IN THE TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

In Re Marriage of:
Amanda Gustafson,

Petitioner,

v.

James Van Nguyen,

Respondent.

Court File No. 867-17

MEMORANDUM OPINION AND ORDER

The above-entitled matter came before the Honorable Henry M. Buffalo, Jr., Judge of the Shakopee Mdewakanton Sioux Community (SMSC or Community) Court, on October 17, 2017, pursuant to a motion to dismiss filed by Respondent James Van Nguyen on September 19, 2019. Respondent is represented by Adam J. Blahnik, Blahnik Law Office, PLLC and Jonathan D. Miller, Meagher & Geer, P.L.L.P. Petitioner is represented by Gary A. Debele, Messerli & Kramer, P.A.

In his motion, Respondent seeks dismissal of this matter "due to lack of personal jurisdiction and subject matter jurisdiction." Resp't's Mot. to Dismiss Pet'r's Pet. for Dissolution of Marriage. at 1 (Aug. 29, 2017). On September 19, 2017, Respondent submitted a Memorandum of Law in Support of his Motion to Dismiss as well as a Declaration of the Respondent James Van Nguyen. Respondent also

raised his objections to the Court's jurisdiction in his Answer to the Petition and Counterpetition filed with this Court on August 28, 2017.

On October 6, 2017, Petitioner Amanda Gustafson, filed a responsive notice of motion, memorandum of law, an affidavit of Petitioner Amanda G. Gustafson, and an affidavit of her attorney with exhibits. Pet'r's Resp. Notice of Mot. and Mot. (Oct. 6, 2017); Pet'r's Reply Mem. of Law (Oct. 6, 2017); Aff. of Pet'r Amanda G. Gustafson, (Oct. 6, 2017); Aff. of Gary A. Debele, Esq. with exhibits (Oct. 6, 2017).

The Court heard oral argument on the motion to dismiss on October 17, 2017.

Based upon all files, records, and proceedings herein, the Court hereby finds the following:

I. FACTS

Petitioner Amanda Gustafson is a member of the Shakopee Mdewakanton Sioux Community. Pet. for Dissolution of Marriage, at 2 ¶ 4; Respondent's Answer to Petition and Counterpetition, at 1, ¶ 5. Respondent James Van Nguyen is not a member of the Shakopee Mdewakanton Sioux Community. Petition for Dissolution of Marriage, at 2, ¶4; Decl. of James Van Nguyen, at 1 ¶ 1, (Sep. 19, 2017). The Parties were married on June 13, 2014 in Las Vegas Nevada, and were married for just over three years as of July 20, 2017. Pet. for Dissolution of Marriage, at 1 ¶ 3; Respondent's Answer to Petition and Counterpetition at 1 ¶ 4. The parties have a minor child who is a member of the Shakopee Mdewakanton Sioux Community. Pet. for Dissolution of Marriage, at 2 ¶ 5; Respondent's Answer to Petition and Counterpetition at 2, ¶ 6.

Prior proceedings in the SMSC Courts. The Court knows these parties well, as the current proceedings are not the first proceedings involving these parties in the SMSC Tribal Courts.

At the time of the marriage, Petitioner was subject to Conservatorship of Estate and Person which had been established by this Court pursuant to Community law. *See Gustafson v. Nguyen,* No. 803-14 (hereafter "*Dissolution I*"), Mem. Op. and Order at 3 (Feb. 5, 2015) (discussing history of the conservatorship over the Petitioner.)[1] The Tribal Court conservatorship over Petitioner was first established in 2007 when she turned 18, before she met Respondent. Affidavit of Amanda Gufaston at 3, ¶ 6. That conservatorship was closed in 2012, but reopened in April 2014, shortly before the parties' marriage while she was pregnant with their child. *Id.* Respondent supported the reopening of the conservatorship. *Id.*; *see also Dissolution I,* Mem. Op. and Order at 3 (Feb. 5, 2015). The conservatorship was again closed on September 24, 2014, after the birth of the parties' child. Affidavit of Amanda Gustafson at 3, ¶6.

On October 8, 2014, Petitioner initiated an action in this Court seeking dissolution of the parties' marriage. In the Respondent's answer and counter-petition, he objected to the Court's subject matter and personal jurisdiction over the matter. *Dissolution I,* Answer and Counterpet. for Dissolution of Marriage, at 1 (Oct. 30, 2014). In those proceedings, the Petitioner moved the Court to find that the marriage was void because she lacked the capacity to marry due to the

[1] This Court will take judicial notice of the pleadings and transcripts in the first dissolution action that involved these parties. *In re the Marriage of Amanda Gustofson v. James Van Nguyen,* SMSC Court File No. 803-14.

conservatorship. Petitioner's Not. of Mot. and Mot. for Emergency Hr'g, *Dissolution I*, at 1 (Oct. 20, 2014). Respondent opposed her motion and argued that the marriage was valid. Ultimately, a 3-judge panel agreed with Respondent, and made a final determination that Petitioner's right to marry had never been restricted. *Dissolution I*, Mem. Op. and Order at 3 (Feb. 5, 2015). No motion to dismiss for lack of jurisdiction was filed by the Respondent in that matter and the dissolution action ultimately ended with a stipulated agreement to dismiss the action when the parties reconciled. *Dissolution I*, Stip. & Order to Dismiss Dissolution of Marriage Proceeding and to Seal File, at 1 (June 26, 2015).

In late November 2014, a petition for a child in need of services regarding the parties' minor child was filed by the SMSC's Family and Child Services Department in the SMSC Children's Court. [redacted] [2] The Court appointed a Guardian ad Litum for the parties' child, and oversaw proceedings implemented by the SMSC's Child and Family Services Department to address the responsibilities of both parents in connection with that child through counseling, substance abuse testing and the development of a plan that would help ensure that both parents were able to properly meet the child's needs. Both the Petitioner and Respondent actively participated in those proceedings and in the counseling and related social services required by those proceedings. Those proceedings allowed them to resume care for their child, so that the matter was concluded and the file

[2] This Court will take judicial notice of the pleadings and transcripts in the child welfare proceeding that involved these parties and their child. [redacted]

closed in July 2015. The order closing the case indicated that the child would remain a ward of the Court as provided by ICWA.

Proceedings in other courts. In addition to proceedings in the SMSC Courts, other Courts have been asked to address disputes involving the parties. In October 2014, at the request of Mr. Nguyen, the Scott County District Court issued an ex parte order for protection against Ms. Gustafson and later held a hearing on the matter. See Resp't's Mem. at 5 (citing Scott County District Court File No. 70-FA-14-17526); Affidavit of Amanda Gustafson at 4, ¶ 8. Shortly after Ms. Gustafson filed her October 8, 2014 petition for dissolution of the marriage in the SMSC Tribal Court, Respondent, on October 16, 2014, filed a suit for dissolution of the marriage in Scott County District Court. See Resp't's Mem. at 6 (citing Scott County District Court File No. 70-FA-14-18705); Affidavit of Amanda Gustafson at 4, ¶ 8. The parties reconciled and the proceedings in the Scott County District Court on the protection order and marriage dissolution were also dismissed in June and July 2015. See Resp't's Mem. at 5, 6; Affidavit of Amanda Gustafson at 4, ¶ 9.

As reflected in records from the SMSC Child Welfare case [redacted] various other courts have been involved in criminal and civil protective order proceedings involving both parties.

The 2017 proceedings for dissolution of the marriage.

On June 28, 2017, Respondent filed a petition in the California courts for divorce, child custody, spousal support and a division of the marital property. *Nguyen v. Nguyen*, Superior Court of California, Humboldt County, Court File No.

FL170479 (copy of the petition submitted as Ex 2a to the Affidavit of Gary A. Debele).

On July 20, 2017, Petitioner filed a petition for dissolution of marriage in this Court. Pet. for Dissolution of Marriage (Jul. 20, 2017). In her petition, she also seeks a judgment granting her custody of the parties' child subject to supervised parenting time for Respondent; reserving the issue of child support; denying either party temporary or permanent spousal support; allocating the outstanding bills and obligations of the parties; and awarding Petitioner her non-marital property and an equitable share of the marital property.

In July 2017, the Petitioner appeared in the California proceedings and sought dismissal of that action. The California Court held a hearing on July 27 and 28, 2017, the transcripts of which have been filed with this Court. At the conclusion of the hearing, the California Court found that the child had not resided in the State of California for the time required for the California courts to have jurisdiction over a child custody proceeding under the Uniform Child Custody Jurisdiction and Enforcement Act, and that California would not exercise jurisdiction over the minor child as California was an inconvenient forum. California Court Order of July 28, 2017 (submitted as Ex 2c to the Affidavit of Gary A. Debele); see also California Court Transcript of Proceedings on July 28, 2017 at 2-3. The California Court entered a temporary order addressing custody and visitation but otherwise stayed the proceedings in its case pending "pending orders of the Shakopee Mdewakanton Sioux Community Tribal Court or other court with jurisdiction over [the child] pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act."

