FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA
****

In Re the Marriage of
BRUCE BAUER,
Petitioner/Appellant,

vs.

Appeal No. 059

KAREN KOHL BAUER,
Respondent/Appellee,

THIS APPEAL is from the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. Lawyer-Judge Julian H. Brown presided.

FOR APPELLANT: Laura Christoffersen, Attorney at Law, P. 0. Box 997, Wolf Point, Montana 59201.

FOR APPELLEE: Ronald Hodge, Attorney at Law, P. 0. Box 1797, Bismarck, North Dakota 58502.

CIVIL: THE PORTION OF THE TRIBAL COURT'S JUDGMENT WHICH STATED, "THAT IT IS IN THE BEST INTEREST OF THE TWO MINOR CHILDREN THAT CUSTODY BE PLACED WITH THE RESPONDENT, WITH LIBERAL VISITATION TO THE PETITIONER." WAS A FACTUAL DETERMINATION NOT SUPPORTED BY SUBSTANTIAL EVIDENCE; THE PARTIES ARE ENTITLED TO JOINT CUSTODY WITH EQUAL PHYSICAL CUSTODY AND VISITATION RIGHTS; AND THE MARITAL ESTATE IS TO BE EQUITABLY DISTRIBUTED AND INCLUDE ALL PROPERTY FROM THE DATE OF SEPARATION INCLUDING ANY ITEMS IMPROPERLY DISPOSED OF DURING THE PENDENCY OF THE DIVORCE ACTION.

Argued: April 12, 1989. Decided: April 12, 1989.

OPINION by Arnie A. Hove, Chief Justice, joined by Gary James Melbourne, Associate Justice, Floyd Azure, Associate Justice.

HELD: THE PARTIES ARE HEREBY AMENDED JOINT CUSTODY OF THEIR CHILDREN WITH EQUAL PHYSICAL CUSTODY AND VISITATION RIGHTS ACCORDING TO THE RECOMMENDED SCHEDULE OR AS OTHERWISE MUTUALLY AGREED. THIS MATTER IS REMANDED TO TRIBAL COURT FOR A HEARING AND DETERMINATION OF

AN EQUITABLE DISTRIBUTION OF THE MARITAL ESTATE IN ACCORDANCE WITH THE INSTRUCTIONS IN THIS OPINION WITHIN THIRTY (30) DAYS FROM THE FILING OF THE SAME.

FACTS:

On August 31, 1988 at 2:00 p.m., a trial was held in the Tribal Court at Wolf Point, Montana. The Appellant and Appellee were present with their counsel. The hearing was being recorded as required by I CCOJ 103. After the presentation of the testimony and introduction of evidence was completed on the issues of child custody and property division, the trial was concluded. Appellee's counsel was directed to prepare the Tribal Court's judgment which was to reflect the oral order issued on that day by Lawyer-Judge Julian H. Brown.

On September 12, 1988, Judge Brown signed a two page judgment wherein the parties were divorced; the two minor children were placed in the custody of the Appellee with liberal visitation of the children to Appellant; and Appellant was ordered to pay $225.00 per month commencing the first regular pay period after August 31, 1988. On November 7, 1988, Judge Brown issued and entered nunc pro tunc the above Judgment and a three page Findings of Fact, Conclusions of Law and Order for Judgment.

The aforementioned judgment failed to address the division of marital personal property, however, the Findings of Fact, Conclusions of Law and Order of Judgment indicated that the Court had chosen to bifurcate the trial and hold a hearing on the division of marital property until a later date. The judgment also failed to provide any findings as to the fitness of the parents for purposes of custody and visitation, however, the Findings of Fact, Conclusion of Law and Order for Judgment contained the following:

> "3. In custody, the Court finds that both parents are fit to care for the two children, Justin and Glance, and that for these young children the most important crucial determination is for the best interest of the children; and further, since Justin has been living with this mother in the past, the court now finds the best interest of the children is to not change the status quo, and hereby awards custody of both children to the respondent and mother;"

The judgment and Findings of Fact Conclusions of Law and Order for Judgment failed to clearly or properly address whether joint or physical custody had been awarded; what visitation the non-custodial parent was awarded; or how the marital property was to be divided. The judgment was described as ridiculous during oral arguments. Appellee's counsel admitted to having prepared and drafted the judgment at the direction of the Tribal Court and that the document was ridiculous.

