LIST OF SMSC TRIAL COURT OPINIONS

Index Vol. 6
2010-2014

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

SCOTT COUNTY **STATE OF MINNESOTA**

In Re the Marriage of:

Cheri Lynn Crooks-Bathel ,

Petitioner, Court File No. 651-09

and

David Ernest Bathel,

Respondent.

OPINION AND ORDER

The Respondent has moved to dismiss these proceedings or, in the alternative, for a stay pending the resolution of matters presently before the United States District Court for the District of Minnesota. For the reasons set forth below, I deny both motions.

Summary of the Proceedings

The Petitioner asks this Court to dissolve her marriage. She is a member of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Shakopee Community"); the Respondent is not. In affidavits supporting various motions, the Petitioner asserts that the parties have resided on a Community land assignment on the Shakopee Reservation for the twenty-three years of their marriage; that for the last fifteen years the Respondent has worked for a business the parties own on the Reservation; that the Petitioner has worked for the Shakopee Community's government for the last sixteen years; and that the parties have raised two children to adulthood on the Reservation. The Petitioner filed her petition on November 30, 2009, and a summons was issued on that date, but the Petitioner's process server was unable to effect service on the Respondent until December 7, 2009. In the meantime, the Respondent, having been informed by the Petitioner of the existence of these proceedings, on December 2, 2009 filed a marriage dissolution petition in the District Court for Minnesota's First Judicial District and, on the same day, served a summons for that proceeding on the Petitioner.

There followed a flurry of filings.

On December 8, 2009, citing no rule in this Court's Rules of Civil Procedure, the Petitioner filed a motion styled "Motion for Jurisdiction Order", with a supporting memorandum, asking that this Court declare that it had jurisdiction to hear her Petition. On December 15, 2009, the Respondent, also citing no rule, filed a motion styled "Responsive Motion in Opposition to Jurisdiction", in which the Respondent asserted that he was making –

> a limited appearance in this matter as to the issue of jurisdiction of this Court and requests that this Court deny Petitioner's motion for lack of jurisdiction. This responsive motion in no way affirms that Respondent consents to the jurisdiction of this Court in the above matter.

Then, notwithstanding what appeared to be a special appearance, on the following day the Respondent filed an Answer.

Thereafter, the Petitioner filed a second motion, also captioned "Motion for Jurisdiction Order", on December 23, 2009; and December 31, 2009, the Shakopee Community moved for an order permitting it to file what effectively is an *amicus curiae* brief supporting the Petitioner's position with respect to this Court's jurisdiction[1].

Filings during this period were not limited to those made in this Court. In mid-December, the Petitioner removed the Respondent's State court proceeding to the United States District Court for the District of Minnesota.

In an attempt to put some structure on the filings in this Court, a hearing was held on January 6, 2010, where the Court informed the parties that it was unclear how the Petitioner's motions fit within this Court's rules, but that the Respondent's December 15, 2009 filing would be treated as a motion to dismiss under our Rule 12(b). A briefing schedule was established for that motion; the Respondent then filed a brief in support of the motion; the Petitioner timely filed a response; and the Respondent chose to file no reply. That brings the case to where it is today.

This Court's Jurisdiction under the Domestic Relations Code

In his memorandum, the Respondent argues that dismissal of this proceeding is appropriate because, in his view, the text of the Community's Domestic Relations Code does not give the Court personal or subject matter jurisdiction over non-members in marriage dissolution proceedings. He also argues that, even if this Court does have jurisdiction, the Court should refrain from exercising its jurisdiction in light of his filing parallel proceedings in Minnesota State court – the proceedings which have been removed by the Petitioner to the United States District Court.

---

[1] At the hearing on this matter held on January 6th, neither party objected to the submission of that brief, so the Community's motion is granted, and the brief is accepted into the record.

In considering a motion to dismiss under our Rule 12(b), this Court assumes all the facts alleged in a petition or complaint to be true, and views the allegations therein in the light most favorable to the Petitioner. Crooks v. SMS(D)C, 4 Shak. T.C. 92, 93 (Oct. 31, 2000); Welch v. SMS(D)C, 2 Shak. T.C. 112, 115 (Feb. 7, 1996), *affirmed*, Welch v. SMS(D)C, 1 Shak. A.C. 35 (Oct. 14, 1996). A case may be dismissed under our 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. Crooks v. SMS(D)C, 4 Shak. T.C. 92, 93 (Oct. 31, 2000); Welch v. SMS(D)C, 2 Shak. T.C. 112, 115 (Feb. 7, 1996), *affirmed*, Welch v. SMS(D)C, 1 Shak. A.C. 35 (Oct. 14, 1996).

The Shakopee Community adopted its Domestic Relations Code in 1995, pursuant both to its inherent sovereign authority and to the specific authority granted by the Community's Constitution. Resolution No. 05-23-95-002 para. 4. The resolution by which the Shakopee Community adopted the Code granted this Court the authority and responsibility to hear and resolve domestic issues. Resolution No. 05-23-95-002 para. 7. The Shakopee Community notes, in its *amicus curiae* filing, that because the Domestic Relations Code was intended to apply to persons who are not members of the Community, the Community was required, under its Constitution, to obtain the approval of the Department of Interior before implementing the Code, see Community's Motion for Permission to File Statement on Jurisdiction, page 2. That approval was sought and was given. Id.

Chapter III of the Community's Domestic Relations Code governs divorce. Section 1 of Chapter III establishes the Community's jurisdiction over marriage dissolution proceedings:

> The Shakopee Mdewakanton Sioux (Dakota) Community shall have jurisdiction over all persons who have resided on its Reservation or on any allotted or tribally purchased lands, or any public domain land designated for Tribal use, for at least 90 days prior to commencing any action for the dissolution of a marriage before the Courts of the Shakopee Mdewakanton Sioux (Dakota) Community.

On its face, this provision, coupled with the delegation to this Court worked by Resolution No. 05-23-95-002, gives the Court jurisdiction over "all persons", members and non-members, who are parties to a divorce proceeding and who meet the section's residency requirement.

The Respondent, however, disagrees. He focuses on language in Chapter I, Section 1 of the Code, which describes this Court's jurisdiction over the domestic relations of the Community's "members", and from this focus he argues that the Code was not meant to apply to non-members. But in the Court's view the Respondent is reading from the wrong chapter of the Code. Chapter I of the Domestic Relations Code, from which he argues, sets forth the rules and requirements regarding the creation of a valid marriage under Community law. The Petitioner here is not questioning the validity

of the parties' marriage; she is seeking the Court to dissolve the marriage. This proceeding, therefore, is governed by Chapter III of the Domestic Relations Code, not Chapter I; and Chapter III, Section 1 establishes this Court's jurisdiction over "all persons" involved in a marriage dissolution proceeding, so long as they meet the section's 90 day residency requirement.

But even if the Respondent was correct that Chapter I, Section 1 of the Domestic Relations Code applied to marriage dissolutions, his reading of that section is too narrow. His argument centers on this language in the section:

> The Shakopee Mdewakanton Sioux (Dakota) Community shall have jurisdiction over all marriages licensed and performed on its Reservation or on any allotted or tribally purchased lands or any public domain lands designated for Tribal use. The Community shall have original jurisdiction over the domestic relations of its members. All persons must be residents of the Community as defined by Community law.

The Respondent focuses on the second sentence of this section which uses the term "members". But he fails to discuss the next sentence of Chapter I, Section 1, which uses the term "all persons" in referring to the parties to a domestic relations dispute. If the Code were not intended to apply to non-members, surely its drafters would have used the term "members" consistently, rather than employing the more inclusive phrase "all persons". In this Court's view, there is no way to read the phrase "all persons" to exclude persons who are not members of the Shakopee Community. So, the natural way to read Chapter I, Section 1, and Chapter III, Section 1, is that the Domestic Relations Code gives this Court jurisdiction over the marriages of the Shakopee Community's members, together with their non-member spouses, if all parties meet the residency requirements set out by the Code.

This reading of the Code comports with the reality of the Shakopee Community. The Community is small, both in terms of the numbers of its members and the size of its land base, and it is common knowledge that the great majority of marriages within the Community are between a member and a non-member. In the Court's view, it is appropriate to take judicial notice of that fact; and, given that fact, it would have made little sense for the Community to have drafted, passed, and successfully sought Secretarial approval of a Code that did not apply to non-members who were residents of the Shakopee Reservation.

This reading of the Domestic Relations Code also is consistent with long-standing federal policy and case law that supports tribal jurisdiction over domestic matters. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1976) ("[Indians] remain a separate people, with the power of regulating their internal and social relations. They have the power to make their own substantive law in internal matters and to enforce that law in their own forums (citations omitted).") Federal cases have long noted that tribes may exercise jurisdiction over non-members, even on non-member-owned fee land, when those persons have entered into consensual relations with a tribe or its members. U.S. v.

Montana, 450 U.S. 544, 565-66 (1981). ("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). The Petitioner here alleges that she and the Respondent have been married and living on tribal land within the Reservation for twenty-three years. See Affidavit of Cherie Crooks Bathel, ¶ 5, attached to Petitioner's Memorandum of Law in Support of Jurisdictional Determination. In this Court's view, marriage and residency on Community lands within the Reservation clearly meet the requirement of a consensual relationship under Montana; and the governance of domestic relations of the Community's members and their spouses on the lands of the Shakopee Reservation plainly is central to the health and welfare of the tribe.

Finally, this reading of the Domestic Relations Code is consistent with case law of this Court during the last fifteen years. In the years since the adoption of the Domestic Relations Code, this Court routinely has applied the Code to non-members who have met the Code's residency requirements, in the context of marriage dissolutions and other domestic relations proceedings, and several of the decisions reflecting that reality appear in our reporters. See, e.g., Welch v. Welch, 5 Shak. T.C. 127 (Aug. 18, 2008), *aff'd in part and rev'd in part* Welch v. Welch, 2 Shak A.C. 11 (April 15, 2009) (*plurality opinion*); Brooks v. Corwin, 5 Shak. T.C. 83 (Oct. 15, 2007), *aff'd* Brooks v. Corwin, 2 Shak. A.C. 5 (Aug. 4, 2008); Cannon v. Prescott, 4 Shak. T.C. 144 (Nov. 25, 2002).

In short, in the Court's view, the Shakopee Community's Domestic Relations Code gives us subject matter jurisdiction over a marriage dissolution proceeding between a member and a non-member who have resided on the Shakopee Reservation for more than ninety days. And, reading the Petitioner's allegations in the light most favorable to her, she clearly has alleged facts that establish the requisite ninety-day residency period. See Petition for Dissolution of Marriage ¶¶ 1, 10-12; Affidavit of Cherie Crooks Bathel, ¶ 5, Attached to Petitioner's Memorandum of Law in Support of Jurisdictional Determination.

The Respondent does not deny that his residence on the Shakopee Reservation meets the required period; but, in his memorandum supporting his motion to dismiss, he does make what appear to be two separate residence-related arguments. He asserts, first, that the Code cannot apply him and his marriage because his marriage occurred before the Code was made applicable to the residents of the Shakopee Reservation. He also argues that because his nuptials took place in the State of Nevada the Domestic Relations Code does not apply to the marriage. But, again, this is a marriage dissolution proceeding brought under Chapter III of the Code, not a proceeding to solemnize a marriage under the Chapter I. Under Chapter I of the Code, a requirement for entering into a marriage under Community law is that the marriage ceremony take place on the

Reservation. See Domestic Relations Code, Chapter I, Section 1. In a marriage dissolution proceeding, however, Chapter III, Section 1 of the Code gives this Court jurisdiction over "all persons" in a marriage if they have resided within the reservation for at least ninety days prior to the action's filing, regardless of when the marriage was solemnized, or where it was solemnized.

Before turning to the Respondent's contention that, if the Court has jurisdiction here, that jurisdiction should not be exercised, the matter of personal jurisdiction should be touched upon. The Respondent has not argued the point, but nonetheless it should be noted that, from the record, it is apparent this Court has personal jurisdiction over the parties. Our precedents establish that the Court's personal jurisdiction over non-Indians may be exercised if the minimum contacts requirements set forth in International Shoe v. Washington, 326 U.S. 310, 316 (1945), are met. LSI v. Prescott and Johnson, 2 Shak. T.C. 152, 158 (July 1, 1996). Under that test, a factor that the Court may consider is whether the Respondent is alleged to have purposely availed himself of the benefits of the tribal community. International Shoe, 326 U.S. at 319. Here, the Petitioner alleges that she and the Respondent have a homestead located on the Reservation, that they have been married and living on the Reservation for the twenty-three years, that they jointly own a business located on the reservation, that the Respondent has been employed by that business for the past 15 years, that the parties share medical insurance provided by the Community, and that their children – who are Community members themselves – were born and raised in the Community and presently hold homestead land assignments on the Reservation. See Petition for Dissolution of Marriage ¶¶ 1, 10-12; Affidavit of Cherie Crooks Bathel, ¶ 5, Attached to Petitioner's Memorandum of Law in Support of Jurisdictional Determination. If these facts are true, the Respondent clearly has, for years, purposely availed himself of the benefits the Community's laws and society. His status as a Shakopee Community member, or as an Indian or non-Indian, is irrelevant: the Petitioner has alleged contacts that support jurisdiction under our precedents. LSI v. Prescott and Johnson, 1 Shak. A.C. 48, 56-58 (Dec. 31, 1996); Barrientez v. SMS(D)C, 1 Shak. T.C. 61, 71 (June 17, 1991).

The appropriateness of this Court as the forum for these proceedings.

The Respondent argues that, even if this Court has jurisdiction, it should not exercise its jurisdiction. He forwards three arguments in this regard. First, he suggests that jurisdiction should not be exercised because both parties agree there are federal issues to be resolved in this case. Second, he argues that a stay is appropriate here because the United States District Court will decide the pertinent jurisdictional issues, and for this Court to render a decision on the same issues would be unfair and duplicative. Finally, he asserts that the State of Minnesota's "first to file" rule should apply here, and – because he served process in his case before the Petitioner served him – this case should be stayed and the District Court for the First District should be allowed to take its case to judgment.

Respondent's first argument can be addressed succinctly. He states, in his memorandum of law:

> The parties agree the Tribal Court should not assert jurisdiction because there are federal issues present that the U.S. District Court must address first before the Tribal Court case can proceed.

Respondent's Memorandum of Law Regarding Tribal Court Jurisdiction, page 13.

But his statement clearly does not reflect the actual position of the parties. The Petitioner has been very clear that she believes jurisdiction properly lies with this Court, and this Court has received no request from her to stay these proceedings pending the outcome in the United States District Court. See, e.g., Petitioner's Memorandum in Response to Respondent's Motion to Dismiss for Lack of Tribal Court Jurisdiction, pp. 3-4. So, this Court has before it two parties who disagree about the Court's jurisdiction, there is a live controversy, and this Court should, and today does, resolve it.[2]

The Respondent cites no law to support his second argument, and in this Court's view there is none. An affidavit filed by the Respondent makes it clear that, prior to filing and serving notice of his state court action, the Respondent knew that this case had been filed and that the Petitioner was attempting to perfect service on him. See Affidavit of David Bathel, ¶ 4, *attached to* Respondent's Notice of Motion and Responsive Motion in Opposition to Jurisdiction (acknowledging he received a voicemail from Petitioner's process server trying to locate him before he filed in state court). So, it is he who bears the primary responsibility for the present state of affairs: he chose to commence a second action after he knew that this proceeding had been initiated. If he had preferred to litigate in only one forum he should not have filed a case in a second forum.

In support of his third argument – the "first to file" argument – the Respondent cites a case where the same litigation had been filed in two different Minnesota state district courts. See Minn. Mut. Ins. v. Anderson, 410 N.W.2d 80, 82 (1987). Clearly, that is not the present case. Here, although this Court and the Minnesota courts may have concurrent jurisdiction, we are courts of different sovereigns. This Court is not part of the Minnesota State judicial system; the First Judicial District of the State of Minnesota is not part of the Shakopee Community's court system. It would make little sense for either of the two courts to apply a first to file rule in a context where neither has the power to

[2] The Respondent also argues that it would be an error for this Court to exercise jurisdiction because to do so would interfere with his right to have access to courts under the United States and Minnesota Constitutions. To support this argument, Respondent cites only Bounds v. Smith, 430 U.S. 817 (1977), a case that addresses the extent to which prisoners must be allowed to use law libraries in order to make their federal right to access the courts meaningful. This Court notes that the Respondent, who is ably represented by counsel, and who has appeared in three different forums for this case, does not appear to have a problem with accessing the courts, but rather is concerned about obtaining a specific jurisdictional ruling. But it is not the place of this Court to delineate the nature of the Respondent's federal or state constitutional rights. If the Respondent believes his federal or state constitutional rights have been interfered with, he must seek redress in a more appropriate forum, presumably either a federal or state court.

enforce their orders. If this Court applied a "first to file rule" in this case, and concluded that the Petitioner actually had succeeded in filing this case first, this Court is unaware of any authority that would allow it to stay the subsequently-filed Minnesota court proceeding.

