IN THE COURT OF APPEALS
FOR THE
ROSEBUD SIOUX TRIBE

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CA8708

VERNON "IKE" SCHMIDT, DEFENDANT/APPELLANT

V.

SHIRLEY MEDEARIS, PLAINTIFF/APPELLEE

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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 Trial Court be, and the same is hereby, affirmed.

Dated this 9th day of May, 1989.

BY THE COURT:

Frank Pommershiem
Appellate Justice

ATTEST:

Carmen Hirsch
Clerk of Courts

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VERNON "IKE" SCHMIDT, DEFENDANT/APPELLANT

v.

SHIRLEY MEDEARIS, PLAINTIFF/APPELLEE

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APPEAL FROM THE ROSEBUD

SIOUX TRIBAL COURT OF THE

ROSEBUD SIOUX TRIBE

- - - - - - - - - - - -

HONORABLE SHERMAN J. MARSHALL
Presiding Judge

- - - - - - - - - - - -

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OPINION FILED 5-9-89

CASE # CA87-08

POMMERSHEIM, JUSTICE

I. Background

This appeal raises several issues concerning the trial court's award of current child support, as well as a lump sum award for child support arrearages due and owing. The present child support enforcement action was initiated by Shirley Medearis, the Plaintiff/Appellee, against Vernon "Ike" Schmidt, Defendant/Appellant, on July 10, 1987. After a hearing on September 23, 1987, the tribal court entered its order on October 27, 1987 which was supported by findings of fact and conclusions of law. The order determined inter alia that the appellant pay the sum of $200/per month child support in the future plus an additional $100.00 per month to be applied to arrearages in the amount of $11,303.00. The Order also determined that the appellant was in contempt for failure to make said child support payments in the past, but that he might purge himself of said contempt by making timely support payments as set out in the court's order.

This enforcement action which is the subject of this appeal has its roots in a state divorce decree. In that decree which was obtained from the circuit court in Tripp County, South Dakota on July 23, 1979 the Appellant was ordered to pay $200/month

child support for his children Shawnee Marie, age 14, date of birth July 12, 1974 and Stacey Lynn, age 15, date of birth, June 14, 1973. This state divorce decree was subsequently ratified and adopted by the Rosebud Sioux Tribal Court in an order dated August 28, 1980.

Several times thereafter, the appellee sought to enforce the child support provisions of the decree against the appellant. Despite numerous hearings which were primarily informal and several pre-trial conferences, no subsequent order was entered in the matter until the trial court's order of October 27, 1987 which is the subject of this appeal. The appellant also had recognized custody of one child for the period August 1984 - April 1985 during which no support payments were due.

The Appellant raises several issues on appeal. These include whether there was agreement by the parties to dissolve or reduce the amount of arrearages, whether the action is barred by the appropriate statute of limitations, whether the action is barred by the doctrine of laches, and whether contempt is an appropriate enforcement remedial device. These issues will be analyzed seriatim.

II. Issues

A. WHETHER THERE WAS A BINDING, COURT APPROVED AGREEMENT BY THE PARTIES TO DISSOLVE OR REDUCE THE AMOUNT OF ARREARAGES.

The tribal court's findings of fact and conclusions of law that accompany its order in this matter found that the defendant/appellant had knowledge of all written orders in the case, that in fact an order for child support existed, and that defendant/appellant had the ability to comply with the order, and that he willingly disobeyed same. The trial court made no affirmative finding as to the existence of any agreement to reduce or dissolve arrearages. Such a finding of child support ought not to be set aside unless the trial court abused its discretion in entering its judgment. Smith v. Olson 296 N.W.2d 549 (SD 1980). Such a rule seems particularly pertinent in the tribal court context where a tribal court judge must weigh many social and cultural, as well as, economic and legal factors, when deciding child support. The record in this case evinces no such abuse of discretion.

It is also important to declare that as a matter of tribal law adjudication, in which many parties will not be represented by counsel and will proceed pro se or with the assistance of a tribal advocate, that this court does not approve child support modifications of divorce decrees absent court amendment in the form of written orders. Hanks v. Hanks 296 N.W.2d 503 (SD 1980). It is necessary that the best interests of Indian children be protected from potentially adverse child support modifications (however arrived at) that are not carefully scrutinized and approved in writing by the trial court.

