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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

<p>IN THE MATTER OF:</p> <p>H.J.M. (DOB 4/18/20),</p> <p>Minor Indian Child.</p> <p>And Concerning:</p> <p>Ryan Michaelson, Appellant,</p> <p>v.</p> <p>Fort Peck Tribes, Appellee.</p>	<p>CAUSE NO. AP # 841</p> <p>ORDER AFFIRMING TRIBAL COURT</p>
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Appeal from the Fort Peck Tribal Court, Imogene Lilley, Presiding Judge.
Appellant Ryan Michaelson, appearing through Counsel Terry Boyd.
Appellee Casee Lepper, appearing through Kristofer FourStar.
Before Justices E. Shanley and B.J. Jones

BACKGROUND AND PROCEDURAL HISTORY

¶ 1 This matter comes before this Court on a Notice of Appeal filed by Appellant on September 19, 2022 from an Order issued September 12, 2022 vacating care and supervision of a minor child, H.J.M. and awarding legal custody to Casee Lepper. The Appellant argues that the Court erred in awarding custody solely to the mother of the child

contrary to a negotiated parenting plan and the recommendation from the Montana Department of Health and Human Services.

¶ 2 The Minor Child, H.J.M., was born on April 18, 2020 in Billings, Montana. Child Protection Services removed H.J.M. from her Casee Lepper's custody on April 20, 2020 and filed an emergency petition for custody in the Fort Peck Tribal Court. Neither parent contested the allegations contained in the Petition and the Tribal Court declared the child a ward of the Court and granted care and supervision to Montana Child Protection Services.

¶ 3 In July 2021, Appellant, the father of the minor child, entered inpatient substance abuse treatment at the Veterans Affairs residential treatment program in Sheridan, Wyoming. Subsequently, he moved from Wolf Point, Montana to Miles City, Montana to continue outpatient services and employment assistance with the Veteran Affairs program.

¶ 4 On May 15, 2021, Casee Lepper was arrested and charged in Montana District Court with Criminal Distribution of Dangerous Drugs. After receiving a deferred sentence, Casee successfully completed inpatient treatment at Rimrock Treatment Center in Billings, Montana, which provided a sober living program and parenting classes.

¶ 5 On March 21, 2022, CPS placed H.M. in the physical custody of Appellant in Miles City, where the minor child remained until the review hearing, which is the subject of this appeal. Between March and September 2022, CPS facilitated joint custody between the parents of the minor child. At the September 12, 2022 Review Hearing in this matter, CPS facilitated the development of a joint parenting plan between the parents

to share custody of the minor child, which was presented to the Court. Appellant Exhibit B (Proposed Parenting Plan).

¶ 6 At the review hearing held on September 12, 2022, the Tribal Court Judge ordered both of the parents to submit to a urinalysis drug test. Casee Lepper tested negative for all substances. Appellant tested positive for marijuana. However, Appellant also submitted to a hair follicle drug test on September 12, 2022. The results of that test came back negative for all substances, including marijuana. Appellant's Exhibit D (Hair Drug Panel). Appellant submits that he used marijuana legally in the State of Montana as an alternative to other medication to mitigate Post-Traumatic Stress Disorder (PTSD) which was a result of his military service and deployment in Afghanistan and his subsequent honorable discharge from the military. This assertion was not disputed below.

¶ 7 Despite the results of the drug tests, neither Casee Lepper nor CPS objected to vacating care and supervision pursuant to the stipulated parenting plan submitted to the Tribal Court. The Fort Peck Tribes did not object to the proposed disposition either, but deferred to the Tribal Court Judge's determination.

¶ 8 This Court granted review to effectively evaluate the issue raised in the Appellant's petition for review. Appellant submitted a brief in support of her Petition on January 24, 2023. Casee Lepper submitted a brief on February 7, 2023 and the Fort Peck Tribes, through Prosecutor David Mrgudich, submitted an Answer Brief on February 14, 2023.

STATEMENT OF JURISDICTION

¶ 9 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. The Tribal Court's Custody Order is a final order subject to appellate review.

STANDARD OF REVIEW

¶ 10 This Court reviews de novo all determinations of the Tribal 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 PRESENTED

Whether Appellant's right to due process, as guaranteed by the Indian Civil Rights Act, 25 U.S.C. 1302(a)(8) was violated due to the Court failing to apply the Best Interests of the Child Standard required in 10 CCOJ 304-C.

DISCUSSION

I. APPELLANT'S RIGHT TO DUE PROCESS, AS GUARANTEED BY THE INDIAN CIVIL RIGHTS ACT, 25 U.S.C. 1302(A)(8) WAS NOT VIOLATED BY THE TRIBAL COURT'S APPLICATION OF THE BEST INTERESTS OF THE CHILD STANDARD REQUIRED BY 9 CCOJ 506 AND 10 CCOJ 304-C.

