

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

JAY EVERETT DORFF,	)	
	)	
Respondent/Appellant,	)	CAUSE NO. AP-93-219-DV
	)	
vs.	)	
	)	OPINION AND ORDER
BILLIE JEAN DORFF,	)	
	)	
Petitioner/Appellee.	)	
	)	

Argued February 19, 1996

Decided March 3, 1996

Jay Everett Dorff, *pro se*, as Respondent/Appellant.

Rebecca T. Dupuis for Billie Jean Dorff Hartung,  
Petitioner/Appellee.

Appeal from the Tribal Court of the Confederated Salish and  
Kootenai Tribes; Stephen A. Lozar, Trial Judge, Presiding.

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

PEREGOY, Chief Justice:

Respondent Jay Everett Dorff (Jay) appeals the trial court's  
order granting petitioner Billie Jean Dorff Hartung (Billie Jean)  
a modification of child support. We affirm in part, reverse in  
part, and remand for further proceedings consistent with this  
opinion.

I. BACKGROUND

Jay and Billie Jean were married in January 1975 in Pablo,  
Montana. Two children were born of the marriage, Camille Jae and  
Crystal Joy. Billie Jean filed for dissolution of the marriage in  
December 1993. In February 1994 the parties entered into a

property settlement and child support agreement. The decree of dissolution was entered in March 1994, and incorporated the settlement agreement.

Pursuant to the settlement agreement, the trial court awarded Jay and Billie Jean joint custody of the minor children. Billie Jean was designated primary residential custodian of Crystal, and Jay was designated primary residential custodian of Camille. Each was ordered to pay the other \$300 per month child support. As a result of the offsetting obligations, neither party was required to pay the other any amount for child support until Camille reached majority or became otherwise emancipated. At such time, the decree required Jay to pay Billie Jean \$300 per month for the support of Crystal until she too reached majority or became otherwise emancipated.

Camille resided with Jay in Florida and Crystal stayed with Billie Jean on the Flathead Reservation in Montana. While living with her father in Florida, Camille dropped out of high school. In October 1994 Jay sent her to Montana to live with her mother. Camille has resided with her mother since that time. She attends Ronan High School, is doing well, and plans to graduate.

In December 1994, Billie Jean filed a motion for modification of the child support provisions of the divorce decree. Therein, she sought an order designating her as the primary residential custodian of Camille and requiring Jay to increase support payments.

The court scheduled the hearing on the motion to modify for

February 10, 1995. Two days before the hearing, the trial judge held a settlement conference by telephone, allowing Jay to appear *pro se* long-distance from Florida. Attorney Rebecca Dupuis appeared on behalf of Billie Jean. When it became evident that a settlement could not be reached, the court raised the question of representation of Jay at the evidentiary hearing on Billie Jean's motion to modify.

The record shows that Jay thought the February 7 settlement conference was part of the February 10 hearing. After advising him that it was not, the court referred Jay to an attorney registry "if [Jay] wanted[ed] representation" at the February 10 hearing, indicating that such "might be a source to find an attorney for Jay if this is the way he wants to go," and if [he] wante[d] to do that." The record further indicates that Jay stated it would be "advantageous" to have counsel, and that he would try, although he was not sure if he could engage an attorney in Montana during the two-day period before the hearing. He accordingly requested additional time. Attorney Dupuis objected to a continuance, arguing that Jay had sufficient notice of the hearing. The court declined to continue the matter and instructed Jay to "try to get an attorney to represent you here by Friday."