On September 13, 1988, the Appellant filed a Notice of Appeal of the Tribal Court's oral order on August 31, 1988. On September 28, 1988, Appellee filed a Motion to Dismiss Appeal and stated,

> "The Respondent so moves for the reason that the Judgment of the lower Court is not a final Judgment. Said Judgment is an oral Judgment and has not been entered as a Final Judgment."

On October 4, 1988, Appellant filed a Brief in Opposition to Motion to dismiss Appeal wherein he admitted a final written order had not yet been issued and thus rights and obligations of the parties had not yet been established. In the brief, Appellant stated the purpose for filing the Notice of Appeal on September 13, 1988 was to preserve his appeal rights. In the brief, Appellant also requested guidance as to the procedure to be followed when the sitting judge has been dismissed from

his duties before entry of the final decree.

On December 6, 1988, this Court received a Petition for Visitation Schedule from Appellant which alleges he has been unable to establish a satisfactory visitation schedule with Appellee. The Petition further alleged Appellee had refused Appellant visitation of his minor children for extended periods of time; Appellant wished to exercise overnight visitation as is appropriate with the childrens' ages; and Appellee had refused to allow Appellant extended visitation during school vacations when she has returned to the area. In the petition, Appellant finally requested alternate holiday visitation. Appellant's petition was never brought for hearing.

This Court determined the September 13, 1989 Notice of Appeal of the oral order was appropriate and necessary to preserve Appellant's rights to an appeal pursuant to I CCOJ 206(a). This Court determined the Notice of Appeal was also sufficient under I CCOJ 206(c) since Appellant was unable to designate the judgment, or part thereof appealed from, and. include the short statement of reasons for the appeal without the written judgment or transcript of the proceedings. For the reasons stated above, an Order Granting Appeal and Setting A Briefing Schedule, Date, and Time for Oral Arguments dated March 16, 1989 was issued.

Appellant raised the following issues on appeal:

> "1. Was the oral order of the court of August 31, 1988 directing Mr. Bauer to pay support a binding order when there is no record of such order?
>
> "2. Did the divorce become final on September 12 of November 7, 1988 when the court issued its written order and is this the date from which Mr. Bauer is required to pay support?
>
> "3. Can this court hear and make a decision without a written transcript of the lower court proceedings and if so, how should the facts be presented to the court?
>
> "4. If this court hears this appeal should this appeal constitute trial de novo and should the parties present witnesses in their favor?
>
> "5. If this court rules that because of the absence of a transcript an appeal of the issues cannot be had, and that the only remedy is a remand for new proceedings, is such action fair, considering that Appellee will be forced to withstand additional attorneys fees at his own cost through no fault of his own, whereas if the transcript had been made, this matter could have been resolved through appeal?
>
> "6. If a remand is necessary to resolve the issues herein, is Appellant responsible for the payment of child support and from what time is Petitioner responsible?
>
> "7. Should the court adopt the Montana Uniform Marriage and Divorce Act with respect to issues not covered by the Fort Peck Comprehensive Code of Justice, particularly the preference listed therein for joint custody."

The Appellee presented the following two (2) issues,

"1. Must the Fort Peck Tribal Court Adopt Montana Divorce Statutes.

"2. Must the Tribal Court make a ruling on all issues at the same time?"

All of Appellant and Appellee's issues set out above will be separately and/or jointly addressed in the following.

I.

Appellant's first issue needs little discussion. An oral order from any court including Tribal Court is a binding order and given effect on the date the order is issued or the order is to become effective. At all times herein, Appellant and Appellee have admitted they knew of the Court's August 31, 1988 oral order. In addition, Appellant and Appellee know the Fort Peck Tribal Court is a court of record and must keep the records required by I CCOJ 103 which includes "preservation of testimony for perpetual memory by electronic recording, or otherwise...."

In this case, the testimony and oral order were being taped. However, the machine did not function properly after the it was worked on by Appellee's attorney who requested permission of the tribal judge to approach the Clerk and assist with the machine. Appellee's attorney indicated he was familiar with and could assist the Clerk with the machine. Whatever was done by Appellee's attorney resulted in the last three tapes failing to record the proceedings.

