

FILED OCT 17 2013

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TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY
LYNN K. McDONALD
CLERK OF COURT

SCOTT COUNTY

STATE OF MINNESOTA

Court File No. 630-09

In Re the Marriage of:

Ashley Rose Farrell,

Petitioner,

And

Corey Lee Farrell,

Respondent.

MEMORANDUM OPINION AND ORDER

The above-entitled matter came before the Honorable Henry M. Buffalo, Jr., Judge of the above-named Court, on the 17th of July, 2013 pursuant to a motion filed by Respondent Corey Lee Farrell. Kevin Wetherille, Esq., appeared on behalf of Respondent and Gary A. Debele, Esq., appeared on behalf of Petitioner who was also present.

On February 2, 2010 the court adopted, by Stipulation of the parties, a Marriage Termination Agreement (MTA) which it entered as a judgment. At the time of the divorce there was one child of the marriage who was born on September 18, 2007. Among several issues addressed by the parties they agreed to the payment of child support by the Petitioner to the Respondent in the amount of \$4000.00 per month which is an upward deviation of that required by the Shakopee Domestic Relations Code, as amended. MTA, Paragraph 21, Page 8. On February 20, 2013 child

support was reduced due to the suspension of the Respondents visitation which resulted in a decrease of the need by the child while under the care of Respondent making the higher amount unreasonable and unfair. The suspension of the Respondents visitation occurred as the result of the commencement of a Child in Need of Assistance Petition filed on August 17, 2012 (Court file CC-069-12) by the Shakopee Community after a police raid occurred at the Respondent's home where he provided care for the child. The Child in Need of Assistance was closed by court order dated August 26, 2013.

In this motion Respondent seeks the reinstatement of child support in the amount of \$4000.00 per month. In support of the request the Respondent makes several arguments: first he argues that he provides the same level of care as previous and the child is at his home, that he maintains his home to provide the care and shares expenses with his roommate but that is not enough to replace the decrease of funds; second, if the higher amount is not restored he will not be able to maintain the child's standard of living while in his care; third, he incurred debt during the course of the Child in Need of Assistance proceeding; forth, although he is now working part time it does not replace the decreased amount; and fifth, there is no basis under the Domestic Relations Code to modify the award agreed to in the stipulation.

In opposition to the motion Petitioner argues; that she agreed to the substantial upward deviation in the MTA because she wanted the child to enjoy the same level of lifestyle while with the Respondent. That she feels the upward deviation is no longer justified and the Respondent should assist in paying for the child's care and the reduction of the award to \$1000.00 per month should be made permanent for several reasons; first under the Domestic Relations Code the

guidelines used to establish child support for one child is \$1948.00 per month and the parenting schedule establishes equal visitation so if the award for support is split between the parents the amount would be \$974.00 each and the current award of \$1000.00 meets the requirements of the Code and should not be changed; second, that the Petitioner is still obligated to pay the mortgage on the home in which the Respondent resides and provides care to the child and that monthly mortgage amount is in excess of \$5000.00 per month; third, that in addition to his roommate the family unit has one child together and the roommate has two other children from a previous marriage and he has another child from a previous relationship all of whom use the Respondent's home and that they, the Respondent and his roommate need to provide the financial support for the needs of that family unit; forth, that the Respondent agreed to a substantial lump sum payment to terminate the spousal maintenance agreement set forth in the MTA and that the Petitioner has paid those monies to Respondent; and fifth, that Petitioner argues that she has incurred substantial attorney fees as a result of the Respondent's poor choices in the care of their child.

LEGAL DISCUSSION

In consideration of a request for the modification of a child support award the court is bound to follow the requirements of the Domestic Relations Code, as amended. The Code at section 7(d)(1) states as follows:

The court may receive evidence to determine if an upward departure from the child support amount delineated in the guidelines is appropriate and necessary for the child(ren). An upward departure from the guidelines shall only occur if the child has medically documented physical, mental or emotional needs, including chemical dependency and learning disability needs, which require professional intervention or oversight and exceed those services provided by Tribal insurance or programs.

The Code also lists in Section 7(b) other factors it may consider in setting or modifying

child support. The pertinent factor for this request is found at 7(b)(1) and states as follows:

The Court shall not consider the following factor(s):

(1) The standard of living the child would have enjoyed had the marriage not been dissolved; had the parents resided together or continue to reside together.