California Court Order of July 28, 2017 (submitted as Ex 2c to the Affidavit of Gary A. Debele).

On August 7, 2017, this Court issued an order confirming the pendency of this action on the Court's docket and this Court's intent to proceed with the case and entered a temporary order of joint physical custody and shared parenting. Order of August 7, 2017 at 4-5, ¶¶ 1-3. This Court's Order further described the two prior conservatorship proceedings that had been initiated by the Community with regard to the Petitioner, as well as the Tribal Court's prior child welfare proceedings over the parties' minor child. *Id.* at 4, ¶ 11. As this Court stated, "Both proceedings have been closed, but this Court maintains exclusive, ongoing child welfare jurisdiction over the minor child pursuant to the final order issued in the child welfare proceeding commenced by this Community." *Id.* at 4, ¶ 11. This Court's order further directed the parties to confer to determine a date and time for an initial hearing on temporary issues. *Id.* at 5, ¶ 4.

This Court's order was brought to the attention of the California Court, and on August 10, 2017, the California Court dismissed the case in its entirety. California Court Order of August 10, 2017, submitted as Ex 2c to the Affidavit of Gary A. Debele.

In August 2017, following dismissal of his California case, Respondent filed a new action for dissolution in Hennepin County Court in Minnesota. Resp't's Mem. at 8 (citing Hennepin County District Court Fle No 27-FA-17-5535). At about the same time, he also filed the instant motion to dismiss this case asserting that this Court

lacks personal and subject matter jurisdiction. Neither party has asked this Court for any modification to the joint parenting provisions of the August 7, 2017 Order.

DISCUSSION

Respondent brings his motion to dismiss under Rule 12(b)(1) and 12(b)(2) of the SMSC Rules of Civil Procedure. He makes three primary arguments in support of his motion to dismiss. He argues, first, that the Court lacks personal jurisdiction over him because it cannot be shown that he has had contacts with the Community sufficient to establish personal jurisdiction. Resp't's Mem. at 8-13. . Second, he argues that as a non-member who resides outside the Community's reservation the Court lacks subject matter jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981). Resp't's Mem. at 13-16. Finally, he argues that the Court lacks subject matter jurisdiction over this marriage dissolution proceeding because the Indian Child Welfare Act (ICWA), 25 U.S.C. §1901 et seq., and Public Law 280, 28 U.S.C. § 1360, establish that "Minnesota has exclusive jurisdiction over the parties' minor child, which necessitates the dissolution proceedings in state court." Resp't's Mem. at 16-18.

The Petitioner opposes dismissal. First. she argues that she has met the residency requirement necessary for the Court to find subject matter jurisdiction pursuant to the Community's Domestic Relations Code. Pet'r' Mem. of Law, at 7-8, 18. Second, she argues that the Court's subject matter jurisdiction is consistent with the requirements of *Montana v. United States*, and unaffected by either the Indian Child Welfare Act or Public Law 280. Third, she argues that the Court has personal jurisdiction over the Respondent because he has "repeatedly availed himself of

resources of this Community" and thereby has established his "presence" in its territory. *Id. at 15.* Finally, the Petitioner asks the Court to maintain this action in the Community despite the concurrent jurisdiction with a similar ongoing dissolution action proceeding filed by Respondent in Minnesota state court. *Id.* at 22.

I. STANDARD OF REVIEW

In general, a party that asks the Court to hear a case must demonstrate that the Court has jurisdiction. *LSI v. Prescott and Johnson*, 2 Shak. T.C. 152 (Jul. 1, 1996). When jurisdiction is challenged on a motion to dismiss "this Court assumes all the facts alleged in the petition or complaint to be true, and views the allegations therein in the light most favorable to the Petitioner." *Crooks-Bathel v. Bathel*, 6 Shak. T.C. 1, 3 (Mar. 18, 2010). Dismissal is proper under the Court's rules "only if it appears beyond a reasonable doubt that the pleader can prove no set of facts in support of the claim that would entitle her to relief." *Id.*

Where materials outside the pleadings are presented with a motion to dismiss that challenges the Court's subject matter or personal jurisdiction, this Court, like the federal courts, "has considerable discretion in determining how and when to resolve the dispute." *Thomas v. Lightfoot*, 6 Shak. T.C. 61, 77 (Dec. 23, 2013) (citing and quoting *Cutco Industries v. Naughton*, 806 F.2d 361, 363 (2d Cir. 1986)). Because the question of jurisdiction is a matter for the Court to decide, this Court, like the federal courts, may resolve issues of fact relevant to its jurisdiction. *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) (federal courts have power to resolve disputed factual issues on a motion to dismiss that challenges jurisdiction); *Faibisch v. Univ. of Minnesota*, 304 F.3d 797, 801 (8th Cir. 2002) (same).

"Jurisdictional issues, whether they involve questions of law or fact, are for the court to decide."..."[T]he trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Prof'l Flight Attendants Ass'n v. Nw. Airlines, Inc.*, No. CIV. 03-6174, 2004 WL 626860, at *3 (D. Minn. Mar. 26, 2004) (citations omitted). Further, like the federal courts, this Court has discretion to resolve factual issues affecting jurisdiction based either on the papers filed or following an evidentiary hearing. "'based solely on the papers or by a proceeding at which evidence is heard.'" *Thomas v. Lightfoot*, 6 Shak. T.C. at 77 (quoting *Cutco Industries v. Naughton*, 806 F.2d 361, 363 (2d Cir. 1986)). *See also Freitag v. ELI*, 94 F.3d 648, 1996 WL 447586 (8th Cir. 1996) ("district court properly considered materials outside the pleadings . . . [and] could undertake its jurisdictional inquiry without conducting a formal evidentiary hearing or forewarning the parties" (citing *Osborn v. United States*, 918 F.2d 724, 729-30 (8th Cir.1990))).

II. SUBJECT MATTER JURISDICTION

This Court first addresses Respondent's argument that the Court lacks subject matter jurisdiction. "Subject matter jurisdiction is the ability of a court to hear a particular kind of case either because it involves a particular subject matter or because it is brought by a particular type of plaintiff or is against a particular type of defendant." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.02 (Nell Jessup Newton ed., 2012) [hereinafter, COHEN'S HANDBOOK].

A. The Community's Law and its Federal Approval.

Both Community law and federal law permit the Community to assert its authority over domestic relations involving its members. The regulation of domestic

relations among Community members and others who come within the Community's jurisdiction is retained within the Community's sovereign authority. SMSC General Council Resolution No. 11-10-15-002 (Nov. 10, 2015). In addition, the Community has "jurisdiction over all persons whose actions involve or affect the [Community] or its members, or where the person in question enters into consensual relations with the Community or its members through commercial dealings, contracts, leases, or other arrangements." SMSC Jurisdictional Amendment Resolution No. 11-14-95-003 (Nov. 14, 1995). The Community has adopted its Domestic Relations Code for the express purpose of "providing for the health, safety and welfare of members by preserving and strengthening family ties whenever possible, by protecting and preserving Tribal heritage and enabling Community members to use their own Tribal forum for the resolution of domestic relations issues." Domestic Relations Code, Introduction at 1.

The Community's Domestic Relations Code addresses many issues regarding marriage, dissolution, child custody, marital property, pre- and post-nuptual agreements, paternity, adoption, and child welfare. *See* Domestic Relations Code. As required by the Community's federally-approved Constitution, because the Community's law was intended to also apply to non-members, the Community sought and received approval by the United States Department of the Interior when the Domestic Relations Code was adopted in 1995. *Crooks-Bathel*, 6 Shak. T.C., at 3. In 2016, when the Domestic Relations Code was amended, federal approval was again sought and granted by the Department of the Interior. Letter from U.S.

Department of the Interior, Bureau of Indian Affairs, Regional Director Diane Rosen to SMSC Chairman Charlie Vig (Feb. 6, 2016).

The Domestic Relations Code provides that the Tribal Court has subject matter jurisdiction with regard to proceedings for dissolution of a marriage:

> 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 ninety (90) days prior to commencing any action for dissolution.

Domestic Relations Code, Chpt II, § 1. Under the Code, subject matter jurisdiction is established if one of the parties to the marriage satisfies the residency requirement.