Normally, Appellant's failure to comply with the August 31, 1988 order would result in his being held in contempt by this Court, however, because of the circumstances in this case, it would be inappropriate to hold Appellant in contempt. Because Appellant was aware of the August 31, 1988 oral order, this Court will not relieve him from the obligations imposed thereunder. Therefore, Appellant is ordered to pay the monthly child support as previously directed and all arrearages from the first pay period following August 31, 1988 as soon as possible and no later than one year from the filing of this Opinion unless otherwise ordered.

II.

Again, Appellant's second issue needs little discussion or legal authority other than I CCOJ 103 which requires the Tribal Court to keep records. The divorce became final on September 12, 1988, and the date from which Mr. Bauer is required to pay support was the first pay period following August 31, 1988. Again, Appellant shall make payments as previously ordered and arrearages as ordered herein.

III.

Appellant's third issue is not as easily resolved. It goes without saying that to review an appeal of a lower court judgment and render a decision without a recording or written transcript of the proceedings is extremely difficult, however, a court can hear and make a decision without a written transcript of the lower court proceedings. In the interests of justice and to prevent further delay, this Court determined to establish what evidence was presented at the August 31, 1988 trial.

There are two acceptable methods for determining the evidence presented where a transcript is not available. The first is for the parties to stipulate as to what the evidence established. The second is for the parties to prepare and present written

statements of what the evidence established. There is support for the presentation and use of written statements under Mont. R. App. p. 9(d). This rule reads,

> "Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. In no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may within 20 days from the hearing or trial or such time extended as the district court may for good cause shown permit, prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the respondent, who may serve objections or propose amendments thereto within 10 days after service. Thereupon, the statement and any objections or proposed amendments shall be submitted for settlement and approval to the district judge who handled the proceedings, and as settled and approved shall be included by the clerk of the district court in the record on appeal. A judge may settle and approve such record after he ceases to be a judge. If such judge before the statement is settled and approved dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle and approve the statement, it shall be settled and approved in such manner as the supreme court may direct."

Pursuant to IV CCOJ 501(d), in the instant case it would have been appropriate for this Court to be guided by Mont. R. App. p. 9(d). Title IV CCOJ 501(d) reads,

> "In determining any case over which it has jurisdiction, the Court shall give binding effect to
>
> "...
>
> "(d) where appropriate, the Court may in its discretion be guided by statutes, common law or rules of decision of the State in which the transaction or occurrence giving rise to the cause of action took place."

It would have been preferable that each party presented written statements as to what the evidence established. Because there were no written statements, testimony was given and received from Appellant and Appellee's attorneys as to what the evidence established in regard to certain factors in CCOJ and MCA which were used by this Court in determining the "best interests of the children." In the following, the Court will discuss the attorneys' testimony and contentions of the parties.

The Appellant asked this Court to find that the lower court erred in making its ruling of September 12, 1988 dated November 7, 1988. Appellant specifically contends,

> "A. The Lower Court Failed to Provide Reasons for Its Award of Custody to Wife and in Making Such Award Should Have Adopted the Montana Marriage and Divorce Act which Provides that Certain Factors Should Be Considered when an Award of Custody is Made, in the Absence of Tribal Law which Governs."

In response thereto, Appellee contends,

"... The Trial Court Judge is allowed to hear all testimony concerning the best interests of Indian children. The Honorable Judge Brown did just that, in the case at bar. He heard all relevant testimony; he observed the witnesses; he made his Findings and arrived at a legal conclusion.

"It would be abhorrent to the Tribal Court to adopt a state statute which could ultimately limit its own jurisdiction. The Tribal Judge had discretion to determine the best interests of these Indian children, and to consider their cultural characteristics as presented to the Tribal Court. He did just that, and Appellant totally fails to give any basis, justification, case or authoritive (sic) law, or other proof that Judge Brown's decision was clearly erroneous ."

In response to Appellee's contention, this Court's standard of review is established in I CCOJ 202 and reads as follows:

"... .The Court of Appeals shall review 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...."