In this Court's view, a far more instructive rule than "first to file", when there is a potential conflict between a tribal court proceeding and a state court proceeding, is the rule laid out in Teague v. Bad River Band, 665 N.W.2d 899 (Wis. 2003) and Teague v. Bad River Band, 612 N.W.2d 709 (Wis. 2000). That case involved a contract dispute between a non-member employee and a tribe. The employee filed a contract action in a state court; thereafter the tribe filed an action in its tribal court. The tribal court reached its judgment first, and the tribal party moved the state court to dismiss its action. The state trial court declined to dismiss, based in part on the "first to file" rule, reasoning that since it had acquired jurisdiction first it should proceed to judgment and the tribal court should have dismissed its case. Presented with these facts, the Wisconsin Supreme Court noted that the typical "first to file" rules do not apply where the engaged courts are of different sovereigns, as are tribal courts and state courts. 612 N.W.2d at 717-18. And, in a subsequent appeal of the same case, the court concluded that tribal-state court conflicts in Wisconsin should be resolved on the principles of comity, based on a number of factors. Teague v. Bad River Band, 665 N.W.2d 899, 917-18 (Wis. 2003). In the Wisconsin Supreme Court's view, those factors are:

> (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' expenditures 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 identities 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 law by contract;

(11) the parties' choice of forum by contract;

(12) whether each court has jurisdiction over the dispute and the parties and has determined its own jurisdiction; and

(13) whether either jurisdiction has entered a final judgment that conflicts with another judgment that is entitled to recognition.

655 N.W.2d at 917-18.

I think this approach, rather than a "first to file" rule, offers a better way to resolve the sorts of problems that are presented by cases of the type here at issue. Not all of the Teague factors will apply in every case, and no one factor probably will be considered determinative, but the factors, taken as whole, give a valuable, workable framework for reaching an equitable decision, and I adopt them.

Here, the first and second factors weigh slightly in favor of this Court's exercising its jurisdiction. The parties filed and served their parallel cases within a nine-day period,[3] but it appears that the State court proceeding is stayed pending the resolution of the removal notice filed by the Petitioner. This Court now has had a hearing, an exchange of briefs, and today is rendering a decision on its jurisdiction. So, this Court has proceeded further – at least slightly further – at this point.

The third factor also seems to weigh in favor of this Court's going forward. Given the geography of the Reservation and Scott County, the burdens on each party of appearing in this Court and in the District Court for the First District are likely to be about equal. But it appears that much of the parties' real property, personal property, and their joint business, are located on the Shakopee Reservation. Their employment histories and their access to health care also appear tied into the Shakopee Community. So, it seems likely that, to the extent there are evidentiary questions in this proceeding, this Court will provide a more convenient forum. It also seems reasonable to believe that the docket in this Court is lighter than that in the Minnesota's First District, making it more likely that this Court will be able to resolve the parties' dispute more expeditiously.

[3] Since this Court does not view this factor as a strict "first to file" question, it will not address the parties' arguments with respect to who precisely "filed first". The Court is aware that the Petitioner filed her Petition first but did not perfect service until after the Respondent had served and filed his state case. The Court is also cognizant of the Petitioner's equitable arguments that the Respondent intentionally avoided service. But, for the purpose of these Teague factors, the Court views these circumstances as essentially a tie, since all pertinent events took place within a nine day time period.

Clearly, the fourth factor weighs heavily in favor of this Court's going forward. The fact that the Shakopee Community has taken the extraordinary step of asking permission to file a brief here indicates the extent to which the Community views this case as potentially affecting its power to govern the affairs of its members. If, for example, the Respondent's jurisdictional arguments here were correct – if the Community had no jurisdiction over non-members who marry members, who live on the Reservation, and who raise children with members of this Community – the impact on the Community's sovereignty and its ability to govern the domestic relations of its members would, for all practical purposes, be eliminated. In addition, this case may implicate Community assets and programs since the parties' land assignments on Community land may be at issue, the Petitioner's per capita payments from the Community's government evidently are at issue, and the parties' health and dental insurance through Community programs may be, as well.

The fifth factor also weighs heavily in favor of this Court's jurisdiction. The Respondent makes no secret of the fact that he is hoping to avail himself of more favorable treatment in the State court proceeding. On page 12 of his Memorandum, he states that he hopes to have his spouse's per capita payments from the Shakopee Community government treated as marital property, by virtue of a State court decision that directly conflicts with the express provisions of the Shakopee Community's Domestic Relations Code. Cf. Zander v. Zander, 720 N.W.2d 360, 369-70 (Minn. Ct. App. 2006) (concluding per capita payments are martial property under Minnesota law despite specific language to the contrary in the Domestic Relations Code), with SMS(D)C Domestic Relations Code, Chapter II, Section 1 ("Per capita payments shall not be defined as marital property"). These efforts 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. It is for precisely this reason that federal courts have routinely deferred to a tribal court's interpretation of its own laws. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1987) ("Adjudication of [reservation] matters by any non-tribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law.")

The sixth factor weighs heavily in favor of exercise of this jurisdiction as well. The maintenance of the Community as a related group of people with a common identity, culture, and heritage is crucial to the Community's continued existence. It is for this reason that the introduction to the Domestic Relations Code states "No more important power is exercised by Indian Tribes than the power to protect and govern the domestic relations of their members."

So, too, with the seventh factor. The Petitioner's alleges that the parties have lived, worked, and raised a family for twenty-three years on Community land. See Petition for Dissolution of Marriage ¶¶ 1, 10-12; Affidavit of Cherie Crooks Bathel, ¶ 5, attached to Petitioner's Memorandum of Law in Support of Jurisdictional Determination. Therefore, the material events giving rise to this litigation appear to have primarily occurred within the Shakopee Reservation, on Community-owned land.

The eighth factor – the institutional interests of this Court – also are significant here. If this Court does not have jurisdiction over non-member spouses of Community members, its ability to administer the Domestic Relations Code will be devastated. In contrast, I believe the institutional interest in the State court's maintaining jurisdiction here, though not absent, is less. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1976) ("[Indians] remain a separate people, with the power of regulating their internal and social relations. They have the power to make their own substantive law in internal matters and to enforce that law in their own forums (citations omitted).")

The ninth factor does not lend weight either to this Court or to the First District Court, since one party here is a Shakopee Community member and one is not; and neither the tenth nor the eleventh factor seems applicable to this case.

The twelfth factor twelve seems to weigh, at least to some extent, in favor of this Court's jurisdiction, because by this decision this Court has determined that facts here, coupled with the Domestic Relations Code and our Court's previous cases, give us subject matter and personal jurisdiction, whereas the First District Court, subject to the stay affected by the removal, has not had the opportunity to conduct an analysis of its jurisdiction.

Finally, neither this case nor First District action has progressed far enough for the thirteenth factor to apply.

Taken together, then, the weight of the Teague factors overwhelmingly supports this Court's exercising the jurisdiction that I have found to exist in this matter. Hence, I decline the Respondent's request to stay these proceedings.

For the foregoing reasons, and based upon all the pleadings and materials filed herein, it is herewith **ORDERED:**

1. The Respondent's motion to dismiss is denied, and

2. The Respondent's motion to stay these proceedings is denied.

Dated: Feb. 17, 2010

John E. Jacobson, Judge

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

SCOTT COUNTY **STATE OF MINNESOTA**

In Re the Marriage of:

Cheri Lynn Crooks-Bathel ,

Petitioner, Court File No. 651-09

and

David Ernest Bathel,

Respondent.

OPINION AND ORDER

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

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In re the matter of

Viking Savings Bank, formerly Viking Savings Association, F.A.,

Petitioner (Judgment Creditor),

v. Court File No. 697-11

Mary M. Brooks,

Respondent (Judgment Debtor).

Findings of fact, Conclusions of Law, and Order

Under Rule 34 of our Rules of Civil Procedure, the Petitioner, Viking Savings Bank, formerly Viking Savings Association, F.A. ("Viking"), seeks full faith and credit for a judgment that it obtained, in the Minnesota District Court for Otter Tail County, against the Respondent Mary M. Brooks. The Court heard evidence on Viking's petition on December 1, 2011. During the hearing, Viking was represented by Kristine Kroenke, Esq., of the Fabyanske, Westra, Hart & Thomson, P.A. law firm; Ms. Brooks appeared *pro se*. Following the hearing, Viking submitted proposed Findings of Fact, Conclusions of Law, and a proposed Order for Judgment; and Ms. Brooks submitted a letter for the Court's review and consideration. Having now considered the evidence presented during the hearing, the Court makes the following Findings of Fact, Conclusions of Law, and enters the following Order:

FINDINGS OF FACT

1. Mary M. Brooks is a member of the Shakopee Mdewakanton Sioux Community.
2. Ms. Brooks' principal residence is located on the Reservation of the Shakopee Mdewakanton Sioux Community, at 13700 Thunderbird Circle, Shakopee, MN 55379-9616.

3. In August, 2007, Ms. Brooks obtained a loan from Viking in the principal amount of $1,315,000.00 for the purpose of purchasing a house located at 15815 – 485th Avenue, Parkers Prairie, MN 56361 ("the Property").
4. The Property is located in Otter Tail County, Minnesota. The Property is not Indian Country, as that term is defined in 18 U.S.C. §1151 (2006); title to the Property is and was not held in trust by the United States for Ms. Brooks; nor is or was title to the Property restricted against alienation.
5. The Property is not Ms. Brooks' principal residence.
6. The Property is not agricultural property.
7. The loan for the purchase of the Property was secured by a mortgage and a promissory note.
8. In 2010, Ms. Brooks stopped making payments on the loan, thereby creating a default under the mortgage and the note.
9. When Ms. Brooks stopped making mortgage payments on the Property, Viking sent Ms. Brooks a Notice of Default, as required by paragraph 22 of the mortgage. The notice, sent on August 19, 2010, notified Ms. Brooks that she was in default and informed her of the acts she needed to undertake to prevent foreclosure on the Property. The notice was sent to Ms. Brooks' address at 13700 Thunderbird Circle, in Shakopee, Minnesota, which was the designated address that Ms. Brooks had provided to Viking. Ms. Brooks did not respond to the notice.
10. More than thirty days after Viking provided Ms. Brooks with the aforesaid notice of default, Viking commenced legal action in the Minnesota District Court for Otter Tail County (Court File No. 56-CV-10-3157) ("the Action"), seeking to foreclose the mortgage.
11. Ms. Brooks was served with Viking's Complaint in the Action on November 18, 2010, but she did not answer the Complaint or otherwise appear in the Action.
12. Ms. Brooks was sent pre-foreclosure counseling notices and a notice of mediation pursuant to Minn. Stat. Chapter 583, the Farmer Lender Mediation Act.
13. A notice of *Lis Pendens* with respect to the Property and the Action was filed in the records of the Otter Tail County Recorder's Office on December 6, 2010.
14. Viking moved for a default judgment, scheduling a hearing on December 16, 2010, at 1:30 p.m.. Viking served the notices for the default judgment along with its default judgment motion papers on Mis Brooks on December 10, 2010.
15. The default judgment hearing occurred on December 16, 2010, as scheduled in the notices. Ms. Brooks did not appear at the default judgment hearing.

16. Viking appeared at the default judgment hearing, at which the Minnesota District Court for Otter Tail County took testimony, and at which Viking's witnesses affirmed the allegations in the Complaint.

17. At the conclusion of the December 16, 2010 hearing, a default judgment was entered against Ms. Brooks, by the Minnesota District Court for Otter Tail County, in the amount of $1,338,892.24, together with interest, which was the amount sought by Viking, and which constitutes the amount owed on the Mortgage with interest accrued through December 16, 2010, and with allowed costs and disbursements.

18. A typographical error in the December 16, 2010 Order was corrected by an Amended Order, issued on January 25, 2011. Judgment was entered by the Minnesota District Court for Otter Tail County on January 26, 2011.

19. Ms. Brooks was served with a copy of the Amended Order, the Amended Judgment; a Notice of Filing of Order, and a Notice of Entry, on January 31, 2011.

20. With the monetary judgment, the Minnesota District Court for Otter Tail County also ordered a Sheriff's sale of the Property.

21. The Otter Tail County Sheriff gave notice of the Sheriff's sale, which notice stated that the sale was scheduled for March 3, 2011, at 10:00 a.m..

22. The notice of Sheriff's sale was provided in conformance with the requirements of Minn. Stat. §550.18. The notice listed Ms. Brooks as the debtor, the amount of the judgment, the mortgage and its recording information, the legal description of the property, and the fact that the proceeds from the sale would be applied to the judgment. The Otter Tail County Sheriff posted a copy of the notice in three public places in Otter Tail County: the Parkers Prairie City Hall, the Parkers Prairie Post Office, and the Parkers Prairie Midwest Bank. The notice was also published for six weeks in a legal newspaper in Otter Tail County.

23. Ms. Brooks was personally served with the Notice of Sheriff's Sale Under Judgment, along with three other notices: "Help for Homeowners in Foreclosure"; "Foreclosure: Advice to Tenants"; and a Notice of Redemption Rights, on January 3, 2011.

24. The Otter Tail County Sheriff conducted a Sheriff's sale on March 3, 2011, at 10:00 a.m., in accordance with the notices provided, to sell the Property. Ms. Brooks did not appear at the Sheriff's sale. Viking was the highest bidder at the Sheriff's sale, and purchased the Property for $525,000, which was the appraised value of the property.

25. Viking moved to confirm the Sheriff's sale, and to include the costs incurred for the required notices and filing fees in the Sheriff's sale.

26. Viking mailed the Sheriff's Report of Sale and the motion to confirm the sale to Ms. Brooks at her address in Shakopee, and at the address of the Property, on March 4, 2011. The Notice of Motion served upon Ms. Brooks stated that the motion to confirm the Sheriff's sale would occur on March 18, 2011, at 1:30 p.m., at the Otter Tail County Courthouse.
27. The hearing to confirm the Sheriff's sale was scheduled for and occurred on March 18, 2011, at the noticed location. Ms. Brooks did not appear at the hearing. At the hearing, the Minnesota District Court for Otter Tail County concluded that the sale had been conducted by the Sheriff in accordance with applicable law. The District Court therefore approved the Sheriff's Report of Sale, confirmed the sake, and entered a Deficiency Judgment in favor of Viking and against Ms. Brooks in the amount of $830,205.71.
28. Subsequent to the entry of the Deficiency Judgment against Ms. Brooks, Viking collected some payments toward the judgment. The balance of the judgment at the time of the hearing before the undersigned was $787,633.07.
29. Viking filed a Summons and Petition, pursuant to Rule 34 of this Court's Rules of Civil Procedure, on May 23, 2011, and served Ms. Brooks with those documents on May 25, 2011.
30. With its Petition, Viking served and filed a certified copy of its judgment from the Action, together with an Affidavit of Identification of Judgment Creditor, and its Affidavit of Identification of Judgment Debtor.
31. Viking also filed and served an Affidavit of Gary Syverson, and an Affidavit of Shari Laven, together with exhibits from the proceedings before the Minnesota District Court for Otter Tail County.
32. Viking paid the required filing fee to this Court
33. On June 24, 2011, Viking filed the original Affidavit of Service with this Court, demonstrating that Ms. Brooks had been personally served with the Summons, Petition, and accompanying Affidavits.
34. In her December 14, 2011 letter to the Court, Ms. Brooks alleged that Viking had sold certain items of her personal property without having the legal authority to do so, and at a price that was manifestly inconsistent with the items' value; but no evidence was offered to the Court, during the December 1, 2011 hearing, with respect to the sales that Ms. Brooks' letter discusses.