When it comes to modifying child support awards this court in Cannon v. Prescott, 4 Shak. T.C. 144 (Nov. 25, 2002), observed that:

The Domestic Relations Code was amended in 2001 to make clear how child support awards are to be calculated and how a request for an increase in child support is to be handled. Specifically, the resolution accompanying those amendments states that,

Members of the Community have not been afforded the full protection of the law of the Community due to misinterpretations or misunderstandings of the [child support] guidelines in the Domestic Relations Code ... [and] the General Council determines it is necessary to clarify its intent and purpose in promulgating the Domestic Relations Code and to clearly specify the limits on the exercise of discretion by the Tribal Court in determining awards of child support ...

id. at Page 2

The court went further to note that the individual seeking the upward deviation, carries a heavy burden and the court is limited in its review.

Here the Respondent carries the burden of making a showing that the upward deviation re-instating the previous award of child support meets the requirements of the Domestic Relations Code. In order to be successful he must,

...."overcome the presumption that awards derived under the guidelines are sufficient to support a particular child, but that this Court may exceed the guidelines in a particular case, provided that the Petitioner [here Respondent] is able to present concrete evidence of a physical, mental, or emotional need of the child that is not covered by Tribal insurance or programs, and which

is not related to the child's lifestyle needs." See Cannon at 4.

The Respondent here makes no showing that the child has a physical, mental or emotional need that is not covered by Tribal insurance or programs. Instead he argues that he will not be able to maintain the child's standard of living while in his care. Although the parties may have stipulated to the standard of living need previously in the MTA, without the agreement of the parties the Code actually prohibits the court from considering the standard of living as a basis for the deviation. Finally, his arguments address his financial needs and not those of the child. The Respondent has therefore failed to make the necessary showing to support his request for reinstatement of the upward deviation.

The Petitioner argues that the Respondent must take some responsibility for the financial support of the child and suggests that the parties should split the amount established by the guidelines for the support of one child. She bolsters her argument by the fact that the new parenting plan splits the visitation time between the two parties equally. The court agrees with the observation that each parent has an obligation to financially support their children. But the court is limited in the setting of an award if the parents share equally in the care of the child. The Domestic Relations Code in Section 7 (a) states that "Child support shall be paid by the non-custodial parent..." Here the parents submitted a Parenting Plan which was adopted by Order of this court on July 17, 2013. This Plan by its nature and intent establishes a schedule and decision-making by the parents with respect to the child that clearly creates joint custody and responsibility for equal care of the child in each of their homes. It is evenly divided to the point where there is no non-custodial parent which is required of the court to set an award of child support.

The Respondent in bringing this motion had the opportunity to inform the court that his

income is insufficient to support the needs of the child while in his care. Instead of providing information as one might find in a budget that lays out the financial needs and expenses of caring for the child and maintaining the home he made bald statements as to those in paragraph 7 and 8 of his affidavit in support of his request where he states as follows:

7. Currently I am back to having the parenting relationship with Chance that was set forth in the divorce decree. He spends significant time in my home. I have expenses associated with this as well. I continue to maintain my home for my son. I do so now without the benefit or assistance of the significant spousal support payment from the Petitioner.

8. After the Petitioner and I agreed to terminate spousal support, I asked my girlfriend, Monica, to move into my home. I needed to have someone to share household expenses with, and Monica and I have a daughter together. There is no doubt that Monica being in the home cannot replace my spousal support, but it does help.

Respondent's Affidavit, Page 2

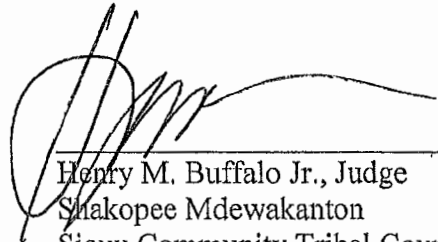
The Petitioner in her affidavit states that she continues to pay the mortgage on the home that the Respondent is currently residing in and that mortgage is in excess of \$5000.00 per month. Petitioner Affidavit, Paragraph 8, Page 4

So in spite of the statement that the Respondent continues to "maintain my home for my son" he does not have the financial responsibility to pay what would otherwise be the largest expense for a family living in a home. Lastly, the Respondent asks the court to take notice of the previous affidavits submitted by him to show that his income is insufficient to provide care for his child and adds that "this information is largely true and correct to date". Respondent Affidavit Paragraph 11, Page 3. Unfortunately this is also an insufficient basis to set an award of child support under Section 7 of the Code.

Based upon the files, proceedings, and argument of counsel, the Court **ORDERS** as follows:

1. That the Respondent's request for an upward departure is **DENIED**.
2. That the Parenting Plan as adopted by this court on July 17, 2013 establishes joint custody of the child and Respondent has failed to show any evidence that would establish a basis for this court to set a child support award under the requirements of Section 7 of the Domestic Relations Code. The existing Child Support award is **VACATED**.

Dated this 17th day of October, 2013



Henry M. Buffalo Jr., Judge
Shakopee Mdewakanton
Sioux Community Tribal Court