The court did not allow Jay to appear *pro se* by telephone at the evidentiary hearing. The trial judge stated that one "obvious reason" is that "I wouldn't know who I'd be talking to." Jay did not travel from Florida to appear personally at the hearing, nor was he represented. Reasoning that "[t]here is only one thing for



the Court to do since [Jay] knew this was here and he had a chance," the court announced a "default judgment" from the bench in favor of Billie Jean.<sup>1</sup>

On March 7, 1995, the trial court entered a written modification of child support, designating Billie Jean as the primary residential custodian of Camille. The court also increased Jay's payments to \$520 per month, to include the \$300 he was obligated to pay for Crystal under the original decree, as well as an additional \$220 per month for Camille until she reaches age nineteen. The court awarded this amount retroactively to October 19, 1994, the date Camille began living with Billie Jean. It further awarded Billie Jean \$1,049.56 for costs and attorney's fees incurred in securing the modification of the child support provisions of the settlement agreement originally incorporated in the divorce decree. Jay appeals.

## II. ISSUES

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<sup>1</sup> Notwithstanding this bench ruling, the court did not enter a default judgment against Jay, either as a matter of fact or as a matter of law. A court can only enter a default judgment if the party entitled to a judgment by default applies to the court for such. The applicable rules of procedure require that the party against whom default is sought be served with written notice of the application at least 3 days prior to the hearing on such application. See Mont.R.Civ.P., Rule 55(b)(2); Ordinance 36-B, CS&KT Law and Order Code, Ch. II, §10. The record indicates that Billie Jean did not apply for a default judgment, that there was no such "default hearing," and that no such judgment was ever entered against Jay. Although the court termed the judgment a "default," it simply proceeded at the February 10 hearing to take evidence in the absence of Jay and/or counsel on his behalf. While labeling the judgment a "default" merely constituted harmless error, proceeding to take evidence in the absence of Jay or a representative is another matter.

We frame the issues on appeal as follows:

1. Whether the trial court erred in modifying Jay's child support obligation.
2. Whether the trial court erred in increasing Jay's child support payments to \$520 per month.
3. Whether the trial court erred in failing to grant an offset to Jay's modified child support obligation in the amount of the estimated value of his gun collection.
4. Whether the trial court erred in determining that Camille is entitled to support until she is nineteen years old, emancipation notwithstanding.
5. Whether the trial court erred in granting a retroactive modification of Jay's child support obligation.
6. Whether the trial court erred in awarding Billie Jean attorney's fees and costs incurred in litigating her motion to modify Jay's child support obligation.

### III. STANDARD OF REVIEW

This Court will review findings of fact in child support modification cases to determine whether they are clearly erroneous. *In re Marriage of Kovash*, 270 Mont. 517, 521 (1995). A finding is clearly erroneous if it is not supported by substantial credible evidence. *Id.*

We will review the trial court's overall decision modifying child support awards to determine whether the court abused its discretion. *In re Marriage of Welch*, 905 P.2d 132, 135 (Mont. 1995). The trial court's determination is entitled to a

presumption of correctness, and will not be disturbed absent an abuse of discretion. *Id.*

We will review questions of law in plenary fashion to determine whether the trial court's interpretation of the law is correct. *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. Either the court applies the law correctly, or it does not. *Id.* at 403.

#### IV. DISCUSSION

##### A. Modification of Jay's Child Support Obligation

Jay argues, in effect, that the trial court abused its discretion by modifying his original child support obligation. Specifically, he contends that the trial court erred by increasing his child support payments from the agreed and decreed offset of zero to \$520 per month.

A trial court may modify a child support obligation "upon a showing of changed circumstances so substantial and continuing as to make the terms [of the original decree] unconscionable." See §40-4-208(2)(b)(1)(i), MCA; see also *In re Marriage of Conklin*, 221 Mont. 30, 32 (1986). It is undisputed that it is in Camille's best interest to reside with Billie Jean, and the court so found. It further found that the mutual child support offset was no longer warranted due to Camille's change of residence. The court therefore did not abuse its discretion by ruling *sub silentio* that Camille's change of residence constituted a substantial and



continuing circumstance warranting a modification of Jay's child support obligations. We hold accordingly.

B. Increase in Jay's Monthly Child Support Payments

Jay contends that the court erred by increasing his child support payments to \$520 per month. Specifically, he claims that he cannot afford to pay more than \$100 per child per month, for a total of \$200 monthly child support.

