

IN THE COURT OF APPEALS

*Appeal dismissed*

FOR THE

ROSEBUD SIOUX TRIBE

GERALD WILLIAM SPOTTED TAIL, )

Plaintiff and Appellant, )

vs. )

CA 92-01

ANN SPOTTED TAIL, )

Defendant and Appellee. )

Appeal from the Tribal Court  
for the  
Rosebud Sioux Tribe  
The Honorable Viola A. Burnette,  
Judge Presiding

O P I N I O N

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FILED  
in the

ROSEBUD SIOUX TRIBAL COURT OF APPEALS

The undersigned Clerk of the Rosebud Sioux Tribal Court of Appeals hereby certifies that this document was received and entered on the docket in the above entitled action by this Court on the 10th day of June 1993

*Janita Marshall*  
Clerk of Courts

Before Justices Roubideaux, Pommersheim and Zephier

Roubideaux-

This case was originally considered and decided by this Court on the issue of disqualification of the Trial Judge who presided over the first Trial in this case.

On June 14, 1991 this Court reversed the trial judgment and remanded the case for a new trial by order dated June 26, 1991, CA 90-01.

The case was retried on March 10, 1992, the Honorable Viola A. Burnette, Associate Justice, presiding, Docket D88-16. After a full hearing, both parties being ably represented by competent counsel, the Court entered a Final Decree of Divorce dated May 20, 1992 granting a divorce on the grounds of irreconcilable differences and awarding custody of the two minor children of the parties to the Defendant mother with structured visitations. The Plaintiff father was ordered to pay child support in the amount of \$390.00 per month to the Rosebud Sioux Tribal Court for transmittal to the Defendant mother commencing on June 1, 1992.

The Court found, among other things, that the Defendant was an abused spouse whose absences from her children were attributed to extreme physical and mental abuse by the Plaintiff causing her to run and hide from the Plaintiff. During the period of time from the date of separation until June of 1987 Defendant's attempts to visit the children were refused, made almost impossible and were allowed by the Plaintiff only on rare occasions.

Defendant's attempts to secure a divorce and custody of her children in the State of Arizona were prevented by the Plaintiff's refusal to submit to Arizona Jurisdiction.

Testimony at trial by James A. Nardini, Director of Southern Plains Mental Health, appointed by the Court to interview, test and evaluate the parents and the children, resulted in a report finding the Defendant mother a fit and proper person to be awarded the care, custody and control of the minor children and that such would be in their best interests.

The Rosebud Sioux Tribal Code, Section 2-1-18 as well as S.D.C.L. 30-27-19 unequivocally state that the welfare and best interests of the minor children are of paramount consideration in the award or change of custody of minor children.

The Trial Court has broad discretion in the award of custody of minor children and will not be reversed on appeal unless the record presents a clear case of abuse of such discretion. Oursland v. Oursland (1968) 83 S.D. 382, 159 N.W. 2d 922. The Trial Court is in the best position to listen to the witnesses, review the evidence and determine what is best for the temporal, mental and moral welfare of the children involved. Isaak v. Isaak (1979) 278 N.W. 2d 445.

In awarding the custody of any minor child a court must be guided by what appears, from all the facts and circumstances, to be for the best interest of the child relative to its temporal, mental and moral welfare; the feelings and desires of

the parents are subservient to this paramount consideration except as such factors may relate to the best interest of the child; evidence of indiscreet conduct of the wife, sufficient to entitle the husband to a divorce, but lack of any evidence showing physical abuse or mistreatment of children by the wife did not authorize trial court to deny custody of children to the wife, who, as the mother of children of tender years, evidenced great love and affection for them. Wiesner v. Wiesner (1963) 80 SD 114, 119 NW 2d 920.

The Wiesner court went on to point out that no showing of finding of fitness is necessary to enable the Court to award custody to one parent or the other; it is the welfare of the child and not the shortcomings of the respective parents which is determinative. Id. Also see Jones v. Jones, (1988) 423 N.W. 2d 517.

The evidence in this case is undisputed and reveals a father who was domineering, abusive and revengeful, who seemed bent on keeping the children away from their natural mother. His constant name-calling and bitter retributions against the mother have kept the children in a state of constant fear which was certainly not in their best interests. The mother, on the other hand, appears to have the best interests of these children at heart, and was forced to take extreme measures to maintain any meaningful contact with them at all. She has at all times evidenced great love and affection for them.


Considering all the facts and circumstances in this case, it appears that the Trial Court did not abuse its discretion

in this case by awarding custody of the minor children to the Defendant mother.

For all the foregoing reasons, the appeal is dismissed. and the Lower Court's Order dated May 29, 1992 is affirmed.

All the Judges concur.

Dated this 14<sup>th</sup> day of June, 1993

  
Ramon A. Roubideaux  
Associate Justice