

ROSEBUD SIOUX SUPREME COURT )  
ROSEBUD SIOUX RESERVATION ) SS APPEALS COURT  
ROSEBUD, SOUTH DAKOTA )  
\*\*\*\*\*

CA2009-07

HEATHER HAUKAAS,  
Plaintiff/Appellant

VS.

NOTICE OF ENTRY  
OF ORDER

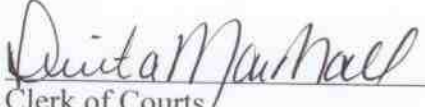
THOMAS GUNHAMMER,  
Defendant/Appellee

\*\*\*\*\*

TO: THE ABOVE-NAMED PARTIES

Please take notice that on the 5<sup>th</sup> day of November, 2010, the Honorable Associate Justice Charles Abourezk presiding, The Court entered an **MEMORANDUM OPINION AND ORDER**. A certified copy of said Judgment of **ORDER** is enclosed and by this reference is incorporated herein and is herewith served upon you.

Dated this 5th day of November, 2010.

  
Clerk of Courts

CERTIFICATE OF SERVICE

I, Denita Marshall, Chief Clerk of Courts of Rosebud Sioux Tribal Supreme Court, hereby certify that I served a true and correct copy of the Notice of Entry of Order and copy of said Order upon the Appellant(s) and Appellee(s) as follows by placing in the U.S. Mail, postage prepaid, addressed as follows:

Oliver J. Semans Sr., Attorney for Defendant, Po Box 194, Mission, SD 57555  
Al Arendt, Attorney for Plaintiff – PO Box 1077, Pierre, SD 57501

Dated this 5<sup>th</sup> day of November, 2010

  
Clerk of Courts

SUPREME COURT  
OF THE  
ROSEBUD SIOUX TRIBE

---

THOMAS GUNHAMMER,  
Defendant/Appellant,

CA 2009-07

vs.

HEATHER HAUKAAS,  
Plaintiff/Appellee.

MEMORANDUM OPINION  
AND ORDER

---

Per curiam.( Chief Justice Pommersheim and Associate Justices Cheryl Three Stars Valandra and Charles Abourezk)

This matter began with an order entered on or about July 17, 2006 by the trial court requiring Appellant Thomas Gunhammer to pay child support to Plaintiff/Appellee Heather Haukaas in the amount \$400.00 per month for his two minor children, E.H. and E.G.

On June 18, 2007, Gunhammer brought a *pro se* motion for modification of child support. A notice of hearing was issued and a hearing was calendared for July 19, 2007 and that hearing was continued by the trial court for reasons that are unclear in the scant record below. The *pro se* motion was never heard by the trial court, nor did the Court respond in any way to the motion and request and notice of hearing.

On December 11, 2008, Gunhammer, at this point represented by his tribal attorney Oliver J. Semans, brought a more complete motion for modification of the previous child support order, first indicating that Gunhammer had brought a complaint challenging paternity on the child E.H. In that same motion, he sought to lower the child support contained in the court's previous order. A hearing was held before the Honorable Sherman Marshall on June 18, 2009. According to the pleadings, finally on August 18, 2009, the order was modified and Gunhammer was ordered to pay \$339.00 per month, rather than the \$400.00 per month in the original order, to commence on July 1, 2009 until the children reached the age of 18 or graduated from high school, whichever came later.

There is one additional court order in the trial court's file from the following day, August 19, 2009, in which the same trial court judge issued an Order of contempt and Findings and Conclusions, saying Gunhammer was in contempt of the very first child support order from April 10, 2006, and that he was seriously in arrears on his child

support payments as previously ordered by the trial court. He was remanded to the custody of the Tribe for 30 days, ordered to pay \$1,000.00 against child support arrears to the Clerk of the Rosebud Tribal Court. Oddly, the order also suggests that the *pro se* hearing petitioned for by Gunhammer was actually held on June 18, 2007. This appears to be a factual or procedural mistake in the trial court's file, or at least in the record below, as there is no other evidence or orders in the thin record we do have showing that this hearing was ever held, nor was there any order that resulted from such hearing.

Gunhammer now suggests on appeal that the trial court was in error by not allowing the modification of child support, essentially *nunc pro tunc*, back to the date when the first scheduled hearing was supposed to occur on July 19, 2007.

Haukaas argues through her attorney Al Arendt that the trial court did not err in failing or refusing to make the modification of the order retroactive to July 19, 2007, saying that the effective date of the order of modification was within the broad discretion of the trial court in fashioning any remedy requested by a moving party.

I. The Rosebud Sioux Tribal Code, as amended, in § 4-2-8 allows the Court to look to the law of any tribe or state which is consistent with the policies underlying tribal law, customs, or usage. As much of the tribe's laws on this subject mirror the State of South Dakota's, we will look to that authority.

