CHILDREN'S COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX
(DAKOTA) COMMUNITY

FILED MAR 03 2016

LYNN K. McDONALD
CLERK OF COURT

**IN THE CHILDREN'S COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY**

SMSC RESERVATION **STATE OF MINNESOTA**

In re [redacted] **Court File No. CC083-15**

Children in Need of Assistance

Memorandum Decision and Order

Summary.

The mother of [redacted] has moved to dismiss this matter, contending that the Shakopee Mdewakanton Sioux Community ("the Community") and this Court lack the requisite jurisdiction to hear it. For the reasons set forth in detail below, having to do with the plain language of the Domestic Relations Code ("the Code") of the Community, the inherent authority of the Community to protect Indian children who reside on the Shakopee Reservation, and the Congressional confirmation of that authority that is worked by the Indian Child Welfare Act, we deny that motion.

Procedural History.

This matter was commenced on January 22, 2015, in response to an emergency *ex parte* petition from a Child Welfare Officer of the Community, filed under Chapter IX of the Code, asking that the Court grant temporary legal and physical custody of [redacted] to the Community.

Chapter IX, section 9.a. of the Code provides –

> The Court [of the Shakopee Mdewakanton Sioux Community, sitting as the Children's Court] shall make such orders for the commitment, custody and care of [a child in need of assistance] and take such other actions as it may deem advisable and appropriate in the interest of the child and the interests of the Community.

And Chapter IX, section 2.d. of the Code defines "Child in need of assistance" as –

> Any child who is in violation of the law, dependent, neglected, or subject to physical, emotional or sexual abuse shall be deemed for these provisions a child in need of assistance and may be the subject of a petition under this Chapter. Such designation shall include: a minor Tribal member; a minor eligible for enrollment; [and] any Indian child domiciled on the Shakopee Mdewakanton Dakota Reservation or temporarily located on the Reservation.

At the time the Child Welfare Officer's petition was filed, and for a number of months preceding the filing, were domiciled , on the Shakopee Reservation, with their mother and with the father of is not a member of the Community, but is eligible for Community membership; . is a member of the another federally acknowledged Indian tribe; father is a member of the Community; and the children's mother is non-Indian.

On January 25, 2015, the Court held a hearing on the Child Welfare Officer's petition and concluded that the matter should not be heard *ex parte*. Therefore, on January 28, 2015, the Court convened a hearing at which both and were present. The Court heard evidence to the effect that the condition of the residence was concerning, that there was considerable evidence of chemical use by and that at one point, when the parents had raised their voices, hid behind the legs of a Child Welfare Officer – who was a total stranger to him – and said "I scared". Nonetheless, at the conclusion of that hearing, the Court denied the Community's request that temporary physical and legal custody of the children be transferred to the Community, but instead ordered the family's adults to remain sober, to provide random drug screens, and to work closely with the Community to develop a case plan that would ensure the family's physical and chemical health going forward.

Thereafter, on February 25, 2015, the Community by emergency motion again sought a transfer of physical and legal custody for both children, as a consequence of a medical examination of , which had led to the conclusion that had been the victim of "non-accidental" injuries to – injuries that had resulted in subdural hemorrhaging of such severity that the placement of a shunt in was mandated, to drain a substantial quantity of blood from

The Court immediately granted the Community's motion, placing temporary legal and physical custody of both [redacted] with Community's Family and Children's Services Department ("the Department"). The Department and the Court-appointed Guardian *ad Litem* each recommended that [redacted] be temporarily placed with a non-Indian foster care family that had many years of therapeutic experience in caring for young children, and the Court adopted those recommendations.

When [redacted]s membership in the [redacted] ("the Nation") was established, shortly after the commencement of these proceedings, the Department notified the Nation, and thereafter representatives of the Nation have been included on the Court's service list, regularly have participated by telephone in the Court's status hearings, and have supported the positions taken by the Department and the Guardian *ad Litem* and the orders entered by the Court[1].