¶ 11 Appellant cites 10 CCOJ 304-C(c)(1), which requires the Tribal Court to consider the parent's fundamental right to parent their child while weighing the factors listed in 10 CCOJ 304-C(a)(1-14), in support of his claim that the Tribal Court's application of the Best Interests of the Child factors violated his fundamental right to parent H.J.M.

¶ 12 The Tribal Court's Order indicates it issued its decision pursuant to 9 CCOJ 506, which requires the Court to make such disposition as is in the best interest of the child. Although the Court does not specifically address the Best Interest of the Child factors, as outlined in 10 CCOJ 304-C, a detailed discussion of each individual factor is not an abuse of discretion. *In the Matter of G.W.*, APP 833 (Apr. 17 2023). The Tribal Court did make factual findings in its Permanency Hearing Order that reflect both parents

have been compliant with their case plans and are suitable to care for the child. However, the Court indicates that:

Although the State of Montana has legalized use of marijuana, the Fort Peck Tribes has not. Furthermore, the parties have been court ordered from the onset of this case to have no use of alcohol and/or drugs. Both parties have been under the jurisdiction of this Court from the onset of this matter. This Court cannot return a child to a parent who is still actively using illegal drugs as outlined in the CCOJ, including marijuana.

Permanency Order, F20-04-072, Conclusions of Law, ¶ 7, p. 4.

¶ 13 It is concerning to this Court that the results of Appellant's urinalysis were not confirmed by the subsequent hair follicle test; however, Appellant, by his own admission, used marijuana which was prohibited by his case plan for reunification. While this use did not violate any laws in Montana outside of the Fort Peck Reservation where he resides, it is still considered illegal on the Fort Peck Reservation and was prohibited by prior Court Order in this matter. The Court is cognizant of the fact that there are other controlled substances that, without a prescription, the possession of which is illegal (fentanyl, opioids etc), but with a prescription are not illegal on the Fort Peck reservation. Marijuana, for some reason, is still treated as an illegal drug despite a person having a medical prescription. Were this case one regarding criminal liability for medical use of marijuana, the Court may be inclined to believe that the Tribes' treatment of medical marijuana use, as compared to the medical use of other illicit substances, is violative of the equal protection rights of those persons prescribed medical marijuana. However, this case arises in the context of child protection proceedings where a Court has the authority to control the use of even legal substances (alcohol for example) if shown to have contributed to the neglect or abuse of a child. That issue is thus not before the Court.

¶ 14 Given Appellant's prior maintenance of sobriety, completion of other tasks in his case plan, and successful trial-home visit with the minor child, it appears that this is a minor setback in his demonstrated abilities to care for his child. However, the Tribal Court maintains discretion to make and weigh relevant findings based on the presentation of evidence at the hearing. This Court grants the Tribal Court considerable deference not only as the finder of fact but also in weighing the evidence submitted. *In the Matter of B.K.H.*, APP 780 (Mar. 18, 2019). The Tribal Court adequately articulated the basis for its decision and this Court finds no legal justification for setting aside the Order based on the law.

¶ 15 However, the Permanency Order indicates that Appellant shall have supervised visitation *until* he is able to show this Court at least six months of documented sobriety. Given the length of time this case has been pending on appeal, Appellant may now seek a modification of the Court's Order in the event he is able to document his sobriety and demonstrate that a modification is in the best interests of the child.

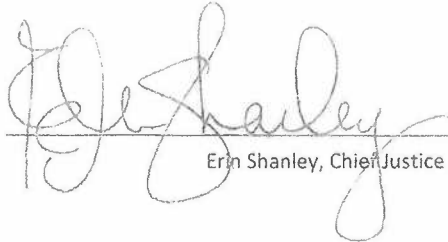
¶ 16 This Court will not disturb factual findings of the Tribal Court if such findings are supported by substantial evidence. 2 CCOJ 202. This Court grants the Tribal Court considerable deference as the finder of fact. *In the Matter of G.T.A.*, APP 765 (Oct. 22 2018); *In the Matter of B.T.*, APP 773 (Nov. 26 2018); *In the Matter of J.M.*, APP 775 (Oct 23, 2018); *In the Matter of G.W.*, APP 833 (Apr. 17 2023). Therefore, the Court does not find an abuse of discretion or reversible error based on the Court's findings.

CONCLUSION

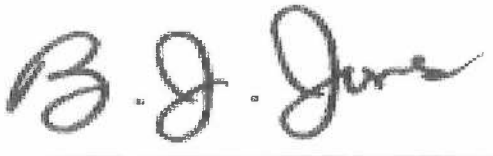
For the reasons stated above, the Tribal Court's Permanency Order is AFFIRMED.

SO ORDERED this 17th day of August 2023.

FORT PECK COURT OF APPEALS



Erin Shanley, Chief Justice



B.J. Jones, Associate Justice