Section 40-4-204(3)(a), MCA, provides in relevant part:

Whenever a court issues or modifies an order concerning child support, the court shall determine the child support obligation by applying the standards in this section and the uniform child support guidelines adopted by the department of social and rehabilitative services...The guidelines must be used in all cases... The amount determined under the guidelines is presumed to be an adequate and reasonable support award, unless the court finds by clear and convincing evidence that the application of the standards and guidelines is unjust to the child or any of the parties or is inappropriate in the particular case.

See also *In re the Marriage of Clingingsmith*, 254 Mont. 399, 406 (1992).

In the instant case, the trial court applied the Montana Child Support Guidelines, and determined Jay's ability to pay based on completion of the Montana Child Support Determination Worksheet prepared by Billie Jean's attorney. Cf. *In re Marriage of Welch*, 905 P.2d 132, 134 (Mont. 1995) (court adopted figures from child support worksheet prepared by petitioner's attorney). The court found Jay's annual gross income to be \$25,000, and that it was derived from two sources: (1) \$20,400 from workers' compensation,

and (2) \$4,600 earned from "carpentry jobs performed on the side."<sup>2</sup>

Jay's income from worker's compensation is undisputed. It is supported by documentary evidence which he submitted showing that he received \$1,700 per month in worker's compensation benefits, and by corroborating testimony of Billie Jean. This finding is therefore supported by substantial credible evidence.

The parties dispute whether Jay earns \$4,600 per year for carpentry work. Jay contends on appeal that the court erred by including the \$4,600 as part of his yearly annual income. The court's \$4,600 finding is based on testimony elicited from Billie Jean and Camille at the February 10 hearing. As a partial result of this finding, the court increased Jay's child support payments to \$520 per month. We must determine whether the finding that Jay earns \$4,600 each year from carpentry jobs is supported by substantial credible evidence. See *In re Marriage of Kovash*, 270 Mont. 517, 521 (1995). In light of the particular circumstances of this case, we conclude that it is not.

"Substantial evidence" is evidence that "is of such weight and

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<sup>2</sup> The court found the \$4,600 to be "imputed income," based on the Montana Child Support Determination Worksheet prepared by counsel for Billie Jean. As a threshold matter, "imputed income" under controlling law is not earned income. "'Imputed income' means income not actually earned by a parent, but which may be attributed to the parent because the parent is voluntarily unemployed, is not working full-time when full-time work is available, or the parent is intentionally working below his or her ability or capacity to earn income." Rule 46.30.1513, Determination of Imputed Income, Administrative Rules of Montana (ARM) (1995). Since, as the court found, the \$4,600 was earned by performing carpentry jobs, it is not "imputed income." While it was harmless error to treat it as such, whether it was properly included as part of Jay's gross annual income is another matter.



quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proven." 5 Am. Jur. 2d *Appellate Review* § 666, at 340 (1995). The Montana Supreme Court has stated that "substantial evidence" is evidence "as will convince reasonable men and on which such men may not reasonably differ as to whether it establishes the (prevailing party's) case, and, if all reasonable men must conclude that the evidence does not establish such case, then it is not substantial evidence." *Cameron v. Cameron*, 179 Mont. 219, 228 (1978).<sup>3</sup>

For evidence to be "credible" under tribal law, it must have been elicited and admitted in a trial or hearing conducted "...in such manner as to do substantial justice between the parties according to applicable law..." See CS&KT Ordinance 36-B, Ch.II, § 9(2). This means that trial proceedings must be cloaked with the protections and guarantees of due process ("applicable law") before evidence elicited can be considered "substantial credible evidence." Where facts are disputed, as the \$4,600 is here, an evidentiary hearing is required so as to afford the parties the right to appear or be represented by counsel, to offer testimony, and to cross-examine adverse witnesses. See e.g., Ordinance 36-B, Ch. II, §§7, 9(1). In this case, these procedural protections were not extended to Jay, nor was the February 10 hearing conducted in a "manner as to do substantial justice between the parties."

