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FORT PECK
TRIBAL COURT OF APPEALS

**FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA**

In the Matter of: K. F. & J. F. Minor Indian Children. And Concerning: Kristopher FourStar, Appellant v. Jewel Payne, Appellee	CAUSE NO. AP # 2021-806 OPINION
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Appeal from the Fort Peck Tribal Court, John J. Robinson Presiding Special Judge.

Appellant Kristopher FourStar, representing himself.

Appellee Jewel Payne, represented on brief by Terrance L. Toavs (subsequently withdrawn).

Before B.J. Jones, and B. Desmond, Associate Justices, and G. Christensen, Alternate Associate Justice. Chief Justice E. Shanley recused.

BACKGROUND

¶ 1 This matter comes before this Court on Appellant Kristopher FourStar's Notice of Appeal, filed on January 28, 2021, contesting the Trial Court's January 22, 2021 Order adopting a new proposed parenting plan that changed primary custody

of the minor children from the Father to the Mother. The Appellant also requested a stay of the Trial Court's Order pending appeal.

¶ 2 On February 1, 2021, the Fort Peck Court of Appeals (FPCOA) accepted review of the matter, ordered a stay of the Trial Court's Order, and set a briefing schedule. Chief Justice Erin Shanley recused herself, and Alternate Associate Justice Grant Christensen was assigned in her place. The matter is now fully briefed. We reverse the Order adopting the new proposed parenting plan and remand to the Tribal Trial Court for further proceedings in accordance with the following.

STATEMENT OF JURISDICTION

¶ 3 According to CCOJ Title II, Chapter 2, §202,

The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court, appeals of administrative decision where a provision of this Code expressly vests such jurisdiction in the Court of Appeals

STANDARD OF REVIEW

¶ 4 This Court reviews de novo all determinations of the lower court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence. 2 CCOJ §202.

ISSUE

- **Did the Tribal Court properly apply 10 CCOJ §304-C when it replaced the existing parenting plan governing custody of the minor children with the proposed amended parenting plan?**

DISCUSSION

¶ 5 When reviewing a child custody action outside legal separation, divorce, or annulment proceedings the Tribal Code directs the Court to “employ the standards set forth in Section 304 of this Title.” 10 CCOJ §304-A.

¶ 6 CCOJ Title X, Chapter 3, §304-C directs that the “best interests and welfare of the child is determined by the Court’s consideration and evaluation of all factors affecting the best interests and welfare of the child.” The statutory provision goes on to explicitly recognize that “[t]hese factors include all of the following when applicable:

(1) The love, affection, and other emotional ties existing between the parents and child and the ability of each parent to provide the child with nurture, love, affection and guidance.

(2) The ability of each parent to assure that the child receives adequate food, clothing, shelter, medical care, and a safe environment.

(3) The child's developmental needs and the ability of each parent to meet those needs, both in the present and in the future.

(4) The sufficiency and stability of each parent's home environment, the impact of extended family, the length of time the child has lived in each parent's home, and the desirability of maintaining continuity in the child's home and community.

(5) The willingness and ability of each parent to facilitate and encourage learning and participating in the culture and traditions of the Fort Peck Tribes.

(6) The willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.

(7) The moral fitness of the parents, as that fitness impacts the child.

(8) The mental and physical health of the parents, as that health impacts the child.

(9) The home, school, and community records of the child and the potential effect of any change.

(10) If the Court finds by clear and convincing evidence that a child is of sufficient maturity to make a sound judgment, the Court may give substantial weight to the preference of the mature child. The Court shall also give due consideration to other factors that may have affected the child's preference, including whether the child's preference was based on undesirable or improper influences.

(11) Evidence of domestic violence. [Further text omitted because there are no allegations of domestic violence in this proceeding]

(12) The interaction and interrelationship, or the potential for interaction and interrelationship, of the child with any person who resides in, is present, or frequents the household of a parent and who may significantly affect the child's best interests. The Court shall consider that person's history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.

(13) The making of false allegations not made in good faith, by one parent against the other.

(14) Any other factors considered by the Court to be relevant to a particular parental rights and responsibilities dispute.”

¶ 7 As demonstrated by the comprehensive, but not exhaustive, list of factors the Tribal Code directs the Court to consider before determining the best interests of the child, any determination by the Tribal Court affecting a change in custodial arrangements must be undertaken only after grave deliberation. It is precisely because the custody of children is so important that the Tribal Code mandates such a thorough review to determine the best interests of the child. In this case the Trial Court may have considered all of the relevant factors required by 10 CCOJ §304-A, but the Court’s written Order fails to document that consideration.

¶ 8 The Trial Court’s Order duly recognized that both parents are “competent and responsible adults of good character, and are capable of providing for and in the best interests of the children.”

¶ 9 The Trial Court's Order then made only three other clear findings of fact in order to support its decision to adopt the new proposed parenting plan: 1) that the children, ages 17 and 15, have expressed a desire for their primary residence to be with their Mother while summer visitation be with their Father, 2) that Father has twice changed his residence, resulting in the children changing schools and impacting the ability of Mother to visit the children, and 3) that Father "now resides in a more remote area of Montana resulting in greater hinderance to [Mother] being able to hold visitation with the children."

¶ 10 While we recognize that the Tribal Code does allow the Court to give some weight to the preferences of a mature child after being satisfied by clear and convincing evidence that the child is sufficiently mature to make a sound judgment, we hold that the Court cannot ignore the other factors identified by Tribal Code. It may be that the Trial Court fully considered all of the factors mandated by 10 CCOJ §304-C, and came to the conclusion that the adoption of the revised parenting plan was in the best interests of the children, but the Order issued by the Trial Court has failed to document that consideration.

¶ 11 The failure of the Tribal Court to explicitly consider the factors required by 10 CCOJ §304-C is suggested by the Order itself. The Code requires the Court to consider "the willingness and ability of each parent to facilitate and encourage learning and participating in the culture and traditions of the Fort Peck Tribes." 10 CCOJ §304-C(5). The Tribal Court Order explicitly relied upon the fact that Father "now resides in a more remote area of Montana resulting in greater hinderance to [Mother] being able to hold visitation with the children" as a reason to grant the amended parenting plan. However, the "more remote area of Montana" is the Fort

Peck Indian Reservation and, as Appellant's brief points out, the Appellant now lives next door to Mother's family. These facts alone do not mandate that the original parenting arrangement cannot be changed, but it was error for the Trial Court to consider that moving to the Fort Peck Indian Reservation is a factor that supports amending the parenting plan. Relocating to the Reservation certainly facilitates and encourages "the participation in the culture and traditions of the Fort Peck Tribes" and that important benefit must be weighed by the Trial Court when it determines the best interest of the children. Additionally, there is nothing in the findings of the Court to conclude that the father's move was out of a desire to interfere with the mother's visitation.

CONCLUSION

¶ 12 For the reasons stated above, the Trial Court's Order adopting the amended parenting plan is reversed because it is not clear from the face of the Order that the Trial Court considered all of the factors required by 10 CCOJ §304-C before changing the custodial arrangements. This matter is hereby remanded to the Tribal Court with instructions to fully consider all of the factors required by the Trial Code when making a determination of whether the best interests of the children is to modify the existing custodial agreement.

SO ORDERED this 3rd day of May 2021.

FORT PECK COURT OF APPEALS

B.J. Jones

B.J. Jones, Associate Justice

Brenda C Desmond

Brenda C Desmond, Associate Justice

Grant Christensen

Grant Christensen, Alternate Associate Justice

**Chief Justice Erin Shanley is Recused