IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, PABLO, MONTANA

IN RE THE ADOPTION OF ASHLEY FELSMAN AND KRIS MIKKELSEN FELSMAN, Minors.	CAUSE NO. 94-334-A OPINION AND ORDER

Argued February 19, 1996

Decided March 3, 1996

Douglas Anderson, Missoula, Montana for petitioners/appellants Steven and Julie Farmer.

Rebecca T. Dupuis, Polson, Montana for respondents Floris J. Mikkelsen and Sally A. Buckley.

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes; Leslie Kalowat, Trial Judge, Presiding.

Before: PEREGOY, Chief Justice, HALL and WHEELIS, Justices.

PEREGOY, Chief Justice:

Steven and Julie Farmer appeal the Tribal Court's dismissal of their petition to adopt Kris Mikkelsen Felsman and Ashley Cecille Felsman, minor children. We vacate the dismissal order and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Kris Mikkelsen Felsman and Ashley Cecille Felsman are the natural born children of Annabeth Felsman who was an enrolled member of the Confederated Salish and Kootenai Tribes (CS&KT or Tribes). Known in the community that Annabeth was a lesbian, Ashley, now aged nine, and Kris, now aged seven, were conceived by

artificial insemination. Their natural fathers are therefore unknown, and discovery of their identity is prohibited by law. The children are enrolled tribal members. On February 8, 1994, Annabeth committed suicide. Prior to her death, she had been employed as a social worker for the state of Montana, and the Tribes.

Marilyn Ducharme provided day-care services for the children at various times prior to Annabeth's death. Ms. Ducharme is the mother of Steven Farmer, petitioner/appellant with his wife Julie in this action. Prior to committing suicide, Annabeth left a list of people who could be contacted to temporarily care for the children. Marilyn Ducharme was one of the people listed.

Annabeth also left a holographic will in the form of a letter expressing her wishes as to whom she wanted to raise her children. Therein she named her "best friends," Floris J. Mikkelsen and Sally A. Buckley, having determined that such "would be in the best interests" of the children. Mikkelsen and Buckley, also lesbians, are respondents in this adoption action. Both are non-Indian and reside together at their home in Seattle, Washington.

After Annabeth's death, the children stayed with Ms. Ducharme for approximately four months. In June of 1994 Ms. Ducharme took the children to Port Orchard, Washington to the home of her son, Steven Farmer, and his wife Julie, also non-Indians. On August 11, 1994, the Farmers petitioned the Tribal Court to adopt the children. On September 9, 1994, Mikkelsen and Buckley also petitioned the Tribal Court for adoption.

On September 22, 1994, Mikkelsen and Buckley moved the court for an order granting them temporary guardianship of Ashley and Kris. On September 28, 1994, the Farmers also moved for temporary guardianship. On October 14, 1994, the court held an evidentiary hearing on the matter. Petitioners Steven and Julie Farmer appeared and were represented by counsel, Philip A. Grainey. Petitioners Mikkelsen and Buckley also appeared and were represented by counsel, Rebecca T. Dupuis. The children were represented by Susan A. Firth and Roberta Hoe, court-appointed attorneys and Guardians ad Litem.[1] Witnesses, including petitioner Julie Farmer, gave sworn testimony and exhibits were introduced.

The court found that Annabeth had established a long-term, close relationship with Mikkelsen and Buckley, which pre-dated the birth of her children. It further found that Mikkelsen and Buckley had been "deeply involved" in the children's lives, and that the children were bonded to them and considered them to be their aunts. The court also found that Annabeth had expressed her desire orally and in writing since the birth of the children that she wanted Mikkelsen and Buckley to raise Ashley and Kris should something happen to her.

The court also entered findings that the Farmers had little contact or relationship with the children prior to the death of

---

[1] Also appearing and represented by counsel were Michael R. and Rhonda L. Durglo, enrolled tribal members who had also petitioned for adoption and temporary guardianship. Michael Durglo and Annabeth Felsman were first cousins. The Durglos reside on the Flathead Reservation. However, for reasons not here relevant, the Durglos subsequently withdrew their petition for adoption.

their mother. It further found that Julie Farmer had serious medical problems which it considered to be an obstacle to adoption. The court additionally found that the Guardians ad Litem had recommended that the children be temporarily placed with Mikkelsen and Buckley.