CONCLUSIONS OF LAW

1. Viking's Summons and Petition in this matter were filed and served in accordance with Rule 34 of this Court's Rules of Civil Procedure.
2. Rule 34 of this Court's Rules of Civil Procedure provides that, if a Petition is properly filed and served, this Court shall enter an order enforcing a foreign judgment if there are no substantial questions with respect to the jurisdiction of the foreign court or with the regularity of the foreign court's proceedings.
3. Jurisdiction over the Action was governed by Minn. Stat. §542.02, which provides that actions for the foreclosure of a mortgage "shall be tried in the county where such real estate or some part thereof is situated."
4. The Minnesota District Court for Otter Tail County had personal jurisdiction over Ms. Brooks and subject matter jurisdiction over the foreclosure action.
5. Minnesota Statutes §47.20, subd. 8, which provides for a thirty-day default notice for a conventional loan of $100,000 or less was not applicable in the Action, because Ms. Brooks' loan exceeded $100,000. Ms. Brooks was nevertheless provided with more than thirty days notice of her default before Viking commenced the Action. Proper notice was also provided in accordance with the terms of her mortgage.
6. Minnesota Statutes §§580.021 and 580.0222 contain requirements to provide pre-foreclosure notice and foreclosure prevention counseling notices to a mortgagor as well as a notice to an authorized counseling agency. Because the Property is not Ms. Brooks' principal place of residence, these notices were not required in the Action. Ms. Brooks was nevertheless provided with these notices.
7. Minnesota Statues, Chapter 583, the Farmer Lender Mediation Act, requires that prior to enforcement of debts against agricultural property, including foreclosures, the mortgagor must be given a Notice of Mediation. Because the Property is not agricultural property, this notice was not required in the Action. Ms. Brooks was nevertheless personally served with this notice.
8. Ms. Brooks was personally and properly served with the Summons and Complain in the Action on November 18, 2010.
9. Minnesota Statutes §§582.041 and 582.042 provide additional notice requirement in a foreclosure action for homestead property, and when agricultural property contains separate tracts. Because the Property was not agricultural property or homestead

property, these notices were not required in the Action. Nevertheless, these notices were served upon Ms. Brooks with the Summons and Complaint in the Action.

10. Ms. Brooks did not answer the Complaint or otherwise appear in the Action, within the twenty day period established by Minnesota Rules of Civil Procedure 12.01, or at any time.
11. Under Rules 5 and 55 of the Minnesota Rules of Civil Procedure, if a defaulting party has not appeared in a proceeding, a notice of a default motion need not be served on the defaulting party. Nonetheless, Viking served Ms. Brooks with its default motion papers and informed her that the motion hearing was scheduled for December 16, 2010, ad 1:30 p.m..
12. The entry of default judgment against Ms. Brooks in the Action was regular and in accordance with Minnesota law and the Minnesota Rules of Civil Procedure.
13. The January 26, 2011 Amendment to the Judgment of the Minnesota District Court for Otter Tail County, to correct a typographical error in the December 16, 2010 Judgment, did not affect the validity of the Judgment against Ms. Brooks.
14. The Sheriff's sale of the Property, and the subsequent confirmation of that sale by the Minnesota District Court for Otter Tail County, conformed with the law of the State of Minnesota.
15. Ms. Brooks had ample notice of the Action, of the subsequent Sheriff's sale, and of the subsequent confirmation of that sale by the Minnesota District Court for Otter Tail County, and she chose not to participate in the Action or to seek relief or mitigation in any other forum.
16. There is are no substantial question that the proceedings in the Minnesota District Court for Otter Tail County were regular and in accordance with Minnesota law and the Minnesota Rules of Civil Procedure.
17. The Court cannot form any conclusion with respect to the appropriateness of the sale by Viking of Mr. Brooks' property; however, any amount owing by Ms. Brooks should be reduced by the amount that a fair sale of her seized property should have brought.
18. The Judgment of the Minnesota District Court for Otter Tail County, as that Judgment has been reduced by any amounts received by Viking from Ms. Brooks or her estate, and as it should have been reduced by the sale of Ms. Brooks' property at a fair price, will be given full faith and credit by this Court.

ORDER

The Petitioner's Judgment of the Minnesota District Court for Otter Tail County against the Respondent will be enforced by this Court.

Dated: March 6, 2012

John E. Jacobson, Judge
Shakopee Mdewakanton Sioux Community
Tribal Court

COURT OF THE SHAKOPEE MEDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

Shannon Bunde,	)	
	)	
Petitioner/Judgment Creditor	)	
	)	
v.	)	Court File No. 712-11
	)	
Marvin Ralph Brewer,	)	
	)	
Respondent/Judgment Debtor.	)	

Memorandum Opinion and Order

Summary

Under Rule 34 of this Court's Rules of Civil Procedure, the Petitioner, Shannon Bunde, asks the Court to enforce her judgment for money damages, in an amount in excess of $2.7 million, obtained against the Respondent, Marvin Ralph Brewer, in the Minnesota District Court for the First District.

Her judgment was obtained by default; and, a year after the entry of that judgment, the District Court denied the Respondent, Mr. Brewer's, motion to set aside the default. On the basis of that denial, Mr. Brewer contends that the District Court's judgment lacks the regularity that would mandate its enforcement under our Rule 34. He also contends that the Minnesota District Court lacked jurisdiction over him because the statutory basis for the District Court's judgment was Minnesota Statutes §169.09, subdv. 5a, which in his view is a "civil-regulatory" provision of the sort that under federal law does not apply to the Shakopee Mdewakanton Sioux (Dakota) Community.

For the reasons set forth below, the Court respectfully must disagree with both of Mr. Brewer's contentions.

This is an extraordinarily difficult case – difficult because of the terrible facts that underlie it; difficult because, in the Court's view, the Respondent had, and repeatedly ignored, opportunities to present arguments and evidence to the trier of fact that might well have changed the trier's decision; and difficult because, as far as the parties and the Court have been able to discern, there is no case law directly on point with respect to a question that lies at the case's heart.

Yet, after long reflection, the Court is convinced that the resolution reached today is absolutely mandated by the law. The Court therefore grants Ms. Bunde's petition[1].

Factual Background

On September 7, 2007, the Petitioner, Shannon Bunde, attended a gathering at a residence on the Reservation of the Shakopee Mdewakanton Sioux Community. Also attending was a Mr. Sean Pozzi. Neither Ms. Bunde nor Mr. Pozzi are members of any Indian tribe. The residence where the gathering was held belonged to relatives of the Respondent, Mr. Marvin Brewer. Both Mr. Brewer and the owner of the house where the gathering was held are members of the Shakopee Mdewakanton Sioux Community.

A Dodge Viper automobile, belonging to Mr. Brewer, was parked in the driveway of the residence. The vehicle was not insured. Mr. Pozzi wished to drive the vehicle; and, in a manner that is disputed, he obtained the vehicle's keys. Ms. Bunde asked to accompany Mr. Pozzi when he drove the vehicle; Mr. Pozzi assented; and he and Ms. Bunde left the gathering, with Mr. Pozzi driving the car. Shortly thereafter, Mr. Pozzi lost control of the vehicle. The resultant one-car accident occurred on McKenna Road, on the Shakopee Reservation. As a result of the accident, Ms. Bunde sustained injuries that required the amputation of her right leg.

Thereafter, on January 9, 2008, Ms. Bunde signed a one-page handwritten document, drafted by Mr. Brewer, which stated that Mr. Brewer would pay Ms. Bunde one thousand dollars per month for twenty-four months; that Mr. Brewer would pay one thousand seven hundred dollars toward the purchase of a prosthetic limb for Ms. Bunde; and that Mr. Brewer would purchase Ms. Bunde a vehicle with a value of between fifteen and twenty thousand dollars. The agreement provided that, in return, Ms. Bunde would not pursue any other remedies against Mr. Brewer. The effect of the agreement was expressly conditioned upon both parties' compliance with its terms. Mr. Brewer made one payment, of one thousand dollars to Ms. Bunde, but did not make any more payments. The circumstances surrounding that failure are disputed.

Ms. Bunde, having received no additional payments, filed the action in the Minnesota District Court that resulted in the judgment here at issue.

---

[1] Ms. Bunde also seeks an order that would garnish the so-called "per capita" payments which the Government of the Shakopee Mdewakanton Sioux Community periodically makes to its members. But, as the Court explained to the parties during oral argument on Ms. Bunde's Petition, the Court lacks jurisdiction to garnish or otherwise attach any monies held by the Community's government for Mr. Brewer or for any Community member. Except with respect to monies owing for child support payments, the Shakopee Community expressly retains its sovereign immunity from unconsented suit with respect to monies it holds for its members' per capita payments. See Resolution No. 09-13-11-016 of the General Council of the Shakopee Mdewakanton Sioux Community, and see Chapter III, section 8.b. of the Domestic Relations Code of the Shakopee Mdewakanton Sioux (Dakota) Community.

Ms. Bunde's claim against Mr. Brewer was based upon Minnesota Statutes §169.09, subd. 5a, which provides that –

> **Driver deemed agent of owner.** Whenever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner or such motor vehicle in the operation thereof.

In the Minnesota District Court proceeding, Mr. Brewer repeatedly, and over extended periods, failed to participate. He failed to respond to at least some of Ms. Bunde's discovery requests. Trial, which had been scheduled for June 9, 2009, was rescheduled after failed mediation, for October 28, 2009. On August 24, 2009, Mr. Brewer's filed an apparently untimely motion to amend his answer and to dismiss the claims against him on jurisdictional grounds. The hearing on that motion was scheduled for October 21, 2009. On October 9, 2009, Mr. Brewer's counsel withdrew. Accompanying that withdrawal was a cover letter sent by the withdrawing attorney to the District Court and to Ms. Bunde's attorney, indicating that a copy of the withdrawal was being sent to Mr. Brewer. Thereafter, Mr. Brewer failed to appear both at the hearing on his motion and at trial; he maintains that he was unaware either of the trial date or of his counsel's withdrawal.

At the trial, on October 28, 2009, the Minnesota District Court received Ms. Bunde's evidence, and entered judgment against both Mr. Brewer and Mr. Pozzi, in an amount in excess of $2.7 million. In its Findings of Fact and Conclusions of Law, the District Court held that it had jurisdiction over Mr. Brewer, and that Minnesota Statutes §169.09, subd. 5a applied to him. Both holdings were based on the grant of civil jurisdiction conveyed to the State of Minnesota by virtue of the federal statute commonly called Public Law 280, 28 U.S.C. §1360(a) (2006).

Following entry of the judgment from that trial, Ms. Bunde's counsel served, by mail, copies of the judgment, and of various other post-judgment documents, on Mr. Brewer, and sought post-trial discovery. After a period of months without response from Mr. Brewer, a hearing was set for September 14, 2010, in Minnesota District Court, on an Order to Show Cause, sought by Ms. Bunde. One day in advance of that scheduled hearing, a new attorney for Mr. Brewer contacted Ms. Bunde's counsel and asked that the hearing be continued. That request was granted, the hearing was rescheduled for October 7, 2010, and at that rescheduled hearing Mr. Brewer's new attorney advised the Court and Ms. Bunde's counsel, for the first time, that Mr. Brewer intended to file a motion seeking the vacation of the October 28, 2009 judgment.

When that motion to vacate was filed and heard, Mr. Brewer's new counsel did not argue that Mr. Pozzi did not have Mr. Brewer's permission to drive his vehicle – an argument that, if it were accepted, would have meant that Minnesota Statutes §169.09, subd. 5a did not apply, and presumably would have

resulted in Mr. Brewer's avoiding the District Court's judgment. The fact that this argument was not made was the subject of argument before this Court: Mr. Brewer's current counsel asserts that the attorney who represented him in the context of his motion to vacate in the Minnesota District Court also was representing Mr. Pozzi at that time, in other matters before Minnesota courts. So, Mr. Brewer's present counsel argues here, if Mr. Brewer's attorney had argued to the Minnesota District Court that Mr. Brewer did not consent to Mr. Pozzi's use of the vehicle, he essentially would have been arguing that his other client, Mr. Pozzi, had stolen Mr. Brewer's vehicle[2].

On February 7, 2011, the Minnesota District Court denied Mr. Brewer's motion to vacate[3]. No appeal was taken from that denial, and the Petition that is here at issue was filed on September 16, 2011.

The Parties' Arguments

Mr. Brewer argues that this Court should not enforce the Minnesota District Court's judgment because, he asserts, the proceedings before that Court lacked the "regularity" that our Rule 34 requires, and because the Minnesota District Court lacked jurisdiction over Mr. Brewer and over the Ms. Bunde's claims against him.

The contentions with respect to "irregularity" are: (i) Mr. Brewer assertedly was not aware of his trial date, and because he missed the trial he was unable to testify or to provide evidence on his own behalf; (ii) hearsay evidence, in the form of the record of police interviews with Mr. Pozzi, was admitted during the trial, and was used against Mr. Brewer; (iii) the Minnesota District Court ignored the effect of the settlement agreement that Ms. Bunde had signed; and (iv) the Minnesota District Court denied Mr. Brewer's motion to vacate the default judgment when such motions generally are granted.

Mr. Brewer also argues that Minnesota Statutes §169.09, subd. 5a does not apply to Indians in Indian Country, citing the Minnesota Supreme Court's decision in State v. Stone, 572 N.W.2d 725 (Minn. 1996). The Stone decision held that several motor vehicle-related sections in Chapter 169 of Minnesota Statutes are not "criminal prohibitory" statutes, but instead are "civil regulatory" provisions of the type

---

[2] Attached to Mr. Brewer's briefing materials was an October 26, 2011 Petition to the Minnesota Supreme Court, filed by the Minnesota Office of Lawyers Professional Responsibility, alleging fifteen separate counts of professional misconduct by Mr. Barry Voss, the attorney who represented Mr. Brewer in the context of his motion to vacate. None of those counts concerns Mr. Voss' representation of Mr. Brewer.

[3] The exhibit attached to the affidavit of Ms. Bunde's counsel that supposedly contained the entirety of the Minnesota District Court's ruling on Mr. Brewer's motion to vacate did not, in fact, contain the whole document. Rather, the exhibit contained only the Court's order and the third page of the Court's supporting memorandum. However, it is plain from these materials that the Minnesota District Court did consider and did reject Mr. Brewer's arguments relating both to regularity and to jurisdiction.

that the United States Supreme Court held, in Bryan v. Itasca County, Minnesota, 426 U.S. 373 (1976), were not included in Congress' grant of jurisdiction to the State of Minnesota under Public Law 280.

Ms. Bunde responds, as to the "regularity" arguments, that Mr. Brewer's arguments were submitted to, and in a memorandum, were rejected by the Minnesota District Court. She asserts that, during the trial, she testified that she had seen Mr. Brewer give Mr. Pozzi consent to drive the vehicle in question. And she contends that Mr. Brewer had, and ignored, multiple opportunities to be heard before the District Court.

On the subject of jurisdiction, Ms. Bunde argues that there is a fundamental and controlling difference between the provisions of Minnesota Statutes §169.09, subd. 5a, and the sections of Chapter 169 of Minnesota Statutes that were the dealt with in the Stone decision. She points out that the sections which Stone held to be inapplicable to Indians in Indian Country all were traffic laws that are enforced by the State of Minnesota (*i.e.*, speeding restrictions; driver licensing requirements; vehicle registration requirements; seat belt usage and child restraint mandates; and motor vehicle insurance and proof of insurance requirements). By contrast, Minnesota Statutes §169.09, subd. 5a cannot be enforced by the State of Minnesota; it carries no criminal or civil penalty of any kind; rather, it creates, as a matter of civil law, an implied agency between a vehicle's owner and any person who is driving the vehicle with the owner's consent. This, Ms. Bunde says, is exactly the sort of general civil law of Minnesota that Congress had in mind when it gave the State of Minnesota civil jurisdiction over Indians in Indian Country outside of the Red Lake Reservation.

Discussion

The Full Faith and Credit Clause of the United States Constitution does not apply to Indian tribal governments. Hence, absent a federal statute that mandates otherwise, the judgments of Indian tribal courts are not automatically given deference by the courts of the several states[4]; and, likewise absent contrary federal law, tribes are free to consider a variety of factors when they are asked to enforce the judgment of a state court.

