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

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IN THE MATTER OF  
BRUCE BAUER,  
Petitioner/Appellant,

**Appeal No. 138**

vs.

KAREN KOHL BAUER,  
Respondent/Appellee,

**THIS APPEAL** came before the Appeals Court from an Order for Amended Judgment, entered by Honorable Howard Bemer on June 6, 1991, ordering that the prior joint custody order be amended, granting Karen Bauer sole legal and physical custody of the minor children of the parties. Bruce Bauer was granted visitation on alternating week-ends on 24 hour notice, and alternating major holidays as provided in the original order. Bruce Bauer's child support obligation was set at \$225.00 per month.

**DECIDED:** The Court will rule on the matter on the submitted briefs.

**BRIEFS WERE SUBMITTED:** Appellant: December 3, 1991  
Appellee : December 17, 1991

**FOR APPELLANT:** Melissa G. Schauer, Lay Advocate, Box 214, Wolf Point, Montana 59201

**FOR APPELLEE:** Ronald A. Hodge, Attorney at Law, P.O. Box 1791, Bismarck, North Dakota 58502

**CIVIL: AWARDING SOLE LEGAL AND PHYSICAL CUSTODY TO KAREN BAUER WAS A FACTUAL DETERMINATION NOT SUPPORTED BY SUBSTANTIAL EVIDENCE; AN AWARD OF JOINT CUSTODY IS IN THE BEST INTEREST OF THE CHILDREN.**

**OPINION** by Debra Johnson, Associate Justice, joined by Gary James Melbourne, Associate Justice.

**HELD: THE AMENDED JUDGMENT OF THE LOWER COURT ORDERING SOLE CUSTODY OF JUSTIN BAUER AND CLARICE BAUER TO KAREN KOHL BAUER IS HEREBY VACATED AND THE ORIGINAL JOINT CUSTODY ORDER IS HEREBY AFFIRMED.**

## FACTS

Justin Bauer and Clarice Bauer are the children of Appellant Bruce Bauer (hereinafter referred to as father) and Appellee Karen Kohl Bauer (hereinafter referred to as mother).

Mother and Father were divorced in August 1988, they were married four (4) years (TR.3, 1,2,3,4). The Mother resides in Dickinson, North Dakota (TR. 13, 19-20). The Father resides in Wolf Point, Montana (TR.18,6) on the Fort Peck Indian Reservation.

On May 23, 1988, a final judgment was issued, providing joint custody to both Appellant and Appellee in the best interests of the children.

A Motion to Modify Custody was filed on December 4, 1989 by Attorney Ronald Hodge for Respondent\Appellee, Karen Bauer, whereas to eliminate joint custody of the children, and place custody of them solely with Appellee with the right of visitation by Appellant.

A Motion for Changed Circumstances was also filed on December 4, 1989, by Appellee, stating thirteen (13) alleged acts the Appellant committed. Attached to this was an affidavit of the Appellee.

On January 4, 1990, the Honorable Terry Body entered an Order to Compel Production of Documents, he further ordered a Show Cause on March 2, 1990.

A Response to Motion to Compel Production of Documents and Order to Show Cause was filed by Appellant's counsel on March 2, 1990.

The Court ordered the Appellee and the Appellant to produce psychological evaluations on themselves and the two (2) children. Appellee provided all the documentation on her and the children. The evaluations concluded the Appellee to have excellent parenting skills. Appellant was reluctant to comply with the Order.

On May 24, 1990 a hearing was held at the Fort Peck Tribal Court with Appellee represented by counsel and Appellant represented by counsel.

The Order for Amended Judgment was submitted to the Honorable Terry Boyd for signature on June 19, 1990, however, this Order was never signed and entered until June 6, 1991, by Chief Judge Howard Bemer for Judge Boyd.

On June 24, 1991, Appellant filed his Petition for Review. On November 8, 1991, said Petition was granted in part, limited to the following issue, which will be addressed by the Court:

1. Did the Tribal Court improperly allow no testimony\evidence supporting the Amended Judgment of Custody entered on June 6, 1991.

I.

In addressing whether the Tribal Court's Amended Judgment entered on June 6, 1991, was appropriate, this Court has the authority to review the custody order issued and affirm or modify the same under 1, CCOJ, 202, this section provides:

"The Jurisdiction of the Court of Appeals shall extend to all appeals from final orders and Judgments of the Tribal Court. 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 on of the Tribal Court if such determinations are supported by substantial evidence...."

It is this Court's decision that awarding sole custody to Appellee is a factual determination not supported by substantial evidence presented at the May 24, 1990 hearing; and is not in the best interests of the children.

The factors which are appropriate and consistent in determining the "best interest of the children" are in **VI CCOJ, 304(b)**, which reads as follows:

"... in determining the best interest of the child, the Court shall consider the relative ability of the parents to provide adequate food, clothing, shelter, medical care, 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".

**In Re the Custody of C.Y., Minor**, Fort Peck Court of Appeals, No. 143, 1992, the Court stated, "The Intent of Child Custody Statute **VI CCOJ, 304**, is to assure minor children frequent and continuing contact with both parents after their parents have separated or divorced to encourage parents to share the rights and responsibilities of child rearing".

This Court further finds no allegations or showing of any harm, abuse or neglect by Appellant or Appellee in regard to the minor children.

Both Appellee and Appellant appear to be caring parents with the best interest of their children a priority, whereby careful consideration should be applied in the rights of the children to know their parents on a equal basis.

In conclusion, the facts of this case do not support an award of sole custody since this would not be in the best interest of the children.

It is the decision of this Court that the order for Amended Judgment, dated June 6, 1991, is hereby vacated, and the original joint custody order is affirmed. Appellants child support obligations remains \$225.00 per month.

**DATED** this \_\_\_\_\_ day of February, 1992.

**BY THE COURT OF APPEALS:**

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DEBRA JOHNSON, ASSOCIATE JUSTICE

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GARY JAMES MELBOURNE, ASSOCIATE JUSTICE

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