Based upon the above findings of fact, the court awarded temporary guardianship to petitioners Mikkelsen and Buckley on October 20, 1994, ruling that such would serve the best interests of the children. Since October 28, 1994, Mikkelsen and Buckley have had legal and physical custody of the children.[2]

On January 12, 1995, the parties filed a combined scheduling order for trial, pursuant to court instructions. The next day the attorneys for the children moved the court for an order allowing them to investigate Julie Farmer's medical records. On February 16, 1995, the court issued an order authorizing such disclosure. On February 17, 1995, the court entered the joint proposed scheduling order, setting the adoption matter for trial on July 31, 1995.

The record indicates that Mikkelsen and Buckley sought discovery of Julie Farmer's medical records on several occasions subsequent to the court's February 16, 1995 disclosure order. Concluding that the Farmers were not in compliance with the order, Mikkelsen and Buckley filed a motion to compel discovery on May 24, 1995. The Farmers did not file a response, nor did they deny any

---

[2] The children had lived with the Farmers for approximately four months prior to Mikkelsen and Buckley taking custody.

of the allegations concerning discovery abuses.

On May 31, 1995, the Farmers moved the court for an order substituting Douglas Anderson for Philip Grainey as their counsel of record. The record indicates that the motion was supported by the signatures of Julie Farmer and attorney Grainey. On June 23, 1995, the court granted Mikkelsen's and Buckley's motion to compel discovery. Therein the court ordered the Farmers "to provide copies of Julie Farmer's medical records for the previous five years pertaining to her diabetes, kidney disease, coronary artery disease and any other medical information concerning the effects of diabetes upon her health, including...any information pertaining to a possible pancreas or kidney transplant." The court further ordered such information to be provided by June 30, 1995, and that failure to do so "shall result in the dismissal of the Farmer's Petition for Adoption." Also on June 23, 1995, the court granted the Farmers' motion to substitute Douglas Anderson as their attorney of record.

On June 15, 1995, Mikkelsen and Buckley moved the court to dismiss the Farmers' petition for adoption based on the medical condition of Julie Farmer. This motion was supported by their brief, a pre-adoption family assessment previously filed by the Farmers, a letter written by Julie Farmer's doctor, two letters written by another doctor, and a pre-placement report prepared for Mikkelsen and Buckley. The Farmers and children's Guardian ad Litem submitted response briefs without supporting documentation. On July 5, 1995, Mikkelsen and Buckley further moved the court to

dismiss the Farmers' petition on the additional ground that the Farmers had failed to comply with the court's discovery order entered on June 23, 1995. This motion was supported by a brief and the affidavit of attorney Dupuis. The Farmers and Guardian ad Litem filed response briefs, again without supporting documentation.

The court did not conduct an evidentiary hearing on respondents' motions to dismiss the Farmers' adoption petition. Instead, it decided the matter on the briefs, affidavits and other supporting documents included in the record. On July 31, 1995 the court entered an order dismissing the Farmers' petition for adoption on two grounds. First, it ruled that adoption by the Farmers would not be in the best interests of the children, given Julie Farmer's health condition. The court stated that it "does not need to hold a hearing on the Petitions to make a finding that the Farmers cannot be considered adoptive parents given Julie Farmers [sic] health. The Court can make this determination based upon the briefs and supporting documents attached to the Briefs, and those already found in the Court file." Second, the court dismissed the petition for the Farmers' failure to comply with the discovery order, finding that the Farmers had a history of non-compliance. The Farmers appeal the dismissal.

On August 3, 1995, the court conducted an adoption hearing on the petition filed by Mikkelsen and Buckley. The petitioners appeared personally with their attorney of record, Rebecca Dupuis, and gave sworn testimony. The children also appeared, represented

by their attorney and Guardian ad Litem, Susan A. Firth. The Farmers were not served notice of the hearing, nor did they or their counsel appear.