But the sound functioning of state and tribal judicial systems is aided when litigants are not encouraged to "forum shop", and when a matter that has been fully and fairly litigated in one court is brought to repose rather than re-litigated in another court. These considerations led this Court, in 1997, to adopt our Rule 34, which provides:

[4] See e.g., Rule 10.2(a) of the Minnesota General Rules of Practice, which mandates a "comity" analysis when a Minnesota court considers a tribal court judgment, and which enumerates an extensive list of factors that Minnesota state courts are to consider when they are asked to enforce a tribal court judgment.

> An action for enforcement of a foreign judgment shall be commenced by filing a Petition therefore, in a form approved by the Court, accompanied by an exemplified or certified copy of the foreign judgment and any relevant supporting documents, and accompanied by a filing fee of twenty-five dollars. If the judgment is one for money damages, the Petition shall be accompanied by Affidavits of Identification of the Judgment Creditor and of the Judgment Debtor, in forms approved by the Court. The Petition and all supporting materials, including any affidavits, shall be served upon each person against whom the Petitioner seeks to enforce the judgment, who shall be denominated Respondents. Each Respondent shall have twenty days from the date of service upon them, within which to respond to the Petition. Upon the completion of such service, the Court shall examine the Petition and supporting materials, and any response thereto, and shall order such additional proceedings as it may deem appropriate. If no substantial question appears with respect to the jurisdiction of the foreign court and the regularity of the foreign proceedings, the Court shall enter an order enforcing the foreign judgment.

Under Rule 34, this Court routinely has enforced State court judgments. See e.g., Texidor v. Cleveland, 3 Shak. T.C. 153 (Apr. 12, 1999). We consider that neither our judicial system nor the system of any other jurisdiction is well-served if parties are uncertain whether a judgment can be successfully taken to a court that should have a role in its enforcement.

For those reasons, it is the Court's view that the various aspects of the Minnesota District Court's proceedings to which Mr. Brewer now objects as lacking "regularity" do not warrant this Court's declining to enforce Ms. Bunde's judgment. Whether this Court would or would not have decided various issues differently – issues relating to the fact that Mr. Brewer's first attorney withdrew shortly before the scheduled trial date, or that Mr. Brewer's second attorney may well have had a conflict of interest that caused him to fail to raise a vitally important contention in Mr. Brewer's defense, or that the District Court declined to re-open a default judgment that involved a very considerable sum of money – all of these things are immaterial. The Minnesota District Court case appears to comport with Minnesota's rules of procedure; no part of the Minnesota District Court proceedings were appealed; and Mr. Brewer's repeated failure to protect his own interests, during very considerable portions of the proceedings before the District Court, make the decision to avoid reconsidering the regularity of the District Court's proceedings all the more appropriate.

But Mr. Brewer's other contention, with respect to the jurisdiction of the Minnesota District Court, raises a much more fundamental question. Mr. Brewer is a member of a federally recognized Indian tribe, and all of the events at issue before the Minnesota District Court took place within the boundaries of the reservation of Mr. Brewer's tribe. Hence, the Minnesota District Court's jurisdiction over Mr. Brewer depends entirely upon whether a Minnesota statutory provision is civil or civil-

regulatory[5] – a question of federal Indian law of considerable complexity. Under these circumstances, I think the District Court's jurisdictional conclusion should be open to more scrutiny than this Court normally will give the jurisdictional conclusions of courts whose judgments are presented to us for enforcement.

Any time the court of a state is asked to exercise jurisdiction over an Indian with respect to matters arising on that Indian's reservation, a question of federal law is presented. Williams v. Lee, 358 U.S. 217 (1959). The question is whether Congress has authorized that exercise of jurisdiction; and the question here is whether the "civil" part of Public Law 280, 28 U.S.C. §1360(a) (2006) authorizes that exercise. That statute provides:

> Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:
>
> ...
>
> | State of | Indian country affected |
> |---|---|
> | ... | ... |
> | Minnesota..... | All Indian country within the State, except the Red Lake Reservation |

On its face, the sweep of this language is very broad; but that facial breadth has been diminished by the United States Supreme Court. In Bryan v. Itasca County, *supra*, the Supreme Court held that the statute's grant of jurisdiction did not include a state's civil tax code. It is worth quoting at some length what the Supreme Court said about the Congressional intent that underlay the adoption of the civil portion of Public Law 280:

> The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservation, and the absence of adequate tribal institutions for law enforcement. ... Thus provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub. L. 280 and is embodied in §2 of the Act, 18 U.S.C. §1162.
>
> In marked contrast in the legislative history is the virtual absence of expression of congressional policy or intent respecting §4's grant of civil jurisdiction to the States.
> ...

[5] The Minnesota District Court appears to have held that it would have jurisdiction over Mr. Brewer even if Public Law 280 did not convey jurisdiction, because the accident in question occurred within a right-of-way that is owned by the City of Shakopee, Minnesota. But that analysis certainly is incorrect: the accident occurred within an Indian Reservation. Title to the land on which the accident occurred has no more legal relevance here than it did in the context of State v. Stone, where all of the offenses at issue occurred on State-owned and maintained roads.

Piecing together as best we can the sparse legislative history of §4, subsection (a) seems to have been primarily intended to redress **the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens**, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in... Indian country...to the same extent that such State...has jurisdiction over other civil causes of action." With this as the primary focus of §4(a), the wording that follows in §4(a) –"and those civil laws of such State..that are of general application to private persons or private property shall have the same force and effect within Indian country as they have elsewhere within the State" – **authorizes application by the state courts of their rules of decision to decide such disputes**. Cf. 28 U.S.C. §1652. This construction finds support in the consistent and uncontradicted references in the legislative history to "permitting" "State courts to adjudicate civil controversies" arising on Indian reservations. ... and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.

476 U.S., at 381, 383-4 (Emphasis supplied).

Nine years after the Bryan decision, the Supreme Court again considered the scope and sweep of Public Law 280, this time in the context of gambling regulation. In California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987), the Court held that the State of California's ostensibly criminal laws regulating bingo games were not applicable to Indian tribes in Indian Country. The Court distinguished between, on the one hand, "criminal/prohibitory" state laws which, in Public Law 280 jurisdictions, apply to Indians in Indian County by the virtue of grant of criminal jurisdiction appearing at 18 U.S.C. §1162(a) (2006), and, on the other hand, "civil/regulatory" provisions which "generally permit[] the conduct at issue, subject to regulation", 480 U.S., at 209. The Court held that enforcement of the latter sorts of provisions, in a criminal prosecution, was not contemplated by Public Law 280.

Mr. Brewer argues that, under the doctrines of these cases, Minnesota Statutes §169.09, subd. 5a must be deemed a "civil/regulatory" provision and therefore inapplicable to him. He notes that Chapter 169 of Minnesota Statutes – the Chapter in which Minnesota Statutes §169.09, subd. 5a is placed – is entitled "Traffic Regulations". And, in section 169.09, the section in which Minnesota Statutes §169.09, subd. 5a appears, a person's failure to comply with any of the provisions, except only one, can result in both the suspension of the person's driver's license and the imposition of criminal penalties[6].

[6] The headings of the other subdivisions of §169.09 illustrate the nature of the section's provisions:
Subdivision 1. Driver to stop for accident with individual.
Subd. 2. Driver to stop for accident to property.
Subd. 3. Driver to give information.
Subd. 4. Collision with unattended vehicle.
Subd. 5. Notify owner of damaged property.
Subd. 5a. Driver deemed agent of owner.
Subd. 6. Notice of personal injury.

That one exception is the subdivision here at issue – subdivision 5.a.— which is designed to be used only in civil lawsuits such as Ms. Bunde's.

Mr. Brewer argues that the subdivision 5a. should be regarded as the same sort of provision as all of the other provisions that surround it: he asserts that it must be considered to be a traffic regulation, and as such it should be regarded as a "civil regulatory" provision of the sort that State v. Stone held to be inapplicable to Indians in Indian Country.

But under the Bryan and Cabazon analysis, although the placement of a statute within a body of law may not be wholly irrelevant, its placement clearly must be far less important than the nature and intended operation of the statute itself.

Mr. Brewer's argument that Minnesota Statutes §169.09, subd. 5a is akin to the provisions that were discussed in Stone is flawed by the fact that the sections at issue in Stone were, at least on their face, criminal statutes. They carried criminal penalties; they were enforceable by the State of Minnesota; they were designed to regulate conduct. By contrast, Minnesota Statutes §169.09, subd. 5a carries no criminal penalty; it cannot be enforced by the State of Minnesota; it applies only in civil litigation between private parties. It is a civil statute, pertaining to the tort law of the State of Minnesota.

The parties were unable to cite the Court to any prior case where the applicability of such a statute to the actions of an Indian in Indian Country has been analyzed in a Public Law 280 context, and the Court also has been unable to find any. The Court therefore is obliged to decide this case without directly applicable reasoning from other judges – but not wholly without guidance.

According to the Supreme Court in Bryan, the purpose of Pubic Law 280's grant of civil jurisdiction to the State of Minnesota and the other States that are dealt with by the statute was to permit the "resolving [of] private legal disputes between reservation Indians, and between Indians and other private citizens" by "the state courts [using]... their rules of decision". Hence, in my view, Minnesota's law relating to torts – whether that law derives from Minnesota's courts or from its Legislature – applies to Indians in Indian Country, outside the Red Lake Reservation.

Minnesota Statutes §169.09, subd. 5a is a generally applicable "rule of decision" for the resolution of "private legal disputes" – disputes involving torts – and under the foregoing analysis it is applicable to Indians in Indian Country under Public Law 280. For these reasons, the decisions of the Minnesota District Court that are the subject of the Petition herein will be enforced by this Court.

Subd. 7. Accident report to commissioner.
Subd. 8. Officer to report accident to commissioner.
Subd. 9. Accident report format.
Subd. 10.[Repealed, 2005 c 163 s 89]
Subd. 11. Coroner to report death.
Subd. 12. Garage to report bullet damage

Dated: March 19, 2012

John E. Jacobson, Judge
Shakopee Mdewakanton Sioux Community
Tribal Court

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

COUNTY OF SCOTT STATE OF MINNESOTA

In Re the Matter

Court File No. [illegible]

Neglected Child.

MEMORANDUM OPINION AND PROTECTIVE ORDER

In this Child Welfare proceeding, the mother of ., has moved the Court for an order directing the Shakopee Mdewakanton Sioux Community Child Welfare Office to provide her with "copies of all case notes, supervised visit reports, case plans, and any other documentation relative to [this matter]." s father, has joined in motion. argues that the Court has adopted one and only one set of discovery rules, and that under those rules she is entitled to all of the documents created and obtained by the Child Welfare Office. The Child Welfare Office has resisted her requests, contending, *inter alia*, that certain of the documents sought are exempt from discovery because they were prepared in anticipation of litigation, and that in some instances pledges of confidentiality were made to persons who provided the Child Welfare Office with information – pledges which would be broken were given access to the information.

On March 18, 2013, the undersigned judges, sitting as a three-judge panel under Rule 25 of this Court's Rules of Civil Procedure, heard oral argument on the parties' contentions, and today, in the Order that follows this Memorandum, we adopt procedures to properly balance the legitimate interests of the moving parties in having access to information with the also-legitimate interests of other persons in protecting very sensitive personal information.

It is in the nature of child-welfare proceedings that materials must be generated and maintained that contain deeply personal, deeply sensitive information – information that, for the

persons to whom it pertains, would be painful to have generally available. It is for these reasons that Chapter IX, section 8, of the Domestic Relations Code of the Shakopee Mdewakanton Sioux Community (the "Code") provides --

> All matters under this Code shall be confidential and heard in closed Court, excluding all persons except the Petitioner, parents, guardian, custodian or caregiver, guardians ad litem, family members, the Child Welfare Officer, attorneys entering appearances on behalf of any of the foregoing, or other persons permitted by the Court.

And it is for the same reasons, Chapter IX, section 10 of the Code mandates that –

> [t]he Court shall maintain a record of all proceedings under this Chapter in files labeled "Records of the Children's Court." The records of proceedings under this Code shall not be open to public inspection ...

In our view, these provisions modify the discovery rules that generally apply to proceedings in this Court. But these provisions of the Code do not contemplate that all aspects of a child-welfare proceeding will be shrouded in secrecy, with sensitive information available only to the Child Welfare Office and the Guardian ad Litem. Indeed, as . correctly points out, Chapter IX, section 14(d)(1) of the Code requires specifically requires that –

> [f]or all matters in which a dispositional order other than a dismissal is entered, the Child Welfare Office shall develop a written plan of service in consultation with the child (of over 12 years of age), the parents guardian, custodian or caregiver and such other child-and-family-service providers as may be appropriate to the case. Each case plan shall be designed to comply with Section 9(e)(1) [of the Code, relating to the Code's preferences of child placements] and shall include the following features:
>
> (i) a description of the type of placement;
> (ii) a discussion of the appropriateness of the placement for the particular child;
> (iii) a plan for assuring that:
> (a) the child receives proper care while in placement;
> (b) services are provided to the parents(s), child, and designated caregivers to facilitate the return of the child to her/his home; and
> (c) the need for services of the child in placement are met and that the services are appropriate of a child must be placed out of home.

Under section Chapter IX, section 14(d)(2) the case plan developed under the foregoing mandate must be reviewed "[a]t no less than six month intervals," with "written findings that address" –

(i) Continuing need for service and/or placement.
(ii) Appropriateness of services and/or placement to date.
(iii) Compliance with the service plan.
(iv) Progress made toward alleviating or mitigating the circumstances giving rise to the dispositional order.
(v) Projection of a likely date by which the child may be returned home or provided a long-term replacement.

Presumably, the process for generating these written findings (which, as matters have developed in our Court, take the form of the Child Welfare Officer reports that are submitted to the Court and the parties in conjunction with review hearings or status conferences) is to be the same as the process involved in creating the initial case plan. That is, the findings should be generated " . . . in consultation with the child (if over 12 years of age), the parents guardian, custodian or caregiver and such other child-and-family-service providers as may be appropriate to the case . . .."

Hence, under the Code the parties – in particular, for our purposes here, the parents – are to have direct involvement in the generation and review of case plans and progress reports. And from that, it seems clear that they also should have access to significant amounts of the information that is available to the Child Welfare Office. On the other hand, we do not discount the arguments made by the Child Welfare Office that there may be circumstances where obtaining information that could be vital to ensuring or enhancing the best interests of the affected child or children – the interests are the central focus of Chapter IX of the Code – would be difficult or impossible unless that information will not be disclosed to certain parties.

So we are obliged to create a balance. Going forward, we intend to adopt a rule that will apply to all of our Child Welfare proceedings. But pending the propounding of that rule – which we intend to circulate for comment to the attorneys who practice before our Children's Court – we today adopt the following Protective Order, that we intend to facilitate the orderly, efficient and expeditious exchange of discoverable information while minimizing the potential for unauthorized disclosure of confidential, proprietary, private or secret documents.

SCOPE OF THIS ORDER

1. Rule 23 of the Rules of Civil Procedure of the Shakopee Mdewakanton Sioux Community shall apply to these proceedings, and the Child Welfare Office of the Shakopee Mdewakanton Sioux Community shall, within twenty days, produce the materials sought by the mother of N.J.B., subject to the provisions of this Protective Order

2. This Protective Order shall apply to all information, documents and things (and copies thereof) produced or disclosed during the course of this matter by any party or nonparty that is required to produce or disclose such information, documents or things pursuant to any other Court order or process, including all such information, documents or things disclosed:

a. pursuant to a subpoena;

b. through informal or formal discovery or at any hearing;

c. pursuant to Court Order unless otherwise allowed by this Court;

d. in testimony given in a deposition or hearing; or

e. through any copies, notes, abstracts or summaries of information described in parts (a) through (d) above.

Information and documents described in this paragraph shall be referred to hereinafter collectively as "Litigation Materials."

DESIGNATION

3. Any party or nonparty producing or disclosing Litigation Materials in this action (hereinafter, "Producing Party") may designate Litigation Materials as "Confidential" or "Attorneys' Eyes Only." Materials designated as "Confidential" or "Attorneys' Eyes Only" are referred to herein as "Designated Materials."

4. Any Producing Party may designate as "Confidential" any Litigation Materials that consist of or relate to any of the following: personal, investigatory, or private material or information concerning any individual.

5. Any Producing Party may designate as "Attorneys' Eyes Only" any Litigation Materials that consist of the following:

a. highly confidential or private information about any party or the child; or

b. any medical, psychological, personal, investigatory material or information concerning any party or the minor child.