B. Montana v. United States, 450 U.S. 544 (1981)

Respondent, in his motion to dismiss advances a legal argument that, whatever may be said in the Code, the Tribal Court lacks subject matter jurisdiction because he is not a tribal member and does not reside on the reservation, relying on *Montana v. United States*, 450 U.S. 544, 565-566 (1981). Respondent's reliance on *Montana* here does not defeat this Court's jurisdiction in this case. Under *Montana*, tribes do have jurisdiction over non-members when either (1) the non-member enters into consensual relationships with tribal members through contracts or other arrangements, *id.* at 565, or (2) when the activities of the non-member have "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

At this outset, it is important to recognize that there is a substantial threshold question about whether *Montana* even applies to a marital dissolution proceeding that also involves issues of child custody and support. As illustrated by the careful and comprehensive analysis in recent decision from the Alaska Supreme

Court, where such proceedings involve a child who is a tribal member, they fall within the tribe's " inherent power 'to regulate domestic relations among members'" just as the "'tribe's powers of internal self-governance include the power to determine the custody of children of divorcing parents, the power to accept transfer jurisdiction of ICWA-defined custody cases from state courts, and the power to initiate child protection cases." *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 264 (Alaska 2016). The court there agreed with the Tribe that "child support is a pillar of domestic relations and is directly related to the well-being of the next generation of tribal members," and that tribal "jurisdiction to adjudicate child support matters arising out of a parent's obligations to his or her tribal child, whose membership is the basis of inherent tribal sovereignty" such that the *Montana* test does not apply. *Id.*

But even assuming *Montana* is applicable, Respondent has entered into a consensual relationship with Petitioner and with the Community sufficient to meet the *Montana* test. Community law permits a person to contract for marriage unless that right has been expressly restricted. *In Re the Marriage of: Amanda Gustafson v. James Van Nguyen (Dissolution I)*, No. 803-14, slip op. at 1-2 (T.C. Feb. 5, 2015). Respondent knowingly entered into a consensual relationship with a Community member through marriage. *Id.* at 1 ¶ 3. At the time that he entered into this marriage contract with Petitioner, he was well aware of her status as a Community member having been personally involved in and generally supportive of the proceedings before this Court when the Community reopened its conservatorship over the Petitioner's person and estate. *See Dissolution I*, Mem. Op. and Order at 2 (Feb. 5,

2015) (stating that: "Mr. Nguyen was likely the person who contacted the Shakopee Community and sought the conservatorships; he is identified in the Petition as Ms. Gustafson's fiancé; and he participated in two of the hearings that the Court held."); *see also Dissolution I*, Resp't's Mem. of Law at 2 (Nov. 24, 2014) (describing his knowledge of the conservatorship proceedings and his participation in the counseling required of Petitioner).[3] That consensual relationship further led to the birth of their child who is also a member of the Shakopee Mdewakanton Sioux Community. Their child has also been the subject of child welfare proceedings in this Court, represented by a Guardian ad Litum appointed by this Court. Respondent and Petitioner participated in those proceedings and worked with the SMSC's Family and Child Services Department, as well as the Court, to securing counseling and implement a plan that, as of July 2015, had allowed them to resume joint custody of their child. While that proceeding was closed in July 2015, the child remains a ward of this Court. [4]

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[3] This was not Respondent's first involvement with the Shakopee Mdewakanton Sioux Community. It is undisputed that for some period of time at least prior to their marriage, Respondent served as a caregiver for Mike Bryant, a disabled Community member who lives on the Reservation, California Court Transcript at 61-62 (Respondent's testimony). The parties only dispute whether Respondent also lived with Mr. Bryant while providing caregiver services. *Id.*; compare Affidavit of Amanda Gustafson at ¶ 28.

[4] Under Community law, a child may be a ward of the Court even though parental rights have not been terminated. In this respect, tribal law differs from state law. As Minnesota recognizes in the Minnesota Tribal-State Indian Child Welfare Agreement, a child who is a "ward of a tribal court is not necessarily the same as a 'state ward, in which a child is free for adoption. An Indian child may be a ward of a tribal court without having parental rights terminated." Agreement at 20, available at: https://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5022-ENG.

Further, because of this consensual relationship, the per capita payments which the SMSC provides to a Tribal member from Tribal government funds, appear to have been a substantial source of the funds that have supported Respondent and the parties' child. While the Court has not yet received evidence on the parties' respective financial resources and is not here making findings on the parties' respective financial circumstances or assets, Respondent testified in the dissolution proceedings that he initiated in California that he does not have to work because Petitioner "has plenty of money." California Court Transcript at 59 (July 27, 2017). And in his counter-petition in this case, he alleges that he and the Petitioner are unemployed, but she receives per capita payments from the Community, and he seeks temporary and permanent spousal maintenance, as well as child custody and child support. Respondent's Answer and Counterpetition at 7 ¶ XI, 9 ¶¶ 3, 9. Thus, the governmental resources that the Community provides to tribal members, including Petitioner here, is a significant substantive issue in decisions regarding marital and nonmarital property, the division of assets, and claims regarding spousal and child support.

Respondent argues that the *Montana* consensual relationship exception does not apply unless the consensual relationship is commercial. For support he cites to *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 655 (2001). Resp't's Mem. of Law in Support of Mot. to Dismiss Pet'r's Dissolution of Marriage, at 15. But *Atkinson* did not so hold. Rather the Court there examined whether a tribe had the authority to regulate, by taxation, non-members who simply held fee lands within the reservation and found that there must be a nexus between the regulation and

activity of the nonmember to support a tribal tax. 532 U.S. at 655-656. The federal courts since *Atkinson* have declined to adopt a view that the *Montana* consensual relations test applies only to a "commercial" transaction. *See Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 173 (5th Cir. 2014) *aff'd Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (declining to find that "noncommercial relationships do not give rise to tribal jurisdiction"). See also *Smith v. Salish Kootenai College 434 F.3d 1127, 1140–41 (9th Cir.2006) (en banc).*, (consensual relations test can apply outside of a business relationship.). Most recently, applying federal law, the Alaska Supreme Court also rejected the notion that the *Montana* consensual relations test applied only to commercial transaction. *State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 272–73 (Alaska 2016). In addressing the tribe's jurisdiction over proceedings involving child support, the Court explained:

> A relationship that leads to the birth of a child is one that has significant consequences and obligations. When two people bring a child into being each should reasonably anticipate that they will be required to care for the child and perhaps may need to turn to a court to establish the precise rights and responsibilities associated with the resulting family relationship. This may require litigating in a court that is tied to the child but with which the parent has more limited contacts. As applied to the broad category of nonmember parents, such events are, in at least some circumstances, reasonably foreseeable. In the context of membership-based inherent tribal sovereignty, relationships that give rise to the birth of a child fit within the first Montana exception.

Id. That reasoning has equal force here.

In sum, the elements required for the *Montana* consensual relations test plainly exists here. The consensual relationship is a domestic relationship between the parties, one of whom is a Community member. The dissolution of the marriage

entails resolution of matters regarding the custody and support of their child, who is also a Community member and who has been the subject of a child welfare proceeding before the Community's Courts and who remains a ward of this Court under ICWA. The dissolution of the marriage also entails identification and allocation of non-marital and marital property, as well as Respondent's claim to spousal maintenance – matters that will require factual and legal analysis regarding their relationship to the per capita payments that are made from Tribal governmental resources to Community members (including Petitioner) and subject to specific terms and conditions defined by Community law. As all these matters are comprehensively addressed by the Community's Domestic Relations Code, this Court is a proper forum to resolve the case under *Montana*'s consensual relations test.

While no more is needed, this Court further finds that this proceeding would also meet *Montana*'s second exception – under which a tribe has jurisdiction if the activities of the non-member have "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. At least with regard to a tribal court's jurisdiction to adjudicate child custody and support obligations, the Alaska Supreme Court has so held. As that Court stated:

> we 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." . . . 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.

State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska, 371 P.3d 255, 273 (Alaska 2016). So too here.

C. ICWA and Public Law 280

Respondent next argues that this Court lacks subject matter jurisdiction because the Indian Child Welfare Act (ICWA), 25 U.S.C. § §1901 et seq., and Public Law 280, 28 U.S.C. §1360, have divested the Community from making child custody determinations and, that, as a result, only Minnesota state courts have jurisdiction to hear this dissolution matter. This Court finds such an argument wholly misguided.