The court found Mikkelsen and Buckley to be "competent and qualified" to adopt the children. It further found that they "are fit to provide a home environment for the healthy development of the children, and that the proposed home is an appropriate and adequate environment for the development of the children." The court also found that Mikkelsen and Buckley were "willing to provide the children with the unique values of Indian culture." Concluding that it was in the best interests of the children to be adopted by Mikkelsen and Buckley, the court entered an interlocutory decree of adoption in their favor, thereby establishing the parent-child relationship between petitioners and the minor children on August 3, 1995.

On August 9, 1995 the Farmers moved this Court for a stay of the adoption proceedings pending a decision on their appeal of the dismissal of their adoption petition. On August 16, 1995, we remanded the motion for stay for determination in the first instance by the trial court since the record had not been transferred to the Court of Appeals. However, the record was subsequently transferred to this Court prior to a ruling by the trial court. On January 16, 1996, we took the matter under consideration and denied the motion to stay the interlocutory decree of adoption establishing the parent-child relationship. However, we granted that part of the Farmers' motion which sought

to preclude trial court issuance of a final adoption decree, pending determination of the Farmers' appeal of the dismissal of their adoption petition and any further related proceedings. We now vacate the dismissal of the Farmers' adoption petition and remand the matter to the trial court for further proceedings consistent with this opinion.

II. ISSUES

The issues on appeal are: (1) whether the Tribal Court erred in dismissing the Farmers' adoption petition without holding an evidentiary hearing on the matter; and (2) whether the Tribal Court erred in dismissing the Farmers' adoption petition for failure to comply with the court's order compelling discovery.

III. STANDARD OF REVIEW

This court will review the trial court's decision in adoption proceedings to determine whether the court abused its discretion. *See In re Matter of the Adoption of R.M., S.P.M., and R.M.*, 241 Mont. 111, 118 (1989). The trial court's determination is entitled to a presumption of correctness, and will not be disturbed absent an abuse of discretion. *See e.g., In re Marriage of Welch*, 905 P.2d, 132, 135 (Mont. 1995).

Pursuant to the Tribal Children's Code of the Confederated Salish and Kootenai Tribes (CS&KT), the petitioner in adoption proceedings has the burden of proof to establish by clear and convincing evidence that the adoption is in the best interests of the children. Ordinance 36-B, CS&KT Law and Order Code, Ch. VI, §6g. Accordingly, the trial court's determination as to what

constitutes the best interests of the children in adoption proceedings in this jurisdiction cannot be disturbed as an abuse of discretion where it is supported by clear and convincing evidence.

We will review questions of law in plenary fashion to determine whether the trial court's interpretation of law is correct. *See e.g., In re Marriage of Clingingsmith*, 254 Mont. 399, 402 (1992). This standard of review is based on the fact that no discretion is involved when a court arrives at a conclusion of law. *Id.* at 402-03. The trial court either applies the law correctly, or it does not. *Id.* at 403.

IV. DISCUSSION

A. Dismissal Without a Hearing on the Adoption Petition

The Farmers argue on appeal that the Tribal Court erred by failing to hold an evidentiary hearing on their adoption petition. They contend that dismissal of their petition on the sole basis of briefs and supporting documents contravened tribal law, amounting to reversible error. We agree.

Respondents Mikkelsen and Buckley argue that Chapter V, Section 6 of the Tribal Children's Code does not preclude the dismissal of an adoption petition based upon briefs and supporting documentation. They further assert that neither Chapter V, Section 6 nor any other provision of tribal law precludes pretrial motions, and that the purpose of such motions is "to reach a disposition of matters without the necessity of a trial." Respondents claim in any event that it is "significant" that the Farmers did not request an evidentiary hearing on the motion to dismiss their

petition. They conclude that the Farmers were not entitled to a trial "as a matter of law." Respondents misconstrue the tribal law which controls this case.