MANNER OF DESIGNATION OF MATERIALS

6. A Producing Party may designate materials in the following manner:

a. Documents or Things. The Producing Party may write, type, or stamp the word "Confidential" or "Attorneys' Eyes Only" on the particular document or thing. Writing, typing, or stamping "Confidential" or "Attorneys' Eyes Only" upon the first page of multi-page Litigation Materials, or Litigation Materials that are bound or attached together by the producing party in any manner, shall have the effect of designating such collection in its entirety.

b. Interrogatories and Requests for Admissions. In answering any interrogatory, request for admission, or part thereof, a Producing Party may write, type, or stamp the word "Confidential" or "Attorneys' Eyes Only" at the beginning of the relevant response.

RESTRICTIONS ON USE AND DISCLOSURE OF CONFIDENTIAL MATERIALS

7. Designated Materials may only be used by the recipient of such information in connection with the litigation of this action, and for no other purpose. The recipient of any Designated Materials shall maintain such information in a manner intended to preserve, and shall use its best efforts to maintain, the confidentiality of such information.

8. Except by Order of this Court, any Litigation Materials designated as "Confidential" (hereinafter, "Confidential Materials") may be disclosed only to the following persons:

a. attorneys of the law firm and its staff; attorneys of the law firm ., attorneys of the law firm and its staff; the Guardian *ad Litem* and her staff; and the Court and Court personnel;

b. stenographic reporters engaged for depositions or other proceedings necessary for the conduct of this case;

c. such other persons as may be consented to by the Producing Party designating the Confidential Materials;

d. the parties to the extent deemed necessary by their respective attorneys of record for the preparation for trial and trial of this action, however, any such disclosure shall be in the form of discussions with the attorneys only and the attorney shall not provide copies of any Designated Materials to the party;

e. the authors, senders, addressees and designated copy recipients of the Confidential Materials; provided, however, that such persons may not retain such Confidential Materials unless otherwise entitled to receive them;

f. outside litigation support vendors including, but not limited to, commercial photocopying vendors, scanning services vendors, coders and keyboard operators; and

g. actual or prospective independent outside consultants or experts retained by the attorneys of record to assist in this action, to the extent deemed necessary by said attorneys, and non-party fact witnesses who are in good faith intended to be called at trial; provided that the person first agrees in writing to the restrictions set forth

herein in the form of the Agreement to Protective Order attached hereto as Exhibit A; and

h. Employees and agents of the Shakopee Mdewakanton Sioux Community Child Welfare Office.

9. Except by Order of this Court, any Litigation Materials designated as "Attorneys' Eyes Only" may be disclosed only to the persons designated in paragraphs 7(a), (b), (c), (d), (f), (g), (h) and (i).

10. If any party otherwise objects to another party's designation of Designated Materials, the objection must be made in writing, must state the reasons for such objection, and must be served on counsel for all parties. Upon the service of such an objection, the parties shall first attempt to resolve the dispute informally. If such efforts are not successful, the party seeking to disclose the Designated Materials or seeking the change or removal of a designation may bring a Motion to Compel Discovery, complying with and under the Tribal Court of the Shakopee Mdewakanton Sioux Community Rules of Civil Procedure, this Court's Scheduling Order (if any), and any other applicable court orders, including any informal motion practice rules allowed by the Court; provided, however, that the making of such motion will not be deemed to be determinative of any ultimate issues in the case.

11. Nothing contained in this Protective Order shall restrict or prevent any Producing Party from disclosing or otherwise using Litigation Materials which that Producing Party produces or discloses itself.

12. The inadvertent or unintentional disclosure by a Producing Party of that party's Designated Materials during the course of this litigation, regardless of whether the information was so designated at the time of disclosure, shall not be deemed a waiver in whole or in part of

the Producing Party's right to designate such materials or to assert their confidential status, either as to the specific information disclosed or as to any other information relating thereto or on the same or related subject matter. Counsel for the parties shall in any event, to the extent possible, upon discovery of inadvertent disclosure, cooperate to restore the confidentiality of the material that was inadvertently or unintentionally disclosed by the Producing Party.

13. Nothing contained in this Protective Order shall affect the right of any party to make any objection, claim any privilege, or otherwise contest any request for production of documents, interrogatory, request for admission, or question at a deposition or trial, or to seek further relief or protective orders from the Court as permitted by the Tribal Court of the Shakopee Mdewakanton Sioux Community Rules of Civil Procedure. Nothing in this Protective Order shall constitute an admission or waiver of any claim or defense by any party.

FILING AND USE IN COURT OF DESIGNATED MATERIALS

14. The parties agree to file all pleadings and other documents containing Designated Materials under seal, and the Clerk of the Court shall so maintain them. Upon the default of a party to file a document containing Designated Materials under seal, any party may subsequently designate to the clerk that the document should be so maintained. The parties agree to make all efforts reasonable to avoid unnecessarily filing documents under seal and to segregate Designated Materials from other Litigation Materials and file Designated Materials separately under seal to the extent possible.

THIRD-PARTY REQUEST FOR DESIGNATED MATERIALS

15. If any party receives a subpoena or document request from a third party that purports to require the production of Designated Materials in that party's possession, the party receiving the subpoena or document request: (a) shall immediately notify the Producing Party that designated

the materials of the receipt of said subpoena or document request, and (b) shall not oppose any effort by the Producing Party to quash the subpoena or obtain a protective order limiting discovery of such material. The Producing Party seeking to retain Designated Materials shall have the obligation to attempt, in good faith, to reach an informal resolution with the subpoenaing party of the confidentiality concerns before the return date of any subpoena or order for production.

DISCOVERY FROM NONPARTIES

16. A nonparty producing Litigation Materials may designate some or all of the Litigation Materials it produces in the same manner provided for in this Protective Order with respect to Litigation Materials produced by or on behalf of the parties to this action. Any party may also designate any Litigation Materials produced by a nonparty as "Confidential" or "Attorneys' Eyes Only." Such Designated Materials shall be governed by the terms of this Protective Order. A party or their attorney may also direct a nonparty to complete the Agreement to Protective Order, attached as Exhibit A, before that party makes a disclosure.

CONCLUSION OF LITIGATION

17. Within 30 days of the conclusion of this action, including any post-trial motions or appellate proceeding, counsel of record for the parties shall ensure that all Designated Materials and all copies thereof and notes, abstracts or summaries made therefrom, in the possession custody or control of counsel or those persons or entities to whom or to which counsel distributed all Designated Materials, are destroyed and shall certify to counsel for the Producing Party that the Designated Materials have been destroyed. The term "destroy" is understood to include the permanent deletion of all Designated Materials from any and all electronic media.

AMENDMENT OF THIS ORDER

18. The provisions of this Protective Order may be modified at any time by stipulation of the parties as approved by the order of the Court. In addition, a party may at any time apply to the Court for modification of this Protective Order by a motion brought in accordance with the rules of the Court.

ORDER

The parties shall abide by all terms and conditions set forth above pertaining to the dissemination and use of Confidential and Attorneys' Eyes Only information and documents.

Dated: June 17, 2013

John E. Jacobson, Judge
Shakopee Mdewakanton Sioux Community
Tribal Court

Judge Vanya S. Hogen

Judge Henry M. Buffalo, Jr.

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

COUNTY OF SCOTT STATE OF MINNESOTA

In Re the Matter of Court File No.

Neglected Child. **AGREEMENT FOR PROTECTIVE ORDER**

---

1. I have read a copy of the Stipulation and Protective Order dated _____, 2013 ("the Order") entered in the above--identified lawsuit and I understand that I am bound by its terms.

2. I hereby agree under penalty of contempt of court that I shall not disclose or use the contents of any material designated as CONFIDENTIAL or ATTORNEYS' EYES ONLY except in accordance with the terms thereof.

3. I hereby agree and submit to the exercise of personal jurisdiction by the Tribal Court of the Shakopee Mdewakanton Sioux Community, insofar as is necessary to enforce the Order.

Dated: _____, 2013 _____
[Insert Name]

IN THE TRIBAL COURT OF THE OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

STATE OF MINNESOTA COUNTY OF SCOTT

Katerina Anderson,

Plaintiff,

v.

Performance Construction, LLC,

Defendant,

v.

Krech Exteriors, Inc., Bruce Sames, Lyman Lumber Company, Integrity Windows, Inc., and Hawk Drywall, Inc.,

Tribal Court File: 721-12

Third-Party Defendants,

and

Krech Exteriors, Inc.,

Fourth-Party Plaintiff,

v.

Daniel Zhakevich, personally and d/b/a as A Wall Remodeling,

Fourth-Party Defendant.

MEMORANDUM OPINION AND ORDER

Before Judge Terry Mason Moore.

Introduction

This is a case involving claims of defective construction at a house located on tribal trust land and within the Reservation at 2475 Paha Circle, Shakopee, Minnesota. Plaintiff, Community member and homeowner Katerina Anderson, contracted with general contractor Performance Construction to build the house and paid approximately $670,000. The parties entered a two-page written contract for the work dated December 14, 2006.[1] Ms. Anderson claims that after completion of construction, problems arose relating to the siding, driveway, tile, trim, countertops, sliding doors, and cabinets. Ms. Anderson brought suit against Performance on January 24, 2012. Performance denied all liability and brought a third-party indemnity action against various suppliers and subcontractors, including window and door supplier Integrity Windows, siding subcontractor Krech Exteriors, and others.

Currently before the Court are two primary motions for summary judgment, one by Performance (which Krech fully incorporated into its own summary-judgment motion) and one by Integrity, both of which were heard on July 12. The following attorneys appeared at the hearing on behalf of the parties: Kurt Mitchell for Plaintiff Katerina Anderson; Nicole Delaney on behalf of Defendant Performance Construction; Michael E. Obermueller on behalf of Third-Party Defendant Integrity Windows; Michael S. Rowley on behalf of Third-Party Defendant and Fourth-Party Plaintiff Krech Exteriors; and Michael M. Skram on behalf of Third-Party Defendant Lyman Lumber.

Lyman did not file any motions. As its attorney reiterated at the hearing, and as demonstrated by the record, in 2011, Lyman declared voluntary bankruptcy in the United States Bankruptcy Court for the District of Minnesota, resulting in an automatic stay of this and any

[1] Attached as Ex. C to Aff. of N. Delaney in Support of Performance Constr.'s Mot. for S.J. (June 19, 2013).

other pending litigation against Lyman. In May 2013, the Bankruptcy Court lifted the stay, but ordered that any claims against Lyman in this or any other case can only proceed to the extent of any available insurance.

Based upon Lyman's recent correspondence, however, the Court understands that Lyman on July 19 settled with Ms. Anderson and that the Court will shortly receive dismissal papers. This does not affect the disposition of either of the pending motions, however.

In the first motion, Performance moves to dismiss on the grounds that the suit is barred due to the Minnesota statute of limitations for construction-defect claims at Minnesota Statute Section 541.051, which provides a potential claimant only two years from discovery of a defect to bring suit.[2] Third-Party Defendant Krech Exteriors, the siding-installation subcontractor, also filed its own motion for summary judgment, but fully incorporated Performance's substantive arguments, and so Krech's motion can be decided on the same grounds.[3]

In the second motion, Third-Party Defendant Integrity Windows moves to dismiss Defendant Performance's claim against Integrity for contribution and indemnity on grounds of failure to state a claim, arguing that Performance has failed to present any evidence of defects in the products Integrity provided for use on the project.

Relevant Facts

Relevant to the statute-of-limitations issue in Performance's motion are certain communications between the parties. It is undisputed that, after completion and at various times in 2008, 2009, and 2010, Ms. Anderson and Kevin Boyd (another resident of the home acting on Ms. Anderson's behalf) , communicated with Performance regarding at least some of the alleged defects. The record presented to the Court to date shows that Performance made certain efforts

[2] *See* Performance Constr.'s Mot. for S.J. (June 19, 2013).
[3] *See* Krech Mot. for S.J. (June 23, 2013).

to address those requests, including coordinating delivery of new siding in 2009.

The very last communication that is on record is an October 2010 letter from Performance's chief operating officer and owner James Michka to Ms. Anderson.[4] Therein, Mr. Michka states Performance would "like to help you get the siding issue resolved and any other items in the home that you feel need attention."[5] There is no evidence in the record regarding whether Ms. Anderson relied on this letter for any purpose.[6] Nor does Mr. Boyd assert that Performance made any promises to repair any of the defects, although he did provide an affidavit alleging that he had some contact with Performance in 2010.[7]

Relevant to the windows and doors defect issue in Integrity's motion are several other documents. The only expert report to date (and discovery closed in May, per the parties' own stipulation) is the "Residential Construction Inspection" dated July 22, 2011 from Advanced Consulting & Inspection ("ACI").[8] Ms. Anderson obtained the report, which discusses issues with the windows and doors.[9] But the report solely discusses what appear to be window and door *installation* problems.[10] In fact, the only time an Integrity product is expressly mentioned therein is to note there was an installation rather than a defect in the product: "Marvin Integrity installation instructions required a backer rod and tooled sealant joint between the window frame and cladding. The caulk joints were not *installed*."[11] Regarding the sliding patio doors Integrity

---

[4] Attached as Ex. 1 to Ex. A (Depo. of J. Michka) to Aff. of K. Mitchell in Support of Plaintiff's Memo. of Law in Opp. to Def. Performance Constr.'s Mot. for S.J. (July 3, 2013).
[5] *Id.*
[6] Aff. of K. Anderson, attached to *id.*
[7] Aff. of K. Boyd, attached to Pl.'s Memo. of Law in Opp. to Third-Party Krech Exterior's Motion for S.J. (July 3, 2013).
[8] ACI Rep. at 48, attached as Ex. 1 to Aff. of N. Delaney in Opp. to Integrity Windows' Mot. for S.J. (July 9, 2013).
[9] *Id.*
[10] *Id.*
[11] *Id.*

supplied, the ACI report states that they are "difficult to operate and have become damaged as a result," but the report also states that "[t]he failure of the caulk joint at mid-height indicates the bowing occurred *after construction was completed*" and points to improperly installed headers as a cause of the problem.[12]

Also on record is Ms. Anderson's remediation proposal from Residential Improvement Contractors, Inc. ("RIC"), dated January 29, 2013, which states only that RIC advises it would "remove and reset all windows" and that existing trims and windows will be "save[d] for re-installation."[13] RIC states that the windows "will be inspected prior to re-installation,"[14] but does not state there are any known defects in them.[15]

Finally, in deposition, Performance's chief operating officer and owner James Michka testified that he had no evidence that there was a defect in either Integrity's windows or doors.[16]

Analysis and Order

I. Standard of review.

This Court follows the Federal Rules of Civil Procedure, including 56(e), which states that summary judgment is proper when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." It is only "where the record as a whole could not lead a rational trier of fact to find for the non-moving party" that a court can conclude that there is no genuine issue as to material fact.[17] A responding party must "set forth specific

---

[12] *Id.* Emphasis added.
[13] RIC Rep at 2, attached as Ex. F to Aff. of N. Delaney in Support of Performance Constr.'s Mot. for S.J. (June 19, 2013).
[14] *Id.*
[15] The RIC proposal states that the total estimate for all repair work comes to $137,840.
[16] *See* J. Michka Depo. at 58, attached as Ex. B to Aff. of M. Obermueller in Support of Integrity Windows, Inc.'s Mot. for S.J. (June 19, 2013).
[17] *Matsushita Elec. Indus., Inc. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

facts showing that there is a genuine issue for trial."[18] And "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."[19]

II. Analysis.

A. Jurisdiction and choice of Minnesota law.

It is unquestioned that this Court has both subject-matter and personal jurisdiction over this matter and these parties, and that the parties have submitted to this Court's jurisdiction. The Court notes, however, that the contract between Ms. Anderson and Performance does not include a choice-of-law clause, which would normally lead to the Court applying Community law to the dispute. But the parties to the contract stated in pleadings and in the summary-judgment hearing that they agree that Minnesota common law should apply to the contract, along with one aspect of Minnesota statutory law, the two-year, construction-defect statute of limitations at Minnesota Statute Section 541.051.[20] Therefore, based upon this express agreement, the Court applies both Minnesota common law and Minnesota's construction-defect statute of limitations.[21]

---

[18] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).
[19] *Liberty Lobby*, 477 U.S. at 252.
[20] *See generally*, Performance Constr. Memo. in Support of Mot. for S.J. at 6-7; Pl.'s Memo. of Law in Opp. to Def. Performance Constr.'s Mot. for S.J. (July 3, 2013) at 4-5.
[21] While it is true that the Court has discretionary authority to look to the common law of other jurisdictions for guidance, as the parties have suggested, the parties here ask the Court to apply a foreign *statute of limitations*. Statutes of limitations are not creatures of common law, although they may control whether common-law claims may be brought. Furthermore, the Court notes that Minnesota views statutes of limitations as typically procedural (rather than substantive). *See, e.g., Commandeur, LLC v. Howard Hartry, Inc.*, 2007 WL 4564186 (Minn. Ct. App. Dec. 21, 2007), citing *Danielson v. Nat'l Supply Co.*, 670 N.W.2d 1, 5 (Minn. Ct. App. 2003) (stating that a limitation period is only substantive "when it applies to a right created by statute, as opposed to a right recognized at common law.'") (internal citations omitted). Here, Ms. Anderson's claims against Performance unquestionably arise under common law (including negligence, negligence *per se*, breach of contract, and breach of implied warranty of fitness for a particular purpose), as do Performance's third-party claims against Integrity and Krech (including contribution and indemnity). So without the parties' express request to apply this

B. Performance Construction's (and Krech Exteriors's) summary-judgment motion.

The state construction-defect statute of limitations at Minnesota Statute Section 541.051 states:

> Except where fraud is involved, no action by any person in contract, tort or otherwise to recover damages for any injury to property, real or personal,...arising out of the defective and unsafe condition of an improvement to real property shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property...more than two years after discovery of the injury.

