**TRIBAL COURT**
**OF THE**
**SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY**

**SCOTT COUNTY** **STATE OF MINNESOTA**

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In Re the Marriage of:

Cheri Lynn Crooks-Bathel ,

Petitioner, Court File No. 651-09

and

David Ernest Bathel,

Respondent.

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## OPINION AND ORDER

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On December 15, 2009, the Respondent moved to dismiss this matter, contending that the Court lacked personal and subject matter jurisdiction; on February 17, 2010, the Court denied that motion; and, on March 8, 2010, the Respondent filed a notice of appeal from that denial. For the reasons set forth below, I now decline to certify the question at issue for appeal.

Ordinarily, the Court's denial of a motion to dismiss is not an appealable final order. See, LSI Board of Directors v. Smith, 1 Shak. A.C. 130, 132 (May 28, 1998); LSI v. Prescott, 4 T.C. 98, 100 (Dec. 29, 2000). But Rule 31 of our Rules of Civil Procedure allows this Court to certify a question of law for appeal in any circumstance where an appeal would lie from a decision of a federal district court; and, in his notice of appeal, the Respondent indicates he is seeks to appeal under that rule.

Our Rule 31 incorporates the substantive requirements of finality embodied in 28 U.S.C. §1292, which prohibits the appeal of a non-final order unless the appeal involves a controlling question of law as to which there is a substantial difference of opinion, and the appeal would materially advance the termination of the litigation. LSI Board of Directors v. Smith, *supra*; LSI v. Prescott, 4 T.C. 98, 100 (Dec. 29, 2000). If the trial court concludes that all of those elements are present, the trial court can so state, and the appellate court can, in its discretion, hear the appeal. The general purpose of both our Rule 31 and 28 U.S.C. §1292 is to allow an interlocutory appeal in exceptional cases in order to avoid protracted and expensive litigation. Paschall v. Kansas City Star. Co., 605 F.2d 403, 406 (8th Cir. 1979)(discussing 28 U.S.C. §1292(b)). Rule 31 and 28 U.S.C. §1292 are not to be used simply to allow interlocutory appeals of important issues, or matters of first impression. Krangel v. General Dynamics Corp.,

968 F.2d 914, 916 (9th Cir. 1992). The requirements incorporated by Rule 31 are conjunctive, meaning that each element must be present to permit the appeal. Arenholz v. Board of Trustees of the University of Illinois, 219 F.3d 674, 676 (7th Cir. 2000). Therefore, in order for an interlocutory appeal to be appropriate the case must present a question of law, which is controlling, to which there is a substantial difference of opinion, the resolution of which would materially advance the termination of the litigation.

Here, the Respondent certainly raises a question of law -- namely, whether this Court has jurisdiction over non-members in the context of a divorce proceeding -- and this question is controlling, in the sense that without jurisdiction, this Court could not proceed with this case. But there does not appear to be a substantial difference of opinion as to whether this Court has jurisdiction over non-members in a divorce proceeding -- or, at least, non-members who otherwise meet the residency requirements of the Domestic Relations Code. The fact that the parties themselves disagree on an issue does not constitute "a difference of opinion" sufficient to warrant certification of an interlocutory order for immediate appeal, Williston v. Eggleston, 410 F.Supp. 274, 277 (S.D.N.Y. 2006), because if the parties' disagreement were all that is required to create a substantial difference of opinion the criterion always would be met and it would be superfluous. In his briefing on his motion to dismiss, the Respondent produced no case from any court holding that tribal courts lacked jurisdiction in a marriage dissolution proceeding involving a non-member who was married to a member and who resided on tribal lands. And, although it is difficult to prove a negative, the Court's research also has disclosed no such cases. So, without any conflicting authority, in my view this Court's decision to deny Respondent's motion to dismiss cannot reasonably be characterized as a decision over which there is a substantial difference of opinion.

From that conclusion it is not necessary for me to go further; but it also is not obvious how allowing an appeal at this point would materially advance the termination of this litigation. It is true that if the Court of Appeals reversed this case could be dismissed for lack of jurisdiction. But given the absence of any conflicting authority, the plain language of Chapter III of the Domestic Relations Code, and this Court's longstanding practice of hearing and deciding marriage dissolution proceedings that involve non-member residents of the Shakopee Reservation, a reversal seems unlikely. Hence, accepting an appeal at this point seems far more likely to prolong this case than to resolve it.

## ORDER

For the foregoing reasons, under Rule 31 of the Rules of Civil Procedure of the Shakopee Mdewakanton Sioux (Dakota) Community the Court declines to certify the question of the Court's jurisdiction to the Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community.

March 18, 2010

Judge John E. Jacobson