First, ICWA's requirements do not apply to "child custody proceedings" in cases arising out of divorce. ICWA's provisions arise only with regard to child custody proceedings that are made in the context of either, foster care placement, termination of parental rights, pre-adoptive placement, or adoptive placement. 25 U.S.C. 1903(1). As the statute plainly states, the "child custody proceedings" as defined in ICWA "shall not include a placement . . . in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1). This Court has previously so noted, stating "ICWA does not touch the subject of child custody in marriage dissolutions." *Thomas v. Lightfoot*, 6 Shak. T.C. 61, 72 (Dec. 23, 2013).

Second, Respondent is simply incorrect in asserting that the Community lacks ICWA jurisdiction as a result of the language contained in ICWA's sections 1911(a) and 1918 when read with Public Law 280, 28 U.S.C. §1360. Longstanding

and well-established law make clear that Public Law 280 simply grants states concurrent jurisdiction over criminal matters involving Indians on-reservation, and limited civil jurisdiction to hear and adjudicate private civil disputes involving Indians in the state courts., *Bryan v. Itasca Cnty., Minnesota,* 426 U.S. 373, 379-80 (1976). It is also well-established that Public Law 280 does not grant to states jurisdiction to impose the state's civil-regulatory laws over tribes or Indians on the reservation. *State v. Stone,* 572 N.W.2d 725, 731 (Minn. 1997) (applying *California v. Cabazon Band of Indians,* 480 U.S. 202 (1987)).

Moreover, it is equally well-established that Public Law 280 did not in any way abrogate or divest tribes of tribal jurisdiction. *See Bryan,* 426 U.S. at 391. *See also Walker v. Rushing,* 898 F.2d 672, 675 (8th Cir. 1990) ("Nothing in the wording of Public Law 280 or its legislative history precludes concurrent tribal authority."); *Gavle v. Little Six,* 555 N.W.2d 284, 298 (Minn. 1996) (finding that Minnesota state courts had concurrent jurisdiction — along with the tribal court — to hear a private cause of action involving a tribal entity); *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians,* 612 N.W.2d 709, 717 (WI 2000) ("Public Law 280 concerns providing Indian litigants with jurisdictional options beyond the tribal courts, not depriving tribal courts of jurisdiction that they otherwise rightfully possess as the courts of an independent sovereign."); *Miodowski v. Miodowski,* 2006 WL 3454797, at *4 (D. Neb. 2006) (finding that Public Law 280 restricted the Tribe's jurisdiction over a dissolution action involving a Tribal member and a non-member who did not reside on the reservation). As summarized by the pre-eminent Treatise on Federal Indian law:

> The nearly unanimous view among tribal courts, state courts, lower federal courts, state attorneys general, the Solicitor of the Department of the Interior, and legal scholars is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched. This conclusion flows naturally from the Indian law canons of construction, which establish that federal statutes should not be interpreted to remove tribal governmental powers unless the statutes expressly so provide. Public Law 280 did not specifically extinguish any tribal court jurisdiction, and the legislative history reflects no such congressional intent.

COHEN'S HANDBOOK § 7.02.

Thus, while Minnesota state courts, as a result of Public Law 280, may have jurisdiction over marriage dissolution matters involving tribal members, that jurisdiction does not displace the Community's jurisdiction over marriage dissolution proceedings. As stated in *Thomas v. Lightfoot*, 6 Shak. T.C. 61 (Dec. 23, 2013):

> Public Law 280 authorizes the courts of the State of Minnesota to hear and decide civil cases that may arise on the Shakopee Reservation under State law, but nothing in Public Law 280 limits, or was intended to limit, the inherent civil and criminal jurisdiction of the Shakopee Mdewakanton Sioux Community.

Respondent's contrary argument, that the Community lacks jurisdiction under Public Law 280 and ICWA over matters involving child custody is based on a wholesale misreading of a decision from the Ninth Circuit, *Doe v Mann*, 415 F.3d 1038 (9th Cir. 2005). The court there addressed the interplay between Public Law 280 and ICWA for the purpose of determining whether a tribe in California had exclusive jurisdiction under ICWA's section 1911(a) regarding an Indian child domiciled on the reservation, or whether California, as a Public Law 280 state, retained concurrent jurisdiction that it shared with the tribe over that matter. Following a lengthy analysis that included an examination of the nature of

California's child dependency laws under the standard set out in *Cabazon*, the court concluded that ICWA did not divest California of the concurrent jurisdiction it had acquired under Public Law 280. In so doing the court noted that all Congress intended by ICWA's section 1918 was allow states to maintain whatever jurisdiction that they might have acquired under laws like Public Law 280 -- subject to the rights that tribes retained to divest the state of the state's concurrent jurisdiction by reassuming exclusive tribal jurisdiction over such matters. In short, the decision in *Doe v. Mann*[5] refutes Respondent's assertion that under Public Law 280 the State has "exclusive jurisdiction" over custody proceedings involving an Indian child.

Consistent with these well-settled principles of law, the Tribes in Minnesota, including the Shakopee Mdewakanton Sioux Community, have long exercised tribal jurisdiction in accord with ICWA. The provisions of the SMSC's Code address child custody proceedings related to foster care, adoptive placement and termination of parental rights and which also implement ICWA. The United States Department of the Interior has reviewed and affirmatively approved this Code. In addition, Minnesota, by statute enacted more than 30 years ago, adopted state law to implement ICWA including its provisions on tribal and state jurisdiction. Minnesota Indian Family Preservation Act. Minn. Stat. §§ 260.751 - 260.835 (1985). In so doing, the State also addressed state law with regard to an Indian child who is a ward of a tribal court, stating that "when an Indian child is a ward of the tribal court, the Indian tribe retains exclusive jurisdiction, notwithstanding the residence or

[5] See also *Native Vill. of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 562 (9th Cir. 1991) ("neither [ICWA] nor Public Law 280 prevents [tribes] from exercising concurrent jurisdiction").

domicile of the child." Minn. Stat. §260.771(1). Minnesota recognizes the jurisdiction of the Shakopee Mdewakanton Sioux Community with regard to ICWA as shown by the Minnesota Tribal-State Indian Child Welfare Agreement – an intergovernmental agreement authorized by ICWA, 25 U.S.C. § 1919(a) – to which this Community is a party. [6]

In sum, it is simply fundamentally incorrect to assert that the Shakopee Mdewakanton Sioux Community lacks jurisdiction over child custody proceedings under ICWA or over this marital dissolution proceeding as a result of Public Law 280. Neither ICWA nor Public Law 280 deprive this Court of its inherent sovereign authority and jurisdiction to adjudicate a proceeding for dissolution of a marriage involving a Community member, and the related domestic relation issues regarding child custody, support, and distribution of property.

D. Subject matter jurisdiction under the SMSC Domestic Relations Code

Respondent's motion challenging subject matter jurisdiction is limited to advancing the two legal arguments addressed above. Respondent, in its motion, has not asked this Court to dismiss this action based on a failure of the Petitioner to meet the requirements of Chapter II of the Community's Domestic Relations Code, although he denies that such jurisdiction exists. Because subject matter jurisdiction

[6] Available at: https://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5022-ENG

is a threshold issue, the Court will address it here, and does so based on the evidence submitted by the parties to date. [7]

> Community law states that the Tribal Court
>
> > [S]hall 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 ninety (90) days prior to commencing any action for dissolution.

Domestic Relations Code, Chpt II, § 1. The decisions of the SMCS courts teach that residency "may be satisfied when a party regularly spent time on the Shakopee Reservation, availed herself or himself of the Community's services, and maintains personal property in a home on the Shakopee Reservation." *Thomas v. Lightfoot*, 6 Shak. T.C. 79, 86 (Feb. 10, 2014). As recognized in *Thomas*, a person may maintain more than one residence, and the use of multiple residences does not preclude this Court from having jurisdiction of a marriage dissolution proceeding under the Domestic Relations Code. [8] As explained in *Thomas*:

> When the General Council of the Shakopee Mdewakanton Sioux Community adopted the Shakopee Mdewakanton Sioux Community Domestic Relations Code in 1995, it deliberately chose the phrase "who have resided on" to describe the persons over whom the Community and this Court could exercise domestic relations

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[7] As set out in *Thomas v. Lightfoot*, 6 Shak. T.C. 61 (Dec. 23, 2013), and as discussed above, this Court, following the approach taken by the federal courts, has considerable discretion in deciding how and when to resolve factual disputes regarding residence as it bears on this Court's subject matter jurisdiction, and may decide the matter "'based solely on the papers or by a proceeding at which evidence is heard.'" *Id.*, (quoting *Cutco Industries v. Naughton*, 806 F.2d 361, 363 (2d Cir. 1986)).