Minnesota case law strictly construes this two-year limitation, and a cause of action accrues upon discovery.[22] And this means only discovery of the "symptoms" of the defects, not the underlying causes.[23] Promises to repair can toll the statute of limitations under equitable estoppel principles, but only if the injured party reasonably and detrimentally relied on the promises, which is a fact-specific inquiry:

> ..."[w]hen a party allegedly responsible for remedying a defect in real property makes assurances or representations that the defect will be repaired, that party may be estopped from asserting a statute-of-limitations defense if the injured party reasonably and detrimentally relied on the assurances or representations." *Rhee v. Golden Home Builders,* 617 N.W.2d 618, 622 (Minn.App.2000) (citations omitted). Such assurances may toll statutes of limitation on the theory of equitable estoppel. *U.S. Leasing Corp. v. Biba Info. Processing Servs., Inc.,* 436 N.W.2d 823, 826 (Minn.App.1989), *review denied* (Minn. May 24, 1989). Whether equitable estoppel applies is a question of fact unless only one inference can be

---

purely procedural Minnesota statute of limitations, the Court would likely be without authority to do so.

[22] Minn. Stat. § 541.051 subd. 1(c).

[23] *See, e.g., Oreck v. Harvey Homes*, 602 N.W.2d 424, 428 (Minn. Ct. App. 2000) (statute begins to run upon discovery "of an injury sufficient to entitle him or her to maintain a cause of action") (internal citations omitted); *Greenbrier Village Condo Two Ass'n, Inc. v. Keller Inv., Inc.*, 409 N.W.2d 519, 524 (Minn. Ct. App. 1987) (statute begins to run "when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, an injury sufficient to entitle him to maintain a cause of action."); *Hyland Hill N. Condo Assoc., Inc. v. Hyland Hill Co.*, 549 N.W.2d 617 (Minn. 1996), *overruled in sep. pt. by Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672 (Minn. 2004) (knowledge of full extent of injury not necessary to trigger statute of limitations).

drawn from the facts. *Rice St. VFW, Post No. 3877 v. City of St. Paul,* 452 N.W.2d 503, 508 (Minn.App.1990).[24]

Here, Performance argues, based upon Ms. Anderson's own admissions in deposition, that, at the latest, Ms. Anderson knew of all the housing defects by May 2009. Performance further claimsthat by September 2009 it had stopped responding to her (much less making any promises to repair).[25] Therefore, Performance reasons, Ms. Anderson had until May 2011 at the latest to file a complaint against Performance. Because Ms. Anderson did not file until January 2012, Performance argues that Minnesota's construction-defect statute of limitations bars her claims and requires dismissal.

But this ignores the October 2010 letter that Performance owner Mr. Michka sent to Ms. Anderson where he stated he would "like to help you get the siding issue resolved and any other items in the home that you feel need attention." One permissible reading of this letter (although admittedly not the only reading) is that Performance is promising to return to repair the problems.[26] This could serve to push the limit out far enough to make Ms. Anderson's January 2012 filing timely.

But even if this letter does constitute a promise to repair (which is Ms. Anderson's burden to prove at trial), Ms. Anderson will also have to show that she (or Mr. Boyd on her behalf) reasonably relied on that promise. There is nothing before the Court on this point. As counsel for Performance admitted at the hearing, in deposition, Ms. Anderson was not asked

---

[24] *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.,* 715 N.W.2d 458, 473 (Minn. Ct. App. 2006).

[25] *See, e.g.*, Performance Constr.'s Memo. in Support of Mot. for S.J. at 3-6 (citing K. Anderson Depo.).

[26] *See* Pl.'s Memo. of Law in Opp. to Def. Performance Constr.'s Mot. for S.J. at 3-4. The Court notes, however, that the affidavits Ms. Anderson and Mr. Boyd offer as their primary support in opposition to Performance's motion are not very helpful. Neither states whether they relied on the letter and neither include any specific dates or the content of other alleged communications between Mr. Boyd and Performance in 2010.

about her reliance on the letter either way.[27]

Whether the letter is a promise, and if so, whether Ms. Anderson reasonably relied on it, constitute threshold fact issues to be decided at trial before any other aspects of the defect claims can be considered. Construing the facts in the most favorable light to Ms. Anderson as the nonmovant, Performance has failed to meet its burden to justify summary judgment and its motion is denied. Correspondingly, Krech's motion incorporating Performance's arguments is denied.[28]

C. Integrity Windows's summary-judgment motion.

Conversely, Integrity *has* met its burden show that there remains no genuine issue of material fact that remains for trial regarding whether the products Integrity supplied to the project contributed to the damages. Performance has not met its burden to show there is any evidence upon which the Court as the factfinder could reasonably find in Performance's favor at trial. Performance has simply offered no evidence of any defects in the products, much less that these defects contributed to any damages Ms. Anderson suffered for which Performance may be liable. The Court therefore grants Integrity's summary judgment motion and dismisses Integrity from the case.

1. Late service and filing.

First, the Court addresses Performance's argument that Integrity's admittedly-late filing delay justifies denial on purely procedural grounds. The summary-judgment hearing was set for August 12, and dispositive motions were due 28 days earlier, or by Friday, June 14. Integrity instead filed on Monday, June 17, and due to a service-list omission, also failed to serve

[27] Nor does Mr. Boyd's affidavit regarding some contact with Performance in 2010 support a claim of estoppel, as Mr. Boyd never asserts that Performance made him any promises to repair.
[28] The Court need not reach the question of whether Krech was entitled to bring this motion on a "pass-through" basis in the first place,.

Performance until on or about Friday, June 21.

But there has been no showing of prejudice to Performance. Moreover, the late service appears to have genuinely been an oversight, and Performance was still served a full three weeks before the hearing. Most importantly, Integrity's motion has merit and granting it will serve to efficiently manage this case by dismissing an unnecessary party. Under these circumstances, the Court can and does accept this late filing.

2. Claims of defects in Integrity products.

Integrity has met its burden to show there is no factual basis for Performance to claim there were any defects in Integrity's products. Performance had the entire discovery period to obtain evidence regarding alleged defects in the Integrity window and door assemblies if Performance wished to proceed to trial. For example, it is not enough, as Performance argues, that Ms. Anderson has experienced problems operating the patio doors, or that "Plaintiff's expert has also identified issues with components of the patio doors coming loose and difficulty in operating the patio doors properly."[29] These facts do not logically lead to the sole conclusion that the patio door *components* are defective, only that *something* is wrong, whether the problem is with manufacture, installation, or something else. Moreover, neither ACI or RIC conclude that there were defects in the windows and doors themselves, only highlighting problems with their installation, in which Integrity had no role. And ACI goes on to identify a number of *specific* door and window installation problems--including a failure to follow Integrity's manufacturer instructions. In other words, the evidence on record, while not conclusive, indicates that Integrity's products are likely *not* the source of Ms. Anderson's damages.

Under these circumstances, to defeat summary judgment, Performance needed to provide

[29] Performance Constr.'s Memo. in Opp. to Integrity Windows' Mot. for S.J. at 5.

at least some evidence suggesting that Integrity's products were defective and that they contributed to Ms. Anderson's damages, likely including expert testimony.[30] Performance did not do so. Therefore, Performance has failed to meet its burden to raise any material fact in support of its third-party claims against Integrity. The Court grants Integrity's motion and Integrity is dismissed from the case.

[30] *See, e.g., Mozes v. Medtronic, Inc.*, 14 F. Supp. 2d 1124, 1128 (D. Minn. 1998) (stating expert testimony may be needed in product-liability cases, as in negligence cases, and where "the acts or omissions complained of are within the general knowledge and experience of lay persons").

Order

For the foregoing reasons, and based on all the files and pleadings herein, it is herewith ORDERED:

1. Defendant Performance Construction, Inc.'s motion for summary judgment is DENIED;

2. For the same reasons, Third-Party Defendant Krech Exteriors, Inc.'s motion for summary judgment is also DENIED; and

3. Third-Party Defendant Integrity Windows, Inc.'s motion for summary judgment is GRANTED and Integrity Windows is dismissed from the case.

This matter will be set on for trial as to all the remaining parties.

Date: August 9, 2013

Terry Mason Moore
Tribal Court Judge, *Pro Tem*

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

SCOTT COUNTY STATE OF MINNESOTA

Court File No. 630-09

In Re the Marriage of:

Ashley Rose Farrell,

Petitioner,

And

Corey Lee Farrell,

Respondent.

MEMORANDUM OPINION AND ORDER

The above-entitled matter came before the Honorable Henry M. Buffalo, Jr., Judge of the above-named Court, on the 17th of July, 2013 pursuant to a motion filed by Respondent Corey Lee Farrell. Kevin Wetherille, Esq., appeared on behalf of Respondent and Gary A. Debele, Esq., appeared on behalf of Petitioner who was also present.

On February 2, 2010 the court adopted, by Stipulation of the parties, a Marriage Termination Agreement (MTA) which it entered as a judgment. At the time of the divorce there was one child of the marriage who was born on September 18, 2007. Among several issues addressed by the parties they agreed to the payment of child support by the Petitioner to the Respondent in the amount of $4000.00 per month which is an upward deviation of that required by the Shakopee Domestic Relations Code, as amended. MTA, Paragraph 21, Page 8. On February 20, 2013 child

support was reduced due to the suspension of the Respondents visitation which resulted in a decrease of the need by the child while under the care of Respondent making the higher amount unreasonable and unfair. The suspension of the Respondents visitation occurred as the result of the commencement of a Child in Need of Assistance Petition filed on August 17, 2012 (Court file CC-069-12) by the Shakopee Community after a police raid occurred at the Respondent's home where he provided care for the child. The Child in Need of Assistance was closed by court order dated August 26, 2013.

In this motion Respondent seeks the reinstatement of child support in the amount of $4000.00 per month. In support of the request the Respondent makes several arguments: first he argues that he provides the same level of care as previous and the child is at his home, that he maintains his home to provide the care and shares expenses with his roommate but that is not enough to replace the decrease of funds; second, if the higher amount is not restored he will not be able to maintain the child's standard of living while in his care; third, he incurred debt during the course of the Child in Need of Assistance proceeding; forth, although he is now working part time it does not replace the decreased amount; and fifth, there is no basis under the Domestic Relations Code to modify the award agreed to in the stipulation.

In opposition to the motion Petitioner argues; that she agreed to the substantial upward deviation in the MTA because she wanted the child to enjoy the same level of lifestyle while with the Respondent. That she feels the upward deviation is no longer justified and the Respondent should assist in paying for the child's care and the reduction of the award to $1000.00 per month should be made permanent for several reasons; first under the Domestic Relations Code the

guidelines used to establish child support for one child is $1948.00 per month and the parenting schedule establishes equal visitation so if the award for support is split between the parents the amount would be $974.00 each and the current award of $1000.00 meets the requirements of the Code and should not be changed; second, that the Petitioner is still obligated to pay the mortgage on the home in which the Respondent resides and provides care to the child and that monthly mortgage amount is in excess of $5000.00 per month; third, that in addition to his roommate the family unit has one child together and the roommate has two other children from a previous marriage and he has another child from a previous relationship all of whom use the Respondent's home and that they, the Respondent and his roommate need to provide the financial support for the needs of that family unit; forth, that the Respondent agreed to a substantial lump sum payment to terminate the spousal maintenance agreement set forth in the MTA and that the Petitioner has paid those monies to Respondent; and fifth, that Petitioner argues that she has incurred substantial attorney fees as a result of the Respondent's poor choices in the care of their child.

LEGAL DISCUSSION

In consideration of a request for the modification of a child support award the court is bound to follow the requirements of the Domestic Relations Code, as amended. The Code at section 7(d)(1) states as follows:

> The court may receive evidence to determine if an upward departure from the child support amount delineated in the guidelines is appropriate and necessary for the child(ren). An upward departure from the guidelines shall only occur if the child has medically documented physical, mental or emotional needs, including chemical dependency and learning disability needs, which require professional intervention or oversight and exceed those services provided by Tribal insurance or programs.

The Code also lists in Section 7(b) other factors it may consider in setting or modifying

child support. The pertinent factor for this request is found at 7(b)(1) and states as follows:

> The Court shall not consider the following factor(s):
>
> (1) The standard of living the child would have enjoyed had the marriage not been dissolved; had the parents resided together or continue to reside together.

When it comes to modifying child support awards this court in Cannon v. Prescott, 4 Shak. T.C. 144 (Nov. 25, 2002), observed that:

> The Domestic Relations Code was amended in 2001 to make clear how child support awards are to be calculated and how a request for an increase in child support is to be handled. Specifically, the resolution accompanying those amendments states that,
>
> > Members of the Community have not been afforded the full protection of the law of the Community due to misinterpretations or misunderstandings of the [child support] guidelines in the Domestic Relations Code ... [and] the General Council determines it is necessary to clarify its intent and purpose in promulgating the Domestic Relations Code and to clearly specify the limits on the exercise of discretion by the Tribal Court in determining awards of child support .. .

id. at Page 2

The court went further to note that the individual seeking the upward deviation, carries a heavy burden and the court is limited in its review.

Here the Respondent carries the burden of making a showing that the upward deviation re-instating the previous award of child support meets the requirements of the Domestic Relations Code. In order to be successful he must,

> ...."overcome the presumption that awards derived under the guidelines are sufficient to support a particular child, but that this Court may exceed the guidelines in a particular case, provided that the Petitioner [here Respondent] is able to present concrete evidence of a physical, mental, or emotional need of the child that is not covered by Tribal insurance or programs, and which

is not related to the child's lifestyle needs." See Cannon at 4.

The Respondent here makes no showing that the child has a physical, mental or emotional need that is not covered by Tribal insurance or programs. Instead he argues that he will not be able to maintain the child's standard of living while in his care. Although the parties may have stipulated to the standard of living need previously in the MTA, without the agreement of the parties the Code actually prohibits the court from considering the standard of living as a basis for the deviation. Finally, his arguments address his financial needs and not those of the child. The Respondent has therefore failed to make the necessary showing to support his request for reinstatement of the upward deviation.

The Petitioner argues that the Respondent must take some responsibility for the financial support of the child and suggests that the parties should split the amount established by the guidelines for the support of one child. She bolsters her argument by the fact that the new parenting plan splits the visitation time between the two parties equally. The court agrees with the observation that each parent has an obligation to financially support their children. But the court is limited in the setting of an award if the parents share equally in the care of the child. The Domestic Relations Code in Section 7 (a) states that "Child support shall be paid by the non-custodial parent..." Here the parents submitted a Parenting Plan which was adopted by Order of this court on July 17, 2013. This Plan by its nature and intent establishes a schedule and decision-making by the parents with respect to the child that clearly creates joint custody and responsibility for equal care of the child in each of their homes. It is evenly divided to the point where there is no non-custodial parent which is required of the court to set an award of child support.

