COURT OF APPEALS OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

SMSC RESERVATION **STATE OF MINNESOTA**

In re the marriage of:

James Van Nguyen,

Appellant/Respondent.

vs.

Amanda Gail Gustafson,

Appellee/Petitioner.

File No. Ct. App. 045-19

Memorandum Opinion and Order

In this marriage dissolution matter, James Van Nguyen appeals a May 3, 2019 decision by the Trial Court of the Shakopee Mdewakanton Sioux Community, contending that the Trial Court lacked subject-matter jurisdiction over his marriage to the Appellee, Amanda Gail Gustafson, and also lacked personal jurisdiction over him. Nguyen also contends that in its decision the Trial Court abused its discretion when it adopted a parenting time schedule for the parties' child that denied Nguyen's request for parenting time each year during the Vietnamese New Year ("Tet").

Today we affirm the Trial Court with respect to both its subject-matter jurisdiction and its personal jurisdiction, but we reverse it with respect to the aspect of the parties' parenting time to which Nguyen objects, and we remand the matter as to that issue.

Several distinct reasons underlie our conclusions. First, the Trial Court's dissolution of parties' marriage was an exercise of its *in rem* jurisdiction over the marriage, which was entirely proper given the Trial Court's findings with respect to Gustafson's residence at the time of the filing of her petition. Second, the Trial Court's orders, with respect to the custody and parenting time of the parties' Community-member child, who remains a ward of the Community's Children's Court as a consequence of prior proceedings in that Court, was appropriate given the Court's duty to ensure her continued protection and welfare. Third, the Trial Court's Final Judgment, dealing with all aspects of Gustafson's petition, was a proper exercise of the Community's inherent retained power to regulate the domestic affairs of its members. Finally, although for the foregoing reasons we believe that the doctrines set out by

the Supreme Court of the United States in *Montana v. United States*, 450 U.S. 544 (1981) do not apply to this case, we also believe that, if that case in fact is applicable, then as the Trial Court found, each of the case's two exceptions, relating to permissible tribal court jurisdiction over non-Indians, apply here.

I. The Parties and Their Child.

Gustafson is a member of the Shakopee Mdewakanton Sioux Community ("the Community"). Nguyen is not a member of an Indian tribe. Gustafson and Nguyen are the parents of one child, who is a member of the Community and who, as a consequence of child welfare proceedings that were instituted in 2015 and are discussed below, continues to be a ward of the Community's Children's Court.

II. The Parties' Litigation History.

The parties and their marriage have generated a considerable judicial history, within the Community's Courts and in other jurisdictions, and a significant amount of that history bears directly on the jurisdictional questions raised in this appeal.

The parties were married in Las Vegas, Nevada, on June 13, 2014. At the time of their marriage, Gustafson was the subject of a Conservatorship of Person, created by and supervised by the Community Court under the Community's Amended and Restated Conservatorship Ordinance, SMSC Ordinance No. 03-11-08-016. Appendix to Appellant's Brief at 53, *Nguyen v. Gustafson*, No. 045-19 (SMSC Ct. App. filed July 5, 2019) (hereinafter "Nguyen App."). The Conservatorship had been created with the knowledge of, and the agreement of, Nguyen. *Id.* It was prompted by Gustafson's admitted drug use, her pregnancy, and her significant emotional and psychological problems. *Id.* Under the Conservatorship, Gustafson's drug treatment, medical care, and therapy were directed and supervised by the Community Court, and both she and Nguyen participated on the record in the Court's monitoring hearings (although the Court and the Court-appointed Conservators did not learn of the marriage until after the event had occurred). *Id.* at 47, 53. During the pendency of her Conservatorship, Gustafson successfully completed drug treatment and gave birth to a healthy baby, and in September 2014, the Court closed her Conservatorship file.

Less than one month later, Gustafson initiated marriage dissolution proceedings in the Community Court. *Id.* at 53; *see In re the Marriage of Amanda Gustafson and James Van Nguyen*, SMSC Court File No. 803-14 (filed Oct. 8, 2014). In her petition, she averred that there had been an irretrievable breakdown in the marriage and, *inter alia*, that by virtue of the existence of the Conservatorship in June 2014, she had lacked the legal capacity necessary to contract a marriage.[1]

Shortly after Gustafson's filing, Nguyen initiated two proceedings in the Minnesota District Court for the First Judicial District. He sought and received an *ex parte* protective order against Gustafson, in

[1] The Trial Court took judicial notice of the records of this proceeding, Nguyen App. at 53 n.1, and we do as well.

MN District Court File No. 70-FA-14-17526, and he sought marriage dissolution, in File No. 70-FA-14-18705. *Id.* at 55.

In the Community Court, responding to Gustafson's action, Nguyen argued that neither he nor Gustafson had been a resident of the Shakopee Mdewakanton Sioux Community Reservation for at least ninety days prior to the commencement of Gustafson's proceeding, as required under the Community's Domestic Relations Code, and therefore the Community Court lacked jurisdiction over the dissolution proceedings. *See id.* at 54–55. He also contended that, if the Community Court did have jurisdiction, it should find that the parties' marriage was not void, and that the Court should award him sole physical and legal custody of the parties' child and should allocate to him certain of the parties' jointly held real and personal property. *See id.*

The Community Court resolved the question of Gustafson's legal capacity to marry in February 2015, when a three-judge panel concluded that Gustafson's Conservatorship did not void her legal capacity to marry. *Id.* at 54. The panel left all other questions in the litigation open for further proceedings. *See id.*