[8] At the time of the *Thomas* case, the Domestic Relations Code required that both parties to a dissolution proceeding be residents of the Reservation. *See Thomas v. Lightfoot*, 6 Shak. T.C. 61, 74 (Dec. 23, 2013) (quoting the Code then in effect). The Code has since been amended to establish subject matter jurisdiction so long as one party satisfies the residency requirement.

> jurisdiction. Therefore, in order for this Court to exercise domestic relations jurisdiction over a person, it is not necessary that the Court find that the person intends a residence on the Reservation to be his or her permanent home. Rather, the Court simply must find that the person has been a resident of the Reservation.

Id. at 85-86.

Petitioner, in a sworn affidavit, provided sufficient evidence of residency on the Reservation to establish a *prima facie* basis for this Court's subject matter jurisdiction under the Domestic Relations Code. Petitioner avers that, although she has lived at other locations in Minnesota and California, the SMSC Reservation has continuously been the Petitioner's legal residence. Aff. of Pet'r Amanda Gustofson, at 2 (Oct. 6, 2017). In her affidavit, she sets out additional detail, averring that:

> I have maintained an address on the SMSC reservation during my entire adult life. Like many of my fellow Community members, I have always maintained a residence on the reservation, I spend time at that residence, and I also maintain residences in other locations, but always consider the Reservation to be my primary residence, both for cultural and legal reasons. I have long had a land assignment and plans to build my own residence on the reservation. I recently acquired a different land assignment and have started working with an architect and construction company to build my own home on the reservation with those plans moving forward in the near future. Until that home is complete, my legal address remains my grandmother's home on the reservation located at 3879 Eagle Creek NW, Prior Lake, MN 55372.

Id. at pages 2-3, ¶3. She further avers that:

> Despite also having homes at various times off the reservation in both Minnesota and in California, I have always maintained a home and legal address on my Community's reservation. I have lived with my parents, my grandmother, my brother, and both James and I have at various times lived in the home of Michael Bryant, Jr. – all of which are homes physically located on the SMSC Reservation.

Id. at 5, ¶11.

> It is important to understand that in some sense, James and I were a typical married SMSC couple: my financial resources allowed us to maintain several residences in Minnesota and California, including the use of residences of various relatives who had homes on the reservation which were used as my legal residence while I worked on obtaining a land assignment upon which I could build my own home. At various times throughout our relationship, James and/or I lived with Michael Bryant, Jr., my parents, Joe and Mary Jo Gustafson, my grandmother Cynthia Prescott and my brother Joe.

Id. at 8, ¶ 21.

> Prior to [redacted] birth, in the summer months of 2014 we stayed in a home I owned in Sherman Oaks, California. We returned to Minnesota for [redacted] birth on September 11, 2014, and stayed in Minnesota until June of 2015. During that time [redacted] lived with me at my aunt's home on the reservation, in a home that James and I occupied together in Prior Lake, and then in a home I purchased in Bloomington. We periodically occupied the Bloomington home from June of 2015 to October 2015. Beginning August 2016 [redacted] and I were living with my sister Elizabeth in New Prague, Minnesota, as well as with my brother on the reservation. Starting in September or October of 2016, James was making plans to establish a home in Humboldt County in northern California and traveling back and forth between Minnesota and California. As I testified in California, it was never my intent to make California my permanent or primary home in place of my Minnesota residences.

Id. at 9, ¶ 22.

Petitioner further avers that she uses her reservation address for her tax returns, as well as her driver's license and passport. *Id.* [9]

Petitioner has also continually benefited from Community services, including "monthly cash support for our family through my per capita payments," as well as "medical and dental insurance benefits and services, daycare and preschool

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[9] The fact that Petitioner was incarcerated from February 2, 2017 through May 14, 2017 does not alter her residency. *See, e.g., Jones v. Hadican*, 552 F.2d 249, 250-51 (8th Cir. 1977); *Forciea v. Fortis Benefits Ins. Co.*, No. CIV. 08-2219, 2008 WL 4371379, at *2 (D. Minn. Sept. 22, 2008). *See also United States v. Arango*, 670 F.3d 988 (9th Cir. 2012).

education services" made available through the Shakopee Community. *Id* at 11, ¶ 26; and at *Ex.* A, at 171. The Community's services to Petitioner further include those provided though this Court. In particular, these include the Conservatorship proceedings over her estate and person which was first initiated when she turned 18, and again when the conservatorship was re-established from April 2014 until September 2014 (proceedings in which Respondent participated and generally supported). It also includes the child welfare proceedings for their child, who remains a ward of this Court.

Respondent does not and cannot dispute the record of this Court's role in the lives of this family. And Respondent did not present evidence to refute the specific averments contained in Petitioner's Affidavit regarding her legal address and her residence with family members on the Reservation, but instead generally denies that Petitioner met the residency requirement. Respondent's Answer to Petition at 1, ¶ 2. In his Declaration, he further avers that neither party has "maintained or owned a residence on Community property," Decl. of James Van Nguyen, at 2, ¶ 9. However, the SMSC Domestic Relations Code does not require that residency be established solely by proof that one owned or maintained a residence. A person may reside on the Reservation by living with other family members., which Petitioner avers she has done.

The records from this Court on the related cases involving these parties indicate that when they had marital problems, Petitioner returned to the Reservation and lived with family members. Respondent, in the first dissolution proceedings before this Court (although he disputed that the parties met the 90-day

residency requirement of the Domestic Relations Code), affirmatively stated that at the time of those proceedings and since the time they had separated, Petitioner "resides on Community property on the Shakopee Mdewakanton Sioux Reservation." See *Dissolution I*, Answer and Counterpet. for Dissolution of Marriage, at 3, ¶ VII (Oct. 30, 2014). While this Court's records regarding the child welfare case indicate that by July 2015, the parties had reconciled and resumed living together, it also appears that when problems again arose in the marriage, Petitioner would return to the Reservation to live with family members or friends. Respondent's statements in the current proceedings so indicate. In his declaration, Respondent states that, despite the Community's no-trespass order, he did in fact visit Petitioner on the Reservation where she was staying with her father and with their mutual friend. Decl. of James Van Nguyen, at 3, ¶ 19. While he also describes those as "temporary" stays, he does not present any specific evidence to refute any of the averments contained in Petitioner's Affidavit regarding her residence with family members on the Reservation, or Petitioner's use of an on-Reservation address as her legal address for tax, driver's license and other purposes.

Based on the evidence presented in response to the motion to dismiss as well as the records of the related proceedings involving these parties in this Court, this Court finds prima facie evidence that Petitioner satisfied the residency requirement of the Domestic Relations Code for purposes of this Court's subject matter jurisdiction.

III. PERSONAL JURISDICTION OVER RESPONDENT

This Court's jurisdiction depends not only on subject matter jurisdiction but also personal jurisdiction over the parties. "[T]he Indian Civil Rights Act (ICRA) imposes a statutory version of the due process clause on tribal courts." COHEN'S HANDBOOK § 7.02. To ensure due process for litigants in Tribal Court, this Court has adopted the "minimum contacts" doctrine when evaluating personal jurisdiction. *LSI v. Prescott and Johnson*, 2 Shak. T.C. 152, 158 (Jul. 1, 1996) (*citing International Shoe v. Washington*, 326 U.S. 310 (1945)). The Court may exercise personal jurisdiction over a non-member who has personally availed himself of the benefits of the tribal community. *Crooks-Bathel*, 6 Shak. T.C., at 6. The burden of proving "minimum contacts" is on the Petitioner to establish with *prima facie* evidence. *LSI v. Prescott and Johnson*, 2 Shak. T.C., at 158. Allegations in the petition are to be read in a light most favorable to the petitioner, however, — when contradicted — such allegations must be shown not just by the pleadings, but also by affidavits and exhibits. *See Toomey v. Dahl*, 63 F. Supp. 3d 982, 989 (D. Minn. 2014).

The question under *International Shoe* is whether this Court's exercise of personal jurisdiction will "offend traditional conceptions of fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 464 (1985) (internal citations removed). This requires a balancing of several factors. First, the closeness of the relationship between the matter at issue and the contacts made such that the Respondent would have had "fair warning" of the court's jurisdiction. *Id.* at 472. While foreseeability alone has some weight in this analysis, it is not enough rather it must be coupled with the purposeful "availment of the benefits of the Community"

to find that Respondent could reasonable have known he was subject to the Community's jurisdiction. *Id.* at 474-475; *Crooks-Bathel.* 6 Shak., at 6.