Here, the court refused to let Jay appear *pro se* by long-

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<sup>3</sup> The evidence may be "inherently weak" and still be considered "substantial," and substantial evidence may conflict with other evidence presented. *Id.*

distance telephone at the February 10 evidentiary hearing, even though it had allowed him to so appear two days earlier at the February 7 settlement conference. If the court was satisfied that it was Jay who in fact appeared *pro se* by telephone for the February 7 conference, it had no rational basis to conclude that it would not be able to ascertain his identity on the phone at the February 10 evidentiary hearing. Certainly, the court could have verified Jay's identity by conducting a sworn *voir dire* examination of Billie Jean and Camille, who know Jay's voice. Moreover, the record indicates that the February 10 evidentiary hearing was noticed on January 20, but that no notice was sent to the parties regarding the February 7 settlement conference--which Jay, a non-attorney, thought was part of the February 10 hearing.<sup>4</sup>

In view of these circumstances, Jay had a reasonable expectation that he would be allowed to appear *pro se* by telephone at the February 10 hearing. It was arbitrary and prejudicially unfair not to allow him do so, and to concurrently deny his request for a reasonable continuance in order to obtain Montana counsel within the two-day period between the settlement conference and evidentiary hearing. This is particularly so considering that the court had pre-determined at the February 7 conference that it would

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<sup>4</sup> We have instructed that *pro se* litigants "are commonly required to comply with standards less stringent than those applied to expertly trained members of the legal profession." *Bates v. Jean*, 745 F.2d 1146, 1150 (7th Cir. 1984). Most districts are 'extraordinarily patient and understandably lenient' with *pro se* litigants who are unfamiliar with the rules of procedure. *Harris v. Callwood*, 844 F.2d 1254, 1261 (6th Cir. 1988) (Ryan, J., dissenting)." See *Northwest Collections, Inc. v. Pichette*, 22 ILR 6048-49 (C.S.&K.T. Ct.App., Feb. 3, 1995).

accord "powerful" weight to Camille's testimony at the February 10 hearing, and that the court was aware of Jay's circumstances, i.e., that he is a non-attorney located in Florida with modest means.

Refusal to let Jay enter a *pro se* appearance or grant him a continuance resulted in denying him "substantial justice according to law," i.e., it constituted a denial of due process. This ultimately and fatally tainted the sole evidence upon which the court based its finding that he earns \$4,600 per year from carpentry jobs. Because this evidence was elicited and admitted without due process, it cannot be considered "substantial credible evidence" as a matter of law. See e.g., 5 Am. Jur. 2d *Appellate Review* § 666, at 340 (1995); CS&KT Ordinance 36-B, Ch. II, §§ 7, 9. Since the \$4,600 yearly income finding is not supported by substantial credible evidence, it is "clearly erroneous" under controlling law. See, e.g., *In re Marriage of Kovash*, 270 Mont. 517, 521 (1995). We hold accordingly.

We further hold that the child support modification of \$520 per month constituted an abuse of discretion since the clearly erroneous finding of \$4,600 was included as part of Jay's annual income to determine the amount of the modified award. See e.g., *In re the Marriage of Welch*, 905 P.2d 132, 135 (Mont. 1995). We therefore set aside the modified award of \$520.

We remand the matter for further proceedings to allow Jay reasonable time to engage Montana counsel or to appear *pro se* by telephone for the limited purpose of eliciting evidence regarding income allegedly earned from carpentry jobs, and a further



determination how such earned income, if any, factors into a properly determined modified child support award.<sup>5</sup>

C. Gun Collection Offset

Jay argues that the court erred by failing to grant an offset to his modified child support obligation in the amount of the estimated value of his gun collection (\$10,791.49), allegedly sold by Billie Jean. Billie Jean asserts that the gun collection was personal property, and that personal property cannot later be claimed for inclusion as child support.