The Code of Domestic Relations of the Confederated Salish and Kootenai Tribes, Chapter V, Section 6, Adoptions, requires in relevant part that:

> 2. Adoption proceedings shall be initiated by filing a petition with the Court, which shall conduct the proceedings in a manner that shall assure that all concerned parties, including minors, shall have proper notice of hearings, and be accorded the right to professional counsel of [sic] lay representative at their own expense, the opportunity to introduce evidence, to be heard on their own behalf, and to examine witnesses.
> ...
>
> 5. The person or persons seeking to adopt the child shall appear before the Court and be examined and the Court may require a report to be prepared by the Tribal Social Services Division or the Bureau of Indian Affairs or public agency or person designated by the Court to make such a report on the qualifications of the adoptive person or persons.
>
> ...
>
> 8. After the Court has heard all the facts in such an adoption proceeding, and believes that it is to [sic] the best [sic] of the child to be adopted, it shall enter and [sic] Order accordingly, which may be interlocutory or final...

The above-quoted provisions of CS&KT tribal law control this case. This authority unequivocally requires the trial court to hold a hearing on each adoption petition, notwithstanding whether, as here, the adoption is contested pursuant to competing petitions. In the instant case, the court was statutorily mandated to hold a hearing on the Farmers' petition. It was reversible error not to do so, either independent of or jointly with a hearing on

respondents' adoption petition. We hold accordingly.

Respondents further assert that Chapter VI, Section 6e of the Tribal Children's Code authorizes the court to enter a summary order in adoption proceedings without a hearing. Their reliance on this provision is misplaced.

The Tribal Children's Code, Chapter VI, Section 6e provides in relevant part that the "Court may enter a Summary Order of Adoption if such is requested in the petition..." Chapter VI, Section 6g further provides that "[u]nless the adoption is granted by Summary Order, the Court shall hold a hearing upon the petition."

Chapter VI, Section 6e is facially limited to authorizing summary orders of adoption, and only in cases where the petitioner expressly requests such in the adoption petition and satisfies certain conditions. Neither this nor any other provision of applicable law authorizes summary orders dismissing or denying adoption petitions, as respondents would urge. Since no summary order granting adoption by the Farmers was entered (or requested), the trial court was required to conduct an evidentiary hearing on their petition. We hold accordingly.

Mikkelsen and Buckley rely on two evidentiary hearings conducted "during the course of this case" to assert that dismissal of the Farmers' adoption petition did not circumvent the requirements of tribal law. They rely primarily on the October 14, 1994 hearing on the parties' motions for temporary guardianship. Mikkelsen and Buckley stress that all parties were present and represented by counsel at the temporary guardianship hearing, and

that Floris J. Mikkelsen, Steven and Julie Farmer and others testified. Respondents point out that the trial court grounded its dismissal of the Farmers' adoption petition, in part, on the basis of Julie Farmer's testimony.[3]

Respondents also rely on the August 3, 1995 hearing on their adoption petition to assert that dismissal of the Farmers' petition did not circumvent the requirements of Chapter V, Section 6 of the Code of Domestic Relations. Mikkelsen and Buckley emphasize that they and other supporting witnesses appeared before the court, and that such was sufficient to satisfy the requirements of Chapter V, Section 6 that the party seeking adoption must appear before the court and be examined. Respondents' argument lacks merit.

The two hearings upon which respondents rely cannot serve to meet the requirements of tribal law to hold an evidentiary hearing on the Farmers' adoption petition. A temporary custody hearing cannot be substituted for a hearing on an adoption petition. Nor can a hearing on one party's adoption petition be substituted for a hearing on the adoption petition of another party. The above-quoted tribal law does not allow for such. Rather, it requires a hearing on each adoption petition in order that "all concerned parties" will be given "proper notice of hearings," accorded the right to representation by counsel, the opportunity to introduce evidence and to be heard on their own behalf, and to examine

---

[3] Specifically, the trial court considered Julie Farmer's testimony that she must be on dialysis throughout the night, and that she would not be able to care for the children should a crisis occur during the evening.

