

SUPREME COURT
FOR THE
ROSEBUD SIOUX TRIBE

CHAD HEIN,

DEFENDANT/APPELLANT,

VS.

CINDY DUBRAY,

PLAINTIFF/APPELLEE.

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CA 2009-04

OPINION AND ORDER

Before Associate Justice Cheryl Three Stars Valandra, Associate Justice Charles Abourezk and Chief Justice Frank Pommersheim.

Chad Hein, Defendant/Appellant appeals the Order from Honorable Steve Emery of the Rosebud Sioux Tribal Court denying his Motion for Modification of Child Support. The Defendant/Appellant also appeals the Court's Judgment and Decree of Divorce issued on August 13, 2008.

I. BACKGROUND

Cindy Dubray, Plaintiff/Appellee, initiated a divorce action in the Rosebud Sioux Tribal Court, and a hearing was held on the divorce Complaint and Appellant's Answer and Counterclaim on August 13, 2008. The Appellant did not appear at the hearing. The Court issued Findings of Fact, Conclusions of Law and a Judgment and Divorce Decree. The Plaintiff/Appellee was awarded child support for the parties' minor child in the amount of \$350.00 per month.

On February 19, 2009, the Appellant filed a Motion to Modify the child support and to allow him visitation with the parties' minor child. A hearing on the motion was held on March 17, 2009. The Appellee objected to reduction of the child support as well visitation with the Appellant in a jailhouse environment. Appellant had been incarcerated during the divorce hearing held on August 13, 2008 and during the March 17, 2009 hearing.

On March 27, 2009, the tribal Judge issued an Order denying Appellant's motion to reduce child support and to allow visitation with his child at a correctional facility. The Court did allow contact between Appellant and the child through telephonic and written communication. Appellant filed a timely appeal and oral argument was heard by this Court on September 4, 2009.

II. ISSUES

The issues raised on appeal include whether the trial Court erred when it failed to give Appellant adequate notice of the August 13, 2008 divorce hearing and whether the Court erred by denying Appellant's Motion to Modify Child Support. Appellant did not appeal the Court's decision regarding visitation.

III. DISCUSSION

A. WHETHER THE TRIAL COURT FAILED TO PROVIDE APPELLANT WITH ADEQUATE NOTICE OF THE AUGUST 13, 2008 DIVORCE HEARING.

The Appellant did not appeal the Judgment and Decree of Divorce entered by the Tribal Court on August 13, 2008 in a timely manner. Rule 2 of the Supreme Court Rules of Appellate Procedure provides that a Notice of Appeal must be filed with the Clerk of the Tribal Court within thirty (30) days of the Notice of Entry of Judgment in all civil matters. A Certificate of Service from the Rosebud Sioux Tribal Civil Clerk dated August 19, 2008 indicates that the Clerk provided Appellant with a copy of the August 13, 2008 Judgment and Decree of Divorce. The Appellant was required to file an Appeal within thirty (30) days from the date of the certificate of service (which should have been a Notice of Entry of Judgment). Appellant failed to do so and cannot now raise this issue.

B. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO MODIFY CHILD SUPPORT.

The Appellant argues that the trial Court failed to utilize a standard formula in which to base the amount of child support a non-custodial parent should pay. He further argues that the Court did not consider the testimony that Appellant suffered from severe depression and pancreatitis in making its decision to deny Appellant's motion. Appellant does not offer a formula to be utilized by the Court but rather states that there is no tribal law to guide the Rosebud Tribal Judges in determining child support. Counsel for Appellant suggests that the standard in modifying or setting child support amounts should be whether the parent has the ability to pay child support.

Appellee agrees that there are no specific guidelines or laws adopted by the

Section 4-2-8 provides that:

The Tribal Court shall apply the applicable laws of the Rosebud Sioux Tribe and the United States in actions before it. Any matter not covered By the applicable tribal or federal laws shall be decided according to the customs and usages of the Tribe. Where doubt arises as to the customs and usages of the Tribe, the Court may request the advice of persons generally recognized in the community as being familiar with such customs and usages. In any matter in which the rule of law is not supplied by any of the above, the Tribal Court may look to the law of any tribe or state which is consistent with the policies underlying tribal law, custom and usage.

Appellee, therefore, urges this Court to decide that the child support laws of the state of South Dakota be adopted as consistent with the policies underlying tribal law, custom and usage.

The Trial Court did not utilize a particular formula or look to the law of any other tribe for child support laws that would be consistent with the policies of the Rosebud tribal law, custom and usage. If the Court did rely upon the South Dakota child support laws as guidance, under Section 4-2-9, the Court would have been required to find that the state's laws are consistent with the policies underlying Rosebud tribal law, custom and usage and therefore, should be applied in this case. The only finding by the Court was that Appellant's own actions in entering a guilty plea to distribution of methamphetamines prevented him from being gainfully employed.

While the Rosebud Sioux Tribal Code does allow for modification of child support, RSTLC 2-1-18, there are no laws or guidelines provided to the Court to determine the amount of child support that should be paid by non-custodial parents. This Court cannot adopt such laws. It is the responsibility of the legislative branch of the Rosebud Sioux Tribe to adopt the laws applicable to its members.

The narrow issue before this Court is whether the Appellant has the ability to pay child support based upon an adequate showing of a change of circumstances. *Schmidt v. Medearis*, CA87-08 (Rosebud Court of Appeals, 1989). In deciding child support, the trial Court Judge must weigh many social and cultural, as well as, economic and legal factors. *Schmidt v. Medearis*, p. 3.

In this case, the Appellant testified that he would be incarcerated in a federal correctional facility for a period of up to eight (8) years and therefore, would be unable to pay the amount of \$350.00 per month as ordered. He requested that his child support obligation be reduced to \$125.00 per month, an amount that he could reasonably pay.

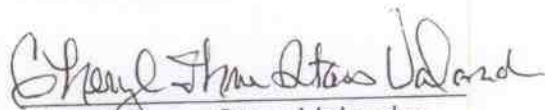
IV. CONCLUSION

Based upon the Appellant's inability to pay \$350.00 per month, the trial Court's decision to deny his motion to modify his child support is reversed and Appellant's motion to modify his child support obligation to \$125.00 per month is granted. The reduction of Appellant's child support obligation to the Appellee shall be effective from the date of the hearing on the Motion to Modify Child Support.

IT IS SO ORDERED.

Dated this 15th day of April, 2010.

FOR THE COURT:



Cheryl Three Stars Valandra
Associate Justice