The Montana Supreme Court has refused to grant an offset in a situation similar to that at bar. See *In re Marriage of Hadford*, 194 Mont. 518, 527 (1981). In *Hadford*, the husband claimed that his back child support obligations should be offset by the failure of the wife to return \$1,399 of an income tax refund. He signed the check and sent it to the wife to sign, which she did. However, she kept all of the proceeds. The Montana Supreme Court refused to grant the offset. It reasoned that "[t]he question of who was entitled to the proceeds of the income tax return was purely a dispute between the husband and wife as to their property settlement, and it should not affect the separate child support

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<sup>5</sup> Our ruling requiring the trial court to accord Jay the choice to enter a *pro se* telephone appearance on remand is limited to the particular facts of this case. We do not hold that telephone hearings are a required option in all cases. Nor do we overlook the underlying importance of personal appearances of witnesses or counsel in order for the court to observe and judge the their demeanor and credibility. We simply hold that due process, fairness and consistency require it in this specific case. Moreover, we note that telephone hearings are sometimes allowed in both state and federal courts where the circumstances so warrant.

obligation imposed on the husband." We find the holding and reasoning in *Hadford* to be instructive here. In this case, the personal property and child support agreement were separate matters of the parties' settlement agreement incorporated in the divorce decree, which Billie Jean now seeks to modify. Like the situation in *Hadford*, the question of the proceeds, if any, of the alleged sale of Jay's gun collection is purely a dispute between Jay and Billie Jean regarding personal property, and should not affect Jay's separate child support obligation. Accordingly, we hold as a matter of law that the proceeds of the alleged gun sale, if any, cannot be used to offset Jay's child support obligations.<sup>6</sup>

#### D. Emancipation

The trial court ordered Jay to provide child support payments for Camille until she reaches the age of nineteen. Jay contends that Camille was emancipated under Florida law when she dropped out of school during the tenth grade. He asserts that this absolves him of any further support obligations of Camille, pursuant to the terms of the Decree of Dissolution. We disagree.

The settlement agreement incorporated in the divorce decree provides that the agreement "shall be construed and governed in accordance with the laws of the Confederated Salish and Kootenai Tribe[s]..." Tribal law provides for the application of the laws of Montana in this case. See Ordinance 36B, Ch. II, §3. Therefore, contrary to Jay's assertion, Florida law is not

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<sup>6</sup> Of course, Jay is entitled to bring a separate action regarding the gun collection matter.

applicable here. The governing statute is §40-4-208(5), MCA which provides:

Provisions for the support of a child are terminated by emancipation of the child or the child's graduation from high school if the child is enrolled in high school, whichever occurs later, but in no event later than the child's 19th birthday, unless the termination date is extended or knowingly waived by written agreement or by an express provision of the decree...

Emancipation triggers the termination of rights and duties in regard to care, custody and earnings of a child. The question of whether a child is emancipated is a question of fact to be determined by the court. Pursuant to Montana law, there is a presumption against emancipation of a child under the age of eighteen, and the burden of establishing emancipation is on the party asserting it. *In re Marriage of Bordner*, 220 Mont. 339, 343 (1986). Jay has failed to meet his burden here.

The trial court found Camille was enrolled in the 11th grade at Ronan High School during the 1994-95 school year. The record further indicates Camille was born on April 26, 1977. She therefore will reach the age of nineteen years on April 26, 1996, presumably while in her senior year of high school. These facts are essentially undisputed. Accordingly, we hold under §40-4-208(5), MCA that the court did not abuse its discretion by awarding Billie Jean child support for Camille until she reaches the age of nineteen years, emancipation notwithstanding. See *In re Marriage of Bowman*, 226 Mont. 99, 109-110 (1987) (§40-4-208(5), MCA clearly empowers the court to order that support of the child may be extended beyond the age of emancipation).