The foster care mother reported that when [redacted] first arrived in her family's care [redacted] had open sores on [redacted] bottom; long, dirty, unkempt fingernails; and fearful behaviors that are not normally seen in a child [redacted] age. Subsequent testing of [redacted], following his placement in the foster home, disclosed that in receptive communication [redacted] scored only in the first percentile of children [redacted] age; in expressive communication [redacted] scored in the second percentile; and that in both cognition and social emotional expression [redacted] scored significantly below average for children of [redacted] age.

Following a period of placement with the therapeutic foster family, the Department and the Guardian *ad Litem* recommended that [redacted] be temporarily placed with his maternal grandmother, and that he undergo therapy at the Community to address the various behaviors that apparently were driven by anxiety. The Court adopted those recommendations on April 21, 2015.

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[1] During a status hearing on January 6, 2016, the Court was informed by counsel for the children's mother that [redacted] father had asked the Indian Child Welfare Advisory Committee ("the ICWA Committee") of the Nation to seek transfer, from the Community to the Nation, of all proceedings affecting the placement and care of [redacted]. Thereafter, on February 1, 2016, the Court received a letter from an attorney for the Nation stating that the ICWA Committee had met, had discussed [redacted] situation and status, and had concluded that it was not seeking a transfer of jurisdiction over him. [redacted]s father has never sought to participate in the proceedings before this Court, and the Community and the Guardian *ad Litem* have informed the Court that they have no telephone or mail contact information for him.

During the succeeding months, the Court held a number of hearings, on the record, to monitor the status of the children. The reports that the Court received indicated that both [redacted] were progressing: [redacted] was becoming more interactive with other persons, and the therapies being provided to [redacted], together with [redacted] placement with [redacted] grandmother, seemed to be reducing the unusual fears and behaviors that [redacted] had exhibited. During some of those hearings, the children's mother and [redacted]'s father participated; during some, one or both did not; and cooperation, by each, with the Department and the Guardian *ad Litem* was inconsistent, and occasionally was completely lacking. During that time, the mother and [redacted]'s father separated, and later in 2015, the mother married [redacted] [redacted]

In September, 2015, given the failure of the parents to comply with the provisions of their case plans – provisions that would make it possible for them to move toward reunification with the children – the Department and the Guardian *ad Litem* independently concluded that, although reunification continued to be their goal, reaching that goal likely would take considerable time. The Department and the Guardian *ad Litem* therefore asked the Court to place [redacted] in the home of one of his maternal [redacted] [redacted] and to maintain [redacted] placement with his maternal grandmother. In response to the request relating to [redacted] the Court held an evidentiary hearing during which both the children's mother and [redacted]s father participated and were represented by counsel (and during which the mother repeatedly refused to provide her current living address). [redacted]'s father supported the transfer of custody of [redacted] to the [redacted] and the children's mother opposed it. On November 11, 2015, based on the evidence received, the Court filed Findings of Fact, Conclusions of Law, and an Order, adopting the recommended change of placement for [redacted] Temporary physical placement of [redacted] remained, and to this date remains, with his maternal grandmother.

On December 8, 2015, the children's mother filed her motion to dismiss this matter, under Rule 12(b)(1) of this Court's Rules of Civil Procedure, contending that the Court has no jurisdiction over her or her children. In light of the importance of the issues raised in that motion, and the need to resolve them with all deliberate speed, the Court ordered that the motion be heard by a three-judge panel, under Rule

25 of our Rules of Civil Procedure, in order that a decision that is final for this Court could be rendered without unnecessary delay[2].

Today, having considered the briefs and submissions from the mother in support of her motion, and from s father, the Community, and the Guardian *ad Litem,* all of who opposed the motion, we conclude that, for several independent reasons, we do have jurisdiction over this proceeding and over the physical and legal custody of both and . We therefore deny the motion.