During this time, while the parties' competing marriage-dissolution proceedings were pending, the Community's Family and Children's Services Department petitioned the Community's Children's Court for an order protecting the parties' daughter. *Id.* at 54-55; *see In re* [redacted] SMSC Court File No. [redacted] (filed Nov. 26, 2014).[2] In response, the Children's Court held a hearing where it received testimony indicating that there had been repeated physical confrontations between the parents in the presence of their child and that there were valid concerns about each parent's substance abuse and about the persons with whom the child was being left when the parents were absent. The Children's Court, therefore, appointed a Guardian *ad Litem*, and ordered the parents to work with the Community's Child Welfare Officers to develop a plan to ensure that both parents were able to properly meet their child's needs. *Id.* at 54. The parents thereafter complied with the Children's Court's orders, and the Court closed its active file in July 2015, but in its closure order it directed that the child would remain a ward of the Court, pursuant to the Indian Child Welfare Act, 25 U.S.C. § 1911(a). *Id.* at 55.

When the Children's Court file closed, the parties apparently had reconciled: stipulated dismissals were filed in the marriage dissolution proceedings that had been pending in the Community Court and in the Minnesota District Court. *Id.* at 54.

The proceeding that gave rise to the present appeal began on July 20, 2017, when Gustafson filed a new petition seeking dissolution of the parties' marriage. *Id.* at 40. Shortly before that filing, Nguyen had filed a petition for dissolution in the Superior Court of California, Humboldt County CA Court File No. FL170479 ("the California Proceeding"). *Id.* at 55-56. In the California Proceeding evidentiary

[2] The Trial Court also took judicial notice of the records in this proceeding, *id.* at 54 n.2, and we do as well.

hearings were held on July 27 - 28, 2017. *Id.* at 56. At the conclusion of the hearing, the court concluded that, based on California's adoption of the Uniform Child Custody Jurisdiction and Enforcement Act,[3] it did not have home-state jurisdiction over the matter because the parties' child had not resided in California for the requisite time, and then declined to exercise jurisdiction pending the Community Court's acceptance of jurisdiction. Nguyen App. at 56–57.

Thereafter, on August 7, 2017, the Trial Court issued an order in Gustafson's dissolution proceeding, confirming the pendency of her dissolution petition on its docket, ordering joint physical custody and shared parenting for the parties' child, noting that the prior conservatorship proceedings and the child welfare matter had been heard in the Community's Courts, and also noting specifically that under the Children's Court Order, the Community Court "maintains exclusive, ongoing child welfare jurisdiction" over the parties' child. *Id.* at 57. That order was then filed with the Humboldt County Court, which Court then dismissed the California Proceeding[4]

Nguyen then filed a marriage dissolution petition in the Minnesota District Court for the Fourth Judicial District, Hennepin County District Court File No. 27-FA-17-5535 ("the Hennepin County Case"), and moved the Trial Court of the Community to dismiss Gustafson's petition, again arguing that it lacked both subject-matter jurisdiction over the parties' marriage and their child, and personal jurisdiction over him. *Id.* at 57–58. The Trial Court denied that motion in a forty-eight page opinion on November 17, 2017. *See id.* at 51–98.

Nguyen sought interlocutory review of that decision before this Court, and on January 30, 2016 we denied his request, noting that under our Rules and pertinent federal case law a trial court's denial of a motion to dismiss on jurisdictional grounds is not properly the subject of interlocutory review unless the jurisdictional challenge is immunity-based. *Id.* at 112–17. Then, Nguyen sought declaratory and injunctive relief in the United States District Court for the District of Minnesota. *Nguyen v. Gustafson*, No. 0:18-cv-0052-SRN-KMM ("the Federal District Court case"). That Court denied his motion for preliminary relief, *Nguyen v. Gustafson*, No. 18-522, 2018 WL 1413463, at *7 (D. Minn. Mar. 21, 2018), and on September 26, 2018 it dismissed his complaint without prejudice, directing him to exhaust his Tribal Court remedies before seeking relief in federal court, *Nguyen v. Gustafson*, No. 18-522, 2018 WL 4623072, at *3 (D. Minn. Sept. 26, 2018).

In the Trial Court, trial was scheduled to begin on September 19, 2018; but on that morning the parties reached a settlement with respect to some of the issues that had been pending, and the substance of that agreement – which awaited written explication – was read into the record. Nguyen App. at 121–23.

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[3] *See* CAL. FAM. CODE § 3421 (West 2020).

[4] Portions of the records of the California Proceeding are included in the Appendix to Gustafson's brief in this appeal. *See* Appendix to Appellee's Brief, *Gustafson v. Nguyen*, No. 045-19 (SMSC Ct. App. filed Aug. 6, 2019).

At the same time, Nguyen filed an objection to the Trial Court's jurisdiction over any aspect of the proceedings. *Id.* at 120–22. In succeeding weeks, the parties were unable to reduce their agreement to writing, and additional disputes arose between them. *See id.* at 2–3. Therefore, to implement the stipulation that had been read into the record, the Trial Court, on February 13, 2019, entered an Order for Partial Judgment, but withheld entry of its Order to permit the parties to file objections. *Id.* at 2. Within the time provided, each party did so, with Gustafson asking the Trial Court to vacate the entirety of the September 19, 2018 settlement, and Nguyen objecting to specific aspects of the Trial Court's Order. *Id.* at 2–6. Having received those materials the Trial Court, on May 8, 2019, filed Findings of Fact, Conclusions of Law, and Order for Final Judgment, and a Judgment and Decree, in which it denied Gustafson's motion to vacate the parties' settlement, dealt serially with Nguyen's objections, and comprehensively resolved all matters relating to custody and visitation of the parties' child and questions relating to the parties' property. *Id.* at 2–39.