At oral arguments the attorneys for both parties were somewhat confused as to what law was applied and whether the factors in VI CCOJ 304(b) to determine the "best interests of the child" were adopted by the Tribal Executive Board in March of 1989 or sometime prior thereto. The attorneys claimed there were no factors adopted or used at the time of the trial August 31, 1988 and this Court accepted the attorneys' statements.

At oral arguments, this Court agreed with Appellant that the lower court failed to provide reasons for its award of custody to Appellee. In addition, it was this Court's position that the lower court should have adopted and used portions of the Montana Uniform Marriage and Divorce Act for guidance in the absence of Tribal law.

This Court has since received information there were factors for determining the "best interests of the child" in VI CCOJ 304 (b) adopted in 1986 by Resolution No. 1287-86-7. The Tribal Court should have been guided by the factors in the CCOJ and set forth reasons reflecting this in its judgment. In that event, the Tribal Court could have still turned for additional guidance to the MCA.

The Applicable Laws section at IV CCOJ 501(d) supports this Court's position. Montana is the State in which the marriage and divorce of the parties occurred. It would have been appropriate for the Tribal Court to be guided by portions of the Montana Uniform Marriage and Divorce Act. In this Opinion, this Court will apply Sections 40-4-212 (Best interest of child), 40-4-222 (Declaration of legislative intent -- joint custody) and 40-4-223 (Award of joint or separate custody), MCA.

Section 40-4-212, MCA contains factors for determining the "best interest of the child" and reads as follows:

"The court shall determine custody 'in accordance with the best interest of the child. The court shall consider all relevant factors, including but not limited to:

"(1) the wishes of the child's parent or parents as to his custody;

"(2) the wishes of the child as to his custodian;

"(3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;

"(4) the child's adjustment to his home, school, and community;

"(5) the mental and physical health of all individuals involved;

"(6) physical abuse or threat of physical abuse by one parent against the other parent or the child; and

"(7) chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either parent."

These factors are consistent with the factors in VI CCOJ 304(b). The factors in VI CCOJ 304(b) read,

"...In determining the best interests of the child, the Court shall consider the relative ability to (sic) the parents to provide adequate food, clothing, shelter, medical card, love and emotional support and day-to-day supervision. The Court shall also take into account the desires of the child. Difference in financial means alone shall not be the deciding factor."

This Court then asked questions of the attorneys as to the factors in Section 40-4-212, MCA and VI CCOJ 304(b) to determine if the factual determinations of the Tribal Court on custody and visitation were supported by substantial evidence.

In questioning the attorneys and applying the factors set forth in Section 40-4-212, M.C.A., the attorneys were asked whether evidence was presented at the trial that Appellant was physically abusive to Appellee or the children or that Appellant had a drug or alcohol problem. The attorneys admitted there was no evidence Appellant was physically abusive to Appellee or the children or Appellant had a drug or alcohol problem. The attorneys also testified the evidence failed to establish any negative interaction or interrelationship of the children with Appellant or adverse mental and physical health conditions of either party. The evidence also established the parties and children had resided on the reservation until only recently when Appellee moved to Dickinson to attend school. Finally, the childrens' maternal and paternal grandparents and other relatives have been and continue to reside on the Fort Peck Indian Reservation.

In questioning the attorneys, regarding the evidence at the August 31, 1988 trial in relation to the factors in VI CCOJ 304 (b), the attorneys for the parties were specifically asked whether there was in testimony that Appellant was unable to provide adequate food, clothing, shelter, medical care, love and emotional support and day-to-day supervision. Both responded that there was no such evidence. The Tribal Court nor this Court need to take into account the desires of the children since they are 3 years old and younger and Appellee has frustrated Appellant's attempts at visitation.

In view of the above facts, the September 13, 1988 Judgment awarding sole physical custody of the children to Appellee was not supported by substantial evidence and did not carry out the intent of VI CCOJ 304 which this Court perceives is the award of joint custody. Before discussing I CCOJ 304 and joint custody, the legislative intent of Montana in Section 40-4-222, MCA will provide background and support for this Court's position.

Section 40-4-222, MCA reads,

> "The legislature of the state of Montana finds and declares that it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy. The legislature believes that the district courts of the state of Montana have the authority to award joint custody if the court finds joint custody in the best interests of the children in the case then before the court. The intent of 40-4-222 through 40-4-224 is to establish certain guidelines for resolution of custody disputes."

