

IN THE COURT OF APPEALS  
FOR THE  
ROSEBUD SIOUX TRIBE

JESSE BARRERA,

v.

GERTRUDE POORMAN

CA87-02  
Petitioner and Appellee,

Respondent and Appellant.

NOTICE OF ENTRY OF ORDER

TO: Mick Grossenburg

PLEASE TAKE NOTICE that an Order and Opinion was duly entered by the Court of Appeals for the Rosebud Sioux Tribe, Todd County, South Dakota, in the above-entitled action on the 14th day of September, 1987.

*Carmen Hicks*  
Appellate Clerk

CERTIFICATE OF MAILING

I, Carmen Hicks, Clerk of the court of Appeals for the Rosebud Sioux tribe, hereby certify that I mailed a certified copy of the Order and Opinion entered in the above-entitled action to:  
Mick Grossenburg, Day & Grossenburg, Attorneys at Law, P.O. Box  
271, Winner, SD 57580  
by first-class certified mail, postage prepaid on this 22nd day of September, 1987.

*Carmen Hicks*  
Appellate Clerk

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O R D E R

This case having received complete appellate review, including oral argument, and the Court having issued opinion and being fully advised in the premises, it is hereby


ORDERED AND ADJUDGED, that the judgment of the Tribal Court be, and the same is hereby, affirmed.

Dated this 14 day of September, 1987.

BY THE COURT:

  
ACTING CHIEF JUDGE

ATTEST:

  
(SEAL) \_\_\_\_\_ CLERK

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APPEAL FROM THE ROSEBUD  
SIOUX TRIBAL COURT OF THE  
ROSEBUD SIOUX TRIBE

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HONORABLE SHERMAN MARSHALL  
Presiding Judge

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Opinion filed 9-14-87

Case # \_\_\_\_\_

FAST HORSE, Justice

Appellant, Gertrude Poorman appeals from a May 22, 1987 order of the Rosebud Sioux Tribal Court, the Honorable Sherman Marshall presiding. Said Court awarded custody of Nicholas Cole Barrera to the Appellee Jesse Barrera. Appellee Jesse Barrera is the natural father of Nicholas Cole Barrera. The child's natural mother is Carol Chasing Horse. The child's date of birth is June 22, 1985. According to the record the natural mother Carol Chasing Horse and Gertrude Poorman are cousins in the first degree and according to Lakota custom and belief members of the same extended family. Soon after the child was born Carol Chasing Horse placed physical custody and later on October 2, 1985 executed a guardianship appointment to Gertrude Poorman of said child.

A hearing was held on March 27, 1986 on the petitioner and natural father Jesse Barrera's request for permanent custody entitled Jesse Barrera v. Gertrude Poorman and Carol Chasing Horse. Jesse Barrera and Gertrude Poorman both appeared. Carol Chasing Horse failed to appear. The March 27, 1986 hearing on permanent custody was granted to Gertrude Poorman on an order dated July 17, 1986. No appeal was filed by Jesse Barrera.

During such proceedings the appeals court noted Jesse Barrera had signed paternity acknowledging himself to be Nicholas Cole Barrera's natural father, and on September 3, 1985 filed a name change on behalf of said child to bear his surname of Barrera on August 30, 1985 shortly after the child was born. Subsequent to this

2, 1985 Carol Chasing Horse signed a sworn affidavit giving custody to Gertrude Poorman.

The Appellee did not appeal the March 27, 1986 hearing or 1986 instead filed a "Petition for Change of Custody" on 1987 alleging unfitness on the part of Gertrude Poorman. The hearing was held and said allegation was withdrawn and therefore

The hearing was held on April 30, 1987 in which custody was awarded to the appellee and natural father Jesse Barrera the Sherman Marshall presiding. It is on this order Gertrude appeals.

The legal issues before the Court of Appeals for the Rosebud are then to-wit:

. Whether the tribal court erred in modifying its previous child custody order without finding a material change in circumstances and without finding that the modification would be in the best interests of the child?