This appeal followed. Nguyen challenges the Trial Court's determination that it had subject-matter jurisdiction over his marriage, that it had personal jurisdiction over him, and that it properly allocated parenting time on the annual Vietnamese holiday of Tet.

Whether a court has subject-matter or personal jurisdiction is an issue of law. *Gisslen v. City of Crystal*, 345 F.3d 624, 627 (8th Cir. 2003); *Bandemer v. Ford Motor Co.*, 931 N.W.2d 744, 749 (Minn. 2019). We review issues of law de novo. *In re Estate of Feezor*, 2 Shak. A.C. 30, 38 n.20 (Apr. 5, 2012); *Welch v. SMS(D)C*, 1 Shak. A.C. 35, 37 (Oct. 14, 1996). We review findings of fact supporting a legal conclusion for clear error. *See Corwin v. Corwin-Brooks*, 2 Shak. A.C. 5, 6 (Aug. 4, 2008). The Trial Court's factual finding is clearly erroneous if it is "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Id.* (quoting *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000)).

III. Subject-Matter Jurisdiction.

Nguyen contends that the Trial Court erred, under the Domestic Relations Code, and also under pertinent provisions of federal law, when it concluded that it had subject-matter jurisdiction over the dissolution proceeding. We conclude, however, that the Trial Court indeed did have subject-matter jurisdiction under both bodies of law.

A. Subject Matter Jurisdiction under the Domestic Relations Code.

The Domestic Relations Code conditions the Tribal Court's exercise of jurisdiction over the subject-matter of a divorce on a residency requirement:

> The Tribal Court shall have jurisdiction over dissolution of marriage proceedings if either the petitioner or respondent in an action for dissolution has resided on the Shakopee Mdewakanton Sioux Community Reservation or on Tribally owned lands, whether in

> trust or fee status, for at least (90) ninety days prior to commencing any action for dissolution.

SMSC Domestic Relations Code, Ch. II, § 1 (2017).

Hence, under the Domestic Relations Code, subject matter jurisdiction over a proceeding seeking the dissolution of a marriage is predicated on establishing that either the petitioner *or* the respondent resided on the Community's Reservation for at least 90 days prior to the petition for dissolution being filed. Under our case law, the Trial Court has discretion with respect to the manner it resolves factual disputes bearing on residence, and may decide the matter " 'based solely on the papers or by a proceeding at which evidence is heard.' " *Thomas v. Lightfoot,* 6 Shak. T.C. 61, 80 (Dec. 23, 2013) (quoting *Cutco Indus. v. Naughton,* 806 F.2d 361, 363 (2d Cir. 1986)).

Essential here is the distinction between residence and domicile: residency requirements may be satisfied under Community law "when a party regularly spent time on the Shakopee Reservation, availed herself or himself to the Community's services, and maintains personal property in a home on the Shakopee Reservation." *Id.* at 86. "A person 'can reside in one place but be domiciled in another.' " *Id.* at 80 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989)). A domicile, on the other hand, is "a person's permanent, established home, as distinguished from a temporary, although actual, place of residence." *Id.* Hence, "[a] person may have more than one residence, but can have only one domicile." *Id.* (citation omitted).

Consistent with these principles, the Trial Court in its November 17, 2017 Order noted that the "use of multiple residencies does not preclude this Court from having jurisdiction of a marriage dissolution proceeding under the Domestic Relations Code." Nguyen App. at 73.

The Trial Court cited several facts in the record supporting Gustafson's residency on the Community's Reservation during the 90 days that preceded her filing of the dissolution action. In an affidavit accompanying her opposition to Nguyen's motion to dismiss, Gustafson stated that she has maintained a home and legal address on the Community's Reservation for her entire adult life, as many other Community members do. Appendix to Appellee's Brief at 5-6, *Nguyen v. Gustafson*, No. 045-19 (hereinafter "Gustafson App."). She has "always consider[ed] the Reservation to be [her] primary residence, both for cultural and legal reasons." *Id.* at 2. Both Gustafson and her daughter "are members of this Community and it is essential to who [they] are that [they] maintain residential and physical contacts with this Community and its reservation lands, which," Gustafson said, "we have always done." *Id.* at 10. As to her legal address, Gustafson averred, "My tax returns used my reservation address as my legal address, as do my driver's license and passport." *Id.* at 9. She also noted that, "[s]everal of [her and Nguyen's] cars remain licensed and registered in Minnesota, even after [she and Nguyen] begun spending

more time at [their] homes in California; in fact, the truck that is [Nguyen's] primary vehicle remains registered to me at my parents' address on the reservation." *Id.* at 11.

These statements should be weighed against the evidence provided to the Trial Court by Nguyen, which was scant and generalized at best. He presented no evidence to refute the specific averments in Gustafson's affidavit regarding her legal address and her residence with family members on the Reservation. Nguyen App. at 76. Instead, he made a general denial that Gustafson had met the Code's residency requirement in his Answer, *id.*, and in the Affidavit which accompanied his motion to dismiss he simply stated that neither he nor Gustafson has "maintained or owned a residence on Community property." *Id.* at 47.