The South Dakota Supreme Court held in a 2006 case that:

even though the record revealed that the referee unintentionally used the wrong figure from the child support guidelines, we characterized the error as a substantive change that could not be corrected with a Rule 60(a) motion. *Id.* ¶¶ 11-12. Quoting the Supreme Court of Montana, we said: The authority of a court to amend its record by a *nunc pro tunc* order is to make it speak the truth, but not to make it speak what it did not speak but ought to have spoken. *Id.* ¶ 13 (quoting *Thomas v. Thomas*, 189 Mont. 547, 551, 617 P.2d 133, 135 (1980)); see also *Reaser*, 2004 SD 116, ¶ 29, 688 N.W.2d at 438 (detailing the nature of clerical errors).

*Nist v. Nist*, 2006 SD 67, 720 N.W.2d 87, 91. See, also, *Wolff v. Weber*, 1997 SD 52, 563 N.W.2d 136, 139.

The South Dakota Supreme Court held in the *Wolff* case, that “[i]t was error,

however, for the trial court to correct the original obligation assigned to [petitioner] in 1990. The court's judgment reflected its intent to set support at \$394 as indicated by the court's findings." Id.

SDCL 15-6-60(a) does not authorize a correction of a mistake of judicial function. [T]he law is that the court cannot amend its judgment to conform to what it now believes it should have done. If further proceedings are necessary in order to provide for support of the children, a motion to modify would be appropriate as, in divorce proceedings, the trial court has continuing jurisdiction with reference to the care of minor children.

Wolff v. Weber, 1997 SD 52, ¶ 19, 563 N.W.2d 136, 139.

The trial court made an apparent error in not calendaring and scheduling the originally requested and set hearing in July 1997, and likely denied due process to Gunhammer, because the hearing was not held after being duly noticed for almost two years, until Gunhammer was able to find an attorney and make his request again, on October 8, 2008. That hearing was held and proceeded properly, and at that hearing the child support was modified downward to \$339 but it was only to commence July 1, 2009. The Order Modifying the Child Support was issued August 18, 2009. The urging by Gunhammer and his attorney on appeal to modify the trial court's order back to the original June 18, 2007 hearing date that was never held, and at which the trial court never ruled, simply cannot take placed because there were no findings or conclusions or any way to divine the trial court's intent going back to June 18, 2007. This Court cannot do what the trial court could not have done either, even though calendaring or scheduling mistakes were made, regarding making the modification retroactive back to June 18, 2007.

II. The next issue to look at is whether the trial court's order of August 18, 2009, following the hearing held on June 18, 2009, and this bears closer scrutiny on appeal. There is a provision in South Dakota law which states that:

Any past due support payments are not subject to modification by a court or administrative entity of this state, except those accruing in any period in which there is pending a petition for modification of the support obligation, but only from the date that the notice of hearing of the petition has been given to the obligee, the obligor, and any such parties having an interest in such matter. SDCL § 25-7-7.3

The first petition from Gunhammer that was followed both by a valid notice of hearing and an actual hearing that resulted in an order, findings and conclusions was brought by Gunhammer through Attorney Semans on December 11, 2008, followed by a hearing on August 18, 2009.

Based upon this record and the events as they occurred and the cases and statutes that we find persuasive, we affirm most of the August 18, 2009 modification order, with the exception that the date of commencement of the child support payments, which based upon the South Dakota code provision cited above, should have begun not on the arbitrary date of July 1, 2009, but rather from the date of the petition leading to that hearing and order on December 18, 2008. The new order from the trial court should reflect this date as the beginning of the modification of Gunhammer's child support down to \$339.

This Court makes no comment about whether, in light of Gunhammer's other obligations to his children and the trial court are set off against any outstanding overpayment of child support payments from December 18, 2008, as that is a matter for the trial court to decide.

This Court is also cognizant that as long as these children are minor children and are within the jurisdiction of the trial court, which retains jurisdiction over modifications of child support, upon proper made and supported petitions to modify child support obligations may be made at any time during that period of jurisdiction, and the Court specifically comments here that it is entering no opinion or order that would affect the trial court to hear any new petitions for modification by either party.

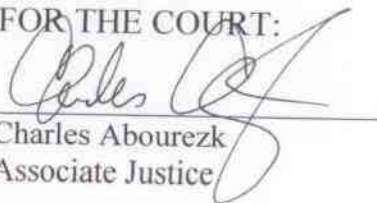
#### IV. Conclusion

For all the above-state reasons, the decision of the trial court is affirmed in part and reversed in part as to the date of the beginning of the modification down to \$339.00 payments by Gunhammer, and this matter is remanded for further additional proceedings consistent with this opinion and Order.

IT IS SO ORDERED.

Dated this 5th day of November, 2010.

FOR THE COURT:

  
Charles Abourezk  
Associate Justice