

IN THE COURT OF APPEALS

FOR THE

ROSEBUD SIOUX TRIBE

CA88-07

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BRENDA DUBRAY SPOTTED TAIL

DEFENDANT/APPELLANT

v.

DENNIS SPOTTED TAIL

PLAINTIFF/APPELLEE

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APPEAL FROM THE ROSEBUD

SIOUX TRIBAL COURT OF THE

ROSEBUD SIOUX TRIBE

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HONORABLE SHERMAN J. MARSHALL  
Presiding Judge  
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Appellant

Dennis Spotted Tail

Plaintiff/Appellee  
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OPINION FILED 5-17-89

CASE # CA88-07

POMMERSHEIM, JUSTICE

I. Background

On May 4, 1988, Plaintiff/Appellee, Dennis Spotted Tail, filed on action for divorce against the Defendant/Appellant, Brenda Dubray Spotted Tail, in the Rosebud Sioux Tribal Court. On September 20, 1988, the maternal grandmother, Pauline Big Crow, filed a Motion to Intervene. The trial was held on October 13, 1988, in which both parties were represented by counsel. As part of the trial, the maternal grandmother's motion to intervene was denied. At the conclusion of the trial, the Court granted the parties a divorce based on irreconcilable differences and reserved a ruling on the custody of the children.

On November 18, 1988, the Court entered its Findings of Fact and Conclusion of Law and its Decree of Divorce. That Order granted legal custody of the parties' three minor children, Jolene Spotted Tail, date of birth, February 19, 1982, Stephen Spotted Tail, date of birth, December 2, 1983, and Shawn Spotted Tail, date of birth, July 22, 1986, to the Plaintiff/Appellee, Dennis Spotted Tail. A Notice of Appeal was filed on December 1, 1988.

## II. Analysis

The sole issues raised on appeal relate to the sufficiency of the evidence and whether the award of custody of the three minor children to the appellee was in the best interests of the children. It is beyond dispute that the applicable tribal court standard for the determination of the custody of a minor child is the best interests of the child. See e.g. Rosebud Sioux Tribal Code Title 2-1-18 (1985); Indian Child Welfare Act, 25 U.S.C. § 1902 (1984); Sobolik v. Stone, 420 N.W.2d 764 (S.D. 1988).

In awarding custody of minors, the trial court must be guided by what appears from all the facts and circumstances to be the best interest of the child's temporal, mental, and moral welfare. Flint v. Flint, 334 N.W.2d 680 (S.D. 1983). Although the trial court is accorded broad discretionary powers in awarding custody of the minor children that discretion is not uncontrolled, it must have a sound and substantial basis in the testimony. Kolb v. Kolb, 324 N.W.2d 279 (S.D. 1982).

In the present case, the record is essentially devoid of evidence relating to what is in the best interests of the children, but is, instead, replete with evidence and accusations concerning the alcohol problems and other alleged 'immoral' conduct of the respective parties. Such an inquiry in which the parties concentrate on demeaning each other's actions misses the critical point, namely that it is the trial court's job to determine what is truly in the best interests of the children.

See e.g. Williams v. Williams, 425 N.W.2d 390 (S.D. 1988). The Court's primary consideration when awarding custody is the best interest of the children and not the shortcomings of the parents. Haak v. Haak, 323 N.W.2d 128 (S.D. 1982). Given the misdirected inquiry at the trial court, there is necessarily insufficient evidence to support its award of custody.

Therefore the decision of the trial court is reversed and remanded and the trial court is directed to hold an evidentiary hearing and to develop a record that supports an award of custody that comports with the standard of the best interests of the children. In order to insure this result, the Court notes the following as reasonable to frame and to guide the trial court's considerations:

1. The trial court, on its own order if necessary, must insure that testimony and evidence is presented from professional and disinterested persons such as teachers, counselors, or social workers (including, for example, a potential home study conducted by the Tribal Department of Social Services).
2. The trial court should also authorize the receipt of testimony from neighbors and members of the extended family, particularly, Ms. Pauline Big Crow, the maternal grandmother. It is also noted that it well within the framework of Lakota tradition and custom that placement be

made, if appropriate, with a member of the extended family, particularly when that individual has provided substantial care and nurture to any of the children.

These guidelines are meant to be suggestive rather than exhaustive, as the Court has full confidence in the expertise of the trial court to solicit and to obtain all the necessary and pertinent evidence.

IT IS SO ORDERED.

AMIOTTE, JUSTICE; ROUBIDEAUX, JUSTICE CONCUR.

May 11, 1989