In considering these submissions, the Trial Court correctly concluded that the residency requirement of the Domestic Relations Code "does not require that residency be established solely by proof that one owned or maintained a residence", and that "[a] person may reside on the Reservation by living with other family members, which [Gustafson] avers that she has done." *Id.* at 76. It bears noting that the record contains additional specific evidence supporting the legal conclusion that Gustafson satisfied the residency requirement, beyond that expressly relied on by the Trial Court. In her Petition for Dissolution, Gustafson stated that at the time of filing her Petition, her mailing address was 3879 Eagle Creek Circle in Prior Lake and that her legal address for at least 90 days prior to petitioning was 2711 Dakota Trail in Prior Lake, which is her parents' home. *Id.* at 41-42. Each of these addresses is located on the Community's Reservation. *Id.*

The Trial Court considered each of the statements in Gustafson's affidavit in concluding that Gustafson had resided on the Reservation for at least 90 days prior to her petitioning for dissolution, and its findings of fact are not clearly erroneous, particularly in light of Nguyen's failure to meaningfully contest them. We, therefore, affirm the Trial Court's conclusion that under the Domestic Relations Code it had subject-matter jurisdiction over the dissolution proceeding.

B. Subject-Matter Jurisdiction under Federal Law.

The core of Nguyen's subject-matter jurisdiction challenge under federal law relates to his contention that the Trial Court had no jurisdiction over *him* (a non-Indian). He argues that neither of the exceptions that are set forth in *Montana v. United States*, 450 U.S. 544 (1981), relating to the jurisdiction of tribal courts over non-Indians, are satisfied in this proceeding, and therefore that the Trial Court could not exercise jurisdiction over any aspect of the parties' marriage, or their child's custody, or their property. As we discuss below, we disagree with Nguyen's contention that neither *Montana* exception is satisfied here. But in our view, the jurisdiction that was exercised by the Trial Court both in dissolving the parties' marriage and in deciding issues relating to the parties' child was not contingent on its exercising personal jurisdiction over Nguyen. We conclude that the marriage dissolution was a proper

exercise of the Trial Court's *in rem* jurisdiction and that its orders with respect to custody and parenting time of the parties' child were made pursuant to the Community's inherent jurisdiction over the child, who is a ward of the Tribal Court. *See* Nguyen App. at 13, 22, 24, 27.

With respect to *in rem* jurisdiction over the marriage, we join the many jurisdictions which hold that insofar as a dissolution or annulment affects marital status only, the action is one *in rem*. *See, e.g.*, *Roberge v. Roberge*, 188 B.R. 366, 367 (E.D. Va. 1995); *Patel v. Patel*, 380 S.W.3d 625, 628 (Mo. Ct. App. 2012. "It is the marriage status which constitutes the res, making a divorce proceeding one in rem, and not an action in personam." *Johnston v. Johnston*, 74 F.2d 774, 775 (D.C. Cir. 1934). In these circumstances, "[p]ersonal jurisdiction over the respondent is not . . . required in order to" change the status of the marriage through annulment or dissolution. *Shahani v. Said*, No. 13-08-00438-CV, 2009 WL 1693066, at *2 (Tex. Ct. App. June 18, 2009); *see Williams v. North Carolina*, 317 U.S. 287, 297–99 (1942) (holding that states may change the marital status of a petitioning spouse even though they do not have personal jurisdiction over the absent respondent spouse).

We acknowledge that the dissolution of a marriage is not always simply a change in marital status. It often involves " 'an amalgam of contractual right and status.' " *In re Marriage of Berry,* 155 S.W.3d 838, 840 (Mo. App. 2005) (quoting *Ferrari v. Ferrari,* 585 S.W.2d 546, 547 (Mo. App. 1979)). This is recognized by Chapter 2 of the Community's Domestic Relations Code, which authorizes the Community Court to issue a decree of dissolution in addition to orders governing the division of property upon dissolution. *See* SMSC Domestic Relations Code, Ch. 2, §§ 2, 5. "Insofar as the proceeding affects certain contractual aspects of the marriage . . . the action is *in personam* and requires personal service or presence of the other spouse for valid judgment." *Patel*, 380 S.W.3d 625 at 628 (internal quotation marks omitted). "Lack of personal jurisdiction precludes consideration of orders pertaining to maintenance, child support, attorney's fees, and division of property (not within the State)." *Id.* (citing *Thompson v. Thompson,* 657 S.W.2d 629, 631 (Mo. 1983) (en banc)); *see Roberge*, 188 B.R. at 367 (failure to establish personal jurisdiction over a spouse in a dissolution proceeding precludes the court from affecting "equitable distribution of the marital estate"). Therefore, when a court exercises jurisdiction over aspects of a dissolution proceeding that affect contractual aspects of the marital relationship, the court must be exercising jurisdiction over both of the individuals in the marital relationship.

Here, the Trial Court's Final Judgment includes discrete orders on various topics, some of which, in our view did require it to have personal jurisdiction over Nguyen. Specifically, we think the Trial Court's distribution of the marital estate precludes a conclusion that exercise of jurisdiction over Nguyen was unnecessary *in all respects*. *See Patel*, 380 S.W.3d 625 at 628. That equitable distribution was principally entered pursuant to a stipulated agreement between the parties, but the Trial Court's Final Judgment includes detailed instructions as to division of real property, household goods and furnishings,

retirement interests, life insurance, cash accounts and investments, automobiles, and debts. Nguyen App. at 16-20. This we believe is an adjudication of contractual marital rights which required *in personam* jurisdiction over both parties to the marriage which, as we discuss below, we believe the Trial Court possessed. But the dissolution of the marriage itself, which was entered by order on May 21, 2018, bifurcated from the other issues in the dissolution proceeding, Nguyen App. at 9, and the Trial Court's re-articulation of that decision in its Final Judgment, *id.* at 22, was an exercise of *in rem* jurisdiction over the marriage, and not over Nguyen, as a matter of Community law. *See North Carolina*, 317 U.S. at 297-99.