Analysis.

1. The mother's contentions. The children's mother argues that this matter must be dismissed for several reasons. She asserts that the Code by its own terms applies only to members of the Community and not to children who merely are eligible for membership or to children who are members of another Indian tribe. Citing *Montana v. United States*, 450 U.S. 544 (1981), she argues that we have no jurisdiction because (i) neither she, nor her mother with whom has been placed under the Court's orders, nor nor ., nor s father, is a member of the Community, and none of those five persons have consented to the Court's jurisdiction; and also (ii) there is no evidence in the record which would establish, under the so-called second *Montana* exception, that this is a matter where a severe threat to the Community's health and welfare is presented that, under federal law, would validate the exercise of Community jurisdiction over non-consenting persons who are not Community members. Finally, looking to the provisions of the Indian Child Welfare Act, she argues that because may have been the victim of a crime, any jurisdiction which this Court might derive from ICWA is negated by a provision of the Act which excludes from the Act's reach a "placement based upon an act which, if committed by an adult, would be deemed a criminal offense".

Having carefully reviewed each of these arguments we conclude that none is sound.

2. The reach of the Code.

The mother's contention with respect to the reach of the Code derives from language in the Code's preamble, which says that the Community "has the inherent sovereign power to regulate the

[2] Under our Rule 31, no appeal lies within our Court from a decision of a three-judge panel.

domestic relations of its members". That general statement is unarguably true, but its presence in the Code's preamble certainly does not diminish the Community's power to regulate persons who are not members of the Community, or that it was the Community's intent, when it adopted the Code, to forgo the exercise of that power if the exercise was of fundamental importance to the Community. As the Community noted in its memorandum opposing the mother's motion, general statutory language does not override or nullify specific statutory provisions, *Fourco Glass Co. v. Transmirra Products, Corp.,* 353 U.S. 22, 228 (1957), and the language of the Code's Chapter IX, section 2.d. is both specific and unambiguous:

> **Any** child who is in violation of the law, dependent, neglected, or subject to physical, emotional or sexual abuse shall be deemed for these provisions a child in need of assistance and may be the subject of a petition under this Chapter. Such designation **shall include**: a minor Tribal member; **a minor eligible for enrollment; [and] any Indian child domiciled on the Shakopee Mdewakanton Dakota Reservation or temporarily located on the Reservation**.

(Emphasis supplied).

It would be difficult to craft clearer language. The General Council of the Community, when it adopted the Code, intended to give this Court the responsibility and the authority to protect children in need of assistance who were domiciled on the Shakopee Reservation if the children were eligible for Community membership, or if they were members of another Indian tribe. As a result, the mother's contention with respect to the reach of the Code is entirely without merit.

2. The effect of *Montana v. United States*.

In *Montana v. United States*, 450 U.S. 544 (1981), the Supreme Court of the United States held that –

> ...[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements A tribe may also retain inherent power to exercise

> civil authority over 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.

450 U.S. at 565-566 (citations omitted). In the years following that decision, the Supreme Court has held that a tribe's inherent sovereign authority in civil matters does not include tort litigation between non-Indians arising from a vehicle accident on a highway within a tribe's reservation, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); that a tribe and its courts cannot reach or regulate the search, by state law enforcement officers, of a tribal member's on-reservation residence, *Nevada v. Hicks*, 533 U.S. 353 (2001); and that a tribal court lacks jurisdiction over a non-Indian who allegedly discriminated against tribal members in the sale of fee lands on the tribe's reservation, *Plains Commerce Bank v. Long Family Land and Cattle Co.*,554 U.S. 316 (2008).