The Respondent in bringing this motion had the opportunity to inform the court that his

income is insufficient to support the needs of the child while in his care. Instead of providing information as one might find in a budget that lays out the financial needs and expenses of caring for the child and maintaining the home he made bald statements as to those in paragraph 7 and 8 of his affidavit in support of his request where he states as follows:

> 7. Currently I am back to having the parenting relationship with Chance that was set forth in the divorce decree. He spends significant time in my home. I have expenses associated with this as well. I continue to maintain my home for my son. I do so now without the benefit or assistance of the significant spousal support payment from the Petitioner.
>
> 8. After the Petitioner and I agreed to terminate spousal support, I asked my girlfriend, Monica, to move into my home. I needed to have someone to share household expenses with, and Monica and I have a daughter together. There is no doubt that Monica being in the home cannot replace my spousal support, but it does help.

Respondent's Affidavit, Page 2

The Petitioner in her affidavit states that she continues to pay the mortgage on the home that the Respondent is currently residing in and that mortgage is in excess of $5000.00 per month. Petitioner Affidavit, Paragraph 8, Page 4

So in spite of the statement that the Respondent continues to "maintain my home for my son" he does not have the financial responsibility to pay what would otherwise be the largest expense for a family living in a home. Lastly, the Respondent asks the court to take notice of the previous affidavits submitted by him to show that his income is insufficient to provide care for his child and adds that "this information is largely true and correct to date". Respondent Affidavit Paragraph 11, Page 3. Unfortunately this is also an insufficient basis to set an award of child support under Section 7 of the Code.

Based upon the files, proceedings, and argument of counsel, the Court **ORDERS** as follows:

1. That the Respondent's request for an upward departure is **DENIED.**

2. That the Parenting Plan as adopted by this court on July 17, 2013 establishes joint custody of the child and Respondent has failed to show any evidence that would establish a basis for this court to set a child support award under the requirements of Section 7 of the Domestic Relations Code. The existing Child Support award is **VACATED.**

Dated this 17th day of October, 2013

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

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

COUNTY OF SCOTT STATE OF MINNESOTA

In Re the Marriage of:

Kenneth Jo Thomas,

Petitioner,

and

Sheryl Rae Lightfoot

Respondent.

Court File No. 778-13

MEMORANDUM OPINION AND ORDER

Introduction.

In this marriage dissolution proceeding, there is, to say the least, considerable complexity overlaying the stresses that virtually always accompany matters of this sort.

There is jurisdictional complexity: the parties were married on the Shakopee Reservation, pursuant to a license issued by this Court pursuant to the Shakopee Mdewakanton Sioux Community's Domestic Relations Code. The Petitioner is a member of the Shakopee Mdewakanton Sioux Community, the Respondent is a member of the Keweenaw Bay Indian Community, and the parties' two children, who are of Chinese ancestry, are not members of any Indian tribe and are not eligible to be members of any Indian tribe.

There are substantial questions with respect to residence: Petitioner asserts that the parties are residents of the Shakopee Mdewakanton Sioux Reservation; but Respondent is, and for the past four years has been, employed as a college professor in British Columbia, and the parties' children live with her.

There are judicial proceedings in multiple jurisdictions: before the Petitioner began the proceedings in this Court the Respondent had initiated litigation in the courts of British Columbia, asking that jurisdiction to dissolve the parties' marriage. The British Columbia court has ordered the Petitioner to pay temporary child support and temporary maintenance. And, after this Court's proceedings began, the Respondent filed an action in the United States District Court for the District of Minnesota seeking injunctive relief to stay or end this Court's involvement in the matter.

To date, the District Court has declined to grant such relief, and therefore this Court today has before it two motions: the Respondent's motion to dismiss for lack of subject matter and personal jurisdiction, and the Petitioner's motion for temporary relief.

In her motion to dismiss, and in her response to the Petitioner's motion for temporary relief, the Respondent argues that there are two reasons why this Court cannot exercise jurisdiction over her, over her marriage, and over the parties' children:. First, she asserts that a section of a federal statute, 28 U.S.C. §1360 (2012) ("Public Law 280") requires any laws adopted by the Shakopee Mdewakanton Sioux Community to be precisely the same as the laws of the State of Minnesota; and she argues that because the Shakopee Mdewakanton Sioux Community's Domestic Relations Code ("the Code") differs in many ways from various of Minnesota' domestic relations laws, the Code's provisions, or at least the diverging portions of the Code, are void, of no effect, and can give this Court no subject matter jurisdiction over the Respondent, or her children, or her

marriage. Second, she asserts that another federal statute, the Indian Child Welfare Act, 25 U.S.C. §§ 1901 – 1963 (2012), operates to deprive the Court of jurisdiction over the parties' children because the children are not tribal members and are not eligible to become members of any federally recognized Indian tribe.

Those are the only two arguments that the Respondent submitted in her brief supporting dismissal. But, during oral argument on the dismissal motion, Respondent's counsel raised a third argument. He suggested that, under the reasoning of an opinion that the Solicitor of the United States Department of the Interior rendered in 1938, the Shakopee Mdewakanton Sioux Community actually has no inherent sovereign powers whatever – that the Community can function as a government only if, and only to the extent that, it has received, and properly is exercising, powers that have been delegated to it by the United States government.

In the Court's view, for the reasons discussed in detail below, none of these three arguments has any force. But, as noted above, there clearly are vitally important questions relating to the Court's jurisdiction – albeit questions that the Respondent has not raised – and those questions will require further proceedings, as is detailed at the conclusion of this opinion.

1. The Respondent's contentions with respect to the effect of the 1938 Opinion of the Solicitor of the United States Department of the Interior concerning the powers of "created" tribes.

The argument that Respondent's counsel made to the Court for the first time during oral argument on December 10, 2013, was as follows:

> MR. KAARDAL: ... if you're not a historical tribe, then you don't have, according to the Solicitor General's opinion, historical powers. And therefore the only powers that Shakopee has in the Constitution are delegated by [the United States Department of the] Interior. And so when we view the [Community's] Constitution from that vantage

> point, that the Shakopee Constitution only has the powers delegated by Interior, this whole notion, the notion of Shakopee exercising sovereign powers and then the government approving it, the federal government approving it, that's not quite what's going on. What's going on is the federal government is ensuring the powers are that delegated are used in a lawful way.
>
> Transcript of December 10, 2013 hearing, at 19, lines 7 – 20.

This argument – that a federally recognized Indian tribe's inherent jurisdiction and powers, its sovereign status, might be different than other tribes' depending upon such things as whether one tribe's members' ancestors did not originally occupy the territory where the tribe's reservation now is located, or upon whether one tribe's present-day membership might consist of persons who are descended from ancestors who were members of different tribes – was put to rest by the United States Congress decades ago. But, given the fact that the argument has emerged here, the history of the issue should be set forth in some detail.

The so-called "historic tribe" question first arose after the passage, in 1934, of the Indian Reorganization Act, 25 U.S.C. 0§461 – 479 (2012) ("the IRA"). In 1936, the Office of the Interior Department's Solicitor was asked by the United States Commissioner of Indian Affairs whether tribal constitutions proposed, under section 16 of the IRA, 25 U.S.C. §476 (1934), for two tribes –the Lower Sioux Indian Community and the Prairie Island Indian Community in Minnesota – could properly give the governments of those Communities the powers to condemn property, to regulate inheritance, and to levy taxes on Community members. The Solicitor responded in the negative, saying –

> Neither of these two Indian groups constitutes a tribe but each is being organized on the basis of their residence upon reserved land. After careful consideration in the Solicitor's Office it has been determined that under section 16 of the Indian

> Reorganization Act a group of Indians which is organized on the basis of a reservation and which is not an historical tribe may not have all of the powers enumerated in the Solicitor's opinion on the Powers of Indian Tribes dated October 25, 1934. The group may not have such of those powers as rest upon the sovereign capacity of the tribe but may have those powers which are incidental to its ownership of property and to its carrying on of business, and those which may be delegated by the Secretary of the Interior.
>
> *Sioux – Elections on Constitutions*, 1 Op. Sol. On Indian Affairs 618 (U.S.D.I. 1979).

Two years later, the Interior Department's Solicitor reiterated and affirmed those views in *Powers of Indian Group Organized Under IRA But Not As Historical Tribe,* 1 Op. Sol. On Indian Affairs 813 (U.S.D.I. 1979).

But whatever effect the Solicitor's views might have had on the manner in which the United States Department of the Interior and its agencies dealt with Indian tribes following the two opinions' issuance, those views are legal nullities now: the opinions have been intentionally and explicitly repudiated by the United States Congress.

On May 14, 1994, in response to their having been informed of some effects, or potential effects of the Interior Department's having drawn distinctions between "historic tribes" and "tribes organized on the basis of their residence upon reserved lands", two United States Senators. John McCain and Daniel Inouye, introduced legislation to amend the Indian Reorganization Act.

The two Senators' discussion, on the Senate floor of the amendment's purposes and the reasons that prompted them to introduce it, are instructive. Senator McCain began:

> Indian tribes exercise powers of self-governance by reason of their inherent sovereignty and not by virtue of a delegation of authority from the Federal Government.
>
> 140 Cong. Rec. S6146 (May 14, 1994).

He continued –

> ...all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority.
>
> Id.

He noted instances where, he had been informed, the Interior Department had used "historic" and "created" classifications for tribes, and he said –

> ...our amendment to Section 16 of the IRA is intended to address all instances where such categories or classifications of Indian tribes have been applied and any statutory basis which may have been used to establish, ratify or implement the categories or classifications.
>
> Id, at S6147.

And he condemned the Interior Department's classification of tribes based upon history, the explicit intent of the amendment in question being to prohibit –

> ...the Secretary [of Interior] or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law.
>
> Id.

Senator Inouye then agreed, noting that Indian tribes stand on an "equal footing" with one another and with the Federal government –

> That is, each federally recognized Indian tribe has the same governmental status as other federally recognized tribes with a government-to-government relationship with the United States.
>
> Id.

The legislation that the Senators introduced on May 14 1994 was adopted, as written, and now appears at 25 U.S.C. §§476(f) and 476(g) (2012), which provide:

> **(f) Privileges and immunities of Indian tribes; prohibition on new regulations.**
>
> Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 [the Indian Reorganization Act] as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.
>
> **(g) Privileges and immunities of Indian tribes; existing regulations.**
>
> Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1934, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

In short, there is nothing in federal law, or in tribal law, that supports a suggestion that the Shakopee Mdewakanton Sioux Community, or any other Indian tribe similarly situated, lacks the inherent sovereign authority to adopt positive law, or that the Community in any way depends, for the power to legislate, upon some delegation from the United States government.

2. <u>The Respondent's contentions with respect to Public Law 280.</u>

The Respondent also argues that Public Law 280, 28 U.S.C. §1360 (2012), limits any exercise of the legislative authority of the Shakopee Community – the limits being set by the civil laws of the State of Minnesota as those laws may change from time to time. The argument is that, if the Shakopee Community does have any legislative power at all, the exercise of that power can in no way deviate

from Minnesota's law, whatever that law may be and however it may change. But the Respondent's argument has no sounder basis in law or in history than does the "historic tribe versus created tribe" argument discussed above.

Any discussion of Public Law 280 in this context must begin with the unanimous decision of the United States Supreme Court in Bryan v. Itasca County, 426 U.S. 393 (1976). As it considered the legislative history and the Congressional intent that underlay Public Law 280, the Supreme Court said:

> Piecing together as best we can the sparse legislative history of [the portions of Public Law 280 relating to civil law, the section] seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; this is definitely the import of the statutory wording conferring upon a State
>
> > "jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in ... Indian country ... to the same extent that such State ... has jurisdiction over other civil causes of action."
>
> With this as the primary focus of §4(a), the wording that follows in §4(a) –
>
> > And those civil laws of such State ... that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State"
>
> -- authorizes application by the state courts of their rules of decision to decide such disputes [footnote omitted] Cf. 28 U.S.C. §1652. This construction finds support in the "consistent and uncontradicted references in the legislative history to "permitting" "*State courts to adjudicate* civil controversies" arising on Indian reservations, H. R. Rep. No. 848, pp. 5,6 (emphasis added), **and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations.**
>
> 416 U.S., at 383-4 (emphasis supplied).

In other words, the Court concluded that Public Law 280 simply authorized the courts of the State of Minnesota to hear and decide civil cases that may arise on the Shakopee Reservation, and to apply the State's law to those cases, but that nothing in Public Law 280 in any way was intended to limit the powers of tribal governments. So, when the Shakopee Community's General Council adopted the Code on May 23, 1995, and in doing so stated that the Community "has the inherent sovereign power to regulate the domestic relations of its members,,. [and] to ... enable them to use their own Tribal forum for resolution of domestic relations issues", the Community was exercising exactly the regulatory function that the Court contemplated when it decided Bryan.

At least one United States District Court has agreed with precisely that analysis (and the Court is aware of no case where any court has ruled to the contrary). In Miodowski v. Miodowski, 2006 WL 3454797 (D. Neb. 2006), the United States District Court for the District of Nebraska considered two cases arising from a divorce degree entered by the tribal court of the Ponca Tribe of Nebraska. Indian tribes in Nebraska are subject to Public Law 280, and both cases before the District Court involved a marriage between a Ponca member and a non-Indian. Prior to the filing of the two cases, the Ponca member had sought and obtained a marriage dissolution order from the Ponca Tribal Court. After that decree had been issued, the non-Indian commenced divorce proceedings in a Nebraska state court, contending that Public Law 280 deprived the Ponca Tribe and its court of any power to terminate her marriage. The Ponca member removed that Nebraska state proceeding to the United States District Court; and thereafter the Ponca Tribe itself filed an original action in the District Court seeking a declaratory judgment that the attempted collateral attack on the tribal court's judgment in state court caused the Tribe irreparable harm.

Resolving the fundamental question relating to the effect of Public Law 280, the District Court said this:

> Short [the non-Indian party] argues that [Public Law 280] divests a tribe of civil jurisdiction in Nebraska unless the tribe has reached an agreement with the State of Nebraska pursuant to 25 U.S.C. §1323 to retrocede jurisdiction back to the tribe. She asks this court to find that the Tribe was without subject matter jurisdiction to enter the divorce decree under [Public Law 280] and remand the case to Douglas County District Court. Short argues that Congress withdrew sovereignty by enacting [Public Law 280], and no retrocession has occurred with the State of Nebraska and the Ponca Tribe. Therefore, she argues, the Tribe has no jurisdiction to hear divorce cases.
>
> Miodowski [the tribal member] contends that [Public Law 280] arguably does not even apply to the Ponca Tribe of Nebraska. However, even if it does, Miodowski argues in the alternative that [Public Law 280] merely grants concurrent jurisdiction and does not deprive the Ponca Tribe of jurisdiction over its civil suits. Miodowski contends that [Public Law 280] does not limit tribal jurisdiction. *See e.g. 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"). As stated by Felix Cohen:
>
> > 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.
>
> Felix Cohen, Cohen's Handbook of Federal Indian Law §7.02(1)(c) (2005 edition).
>
> The court finds the Ponca Tribe had jurisdiction over the parties' divorce case. ...The court agrees with Miodowski that [Public Law 280] creates

> concurrent jurisdiction with the Tribe and a state. If a state chooses to "retrocede" jurisdiction, the Tribe alone would then have jurisdiction over the case. Finally, the Ponca Tribe in this case clearly has established a constitution and internal laws for divorce and marriage.
>
> 2006 WL 3454797, at 3.

As with Ponca, so here: the Shakopee Community has the power under its Constitution to adopt a domestic relations code; the Community has exercised that power by enacting the Code; and the Community properly has given this Court the authority to interpret and apply the Code.

As will be discussed below, the Code which the Respondent asks this Court to nullify may dictate that this matter must be dismissed. But if that proves to be true, the dismissal will result because the Code requires it, not because any artificial reading of Public Law 280 vitiates the Community's power to regulate domestic relations in a manner different than is done by the State of Minnesota[1].

(In passing it can be observed that if the Respondent's arguments with respect to Public Law 280 were correct – if all provisions of the Community's Code that diverge from Minnesota law were to be found legally void – then there likely would be no marriage between the parties for any court to dissolve, because the parties' marriage license was issued by the Clerk of this Court and their marriage was solemnized on the Shakopee Reservation under Section 4 of Chapter I of the Code, a section that certainly does not track or incorporate the marriage licensing and solemnizing requirements of Minnesota law.)