Second, whether it is convenient to have the Respondent appear in this Court. *Burger King*, 471 U.S., at 477. When minimum contacts have been found, the burden will shift to the party challenging jurisdiction to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Id.* at 477. Considerations could include in-convenience due to the forum location, or a potential "fundamental substantive social policy" clash of laws between forums. *Id.*

Finally, the Court may consider what is the Community's interest in protecting its members. Interest may be found in the Community's "ability to govern the domestic relations of its member." *Crooks-Bathel,* 6 Shak.T.C., at 10. Similarly in *Toomey*, the court found that it had personal jurisdiction over an Alaska resident, in part, because "Minnesota has an interest in protecting its residents from out-of-state defendants who reap the benefit of services and funds provided from Minnesota." 63 F. Supp. 3d, at 992.

A. Minimum Contacts; Purposeful Availment

Respondent, in his motion to dismiss, asserts that the Petitioner cannot meet her burden of showing the minimum contacts necessary to support this Court's personal jurisdiction over him. Resp't's Mem. at 11. [10] In support of his position,

[10] 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"

Respondent states that he is not an enrolled member of the Community; he has never resided on Community property; and he has never maintained or owned a residence on Community property. Decl. of James Van Nguyen, ¶ 1, 2, 3, and 9.

Tribal membership is not the only factor relevant to determining the minimum contacts that support personal jurisdiction. *Crooks-Bathel*, 6 Shak. T.C, at 6. And the fact that Respondent did not own or maintain a residence on the Reservation, standing alone, is also not dispositive of the minimum contacts question. The "minimum contacts" test arises precisely because a party is not a resident of place in which jurisdiction is asserted. As illustrated by the decision in *Toomey v. Dahl*, 63 F. Supp. 3d 982 (D. Minn. 2014), on which Respondent relies, other actions taken by a non-resident can establish the minimum contacts sufficient to support personal jurisdiction.

The evidence before the Court shows that Respondent has availed himself of the services and benefits that the Community provides and which are related to his marriage and its dissolution. Shortly before they were married, Respondent participated in and supported the proceedings in the SMSC Courts that established a conservatorship over the estate and person of the Petitioner. *See Dissolution I*, Mem. Op. and Order at 3 (Feb. 5, 2015) (describing history of proceedings regarding

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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). For the reasons discussed below, it is not necessary to decide if this Court might have general personal jurisdiction over Respondent, as there is sufficient evidence to conclude that this Court has specific personal jurisdiction over Respondent with regard to this proceeding for dissolution of the marriage.

conservatorship that were initiated in April 2014, stating that: "Mr. Nguyen was likely the person who contacted the Shakopee Community and sought the conservatorships; he is identified in the Petition as Ms. Gustafson's fiancé; and he participated in two of the hearings that the Court held.")

Although Respondent avers that he did not maintain a residence on the Reservation, he does state that he entered the Reservation to visit Petitioner from time-to-time while she was staying with her father or their friend Mikey. *See* Decl. of James Van Nguyen, ¶ 19.

There is also evidence that Respondent, at times, used an on-reservation address. For example, in the course of the parties' 2014 proceedings for dissolution of their marriage, the Court was provided with a copy records from a criminal proceeding involving Respondent in the Scott County District Court. *See Dissolution I*, Pet'r's Mem. of Law, at Ex. C (Nov. 21. 2014).. That official court record shows Respondent's agreement to and his signature on the terms of a dismissal of a criminal proceeding in February 2014, in which his address is shown as one on the Shakopee Reservation, namely: 2285 Redwing Drive, Shakopee, Minnesota. More recently, in the proceedings before the California court, Respondent testified that he has relied on an on-reservation address for certain tax advantages explaining that a truck, purchased for his benefit by Petitioner and taken by him to California, was registered by Petitioner in Minnesota to an on-reservation address "to avoid sales tax." California Court Transcript at 71-72 (Jul. 27, 2017).

In testimony before the California court, Respondent also testified that per capita payments which his wife receives from the Community are the principal

source of income that has been used to support this family. In response to a question about where he was employed, he responded "I wasn't employed. My -- my wife makes plenty of money." California Court Transcript at 59 (Jul. 27, 2017). In the counter-petition that he filed in this case (as well as in the petition he filed in the Hennepin County case), Respondent states that both he and the Petitioner are unemployed, describes her per capita payments as the family's primary source of income, and affirmatively seeks spousal support from the Petitioner. Respondent 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.

Respondent also avails himself of the Community's services because, as a spouse of a tribal member, he receives medical insurance and is eligible for medical care from the Community. Likewise, their minor child, as an enrolled member of the Community, is eligible for and received daycare, preschool, social services and heath care from the Community.

The foregoing provides sufficient evidence that the Respondent has purposefully availed himself of the benefits of the Community to meet the minimum contacts as set out in *International Shoe, Crooks-Bathel,* 6 Shak. T.C., at 6., and *Toomey v Dahl.* Since minimum contacts exist, the inquiry will shift to the balancing of fair play and substantial justice test.

B. Inconvenient Forum

Having found minimum contacts, the burden will shift to the party challenging jurisdiction to "present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *See Burger King,* 471 U. S., at 477. Nowhere in his declaration or pleadings does Respondent argue that the Community's Court is physically inconvenient for him. Rather he concedes that the "distance between the Hennepin County Courthouse and the Tribal Court of the SMSC is minimal [.]" Resp't's Reply Mem. at 3 (Oct. 13, 2017). And while the Community's Business Council had issued a "No Trespass" order in November 2014, *see* Decl. of James Van Nguyen, ¶ 18., that order does not bar him from appearing in this Court. Indeed, from October 2014 through July 2015, he actively participated in proceedings before this Court in connection with the parties' first suit for dissolution of the marriage – where he prevailed in establishing that the conservatorship did not void the marriage. And from December 2014 to July 2015, he participated in this Court's child welfare proceedings regarding their child, which resulted in his and Petitioner's ability to maintain custody of their child. Because Respondent has made no argument or showing that this Court would be an inconvenient forum, this Court finds that it is not.

C. Community Interests

In analyzing whether this Court has personal jurisdiction over Respondent, the Court may consider what is the Community's interest in protecting its members. Interest may be found in the Community's "ability to govern the domestic relations

of its member." *Crooks-Bathel*, 6 Shak., 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." *Thomas*, 6 Shak. T.C., at 85 (*citing Jacobs v. Jacobs*, 405 N.W. 2d 668, 672 (Wis. 1987)).

The Community's interests weigh heavily in favor of this Court's jurisdiction. The Community has adopted its Domestic Relations Code for the express purpose of "providing for the health, safety and welfare of members by preserving and strengthening family ties whenever possible, by protecting and preserving Tribal heritage and enabling Community members to use their own Tribal forum for the resolution of domestic relations issues." Domestic Relations Code, Introduction at 1. Here, both Petitioner and the couple's minor child are members of the Community. Both Respondent and Petitioner have asked for full legal and physical custody of this minor child.

In addition, this case implicates Community assets and programs made available to its members. The couple's apparent sole or principal source of income during the marriage were Petitioner's per capita payments, and at least some of their assets were derived primarily from those payments. Aff. Amanda Gustafon, ¶ 26, 30. Respondent states that he earns some rental income and that Petitioner's only income is from her per capita payments and yet he has asked the Court to award permanent spousal support to him. Resp't's Answer and Counterpet. for Dissolution of Marriage, at 7, 9. By implication it would seem that he is asserting that per capita income is marital income and, therefore, places these Community government payments at issue. *See Crooks-Bathel*, 6 Shak. T.C., at 10.

The record contains sufficient evidence to establish a prima facie case that the minimum contacts test has been met. In addition, no argument has been asserted that the Tribal Court is an inconvenient forum. Finally, it is in the Community's interest to have jurisdiction over domestic matters that concern its members and Community' payments, property, or services. Therefore, this Court finds that it has personal jurisdiction over Respondent in this case.

IV. COMITY -- APPROPRIATENESS OF THE TRIBAL COURT AS THE FORUM FOR THESE PROCEEDINGS

In response to the motion to dismiss, Petitioner presented arguments that, while this Court and the Hennepin County Court have concurrent jurisdiction, the Tribal Court forum is favored here. Respondent disagrees and argues that the state court forum is favored here. Resp't's Reply Mem. of Law in Support of Mot. to Dismiss Pet'r's Dissolution of Marriage at 8 *et seq.*

In determining whether this Court will issue a stay on its proceedings in favor of a similar action filed in the state court, a thirteen-factor test has been adopted in this jurisdiction. *Crooks-Bathel*, 6 shak. T.C., at 5 (*citing Teague v. Bad River Band*, 665 N.W.2d 899, 917–18 (Wis. 2003)); *In Re the Marriage of: Cyndy Stade-Lieske v. Joseph Stephen Lieske (Stade-Lieske)*, No. 783-14, slip op. at 1-2 (T.C. May 15, 2014). The factors are as follows:

1. Where the action was first filed and the extent to which the case has proceeded in the first court.

2. The parties' and courts' expenditure of time and resources in each court, and the extent to which the parties have complied with any applicable provisions of either court's scheduling orders.