Similarly, the Trial Court's exercise of jurisdiction over the custody and welfare of the parties' child, who the Trial Court noted "is an enrolled member of the [Community]," who "resides equal periods of time with each parent" and "remains a ward of the court", Nguyen App. at 12, did not require the exercise of personal jurisdiction over Nguyen. It was squarely within the contemplation of the Indian Child Welfare Act, 25 U.S.C. 1911(a) (ICWA), which provides that "Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child". 25 U.S.C. § 1911(a). This exclusive-jurisdiction provision in ICWA recognizes inherent tribal jurisdiction in a particular context, but it does not limit tribes' inherent jurisdiction outside of the specific "child custody proceedings" governed by ICWA. *Holyfield*, 490 U.S. at 42 (Congress did not delegate jurisdiction through ICWA's exclusive-jurisdiction provision, but "*confirmed* that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States" (emphasis added)). Here, the Trial Court's adjudication of custody and parenting time in the Final Judgment was rendered in the context of a dissolution proceeding, but it cannot be separated from the Community Courts' ongoing jurisdiction over the child, given her history before the Children's Court and the continuing duty to ensure her protection as a ward. The award of custody and parenting time stems from the Trial Court's inherent jurisdiction to protect its minor wards, even in proceedings outside the scope of ICWA, and that jurisdiction is not dependent on personal jurisdiction over Nguyen. *See also Garcia v. Gutierrez*, 217 P.3d 591, 607 (N.M. 2009) ("Other states have also recognized concurrent state-tribal jurisdiction involving child-custody disputes where at least one of the parties does not reside on reservation land").

C. Personal Jurisdiction.

Nguyen argues here that "extensive contacts" with the Community would be required in order for the Trial Court to properly have maintained personal jurisdiction over him. The Trial Court disagreed, citing *International Shoe v. Washington*, 326 U.S. 310 (1945), and holding that what was required in the proceedings before it was not "extensive contacts" but instead "minimum contacts." It stated:

> In his motion, Respondent asserts lack of personal jurisdiction because "he has not had extensive contacts with the Shakopee Mdewakanton Sioux Community." The law, as set

> out in *International Shoe* and applied by this Court does not require "extensive contacts" but "minimum contacts." Respondent's argument, that there needs to be proof of "continuous and systematic" contacts with the Community, *see* Respondent's Reply at 3, might apply only if the Petitioner was seeking to establish that this Court had "general" personal jurisdiction over him. *See Toomey v. Dahl*, 63 F. Supp. 3d 982, 989–90 (D. Minn. 2014).

Nguyen App. at 79-80. The Trial Court then concluded that, because the record included sufficient evidence of minimum contacts to establish specific personal jurisdiction, there was no need to assess whether the court maintained general jurisdiction over Nguyen. *Id.*

We concur. Nguyen stresses that he is not a Community member, that he and Gustafson were not married in the Community, that they never lived together on Community lands while married, and that his participation in other Community Court hearings "were not directly related to issues of dissolution." *Id.* But, as the Trial Court noted, the minimum contacts necessary to establish personal jurisdiction do not require physical presence or Community membership. *Id.* at 80. The minimum-contacts test specifically contemplates that personal jurisdiction can be established for non-residents of the forum jurisdiction through other actions. *Id.* (citing *Toomey v. Dahl*, 63 F. Supp. 3d 982 (D. Minn. 2014)); *see Walden v. Fiore*, 571 U.S. 277, 283 (2014) (stating that "a nonresident's physical presence within the territorial jurisdiction of the court is not required").

Under Community law, "the court may consider . . . whether the Respondent is alleged to have purposely availed himself of the benefits of the tribal community" in assessing minimum contacts, *Crooks-Bathel*, 6 Shak. T.C. at 6, and the Trial Court determined that Nguyen had purposely availed himself to the services and benefits of the Community in the course of his marriage to Gustafson and the dissolution proceeding. Nguyen App. at 80. The significant Community benefits Nguyen accessed by virtue of his marriage to Gustafson are by themselves sufficient to establish minimum contacts necessary under *International Shoe*. *See Crooks-Bathel*, 6 Shak. T.C. at 6. In the California Proceeding, Nguyen testified that he had relied on an on-reservation address for tax advantages, explaining that a truck, purchased for him by Gustafson, which he took with him to California, was registered to Gustafson at her Reservation address "to avoid sales tax." Nguyen App. at 81. (quoting Tr. of Cal. Proceeding, at 71-72 (July 27, 2017)). Nguyen was subsequently awarded that truck in the final divorce decree. *Id.* at 19. Also during his testimony in the California Proceeding, Nguyen testified that the per capita payments which Gustafson receives because of her Community membership were the principal source of funding during their marriage. *Id.* at 81-82. In response to a question about where he was employed, Nguyen testified that "I wasn't employed. My - - my wife makes plenty of money." *Id.* at 82 (quoting Tr.of Cal. Proceeding, at 59). In Nguyen's petition for dissolution filed in the Minnesota District Court for the