witnesses.[4] The Farmers were not accorded any of these specific statutory rights with respect to their adoption petition. In the first instance, they were deprived of a hearing on their own petition, and therefore had no opportunity to exercise any of the rights set forth above. So too with the hearing on respondents' adoption petition. The record indicates that the Farmers were not served with notice of such hearing, and therefore had no opportunity to respond or participate. In short, failure to hold a hearing on the Farmers' adoption petition circumvented the requirements of tribal law. The two evidentiary hearings upon which Mikkelsen and Buckley rely cannot cure this unlawful circumvention. Notwithstanding the evidence on the merits already adduced in this case, failure to hold a hearing on the Farmers' adoption petition further violates all notions of due process and its underlying value of fair play. This Court will not countenance such results.

Respondents next argue that this Court should affirm the dismissal of the Farmers' petition since the Farmers failed to order transcripts of the guardianship hearing and the adoption hearing on Mikkelsen's and Buckley's petition. In effect, they argue that the record does not contain sufficient evidence to enable meaningful review absent these transcripts. Respondents rely on *In re Adoption of J.M.G., J.J.G., and C.C.G.*, 226 Mont.

---

[4] The rule authorizes and indeed contemplates that joint hearings be held in cases involving competing adoption petitions, e.g., "all concerned parties" are to be given notice and accorded the opportunity to participate.

525, 530-31 (1987) for the proposition that the Montana Supreme Court declines to review whether sufficient evidence supports a finding that adoption by a party is in the best interests of the children when hearing transcripts are not provided. Respondents' reliance on this case is misplaced. The Montana Supreme Court held that the natural father's failure to provide the entire transcript of adoption hearings to which he was a party precluded consideration, on appeal, of whether substantial evidence supported a finding that adoption by the stepfather was in the best interests of the children. *Id.*[5] The two hearings respondents rely upon were not hearings on the Farmer's adoption petition. *In re the Adoption of J.M.G., J.J.G., and C.C.G.* therefore does not support respondents' argument.

Rule 3(2) of Ordinance 90B, the Tribal Appellate Court Procedures Ordinance, provides in relevant part that:

> In all cases where the appellant intends to urge insufficiency of evidence to support the order or judgment appealed from, it shall be the duty of the appellant to order the entire transcript of the evidence and proceedings...

The "order or judgment appealed from" by the Farmers is the dismissal of their adoption petition, not the temporary

---

[5] Respondent's contend that the applicable standard of review is whether the adoption is in the best interest of the children as supported by "substantial evidence," the test employed by the Montana Supreme Court. See e.g., In Re the Adoption of R.M., S.P.M., and R.M., 241 Mont. 111, 118, (1989). However, as set forth elsewhere herein, this jurisdiction is required to apply the "clear and convincing" evidence standard in adoption proceedings pursuant to Ordinance 36-B, Ch. VI, §6g.

guardianship order or the interlocutory adoption decree awarded Mikkelsen and Buckley. Since a hearing was not held on the Farmers' adoption petition, it logically follows that there cannot be any transcripts therefor. Common sense dictates that we cannot affirm the trial court's dismissal of the Farmers' adoption petition based upon their failure to provide transcripts which cannot exist, as respondents would urge.

Because the Farmers were denied a mandatory evidentiary hearing on their adoption petition, we cannot and do not reach the merits going to the issue of the best interests of the children. Notwithstanding the considerable evidence adduced and argued to date regarding this issue, the fact remains that the Farmers were denied their statutory right to put on their case in chief, including cross-examination of witnesses. Such precludes establishment of a complete record and meaningful review of the dismissal of their adoption petition. We accordingly remand the case to the Tribal Court with instructions to reinstate the Farmers' adoption petition, and to expeditiously schedule further proceedings on the matter, including an evidentiary hearing on their petition at a date mutually convenient to the court and "all concerned parties."[6]

---

[6] The Farmers contend on appeal that the Indian Child Welfare Act (ICWA), 25 U.S.C. §§1901 et seq. is applicable to this case. As respondents correctly point out, it is not. The ICWA is limited to state court adoption proceedings involving Indian children. See e.g., 25 U.S.C. §§1911-13. See also, Jones, B.J., *The Indian Child Welfare Handbook: A Legal Guide to the Custody and Adoption of Native American Children*, American Bar Association (1995) at 13.