3. The relative burdens on the parties, including cost, access to and admissibility of evidence and matters of process, practice, and procedure, including whether the action will be decided most expeditiously in tribal or state court.

4. Whether the nature of the action implicates tribal sovereignty, including but not limited to subject matter of the litigation and identifies and potential immunities of the parties.

5. Whether the issues in the case require application and interpretation of a tribe's law or state law.

6. Whether the case involves traditional or cultural matters of the tribe.

7. Whether the location of material events giving rise to the litigation is on tribal or state land.

8. The relative institutional or administrative interests of each court.

9. The tribal membership status of the parties.

10. The parties' choice of forum by contract.

11. The parties' choice of law by contract.

12. Whether each court has jurisdiction over the dispute and the parties and has determined its own jurisdiction.

13. Whether either jurisdiction has entered a final judgement that conflicts with another judgement that is entitled to recognition.

Stade-Liekse, slip op., at 6-7. While all factors will not apply in every matter and no one factor is itself determinative, "the factors, taken as a whole, give a valuable framework for reaching an equitable decision." *Id.*at 7 (internal quotations removed). The Parties have each analyzed these factors in their briefs, and this Court finds it appropriate to do so as well.

A. Where the action was first filed and the extent to which the case has proceeded in the first court.

Petitioner argues that because this action was filed before the Hennepin County suit and this Court has issued a temporary order regarding child custody, this factor weighs in favor of continued tribal court jurisdiction. Petitioner Memorandum at 10-11. Respondent argues that because he was the first to file a dissolution action this year in California, and then "re-commenced his petition for dissolution in Hennepin County District Court on August 18, 2017[11]" that this weighs in favor of the state court proceeding. Resp't's Reply Mem. at 9.

The California action was dismissed in its entirety on August 10, after this Court confirmed that it had assumed jurisdiction over an action that had been filed by Petitioner on July 20. Since the California suit was dismissed in its entirety, it cannot be relied upon to assert that Respondent was first to file. Rather, this factor should be based on considering the relative dates of filing of the two pending cases. As to these, the dissolution action in this Court was filed before Respondent filed his dissolution action in the Hennepin County Court.

In many respects, both cases are in their early stages. The Hennepin County Court held an initial case management conference, and called for briefing on "whether [the state court] should stay its proceedings while this Court considers the motion to dismiss." Pet'r' Reply Mem. at 11. Briefing is apparently concluded and the Hennepin County Court took the matter under advisement. Transcript of October 17 2017 Hearing at 65. In this case, this Court entered a temporary order

[11] MNCIS reports that the matter was filed on August 23, 2017.

on custody on August 7, 2017 which remains in effect. That order directed the parties to confer to determine the date and time for an initial hearing before this Court to address any temporary issues, but the parties have not asked this Court to modify the August 7 2017 Order. The parties have fully briefed Respondent's motion to dismiss, and oral argument on that motion was heard on October 17, 2017.

On balance, since the Tribal Court action was filed before the Hennepin County Court action, and child custody and visitation have been the subject of this Court's August 7, 2017 temporary order, this factor slightly favors Tribal Court jurisdiction. Continued Tribal Court jurisdiction is further supported by the fact that this dissolution proceeding requires decisions on the custody of the parties' minor child. This court previously addressed the custody of this child in connection with the prior child welfare proceedings, and was made a ward of this Court. Those proceedings, coupled with this Court's August 7 2017 temporary custody order, establish a basis on which the Minnesota Courts should recognize the Community as the child's home state for purposes of child custody proceedings as provided by the Uniform Child Custody Jurisdiction and Enforcement Act in Minnesota. Minn. Stat. 518D.101 -518D.317.

B. The parties' and courts' expenditure of time and resources in each court, and the extent to which the parties have complied with any applicable provisions of either court's scheduling orders.

On this factor, Respondent states that "both courts have had limited involvement to date." Resp't's Reply Mem. at 10. However, for the reasons set out above, the Court finds that this factor favors the Tribal Court.

C. The relative burdens on the parties, including cost, access to and admissibility of evidence and matters of process, practice, and procedure, including whether the action will be decided most expeditiously in tribal or state court.

While Respondent recognizes that the "distance between the Hennepin County Courthouse and the Tribal Court of the SMSC is minimal", he argues that because "only Hennepin County has jurisdiction over child custody under ICWA" the matter is best situated in state court. Resp't's Reply Mem. at 10. As discussed above, because ICWA and Public Law 280 do not divest the Community of its jurisdiction, that argument has no relevance here.

In weighing the burdens on the parties, this Court finds that proximity to the Court by either party is likely equal. Matters of process, practice and procedures are similarly equal. Each court has adopted written rules that are published and available to the parties. The parties' joint and individual property is located both on and off the reservation as are witnesses who may be called to testify and, therefore, of equal burden to the parties. The Court find that this factor is neutral.

D. Whether the nature of the action implicates tribal sovereignty, including but not limited to subject matter of the litigation and identifies and potential immunities of the parties.

This factor weighs heavily in favor of this matter proceeding in Tribal Court. As discussed above, the subject matter of this dissolution is properly before this Court. In addition, the Community has adopted its Domestic Relations Code for the express purpose of "providing for the health, safety and welfare of members by preserving and strengthening family ties whenever possible, by protecting and preserving Tribal heritage and enabling Community members to use their own

Tribal forum for the resolution of domestic relations issues." Domestic Relations Code, Introduction at 1.

Respondent argues that "no part of this matter implicates or divests tribal sovereignty." Resp't's Reply Mem., at 10. In addition, he argues that "the marriage occurred wholly outside of the Community and its land." *Id.* At 11.

While the marriage ceremony occurred in Nevada, events prior to and since the marriage have implicated the Community, its laws, its protections for the parties and their minor child. As discussed above, this Court has had a substantial role in the lives of this family. This has occurred through the conservatorship proceedings regarding Petitioner in which Respondent participated,[12] as well as the child welfare proceedings. Further, this case implicates Community assets and programs made available to its members because per capita payments, services and benefits of the Community appear to be an issue in this matter. *See Crooks-Bathel*, 6 Shak. T.C., at 10. As such, Petitioner ability to have resolution of domestic issues heard in her Community's forum weighs heavily in favor of this Court.

E. Whether the issues in the case require application an interpretation of a tribe's law or state law.

Respondent argues that the Tribe's laws have no bearing on this matter based on his position that this Court lacks jurisdiction. Resp't's Reply Mem., at 11. However, for the reasons set out above this Court has jurisdiction. Furthermore,

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[12] *See Dissolution I*, Mem. Op. and Order, at 2 (Feb. 5, 2015) (finding that "Mr. Nguyen was likely the person who contacted the Shakopee Community and sought the conservatorships" of the Petitioner, and that he participated in Conservatorship hearings).

proceedings regarding the dissolution of this marriage do require application of tribal, rather than state law. Both parties cite to a state court decision that conflicts with tribal law regarding the treatment of per capita payments in connection with marital property -- *Zander v. Zander*, 720 N.W.2d 360, 369-70 (Minn. Ct. App. 2006). The Community has a significant interest in the tribal law governing the Community's per capita payments. As this Court found in *Stade-Lieske v. Lieske*, Court File No. 783-17, Memorandum Opinion and Order, (May 15, 2014), the court in *Zander* "treated per capita payments from the Shakopee Community government as marital property in direct conflict with the express provisions of the Shakopee Community's Domestic Relations Code.... and despite the fact that even under state law, gifts to one spouse during a marriage are excluded from marital property." *Stade-Lieske*, Slip Op. at 13-15. This Court further explained in detail the reasons why the Community's interest in interpreting and applying Tribal laws governing the per capita payments are substantial. As this Court explained:

> The per capita payments that are made by the Community to its enrolled members are distributions of a Tribally-owned resource. These are governed, as an initial matter by federal law, 25 U.S.C. §§2710(b) (3), (d)(1), which requires that the Community have a federally approved plan for the use of the Community's income from its gaming enterprises before making such distributions. The Community's federally approved plan is implemented by Community laws which, among other matters: ensure that per capita payments made for the benefit of Community members who are minors or legally incompetent are protected in appropriate trust accounts, (*see* SMS(D)C Resolution 10-27-93-002 adopting the SMS(D)C Gaming Revenue Allocation Amendments to the Business Proceeds Distribution Ordinance); protect a member's interest in per capita payments while held by the Tribe, from garnishment, attachment or execution, subject to limited exceptions, (*see* SMS(D)C Resolution 9-13-11-016); allow for deductions to be made from a member's per capita payments necessary to meet child support obligations, (*see* SMS(D)C Domestic Relations Code, Chapter III, Section 8.b); and establish that per capita payments,

> like other gifts or inheritance which might be made to only one spouse and not another, are not treated as martial property (*see* SMS(D)C Domestic Relations Code, Chapter II, Sections 1, 2). Thus, in adopting Tribal laws to authorize per capita distributions of Tribal funds, the Community undertook careful consideration of how to best meet the needs and protect the interests of the Community and its members with regard to the use of these Tribal funds, and carefully balanced those interests. The Tribe has a very substantial interest here in the proper interpretation and application of these important Tribal laws which govern the disposition of Tribal resources.