Fourth Judicial District, Nguyen stated that he and Gustafson are unemployed, described her per capita payments as the family's primary source of income, and affirmatively sought spousal support from her. *Id.* The Trial Court therefore correctly concluded that Nguyen "has availed himself of resources provided by the Community by benefitting from the per capita payments that the Community distributes to Community members from the Community's tribal resources." *Id.* And Nguyen apparently seeks to continue to purposely avail himself of the Community's financial benefits, since in that Minnesota District Court dissolution proceeding he asks for spousal maintenance from Gustafson, whose sole income, he acknowledges, derives from the per capita payments she receives from the Community. *Id.*

But Nguyen's contacts with the Community and its people and government and programs were not limited to benefits derived from the Community's resources. He participated in, and affirmatively supported, the Community Court's conservatorship proceedings for Gustafson's person and estate. *Id.* at 53. He participated in, and was present during, the Children's Court proceedings involving his child—proceedings that lasted seven months. *Id.* at 54–55. The Children's Court order dismissing those proceedings stated that both Gustafson and Nguyen had satisfied the conditions imposed by the Court -- working with a Community Child Welfare Officer and the Court-appointed Guardian *ad litem*. *Id.* at 54. The custody of the child who was the subject of that file was directly at issue before the Trial Court in this proceeding.

The record also makes it clear that Nguyen frequently was present, and occasionally resided on Community lands. In his Answer to Gustafson's petition for dissolution, he conceded that he entered the Reservation to visit Gustafson while she was staying with her father or their mutual friend (also a Community member). *Id.* at 48. During Gustafson's first Tribal Court dissolution proceeding the Court was provided with records from a Minnesota District Court criminal proceeding, which included an agreement to the terms of the dismissal of the criminal complaint against Nguyen, signed by him, declaring his address to be 2285 Redwing Drive in Shakopee, Minnesota, which is on the Community's Reservation. *Id.* at 81.

Nguyen's Answer to Gustafson's Petition for Dissolution also stated that for three years he was a caretaker for a disabled Community member who was domiciled on the Reservation and that he first met Gustafson in the course of his duties in caretaking for that Community member. *Id.* at 46.

The Community's strong interest in providing a forum for Gustafson's petition also supports personal jurisdiction over Nguyen. *See Downing v. Goldman Phipps, PLLC*, 764 F.3d 906, 912 (8th Cir. 2014) (weighing "the interests of the forum state in providing a forum for its residents" for purposes of assessing personal jurisdiction). The Community has a strong interest in "govern[ing] domestic relations of its members." *Crooks-Bathel*, 6 Shak. T.C. at 10. "Divorce, like marriage, is a concern not only to the immediate parties. Both the state and the tribe have interests to be protected." *Lightfoot*, 6 Shak. T.C. at

85 (citing *Jacobs v. Jacobs*, 405 N.W.2d 668, 672 (Wis. 1987)). In adopting its Domestic Relations Code, the Community expressed a clear purpose: "providing for the health, safety and welfare of members by preserving Tribal heritage and enabling Community members to use their own Tribal forum for the resolution for domestic relations issues." SMSC Domestic Relations Code, Introduction at 1 (2017). And the Community's interest in adjudicating a dissolution of a marriage involving a member is undoubtedly heightened where, as here, the proceeding will touch on custody and parenting time for a minor who is a ward of the Community Court.

In short, the nature, quality, and quantity of Nguyen's contacts with the Community are substantial and are sufficient to support personal jurisdiction over him in these proceedings.

D. The Community's Inherent Authority to Regulate Domestic Relations.

Nguyen argues that neither of the exceptions which, under *Montana v. United States*, 450 U.S. 544 (1981), permit an Indian tribal government to exercise jurisdiction over non-Indians, operates in the context of this litigation. But in our view, the Trial Court's decision was an exercise of inherent, retained jurisdiction to regulate the domestic affairs of its members that did not depend on the satisfaction of either of those exceptions, even though the judgment affected Nguyen.

It is well-settled that "Indian tribes retain those fundamental attributes of sovereignty . . . which have not been divested by Congress or by necessary implication . . . ." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 (1982). This retained power does not depend on a grant of authority from the federal government; rather, it exists by virtue of tribes being "self-governing sovereign political communities" that exercised such powers prior to the founding of the United States. *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978). As a result, "an Indian tribe need not wait for an affirmative grant of authority from Congress in order to exercise dominion over its members." *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 556 (9th Cir. 1991). Accordingly, "when a question of tribal power arises, the relevant inquiry is whether any limitation exists to *prevent* the tribe from acting, not whether any authority exists to *permit* the tribe to act." *Id.* (internal quotation marks and citation omitted) (emphasis in original).

The "power of a tribe to regulate the domestic relations of its members" is "[a]mong those powers retained." *Conroy v. Conroy*, 575 F.2d 175, 181-82 (8th Cir. 1978); *see Montana*, 450 U.S. at 564. Indeed, "the Supreme Court has articulated a core set of sovereign powers that remain intact even though Indian nations are [domestic dependent sovereigns] under federal law; in particular, internal functions involving . . . domestic affairs lie within a tribe's retained inherent sovereign powers." *John v. Baker*, 982 P.2d 738, 751 (Alaska 1999) (citing *Wheeler*, 435 U.S. at 326; *Montana*, 450 U.S. at 564). The regulation of domestic relations is among the issues "inherently reserved for resolution through purely tribal mechanisms due to the privilege and responsibility of sovereigns to regulate their own, purely internal

affairs (and due to the concomitant impropriety of the federal courts dictating answers to such questions)." *Miccosukee Tribe of Indians of Fla. v. Cypress*, 814 F.3d 1202, 1208 (11th Cir. 2015).