But, as the Community noted in its opposition to the motion here at issue, in the years following the *Montana* decision the Supreme Court has not held, or even suggested, that an Indian tribe's inherent authority does not reach to matters involving the safety and welfare of Indian children who are domiciled on the tribe's reservation. Quite to the contrary, eight years after the *Montana* case was decided, in interpreting the Indian Child Welfare Act, 25 U.S.C. §§1901 – 1963 ("the ICWA"), the Supreme Court said this:

> **Tribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA.** Indeed, some of the ICWA's jurisdictional provisions have a strong basis in pre-ICWA case law in the federal and state courts *See e.g.* -- *Wisconsin Potowatomies of Hannahville Indian Community v. Houston,* 393 F. Supp. 719 (W.D. Mich. 1973)(tribal court had exclusive jurisdiction over custody of Indian children found to have been domiciled on reservation); *Wakefield v. Little Light,* 276 Md. 333, 347 A.2d 228 (1975)(same) -- **In enacting the ICWA, Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States.**

Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 42 (emphasis supplied)(first and third citation omitted)

We take this language at face value. Indian tribes historically have exercised jurisdiction over the placement and care of the Indian children who were living on their reservations, and this has been true regardless of whether the children were members of a tribe other than the one which was exercising its jurisdiction. To cite one example, the Court of Appeals of the Confederated Tribes of the Colville Reservation, *In re J.* 1 CCAR 62, 62-64 (Colville Tribal Ct. App. 1992)(holding that the Colville Tribal Court had jurisdiction over a child-protection proceeding involving a child who was a member of the Coeur d'Alene Tribe, but who resided on the Colville Reservation, and whose mother, also a Coeur d'Alene member, raised jurisdictional objections to the Colville Court only after she disagreed with the Court's placement decision.)[3].

Given the reality of Indian Country, it could hardly be otherwise: a member of one tribe frequently lives with and has children with a member of another tribe, or with a non-member, on a reservation where one or both adults is not a member. In such cases, the family's children may be members of (or eligible to be members of) the tribe on whose reservation they reside, or they may be members of (or eligible to be members) a different tribe. So, where social services intervention is necessary to protect a child it would be enormously inefficient, and potentially dangerous, if the tribe on whose reservation the child is domiciled could not exercise its authority to protect the child merely because the child might be a member of, or eligible to be a member of, a different tribe. The provisions of Chapter IX, section 2.d. of the Code eliminate that possibility on the Shakopee Reservation.

Our holding, therefore, is that the Community has inherent sovereign authority to protect both [redacted] that the ICWA confirms that authority, and that if that authority were restricted or withdrawn, the potential harm, to the two children now before the Court and to all other children similarly situated, would directly threaten the health or welfare of the Community. Hence, we also conclude that

[3] *See generally*, Jones, B.J., The Indian Child Welfare Handbook 30 (1995)("The exclusive jurisdiction provision of ICWA applies to all Indian children residing within a tribal court's jurisdiction, regardless of whether a child who is the subject of a custody proceedings is a member of the tribe that is exercising jurisdiction --").

the Community's exercise of its jurisdiction falls squarely within the second exception in the *Montana* decision, quoted above.

3. The Effect of the Indian Child Welfare Act.

The ICWA defines "Indian child" as –

> -- [A]ny unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe".
>
> 25 U.S.C. §1903(4).

Both [redacted] and [redacted] therefore are Indian children under the ICWA; and, as to an Indian child who is domiciled on the child's reservation, the ICWA says this:

> An Indian tribe **shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe**, except where such jurisdiction is otherwise vested in the State by existing Federal law.

25 U.S.C. §1911(a) (emphasis supplied). Since both [redacted] and [redacted] are Indian children who, at the time of the commencement of these proceedings, were domiciled on the Shakopee Reservation, the just-quoted provision would apply to them, and would constitute Congressional affirmation of the exercise of the Community's inherent authority over both of them. But, as noted above, the children's mother contends that §1911(a) is inapplicable to [redacted] because – given the severe and "non-accidental" injuries [redacted] – [redacted] may well have been the victim of a crime.