Stade-Liekse, slip op., at 14; *See also* Letter from Reg. Dir. Diane Rosen to Chairman Charlie Vig (Feb. 6, 2016) (approving the Tribe's Domestic Relations Code including its classification of *per capita* payments in dissolution matters despite its conflict with Minnesota law)).

"'[E]fforts to use a State forum to create a conflict with Community law would neither clarify the application of pre-existing tribal law nor elucidate the rights and duties of people subject to Community law.'" *Stade-Liekse*, Slip Op at 13 (quoting *Crooks-Bathel v. Bathel*, 6 Shak. T.C. 1.) Instead, the "' [a]djudication of [reservation] matters by any non-tribal court . . . infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.'" *Stade-Liekse*, Slip Op at 13 (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) and citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1976) (litigation of matters arising on-reservation in a forum other than the tribe's "cannot help but unsettle a tribal government's ability to maintain authority"); *Fisher v. District County Court*, 424 U.S. 382, 388 (1976) (recognizing the same where a state court asserts jurisdiction over a civil dispute that is otherwise within the tribal court's authority.))

Finally if this matter were heard in the State court, that court may not be able to award complete relief. To the extent that the State court might seek to enter orders regarding the per capita payments, such orders could not be enforced by writs of attachment or garnishment against the Community itself with regard to per capita payments that are due but not yet distributed by the Community to Community members.

For these reasons, the Court finds that this factor weighs heavily in favor of this Court's jurisdiction. *See Crooks-Bathel*, 6 Shak, at 13-14.

F. Whether the case involves traditional or cultural matters of the tribe.

Protecting and preserving Tribal heritage is at the heart of the Domestic Relations Code. *See* Domestic Relations Code, Introduction at 1. Respondent argues that the Tribe's culture and heritage had no role in the marriage and, therefore, the State's interests are favored. This Court disagrees. The ability of a sovereign "to make their own substantive law in internal matters and to enforce that law in its own forums" of utmost importance. *Santa Clara Pueblo*, 436 U.S., at 55-56. While the individual parties have their own unique perspectives on the importance of Tribal heritage, this Court finds that the ability of the Tribe to enforce its own Domestic Relations Code in domestic matters that involve Community members weigh heavily in favor of this Court.

G. Whether the location of material events giving rise to the litigation is on tribal or state land.

In the context of a marital dissolution proceeding, there is no one "location of material events" that give rise to the litigation. Over the course of the marriage, the

parties have had multiple residences, and more than one residence at any given time. They have also traveled. Because of domestic abuse in the relationship, Respondent asserts that the State has a greater institutional interest in this matter. Petitioner argues that because Respondent has availed himself of Community benefits, that this factor weighs in favor of Tribal Court. The events that result in irreconcilable differences are not susceptible to one specific location and cannot simply be said to have occurred within or outside the Reservation. This factor would be neutral, except that here this Court has already assumed a substantial role over the minor child, and this Court prior child welfare proceedings and temporary order on custody the effect of which supports continued Tribal jurisdiction.

H. The relative institutional or administrative interests of each court.

Respondent argues that Minnesota's interests in deciding this dissolution matter are greater based on his position that this Court lacks jurisdiction, and in particular his argument that under the ICWA, the "Tribal Court does not have jurisdiction to determine child custody issues in this case." Resp't's Reply Mem. at 14. For the reasons detailed above, this Court has subject matter jurisdiction which has not be abrogated or diminished by Public Law 280 or ICWA.

While the state certainly has institutional interests in providing a forum for the dissolution of marriage of Minnesota residents, the Community has no less interests with regard to such proceedings involving Community members. The Community has additional interests that differ from those of the State., and, which weigh heavily in favor of this Court retaining jurisdiction. Tribes retain the "right of internal self-government includes the right to prescribe laws applicable to tribe

members." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). One critically central area of inherent tribal authority is domestic relations of tribal members, COHEN'S HANDBOOK § 4.01, especially children who are members of the tribe. *See State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 264 (Alaska 2016), as is expressly stated in the Community's Domestic Relations Code, Introduction at 1.

When, as here, jurisdiction has been established, the institutional interests of this Court is significant in order to preserve the underlying rights and interests of this Community by administering its Domestic Relations Code. Therefore, this factor weighs heavily in favor of retaining this matter in the Tribal Court.

I. The tribal membership status of the parties.

As to the marriage dissolution standing alone, this factor to be neutral because the Petitioner is a member of the Community and the Respondent is not a member. However, the additional proceedings involved in this dissolution regarding child custody and support favor Tribal Court jurisdiction because the child's status as a Community member who is a ward of this Court.

J. The parties' choice of forum by contract.

This factor is inapplicable here.

K. The parties' choice of law by contract.

This factor is inapplicable here.

L. Whether each court has jurisdiction over the dispute and the parties and has determined its own jurisdiction.

While Respondent has contested this Court's subject matter and personal jurisdiction, this Court has addressed the jurisdictional issues and found that it has

subject matter and personal jurisdiction in this case. Petitioner here does not challenge the jurisdiction of the Hennepin County District Court with regard to the dissolution of marriage, Pet'r's Reply Mem. at 17, although she argues that the Tribal Court should be found to be the child's home state under the Uniform Child Custody Jurisdicition and Enforcement Act. Pet'r's Reply Mem. at 17. For the reason set out above, this Court finds that this factor favors Tribal jurisdiction.

M. Whether either jurisdiction has entered a final judgement that conflicts with another judgement that is entitled to recognition.

As the parties confirmed both in their briefs and at the October 17, 2017 hearing, no final judgments have been issued by the Hennepin County court. This Court issued a temporary order accepting jurisdiction upon the request of the California court in August but no final judgment has been issued from this Court. Temp. Order, *Dissolution II*, at 2 (Aug. 7, 2017). Therefore, this court finds this factor to be neutral.

Taken as a whole, these factors support this Court's continued exercise of jurisdiction in this matter.

VI. CONCLUSION

Finding that this Court has subject matter jurisdiction to decide this dissolution matter, that this Court has personal jurisdiction over the Respondent, and that this Court has a substantial interest in continuing to exercise its jurisdiction here, motion to dismiss is DENIED.

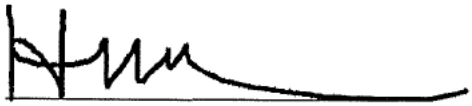
BASED ON THE FOREGOING FINDINGS AND CONCLUSIONS IT IS HEREBY ORDERED:

1. Respondent's information statement must be filed and served on the Petitioner no later than 30 days after the issuance of this order, pursuant to Chapter IV, section 2, paragraph (l) of the Domestic Relations Code.
2. Mandatory disclosures must be filed and served on the parties no later than 30 days after the issuance of this order, pursuant to Chapter IV, section 2, paragraph (n) of the Domestic Relations Code.
3. Absent a Conservator approved settlement agreement, this dissolution matter will be resolved at trial by this Court.
4. A pre-hearing conference is ordered for December 19, 2017 at 10:00 a.m., pursuant to Chapter IV, section 2, paragraph (p) of the Domestic Relations Code.
5. Each party shall complete a pre-hearing conference statement and the same shall be filed and served on the parties no later than 10 days prior to the pre-hearing conference. Such statement shall include a report to this Court on the status of discovery and settlement; outstanding issues for trial; proposed trial date; proposed date for exchange of witness lists for trial; evidence to be marked and introduced, including pre-

organization and stipulations regarding the same; and a pre-trial statement.

SO ORDERED.

Dated: November 10, 2017



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