The Trial Court issued its Order on Jurisdiction and Final Judgment pursuant to the Community's Domestic Relations Code, which provides that the Community has "the inherent sovereign power to protect and govern the domestic relations of its members and shall have original jurisdiction over such matters and matters affecting the health, safety, and welfare of the Community." SMSC Domestic Relations Code, Authority and Jurisdiction (2017). Gustafson initiated the instant dissolution action based on her right, as a Community member residing on the Reservation, to utilize the Community Court to seek dissolution of her marriage on proper grounds. *See* SMSC Domestic Relations Code, Chapter II, § 3 (2017); *Fisher v. Dist. Ct.*, 424 U.S. 382, 388-89 (1976) (affirming the principle that tribal court subject-matter jurisdiction over tribal members is first and foremost a matter of internal tribal law). In our view, no source of federal law divests the Community of its authority to exercise jurisdiction over the marital status of a Community member who seeks adjudication of that status. *See Merrion*, 455 U.S. at 146.

Although Nguyen argues that several aspects of the dissolution touched on off-Reservation conduct, the internal nature of the Tribal Court's Final Judgment is evident in several respects. *See Baker*, 982 P.2d at 751. First, Gustafson is not only a member of the Community, but was also a Reservation resident at the time her Petition was filed, as required by the Domestic Relations Code, such that the regulation of her domestic affairs is an "internal function" for which the Community's inherent jurisdiction has not been divested. Second, the marital relationship that is the subject of the dissolution proceeding produced a minor child, [redacted] for which the Trial Court was required to make determinations of custody as part of the dissolution. *See* SMSC Domestic Relations Code, Chapter III, § 2.a. (2017) ("The Tribal Court shall determine custody, including physical custody and decisionmaking responsibilities in accordance with the best interests of the child."). And because [redacted] is a ward of the Community Court over whom the Community exercises continuing protective jurisdiction, Trial Court's adjudication of custody and parenting time was a particularly internal function. *See* Nguyen App. at 12; 25 U.S.C. § 1911(a). Finally, as noted by the Trial Court, per capita payments that the Community provides to its members constitutes a "significant substantive issue" in decisions regarding division of marital and non-marital property in this case because both parties acknowledge that Gustafson's per capita distributions and the fruits therefrom comprise most, if not all, of the assets addressed in the Final Judgment. Nguyen App. at 65. This further confirms the internal nature of the proceeding at issue. *See In re Barth*, 485 B.R. 919, 922 (Bankr. D. Minn. 2013) (explaining that a federally recognized Indian tribe has the authority to define property rights as to per capita payments of tribal funds because that property is "within its jurisdiction and . . . subject to its law").

Tribal courts maintain jurisdiction over matters "involving nonmembers" when, as here, "the civil actions involve essential self-governance matters . . . where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination." *John*, 982 P.2d at 756 (internal quotation marks and footnotes omitted). Thus, even when "the rights of [a] non-member . . . are affected," the tribe maintains jurisdiction where, as here, that jurisdiction is focused on a tribal member. *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008). The divestiture of tribal jurisdiction over non-members is limited to *active* exercises of jurisdiction or authority over non-members—not to every instance in which a Tribal Court's adjudication merely *affects* a non-member. *See Montana*, 540.U.S. at 565.

This principle is borne out in the context of tribal child protection matters. Through 25 U.S.C. § 1911(a), Congress "confirmed" Indian tribes' retained, inherent sovereignty over child custody proceedings. *Holyfield*, 490 U.S. at 42. When Indian tribes exercise this jurisdiction (as the Trial Court did in part here by making determinations of custody for a ward of the court), they do so pursuant to inherent authority over domestic affairs notwithstanding non-Indian parents being affected or involved. *See Simmonds v. Parks*, 329 P.3d 995, 1021–22 (Alaska 2014) (explaining that the state could not cite "a single federal or state case in which the *Montana* framework has been applied" to suggest a tribal court lacks jurisdiction "in an ICWA-defined child custody proceeding because one of the parents was a non-tribal member"); *Atwood*, 513 F.3d at 948 (concluding that a tribal court had colorable jurisdiction over a custody dispute involving an Indian child even though the father was a non-Indian); *Kaltag Tribal Council v. Jackson*, No. 3:06-cv-211 TMB, 2008 WL 9434481, at *6 (D. Alaska Feb. 22, 2008) (noting that, in the context of tribal court jurisdiction over ICWA proceedings, "it is the membership of the child that is controlling, not the membership of the individual parents"), *aff'd* 344 Fed. App'x 324 (9th Cir. 2009); *Johnson v. Jones*, No. 605CV1256ORL22KRS, 2005 WL 8159765, at *2 (M.D. Fla. Nov. 3, 2005) (holding that the Prairie Island Indian Community Tribal Court had jurisdiction over a child custody proceeding involving a non-Indian mother and Indian children domiciled off-reservation).

In sum, we believe that the Trial Court exercised the Community's inherent, retained jurisdiction to regulate the domestic affairs of its members in issuing the Final Judgment, and therefore that its jurisdiction was not predicated on satisfaction of either of the *Montana* exceptions.

E. *Montana v. United States.*

In *Montana*, the Supreme Court held that, although tribes' sovereign powers generally do not extend to the activities of nonmembers, tribes retain regulatory and adjudicatory jurisdiction over: (1) "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and (2) the "conduct of non-Indians on fee

lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 540 U.S. at 565–66.