Her argument derives from 25 U.S.C. §1903(1), which excludes certain cases from the "child custody proceedings" to which §1911(a) applies:

> Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime --

But that exclusion clearly was intended to apply only to placements of children in a juvenile justice context, where it was the child who had committed an act that "if committed by an adult" would be a crime. *See* BIA Guidelines for State Courts & Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10152 (Feb. 25, 2015)(explaining that the ICWA does not apply to "[p]lacements based upon an act *by the Indian child* which, if committed by an adult, would be deemed a criminal offense" (emphasis

supplied)); *see also*, Peter W. Gorman & Michelle Therese Paquin, *A Minnesota Lawyer's Guide to the Indian Child Welfare Act*, 10 Law & Ineq. 311, 330 (June, 1992). The exclusion created by §1903(1) simply makes it clear that the ICWA was not intended to interfere with law enforcement proceedings in juvenile courts; and to read that exclusion as eliminating a tribal court's power to protect a child who may have been the victim of a crime would be to torture the language of the exclusion, and to stand the fundamental purpose of the ICWA – the protection of Indian children – on its head.

We therefore hold that 25 U.S.C. §1911(a) affirms our jurisdiction over both [redacted] and [redacted], and that the exclusion created by 25 U.S.C. §1903(1) has no applicability to these proceedings.

In passing, we can note that the qualifying phrase – "except where such jurisdiction is otherwise vested in the State by existing Federal law" – in §1911(a) does not in any way affect this case. The phrase may well refer to the jurisdictional framework created by Public Law 280, 28 U.S.C. §1360, wherein certain states, including Minnesota, can exercise certain forms of civil jurisdiction over Indians in certain areas of Indian Country; but here, after the Minnesota authorities were notified of [redacted]'s injuries, as Minnesota law required that they be, they encouraged the Community to commence these proceedings, and have worked cooperatively with the Department thereafter. And we note that the Minnesota Indian Family Preservation Act, Minn. Stat. §260.771, subd. 1, provides that all child placement proceedings involving Indian children residing on a reservation are deemed to be within the exclusive jurisdiction of the tribe.

4. The mother's status as a non-Indian.

The children's mother contends that because she is not a member of an Indian tribe, this Court lacks jurisdiction to protect the welfare of her children. But that contention ignores both the broad language of ICWA and the case law interpreting ICWA's language in the context of an Indian child who has a non-Indian parent. The ICWA defines "parent" very broadly, to include "any biological parent or parents of an Indian child", without reference to the parent's race, ethnicity, or tribal status. 25 U.S.C. §1903(9). And the reach of the Act "does not limit tribal court jurisdiction to cases where both parents are Indian". *Thompson v. Fairfax Cnty. Dep't of Social Servs.*, 747 S.E.2d 838, 849 (Va. Ct. App. 2013);

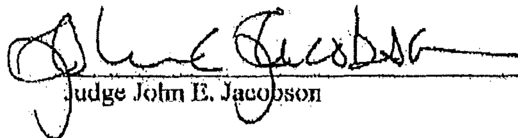
see also Simmonds v. Parks, 329 P.3d 995, 1019 (Alaska 2014)(holding that "tribal jurisdiction and intervention rights [under the ICWA] depend solely on the membership status of the child"); *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008)(concluding that a tribal court had colorable jurisdiction over a custody dispute involving an Indian child despite the fact that the father was a non-Indian); *Kaltag Tribal Council v. Jackson*, No. 3:06-cv-211 TMB, 2008 WL 9434481, at * (D. Alaska Feb. 22, 2008)(noting that in the context of tribal court jurisdiction in 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).

For these reasons, we conclude that the mother's status as a non-Indian does not deprive the Community or this Court of jurisdiction in these proceedings.

Conclusion.

For all the reasons stated, we conclude that the Community maintains jurisdiction over this action. Therefore, we deny the mother's motion to dismiss.

Dated: March 3, 2016



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