B. WHETHER THE STATUTE OF LIMITATIONS BARS THIS ACTION.

The Rosebud Sioux Tribal Code at Chapter 2, Section 4-2-4 (1986) provides for a two year statute of limitations for all causes of action. Despite the fact that this provision was in effect when the plaintiff/appellee filed her action in July 1987, it is not dispositive. The provision cited came into effect in October 1985. This Court has previously held that the recent statute of limitations is not to be applied retroactively. Rosebud Sioux Tribe v. Young (Rosebud Sioux Tribal Court of Appeals Docket # CA-8705, decided September 14, 1987). The previous statute of limitations was six years. Young at 3-4. It is therefore only for child support due after October 1985 that the two year statute of limitations applies. The record also amply demonstrates, and neither side denies, that there were numerous, though inconclusive, hearings on the issue of support between the years 1980-87. These numerous hearings also effectively tolled the running time on the statute of limitations.

It is also recognized law where a decree or order awards installment payments for the support of children, the statute of limitations begins to run as against each installment as it becomes due. See McKee v. McKee 118 P.2d 544 (Kan. 1941), Simmons v. Simmons, 290 N.W. 319 (SD 1940). It is thus clear from the record in this case that the plaintiff/appellant timely filed her request for the enforcement of arrearages in July 1987 and the Court below committed no reversible error on this issue.

C. WHETER THIS ACTION IS BARRED BY THE DOCTRINE OF LACHES OR THE ACQUIESCENCE OF THE PLAINTIFF/APPELLEE.

The doctrine of laches or 'sleeping on one's rights' is clearly inappropriate in this case. As noted earlier, the record in this case amply demonstrates, and neither side denies, that there were numerous, though inclusive, hearings on the issue of child support during the years in question. Without the necessary factual predicate demonstrating inordinate delay in asserting the rights at issue, there is simply no way the doctrine of laches can be pertinent, much less determinative.

Even when there is the necessary factual basis for asserting the doctrine, most courts have rejected the applicability of the doctrine in the context of support payments. Most courts view past due child support as an absolute debt based on a judgment to which the doctrine of laches does not normally apply. Peters v. Weber 267 P.2d 481 (Kan. 1954); Richardson v. Moore, 229 S.E.2d 864 (VA 1976). This rule seems particularly well served in the tribal court context where elements of Lakota culture may encourage deference and patience with others to honor their obligations.

As to the matter of acquiescence by the plaintiff/appellee, the record does not demonstrate, and the court below did not find, acquiescence by the plaintiff/appellant. The plaintiff/appellant was in court numerous times on this matter and she cannot be penalized for accepting what varying payments were proffered at different times for the support of these minor

children. To do so would clearly be inequitable.

D. WHETHER THE DOCTRINE OF CONTEMPT IS AN APPROPRIATE REMEDY IN THIS MATTER

The doctrine of contempt is the most common remedial device used to enforce payment of delinquent, inadequate, or back child support. The only issue in applying the court's contempt power is whether the defaulting party cannot or will not pay. If the party cannot pay, that is he or she lacks the financial ability to pay, the strictures of the due process and equal protection clauses of the Rosebud Sioux Tribal Constitution Art. X., Sec. 3 (1966) and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (8) prevent incarceration of the party for contempt. However, if the party can pay, but simply will not pay, incarceration is proper for failure to comply with a lawful order of the court. The defendant/appellant in this case has not been jailed for contempt and the record does not demonstrate (nor did the court below find) any current inability to pay.

The Court's findings below demonstrate no abuse of discretion in this matter. Such findings however do not bind a defendant from petitioning the trial court at sometime in the future for a modification of its decree predicated on an adequate showing of a change of circumstances.

The Court notes in passing that issues C and D were apparently not raised below and are potentially subject the

limitations pertinent to issues that are not raised in a timely manner. The Court's opinion in this case is not to be construed as permitting unlimited appeal of issues not raised at the trial level. See e.g., Associated Press v. Heart of Black Hills Stations, Inc., 325 N.W.2d 49 (S.D. 1982), Krumm v. Feverhelm, 298 N.W. 2d (S.D. 1980), Rosebud Sioux Tribe v. Young, supra page 4.

The decision of the tribal court in the matter is therefore affirmed.

AMIOTTE, JUSTICE; ROUBIDEAUX, JUSTICE, CONCUR.

April 24, 1989