Although there is no section in Title VI of the CCOJ setting forth the public policy of the Tribal Executive Board, in adopting VI CCOJ 304, it must have been the intent of the Tribal Executive Board to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing. Furthermore, the Tribal Executive Board must have intended the men and women of the Tribes be treated fairly and equitably in custody proceedings. This Court's position finds support where the language in VI CCOJ 304 provides,

> "The Court may grant custody to one parent, or may grant joint custody, specifying the periods during which each parent shall have custody, specifying the periods during which each parent shall have custody. In each case, the Court shall determine the visitation rights, if any, of the non-custodial parent. The determination shall be based on the best interests of the child, and there shall be no presumption that a parent is better suited to be custodial parent based on that parent's gender...."

The September 12, 1988 Judgment alludes to the improper use of the presumption that Appellee is better suited to be the custodial parent based on her gender and fails to establish the required visitation where it states,

> "3. In custody, the Court finds that both parents are fit to care for the two children, Justin and Clarice, and that for these young children the most important crucial determination is for the best interest of the children; and further, since Justin has been living with his mother in the past, the Court now finds the best interest of the children is to not change the status quo, and here by awards custody of both children to their respondent and mother;
>
> and
>
> "4. That the Petitioner shall have liberal visitation which shall be left open at this time;"

Title VI CCOJ 304 is perceived by this Court to intend joint custody and, as much as practical, equal time with the child(ren) to be awarded the non-custodial parent unless it is specifically determined not to be in "the best interests of the child" and there exists substantial evidence to support the determination. Such a construction of VI CCOJ 304 is consistent with Section 40-4-222, M.C.A. and appears fair and equitable under the circumstances of this case.

In addition to the evidence at the August 31, 1988 trial, this Court looked at the conduct of the parties subsequent to the trial. There are statements in Appellant's Petition for Visitation Schedule and statements of counsel at oral argument that

there exists the unfortunate situation where the custodial parent has denied the non-custodial parent frequent and continuing contact with the children. Because of the Appellee's actions of denying Appellant visitation with the children, Section 40-4-223, MCA was considered appropriate and the factor therein also applied in the instant case. This section is set forth in part and reads as follows:

> "...
>
> "(b) to either parent. In making an award to either parent, the court shall consider, along with the factors set out in 40-4-212, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent and may not prefer a parent as custodian because of the parent's sex."

In conclusion, the factors, presumptions and public policy in VI CCOJ 304, Sections 40-4-212, 40-4-222 and 40-4-223 were applied to the facts in this case to determine if the factual determinations of the Tribal Court were supported by substantial evidence. This Court has authority under I CCOJ 202 to set aside the Tribal Court's factual determination "That it is in the best interest of the two minor children that custody be placed with the Respondent, with liberal visitation to the Petitioner." This factual determination was clearly not supported by substantial evidence.

Therefore, it is the unanimous decision of this Court to award joint custody of the children to Appellant and Appellee with an equal sharing of physical custody for periods of six (6) months until such time as the oldest child is enrolled in school. When the oldest child is enrolled in school, the period of physical custody for Appellant and Appellee shall be for a full year starting 7 days after school is out in the summer to 7 days after school is out in the following year. Because Appellant has been denied frequent and continuing contact with the children, Appellant's six (6) months is to begin June 1, 1989 and end December 1, 1989 unless otherwise mutually agreed upon by the parties.

The non-custodial parent is to receive reasonable visitation. The Court will only propose a visitation schedule in the following unless the parties are unable to mutually agree on the same. In the event the parties are unable to agree within ten (10) days of the filing of this Opinion this Court's proposal shall become the rights of the non-custodial parent as to holidays and visitation.

The parties shall have the children alternate major holidays of Christmas, New Years Day, Easter, 4th of July and Thanksgiving. The non-custodial parent shall have reasonable visitation every other weekend beginning at 5:00 p.m. Friday and ending 5:00 p.m. Sunday.