B. Dismissal Based on Failure to Comply with Discovery Order

The trial court also based its dismissal of the Farmer's petition on failure of the Farmers to comply with the June 23, 1995 order compelling discovery of Julie Farmer's medical condition. The discovery order expressly indicated that failure to comply by June 30, 1995 would result in dismissal.

The Farmers further contend that they did not receive notice of the order to compel, and that dismissal of their petition for failure to comply amounted to reversible error. Mikkelsen and Buckley argue that the Farmers did receive notice of the order to compel, but never intended to provide discovery.

The record indicates that the court signed the discovery order on June 23, 1995, and that a copy was mailed the same day to the Farmers' attorney of record, Philip Grainey. The record further indicates that on June 23, the trial court also signed an order granting the Farmers' motion to substitute Douglas Anderson and remove Grainey as their counsel of record. The clerk's certificate of mailing indicates that copies of the substitution order were mailed on June 26, 1995 to attorneys Grainey, Anderson, Dupuis and Firth. The clerk's minute entries further show that the order to compel was signed and filed prior to the order to substitute.

The Farmers contend that the trial court erred by failing to send a copy of the order to compel to attorney Anderson, and therefore, that they cannot properly be considered to have received notice that their petition would be dismissed for noncompliance. However, the Farmers concede that attorney Grainey received a copy.

Notwithstanding, they assert that "[i]t is not the responsibility of a removed attorney to continue to monitor the progress of the case and provide new counsel with copies of documents." Rather, they contend that the trial court had the sole duty to send notice to Anderson. We disagree.

Grainey was counsel of record on June 23, 1995, the day the discovery order was signed and mailed. He was certainly aware that a substitution motion was then pending, having signed the motion himself on May 31, 1995. As respondents point out, notice to an attorney of record constitutes notice to the client or party. *See Davenport v. Davenport*, 69 Mont. 405, 222 P. 422 (1924). Accordingly, we hold that the Farmers received proper notice of the motion to compel since it was served on attorney Grainey, who was counsel of record the day it was served.

Because the Farmers are held to have received notice of the order compelling discovery, their due process rights were not violated. Notwithstanding, failure to comply with the order cannot serve as a basis for dismissal of the their adoption petition. As set forth above, controlling tribal law requires that an evidentiary hearing be held on the Farmers' adoption petition. No such hearing was held. In short, the trial court was not vested with the requisite authority to dismiss the Farmers' petition for failure to comply with the discovery order. We hold accordingly.

We do not hold that the trial court is powerless to redress discovery abuses. However, any such redress must be accomplished pursuant to proper powers of the court, e.g., sanctions or

contempt.

V. CONCLUSION

We hold that the Trial Court committed reversible error as a matter of law in dismissing the Farmers' adoption petition without conducting an evidentiary hearing thereon, and by dismissing their petition for failure to comply with the order compelling discovery. We continue the stay order issued on January 16, 1996 which precludes issuance of a final adoption decree, pending further proceedings on remand of this matter. It appears on remand that a reasonably expeditious, unified hearing involving appellants and respondents would best serve the interests of judicial economy and all concerned parties, including Ashley and Kris Felsman.

VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

SO ordered this 3rd day of March, 1996.

Robert M. Peregoy
Chief Justice

Margaret Hall
Associate Justice

James Wheelis
Associate Justice

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the OPINION AND ORDER to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 11th day of March, 1996.

Douglas Anderson
Attorney at Law
334 E. Broadway
Missoula, Montana 59802

Rebecca T. Dupuis
Attorney at Law
P.O. Box 249
Polson, Montana 59860

Susan Firth
Guardian ad Litem
Confederated Salish and Kootenai Tribes
P.O. Box 278
Pablo, Montana 59855

Clerk of Court
Tribal Court

Abigail Dupuis

Abigail Dupuis
Appellate Court Administrator