#### E. Retroactive Modification

We raise this issue *sua sponte*. The trial court awarded Billie Jean modification retroactive to the day Camille began residing with her in Montana, i.e., October 19, 1994. As a threshold matter, a court's discretionary authority to modify a child support decree is limited to installments accruing after the parties have been provided actual notice of the modification motion. See §40-4-208(1), MCA; *In re Marriage of Kovash*, 270 Mont. 517, 525 (1995); *Cf. In re Marriage of Welch*, 905 P.2d 132, 137 (Mont. 1995). Billie Jean filed her motion for modification on December 5, 1994. Therefore, the effective date of the child support modification could have been no earlier than December 5, 1994, had Billie Jean properly petitioned the court. However, she did not.

In a proceeding for an increase in child support, a trial court may not award retroactive child support unless the petitioner seeks it in the pleadings. *In re Marriage of Parrish*, 234 Mont. 345, 350 (1988). Billie Jean's motion seeking modification of the original support decree was limited to the issues of the primary residential custodian and the amount of support of Camille. The issue of retroactive child support was not before the court. It was therefore improperly awarded as a matter of law and is accordingly set aside.

#### F. Attorney's Fees and Costs

We also raise this issue *sua sponte*. The trial court concluded "as a matter of law" that Billie Jean was entitled to a

judgment for attorney's fees and costs in the amount of \$1,049.56 incurred in litigating her motion to modify. The trial court based this conclusion on testimony which counsel elicited from Billie Jean at the February 10 hearing. Specifically, attorney Dupuis asked Billie Jean if she had requested attorney's fees and costs in her motion to modify, and whether she had requested that Jay be ordered to pay them. Billie Jean replied affirmatively to both questions.

Notwithstanding, the record reveals that Billie Jean did not request attorneys fees or costs in her motion to modify, nor did she move the court to order Jay to pay them. The issue of attorney's fees and costs was therefore not before the court. Moreover, the first and only time the issue of attorney's fees and costs was raised was by Billie Jean's counsel at the February 10 hearing. Because Jay was neither present nor represented, he had no notice or opportunity to respond or object. The award of attorney's fees and costs therefore amounted to a further violation of due process. We hold accordingly as a matter of law and set such award aside in total.

#### V. CONCLUSION

We hold that the trial court: (1) did not abuse its discretion in modifying Jay's child support obligation; (2) abused its discretion in increasing Jay's child support obligation to \$520 per month; (3) as a matter of law did not error in declining to grant Jay an offset to his modified child support obligation in the amount of his gun collection; (4) did not abuse its discretion in

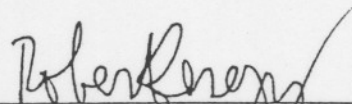
determining that Camille is entitled to support until she is nineteen years old, emancipation notwithstanding; (5) erred as a matter of law in granting retroactive modification of Jay's child support obligation; and (6) erred as a matter of law in awarding attorney's fees and costs which Billie Jean incurred in bringing her motion to modify.

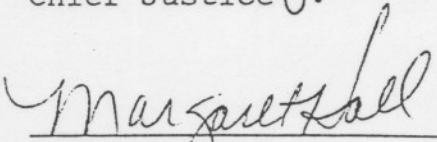
We remand the matter for further proceedings to allow Jay reasonable time to engage Montana counsel or to enter a *pro se* appearance for the limited purpose of eliciting evidence regarding income allegedly earned by Jay performing carpentry jobs, and for a further determination of how such earned income, if any, factors into a properly determined modified child support award.

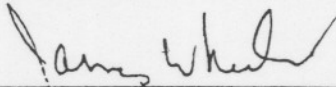
AFFIRMED IN PART, REVERSED IN PART AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION

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.

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Clerk of Court  
Tribal Court

Abigail Dupuis  
Abigail Dupuis  
Appellate Court Administrator