Because of this joint custody and equal physical custody award, the parties shall work with each other to make the physical custody and visitation exchanges as non—traumatic as possible for the children. Furthermore, since the parties will be intimately involved in making decisions about the children's welfare they shall work with each other and advise the other of any medical, dental, and etc. provided the children as soon as possible or no later than twenty-four hours from when the same was provided in an emergency situation.

As for child support, Appellant shall be responsible for child support in the amount of $225.00 per month for each month the Appellee has physical custody of the children. Appellee shall be responsible to Appellant for child support in amount to be determined by the Tribal Court immediately upon her graduation and having obtained employment.

This Court understands the emotional problems which are experienced by children in divorces when custody is changed on

a periodic basis especially where the custodial parent has kept the children from the non-custodial parent during the separation and appeal proceedings. In any event, this Court will not punish Appellant for the behavior of the Appellee and fail to award joint custody and equal physical custody when the applicable law and facts in this case make the same not only appropriate, but, fair and reasonable under the circumstances.

IV.

In response to Appellant's fourth issue, this Court agreed to hear the appeal in this case. This appeal did not constitute trial de novo since the attorneys were asked to state whether the testimony or evidence presented at the trial August 31, 1988 established certain factors in I CCOJ 304 and Section 40-4-212, M.C.A. The attorneys answered in the negative which indicated there were no contested factual issues and Appellant should be awarded custody with equal physical custody £n that this Court determined the Tribal Executive Board must have intended to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage and to encourage parents to share the rights and responsibilities of child rearing and that the Tribal Executive Board must have also intended the men and women of the Tribes be treated fairly and equitably in custody proceedings.

Therefore, the statements of attorneys as to what the testimony and evidence presented at the trial August 31, 1988 did or did not establish, enabled this Court to render a fair and equitable decision without remanding the matter for a new trial.

V.

In addressing Appellant's fifth issue in part, in fairness, this Court did not remand the matter to the Tribal Court for a new trial on the issue of custody and visitation. Therefore, Appellant will incur no additional costs in this regard, however, it is unfortunate that Appellant will be forced to incur additional attorneys fees at his own cost through no fault of his own on the division of marital property.

In further addressing Appellant's fifth issue and Appellee's second issue, because the Tribal Court improperly decided to bifurcate the issues of custody and visitation from that of an equitable property distribution even after evidence was presented at the August 31, 1988 trial, this Court has no choice but to remand that issue to the Tribal Court.

This Court hereby directs that within thirty (30) days of the filing of this Opinion, the parties submit affidavits to the Tribal Court listing the real and personal property owned by the parties as of the date of their separation (including property improperly disposed of), with estimates or appraisals of current values, debts outstanding and who presently has possession of the real or personal property.

This Court remands this matter to the Tribal Court for a determination of an equal distribution of the marital property based on the affidavits of the actual real and personal property in and debts of the marital estate.

VI.

In response to Appellant's sixth issue, a remand of this matter is only necessary to determine what would be an equitable distribution of the marital estate. The Petitioner's responsibility for child support has been previously addressed.

VII.

In addressing Appellant's final issue and Appellee's first issue, this Court did apply portions of the Montana Uniform Marriage and Divorce Act. Such application enabled this Court to properly determine whether the Tribal Court's factual determinations were supported by substantial evidence.

The Appellee's arguments against utilizing the Montana Uniform Marriage and Divorce Act were rejected by this Court. Appellee's argument that historical precedent avoids utilizing state laws on Indian reservations is clearly contrary to IV CCOJ 501(d) which permits such utilization. Therefore, the Tribal Court should use portions of the Montana Uniform Marriage and Divorce Act when the CCOJ is silent on additional guidance is needed to determine "the best interest of the child" and custody and visitation proceedings.

VIII.

As a final matter, Appellee's counsel approached the justices after oral arguments on the sidewalk in front of a cafe in Poplar, Montana. Appellee's counsel expressed dissatisfaction with his treatment during oral arguments in a disrespectful and uncourteous manner to all of the justices.

Counsel's conduct was a violation of Canon 16 of the Code of Ethics for Attorneys and Lay Counselors of the Fort Peck Reservation. In view of prior proceedings in which former Tribal Judge Violet E. Hamilton alleged violations of this same canon by counsel in her presence, counsel is hereby warned that future violations of Canon 16 will result in formal proceedings by this Court.

