-07 (Nav. Sup. Ct. December 10, 2008); *Navajo Transport Services v. Schroeder*, No. SC-CV-44-06 (Nav. Sup. Ct. April 30, 2007). Moreover, that appeals court was adamant that a trial court has to state its reasons for a decision. It ruled that it should be clear that the parties are aware of the trial court's findings. *Smith v. Kasper*, SC-CV-30-07 (Nav. Sup. Ct. December 2, 2009).

Secondly, Joe asserts that the lower court abused its discretion by ignoring its duty to "make inquiry as to the facts at issue that are contradicted by Joe and Jody's affidavits..." He cites, that as a minimum, the lower court could have articulated findings of fact and conclusions of law after a hearing on the merits of his motion to amend their parenting plan.

The Code's only reference to findings of fact and conclusions of law is found at Rule 19, Findings of Fact and Conclusions of Law which states:

> In civil cases where the Court is the trier of fact, counsel for the parties and any unrepresented party shall submit proposed findings of fact and conclusions of law no later than 5 days prior to trial and shall serve a copy of the same upon all counsel of record and any unrepresented party. *(Rev. 4-15-03)*

Regardless of the timing (five days prior to trial), it appears the Tribes anticipated that, for civil cases, there be findings of fact and conclusions of law in adjudicating its civil cases.

This Court agrees with Joe that the lower court abused its discretion by ignoring its duty to "make inquiry" (at a hearing) to contradictory facts presented by his and Jody's affidavits.

Although not dispositive of this issue, Rule 19, at a minimum, anticipates that parties are to give notice of their anticipated facts and proposed conclusions of law.

The Code does not have sections on parenting plans, however, the Code references "parenting plans" in its Child Support Section. 3-1-(2)(h). Other Code sections, involving tribal children, are in the Codes' Child Abuse and Neglect statute wherein the Tribes adopted the "Best Interests of Child" standard.

This Court does not adopt the "best interests of the child" standard for this case because this is not a child abuse or neglect matter nor is it a child support modification matter. The Court finds that the Tribes overall policy with respect to their children, in part, is embodied in various statutes and policies. These Code provisions speak clearly to recognize that Indian children are the Tribes' most important resource. The Tribes declared it to be the policy to "treat Indian children in accordance with their paramount importance." The Tribes used mandatory language when it established that "Indian children shall be entitled to a permanent, physical and emotional environment necessary to promote their successful development into productive, responsible adults."

At the Dissolution of Marriage hearing on February 9, 2005, it is assumed (no transcripts available) the trial court observed Joe and Jody's demeanor, attitude, credibility, and weighed the evidence before it to make findings of fact and based on those, conclusions of law. Contrary to those proceedings, the trial court here never held a hearing to weigh Joe, Jody, or witnesses' testimony or to evaluate evidence on Joe's motion to amend, especially when affidavits showed conflicting facts. Neither substantial change nor "changed circumstances sufficient to warrant consideration of a request to amend" are defined by the code. The order issued by the lower court

does not define those legal ideals, either. The parties and this Court have no idea what criteria was used to make a determination and that specifically, is what this Court sees as the issue.

Based on the Tribes' purpose, policy, and declaration that tribal children are the Tribes' most important resource, and are of paramount importance, and that tribal children are entitled to permanent, physical and emotional environments necessary to promote their successful development into productive, responsible adults. The trial court, at a minimum, must consider "the physical, mental, and psychological conditions and needs of the child and any other factor considered by the court to be relevant to the child."

With highly conflicting versions of their children's present state, it is the best practice of the court to, at the very least, hold a hearing to determine the current state and best placement for each child. This court is not defining substantial change. It is for the lower court, as a trier of fact to determine. However, it is suggested that one notion of substantial change is a child's age. It has been over seven years since the divorce decree was issued. The parties' children were very young. It is assumed that the lower court made its determination, in part, by considering the children's age then. Age of the children can be construed as a substantial change. A child's needs, adjustment and welfare can change significantly as he/she matures. But it is not the only criteria and must be taken in the totality of the circumstances which is best determined by the lower court.

CONCLUSION

The trial court abused its discretion when it found there was no substantial change without holding a hearing, especially when both parties presented facts that would suggest substantial changes since the divorce decree was issued seven years prior. The lower courts are given great deference. However, if a lower court does not provide legal rationale for its decision,

this reviewing court, and the parties, cannot determine the factual and legal basis for the lower court judgment. This process is accomplished by a lower court holding a hearing and providing Findings of Fact and Conclusions of Law. Based on this, we REVERSE the lower court order and REMAND this case back to the lower court for further proceedings consistent with this opinion.

SO ORDERED this 26th day of August, 2014.

Eldena N. Bear Don't Walk
Chief Justice

Joey Jayne
Associate Justice

Greg Dupuis
Associate Justice

cc: David C. Humphrey, Attorney for the Appellant.
Kathleen O'Rourke-Mullins, Attorney for the Appellee.

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, or hand-delivered this 27th day of August, 2014.

Kathleen O'Rourke Mullins
O'ROURKE MULLINS LAW OFFICE
US Hwy 93, Suite 803
Ronan, Montana 59864

David C. Humphrey
HUMPHREY LAW OFFICE
P.O. Box 1708
Polson, Montana 59860

Cara Croft
Clerk of the Tribal Court
P.O. Box 278
Pablo, Montana 59855

Abigail Dupuis
Appellate Court Administrator