Under the first of these exceptions, a tribal court has jurisdiction over a nonmember where the jurisdiction has a nexus to a consensual relationship between the nonmember and the tribe, where the regulation " 'stem[s] from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.' " *Kodiak Oil & Gas, Inc. v. Burr*, 932 F.3d 1125, 1138 (9th Cir. 2019) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 336 (2008)). Here, Nguyen's consensual relationship with the Community within the meaning of *Montana* arises from his voluntary decision to marry a Community member, his voluntary receipt of Community benefits by virtue of his marriage, his relationship as father to a minor Community member, and his participation in his wife's conservatorship proceedings and his daughter's child welfare proceedings.

Under the second *Montana* exception, tribes may exercise jurisdiction over the conduct of non-Indians within their reservations "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66. Here, in our view that exception is satisfied because the dissolution proceeding necessarily adjudicate issues pertaining to the custody, care, and financial support of the parties' enrolled minor child. We agree with the Alaska Supreme Court which said, in *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255 (Alaska 2016):

> "[W]e have no difficulty holding that the adjudication of child support obligations owed to tribal children falls within the second *Montana* exception. Congress has explicitly found 'that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.' And as the superior court correctly recognized, '[e]nsuring that tribal children are supported by their noncustodial parents may be the same thing as ensuring that those children are fed, clothed, and sheltered. The future of a tribe—like that of any society—requires no less.' In light of federal precedent that recognizes that serious damage to territorial resources fits within the second *Montana* exception when a tribe's inherent sovereignty is based on territory, the serious potential for damage to the next generation of tribal members posed by a tribe's inability to administer parental financial support of member or member-eligible children brings the power to set nonmember parents' child support obligations within the retained powers of membership-based inherent tribal sovereignty."

Id. at 273. While the Trial Court here ultimately reserved any award of child support, Nguyen App. 15, the adjudication of custody, care, and parenting time over the child as a ward of the Community Court seems to us to fall squarely within *Montana*'s second exception for the same reasons described in *Haida Indian Tribes of Alaska*. The direct relationship between a tribe's protection of Indian children and the tribe's political integrity, health, and welfare is undeniable. The House of Representatives Report that

accompanied the passage of ICWA concluded that "there can be no greater threat to 'essential tribal relations' and no greater infringement on the right of the . . . tribe to govern themselves than to interfere with tribal control over the custody of their children." H.R. Rep. No. 1386 (1978), *reprinted at* 1978 U.S.C.C.A.N. 7530, 7537 (*quoting Wakefield v. Little Light,* 347 A.2d 228 (Md. App. 1975)). The Trial Court's jurisdiction over this proceeding—one that involves issues of custody and care of a minor child over whom the Community Court maintains exclusive jurisdiction—is directly tied to preserving the political integrity, the economic security, and the health and welfare of the Community. For these reasons, we conclude that the Trial Court was correct in holding that if *Montana v. United States* is applicable here, then each of its two exceptions permitted the Trial Court's exercise of jurisdiction.

F. Parenting Time and the Tet Holiday.

In its February 13, 2019 Partial Judgment and Decree, the Trial Court denied Nguyen's request for parenting time every year for the Vietnamese New Year (Tet). Nguyen objected to that aspect of the Partial Judgment and Decree, asserting that he "should receive time for the Vietnamese New Year (Tet) every year, which would offset [Gustafson] receiving parenting time for the SMSC Pow Wow every year." Nguyen App. 129. In response, the Trial Court in its Final Judgment concluded that Nguyen had "fail[ed] to inform the court through evidence of the importance of celebrating the Vietnamese New Year" and that after consideration of the matter, the Court "found it fair and, in the child's best interest to alternate years regarding this schedule, objection denied." *Id.* at 5. But in his appeal, Nguyen correctly points out that Gustafson also did not present evidence supporting her contention that the Community's pow-wow had unique importance that made it appropriate for the parties' child to be in attendance each year, and that his claim with respect to Tet should stand on the same footing as her claim with respect to the annual pow-wow. In this regard, we think Nguyen is correct.

"District courts have broad discretion on matters of custody and parenting time." *Hansen v. Todnem*, 908 N.W.2d 592, 596 (Minn. 2018). Review of decisions on parenting time is typically "limited to whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law." *In re Custody of N.A.K.*, 649 N.W.2d 166, 174 (Minn. 2002). An abuse of discretion occurs "if a relevant factor that should have been given significant weight is not considered, if an irrelevant or improper factor is considered and given significant weight, or if a court commits a clear error of judgment in the course of weighing proper factors." *Aaron v. Target Corp.,* 357 F.3d 768, 774 (8th Cir. 2004).Here, we think that the Trial Court either should have required Gustafson to provide evidence supporting the annual importance of the Community's pow-wow for the parties' child, or should have accepted Nguyen's contention that the Tet holiday is of particular importance to him and to his child's culture.

We, therefore, reverse the Trial Court's decision on parenting time for the Tet holiday and remand this matter to the Trial Court for appropriate action with respect to this issue.

Conclusion.

For the foregoing reasons, we affirm the Trial Court's decision with respect to its jurisdiction in this matter, reverse the Trial Court's decision on parenting time for the Tet holiday, and remand the file to the Trial Court for reconsideration of the parenting time schedule that it ordered.

Dated: January 23, 2020

Chief Judge John E. Jacobson

Judge Perry Mason Moore

Judge Jill E. Tompkins