THEREFORE, IT IS THE UNANIMOUS DECISION OF THIS COURT TO AWARD JOINT CUSTODY OF THE CHILDREN TO APPELLANT AND APPELLEE WITH AN EQUAL SHARING OF PHYSICAL CUSTODY FOR A PERIOD OF SIX (6) MONTHS UNTIL SUCH TIME AS THE OLDEST CHILD IS ENROLLED IN SCHOOL. WHEN THE OLDEST CHILD IS ENROLLED IN SCHOOL, THE PERIOD OF PHYSICAL CUSTODY SHALL BE FOR A FULL YEAR STARTING 7 DAYS AFTER SCHOOL IS OUT IN THE SUMMER TO 7 DAYS AFTER SCHOOL IS OUT IN THE FOLLOWING YEAR. BECAUSE APPELLANT HAS BEEN DENIED FREQUENT AND CONTINUING CONTACT WITH THE CHILDREN, APPELLANT'S SIX (6) MONTHS SHALL BEGIN JUNE 1, 1989 AND END DECEMBER 6, 1989 UNLESS OTHERWISE MUTUALLY AGREED UPON BY THE PARTIES.

IT IS FURTHER THE OPINION OF THIS COURT THAT THE NON-CUSTODIAL PARENT SHALL RECEIVE REASONABLE VISITATION. THIS COURT PROPOSES THE FOLLOWING VISITATION. THE PARTIES SHALL HAVE THE CHILDREN ALTERNATE MAJOR HOLIDAYS OF CHRISTMAS, NEW YEARS DAY, EASTER, 4TH OF JULY AND THANKSGIVING. THE NON-CUSTODIAL PARENT SHALL HAVE REASONABLE VISITATION OF EVERY OTHER WEEKEND TO BEGIN 5:00 P.M. FRIDAY AND ENDING 5:00 P.M. SUNDAY. IN THE EVENT THE PARTIES ARE NOT ABLE TO AGREE UPON VISITATION WITHIN TEN (10) DAYS OF THE FILING OF THIS OPINION, THE ABOVE SHALL BECOME THE RIGHTS OF THE PARTIES AS TO HOLIDAYS AND VISITATION OF THE NON-CUSTODIAL PARENT.

THE PARTIES SHALL WORK WITH EACH OTHER TO MAKE THE PHYSICAL CUSTODY AND VISITATION EXCHANGES AS NON-TRAUMATIC AS POSSIBLE FOR THE CHILDREN. FURTHERMORE, SINCE THE PARTIES WILL BE INTIMATELY INVOLVED IN MAKING DECISIONS ABOUT THE CHILDREN'S WELFARE THEY SHALL WORK WITH EACH OTHER AND ADVISE THE OTHER PRIOR TO OBTAINING ANY MEDICAL, DENTAL, AND ETC. TREATMENT FOR

THE CHILDREN OR IN AN EMERGENCY NO LATER THAN TWENTY-FOUR HOURS FROM WHEN THE SAME WAS PROVIDED.

APPELLANT SHALL BE RESPONSIBLE FOR CHILD SUPPORT IN THE AMOUNT OF $225.00 PER MONTH FOR EACH MONTH THE APPELLEE HAS PHYSICAL CUSTODY OF THE CHILDREN. APPELLEE SHALL BE RESPONSIBLE TO APPELLANT FOR CHILD SUPPORT IN AN AMOUNT TO BE DETERMINED BY THE TRIBAL COURT IMMEDIATELY UPON HER GRADUATION AND HAVING OBTAINED EMPLOYMENT.

FINALLY, THIS MATTER IS REMANDED TO THE TRIBAL COURT FOR A AN EQUAL DISTRIBUTION OF THE MARITAL PROPERTY IN THE MANNER SET FORTH HEREIN. THE DETERMINATION OF AN EQUAL DISTRIBUTION IS TO BE MADE WITHIN THIRTY (30) DAYS OF THE FILING OF THIS OPINION.

DATED this _____ day of May, 1989.

BY THE COURT OF APPEALS:

_____
Arnie A. Hove, Chief Justice

_____
Gary James Melbourne, Associate Justice

_____
Floyd Azure, Associate Justice