. Whether the tribal court erred in relying upon the common-law parental-preference rule in a case involving a Lakota child who was raised by a non-parent relative from birth and whose natural mother placed the child with the non-parent?

. Whether the trial court erred in awarding custody to natural father after court previously awarded custody to child's cousin, without inquiring into the best interests of the child?

. Whether the trial court should have permitted appellee to proceed after he admitted that allegations contained in petition was without merit; and

Is a natural parent, whether father or mother, who is of good character and is a proper person to have custody, and who is a reasonably able to provide for the child, entitled to custody against all other persons?

The Court of Appeals for the Rosebud Sioux Tribe upon due and proper review of the attendant Appellant's and Appellee's

briefs, and oral arguments on appeal hold that the series of issues presented on appeal are all similarly characterized on whether or not the second or subsequent hearing awarding Appellee custody of his son was proper. We answer in the affirmative. The second hearing was conducted on a "petition to change custody order" and governed by the "Rosebud Sioux Tribe Law and Order Code, Title 3, Chapter 3, Section 20(m), Rules of Procedure, Grounds for Re-hearing." Once the petition for re-hearing is submitted and an action is commenced it is then the Respondent's responsibility in pleading to a preceding pleading to set forth affirmatively accord and satisfaction---and res judicata defenses. We found no affirmative defense but only language alluding to the Appellee's responsibility to meet his burden of proof. The first mention of res judicata as a matter of legal argument was when the trial court requested proposed Findings of Facts, Conclusions of Law, and Orders. Further the Respondent in the trial court proceedings offered no motion to dismiss once the Petitioner in said same proceeding admitted his allegation was unfounded. Hindsight analysis is usually most advantageous however current analysis and advocacy during the hearing on trial process should govern the outcome of the case. A trial judge has his or her limitations and must ordinarily rely on the litigants to offer objections, evidence, motions and pleadings this is true absent extenuating circumstances. A trial judge should remain neutral and unbiased and not offer objections or motions on behalf of litigants. In the case at bar the Respondent-Appellant made no specific objections, defenses or motions regarding res judicata or grounds for re-hearings. Therefore the trial judge made no error in allowing the proceedings to continue and

to then award custody to the Petitioner Appellee, Jesse Barrera.

We find the trial court judges ruling correct respective of the universal right of a natural parents' right to have custody of their own children absent any clear showing of gross misconduct or unfitness or some sound and compelling reason for denying it and that right is superior we find even in Lakota custom and belief. There do exist certain customs and beliefs that children are raised in the context of extended family relationship and to this we find of no issue here in the case at bar. Rather we find the trial judge applied Langerman v. Langerman, 321 N.W2d 532 SD. 1982 SDCL 30-27-23 in the correct manner "The rights of Jesse Barrera relative to the care, custody and control of the minor child, Nicholas Cole Barrera, are superior to any rights Gertrude Poorman might have, since Jesse Barrera is the natural father of Nicholas Cole Barrera and Gertrude Poorman is the natural mother's cousin." This principle reinforced with his finding, "There has been no clear showing against Jesse Barrera of gross misconduct or unfitness or of other extraordinary circumstances affecting the welfare of Nicholas Cole Barrera." The Court of Appeals for the Rosebud Sioux Tribe agree and affirm this reasoning not only for its correctness but to aid in future cases. To rule otherwise would subject children to revolving door patterns in that one member of the child's extended Lakota family would be permitted to have custody of children without findings of unfitness or sound reasons simply on the basis they feel better qualified to care for said children. We do not feel that to be a proper interpretation of Lakota custom and belief. Rather we feel Lakota custom and belief is centered around natural law which ascribes to the belief, absent severe reasons, a natural parent has superior right to their natural

children. We therefore affirm the trial judge's ruling that Jesse Barrera as a natural father of Nicholas Cole Barrera is entitled his custody.

We unanimously agree and concur.

Roubideaux, Chief Justice, Amiotte, concur.