---

[1] One aspect of the law that the Court will apply, should the Court conclude that it does have subject matter and personal jurisdiction here, is not clear from the face of the Code. The Shakopee Community has not adopted, as positive law, the Uniform Child Custody Jurisdiction and Enforcement Act ("the Uniform Act"). But, as the Court made clear to the parties during the December 10, 2013 oral argument, the Court has in the past, and will here again, apply the Uniform Act's substance and procedures, should it ultimately decide that this matter should not be dismissed. The Uniform Act's procedures and strictures provide a humane, clear, and sensible approach to the vitally important question of child custody, and it is well within the Court's discretion to adopt and utilize those procedures and strictures here.

3. The Respondent's arguments with respect to the Indian Child Welfare Act.

Before discussing the provisions of the Code that may lead the Court to conclude that it does not have jurisdiction here – arguments not discussed by the Respondent's pleadings or motions – the Court must deal, briefly, with the third argument that the Respondent has made. The Respondent asserts that the Indian Child Welfare Act, 25 U.S.C. §§ 1901 – 1963 (2012) ("ICWA") creates a federal mandate that somehow forbids this Court from exercising jurisdiction over the parties' children, because neither child is an "Indian Child" as ICWA defines that term.

The parties agree that neither of their children is a member of an Indian tribe, and that neither is eligible to be a tribal member; so it clearly is true neither is an "Indian child" under ICWA's definition of that term,25 U.S.C. §1903(4) (2012).). It also is true, as the Respondent says, that ICWA expressly does not apply to any child custody determinations made in the context of a divorce, 25 U.S.C. §1903(1) (2012). But those agreed truths – that ICWA has no effect, one way or another, on any child that is not an "Indian child", and that ICWA does not touch the subject of child custody in marriage dissolutions – mean that the statute has nothing to say, expressly or by implication, about the situation that is before the Court.

ICWA is simply is silent about a marriage dissolution proceeding pending in a tribal court where the custody of children of a tribal member is at issue. That silence exists whether the children are tribal members, or may be eligible to be tribal members, or will never be tribal members. So ICWA mandates nothing here:

it brings nothing, one way or the other, to any of the jurisdictional questions that are before this Court.

4. This Court's jurisdiction under the provisions of the Shakopee Mdewakanton Sioux Community's Domestic Relations Code.

Notwithstanding everything that has been said above, there are jurisdictional questions before the Court that appear to be substantial – not because of Public Law 280, not because of ICWA, and not because of questions relating to the "historic" nature of the Shakopee Community, but because of what appears to the Court to follow from clear language in the Code that the Community has adopted.

Three provisions of the Code seem to bear on the question of whether this Court can exercise jurisdiction here. The first is a broad statement set forth in Section 1 of the Introduction to the Code:

> **Section 1.** ***Purpose.***
>
> The Shakopee Mdewakanton Sioux (Dakota) Community has the inherent sovereign power to regulate the domestic relations of its members. No more important power is exercised by Indian Tribes than the power to protect and govern the domestic relations of their members. The purpose of this Code is to inform Shakopee Mdewakanton Sioux (Dakota) Community members of that inherent sovereign authority and enable them to use their own Tribal forum for resolution of domestic relations issues.

The second is a statement in the Code with respect to the specific manner in which that broadly stated regulatory power will be exercised in the context of marriage. Section 1 of Chapter I of the Code (Marriage), in its entirety, says:

> **Section 1.** ***Jurisdiction***
>
> The Shakopee Mdewakanton Sioux (Dakota) Community shall have jurisdiction over all marriages licensed and performed on its Reservation or on any allotted or tribally purchased lands or any public domain lands

designated for Tribal use. The Community shall have original jurisdiction over the domestic relations of its members. **All persons must be residents of the Community as defined by Community law.**

(Emphasis supplied).

The third is the specific statement in the Code pertaining to the Community's jurisdiction over proceedings to dissolve a marriage. Section 1 of Chapter III (Divorce) says:

Section 1. ***Residency requirement.***

The Shakopee Mdewakanton Sioux (Dakota Community shall have **jurisdiction over all persons who have resided on its Reservation** or on any allotted or tribally purchased lands, or any public domain land designated for Tribal use, **for at least 90 days prior to commencing any action** for the dissolution of a marriage before the Courts of the Shakopee Mdewakanton Sioux (Dakota) Community.

(Emphasis supplied).

The Court takes the emphasized references to residence in Chapter III, section 1 – and to a lesser extent, in Chapter I, section 1 – to mean that the Shakopee Community has decided to limit the reach of its jurisdiction over marriage and divorce to persons who reside within the Community. So, at least absent a non-resident party's consent, the Court does not have jurisdiction, in a marriage dissolution proceeding, over a person who is not a resident of the Community.

During oral argument on December 10, 2013, the Court questioned the Petitioner's counsel closely on this point. He responded by arguing that the 90-day reference in Section 1, Chapter III of the Code could be read to mean that the requirement would be satisfied if a person had lived on the Community's Reservation for ninety days at any earlier time. But to the Court this just is not credible: if the Community's intent, when it adopted the Code, were to create

marriage dissolution jurisdiction by virtue of any ninety-day stay on the Shakopee Reservation, however long ago that stay might have been, the Court believes that the Community would have made that intent abundantly clear. Rather, Section 1 of Chapter III of the Code appears to be state a proposition that is common in marriage dissolution law throughout the United States: if a party seeks to invoke the jurisdiction of a government to dissolve the party's marriage, the party must have established residence in the jurisdiction for some defined period immediately before filing the dissolution proceeding.

What is not so universal is the phrase "all persons" in Section 1, Chapter III. It may be argued that the phrase was intended to mean "all petitioners", and not "all parties" – during oral argument the Petitioner's counsel urged the Court to read it that way, and to apply the doctrine of International Shoe Company v. State of Washington, 326 U.S. 310 (1945) to the non-resident spouse. Under the International Shoe case, a state and a state court may exercise jurisdiction over a party if the party has "minimum contacts" with the state. And here, because one of the parties' homes is on the Shakopee Reservation, and because it is undisputed that the Respondent and the parties' children at least have visited that home for periods – though the duration of the visits seems to be disputed – the Respondent and the children may well have had "minimum contacts" with the Reservation. But, whatever might be the application of the International Shoe doctrine to the general jurisdictional reach of Indian tribal governments, the Code does not speak to "minimum contacts". It speaks to residents, and to residence, and it says "all persons", and the Court does not believe that it can ignore those words.

In his Petition, the Petitioner asserts that he, and the Respondent, and the parties' children actually are residents of the Shakopee Reservation, notwithstanding the fact that the Respondent and the children have lived for most

of the last four years in Vancouver, British Columbia, where the Respondent teaches at British Columbia University. The Respondent vigorously, and with very considerable documentary support, denies that she has been a resident of the Shakopee Reservation since long before the parties and their children went to Canada. And each party, in their briefing on the Respondent's motion to dismiss, provided the Court with affidavits attaching quantities of documentary materials: drivers licenses, rental contracts, receipts for the children's summer camps, letters from University administrators, airline travel records, photographs, statements of family friends and professional colleagues, and many other forms of possibly probative materials were filed and have been reviewed by the Court.

Among those materials, the Petitioner emphasizes the fact that, for all the years of their marriage, the parties apparently have signed and filed joint tax returns, both with the United States government and with the State of Minnesota, claiming that the Shakopee Reservation home was their principal residence – and the Petitioner asserts that those returns were not only signed by the Respondent but also were prepared by her. On the other hand, among a large collection of materials, some of which appear to strongly support the conclusion that the Respondent is a resident of British Columbia, the Respondent has furnished the Court with a letter, dated August 25, 2013, addressed to the Canada Revenue Agency and apparently signed by the Petitioner, saying, *inter alia*:

> I currently live at the above address [on the Shakopee Reservation] in the United States. **The children reside with their mother at 4520 Woodgreen Dr. West Vancouver BC V7S 2V1.**
>
> Sheryl R. Lightfoot is entitled to claim both daughters as her dependents on her Canadian Income Tax and Benefit Return.
>
> Affidavit of Sheryl Rae Lightfoot in Response to Motion of Kenneth Jo Thomas

> in Support of Motion Regarding Jurisdiction and Temporary Relief, ¶63.D. and Exhibit MM (emphasis supplied).

Given all this, the Court concludes that it must hold an evidentiary hearing to ascertain the legal residence of the Respondent. Our Rules of Civil Procedure in many ways parallel the Federal Rules of Civil Procedure, and although we are not bound to apply our Rules in exactly the same manner as the Federal Courts apply their Rules, we can and do consider the approach that Federal Courts use in deciding issues that are similar to issues that we confront. *See generally,* Prescott v. SMS(D)C Business Council, 2 Shak. T.C. 104 (Feb. 6, 1996).

Under the Federal Rules, if the Court is confronted with a factual dispute that bears upon its subject matter jurisdiction under Rule 12(b)(1) and/or its personal jurisdiction under Federal Rule 12(b)(2), the District Court has considerable discretion in determining how and when to resolve the dispute. As the United States Court of Appeals for the Second Circuit observed many years ago when it was reviewing a District Court's decision on a factual dispute involving a party's residence where federal jurisdiction depended upon diversity –

> Critical to its resolution is the proper approach to the conflicting factual claims that ordinarily arise when lack of personal jurisdiction is asserted. Fed.R.Civ.P. 12(d) grants a district court judge broad discretion in such cases to hear and decide the motion before trial or to defer the matter until trial. The district court may conduct such a hearing based solely upon papers or by a proceeding in which evidence is taken.
>
> CutCo Industries v. Naughton, 806 F.2d 361, 363 (2nd Cir. 1986).

This Court's Rule 12(c) parallels Federal Rule 12(d), and I conclude that we also have the discretion either to defer resolution of factual questions relating to personal and subject matter jurisdiction at trial, or to resolve them earlier. And,

given the clear need that the parties here have for a definite answer to those questions – given the possibility of multiple trials in multiple jurisdictions that the parties may confront – I think it is this Court's duty is to hear testimony, to receive and weigh all relevant evidence pertaining to the Respondent's residence, and to render a decision, as soon as possible.

Consequently, the Clerk of Court will contact the parties' counsel to arrange a telephone conference with the Court, the purpose of which will be to discuss and schedule an evidentiary hearing on the question of the Court's personal jurisdiction over the Respondent. Because the Respondent likely will be in British Columbia, it may well be that the hearing will be conducted using electronic aids; but, although that may create logistical difficulties, the difficulties should not, in the Court's view, be insurmountable[2].

For the foregoing reasons, **IT IS ORDERED:**

1. That both the Respondent's motion to dismiss and the Petitioner's motion for temporary relief will be taken under advisement until the Court rules on its personal jurisdiction over the Respondent; and
2. The Court will hear testimony and receive evidence concerning the residence of the Respondent as soon as is reasonably practicable.

Dated: December 23, 2013

John E. Jacobson, Chief Judge
Court of the Shakopee
Mdewakanton Sioux Community

[2] In the process of scheduling, the Court intends to seek to confer both with the Court in British Columbia that has the parties before it and with the United States District Court for the District of Minnesota, in order that each forum is apprised of, and updated with respect to, the manner in which each of the three pending cases is proceeding.

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

COUNTY OF SCOTT

STATE OF MINNESOTA

In Re the Marriage of:

Kenneth Jo Thomas,

Petitioner,

and

Sheryl Rae Lightfoot

Respondent.

Court File No. 778-13

MEMORANDUM OPINION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Memorandum Opinion

In the December 26, 2013 Opinion filed in this matter, the Court rejected several arguments made by the Respondent in support of her motion to dismiss, but concluded that an evidentiary hearing should be held with respect to whether the Respondent meets the "residency" requirement that is established by Chapter III, section 1 of the Shakopee Mdewakanton Sioux Community's Domestic Relations Code. That hearing was held on January 31, 2014,[1] and today the Court concludes that while the Respondent is both a domiciliary and a resident of Vancouver, British Columbia, she also was, at the time of the filing of this matter and for more than ninety days preceding the filing, a resident of the Shakopee Mdewakanton Sioux Reservation.

The Court therefore denies the Respondent's motion to dismiss. But, given the pendency of parallel proceedings in the Supreme Court of British Columbia, the Court will stay these proceedings for the time being to ensure, insofar as possible, an orderly and coordinated process in both court systems

[1] The Respondent, her counsel, and a number of her witnesses, participated in the hearing by telephone connection from a site in Vancouver, British Columbia, while the Court, with the Petitioner, his counsel additional counsel for the Respondent, and other witnesses, convened in Courtroom No. 1 in the United States Courthouse in St. Paul, Minnesota. That arrangement, which enormously assisted the process because of the Courtroom's superior sound system, was made possible by the courtesy and generosity of United States District Judge Donovan Frank, and by the technical expertise assiduous planning of Judge Frank's Calendar Clerk, Ms. Brenda Schaffer. The Court is deeply grateful to Judge Frank and Ms. Schaffer..

going forward. In particular, it seems clear, from all the evidence, that the parties' children are, and for more than four years have been, living primarily in British Columbia, where they have attended school and spent the majority of their free time. Therefore, if the British Columbia Supreme Court concludes that it has jurisdiction to hear the matter that is before it, this Court would be deeply loathe to engage in any process relating to the physical or legal custody of the children. And it may be that many, or perhaps all, other issues between the parties should not be decided by this Court. Prudence therefore dictates that this Court should await the jurisdictional decision of the British Columbia Court; and, if that Court concludes that it does have jurisdiction, it would seem appropriate for the two forums then to engage in discussion to seek an orderly way forward.

The basis for this Court's decision with respect to its jurisdiction rests on the legal distinction between domicile and residence. As the United States Supreme Court has observed, a person "can reside in one place but be domiciled in another". Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989). "Domicile" denotes a person's permanent, established home, as distinguished from a temporary, although actual, place of residence. Domicile is the place where a person intends to remain permanently, or for an indefinite length of time. A person may have more than one residence, but can have only one domicile. Atasi v. Atassi, 451 S.E. 2d 371, 374 (N.C. Ct. of App. 1995).

Here, as is set out in detail in the Findings of Fact below, the Respondent has two residences, one in British Columbia, where she is domiciled, and another on the Shakopee Mdewakanton Sioux Reservation. She is employed on a full-time basis as a Professor in the University of British Columbia; in 2012 her appointment, which is a "tenure track" arrangement, was renewed, and she recently was awarded a Canada Research Chair, a highly prestigious position that has a five-year term. Since moving to Vancouver in the summer of 2009, she has spent the large majority of her time in British Columbia, and there is no evidence that she intends to leave. But, again as set forth in the Findings of Fact, throughout her time in Vancouver, the Respondent also has regularly spent time – Christmas holidays, summer holidays, and other times – in a home ("the Reservation Home") on the Reservation of the Shakopee Mdewakanton Sioux Community. She was most recently there in August, 2013. At the time of the filing of the instant proceedings she kept a large closet full of clothes, and a very considerable number of books, in the Reservation Home. And during her recuperation from breast cancer surgery she stayed in the Reservation Home from Selptember, 2012 through the end of February, 2013.

Hence, though the Reservation Home is not the Respondent's domicile (though it clearly is the Petitioner's), it is a residence of the Respondent's; and it is to residence, not to domicile, that Chapter III, section 1 of the Shakopee Community's Domestic Relations Code speaks. Accordingly, as under that section, I conclude that this Court has jurisdiction over both the parties and their marriage.

Findings of Fact.

1. The Petitioner, Kenneth Jo Thomas, is a member of the Shakopee Mdewakanton Sioux Community, a federally recognized Indian tribe.
2. The Respondent, Sheryl Rae Lightfoot, is a member of the Keweenaw Bay Indian Community, also a federally recognized Indian tribe.
3. Both parties are citizens of the United States of America.
4. The parties were married on August 21, 1996, on the Reservation of the Shakopee Mdewakanton Sioux Community, under the authority of a marriage license issued pursuant to Chapter I, section 4.a. of the Shakopee Mdewakanton Sioux Community Domestic Relations Code.
5. The parties jointly own two homes, one at 12585 Riverview Road, Eden Prairie, Minnesota 55347 ("the Eden Prairie Home"), and the other at 4123; Causeway Vista Drive, Tampa, Florida 33615 ("the Tampa Home"). Both the Eden Prairie Home and the Tampa Home presently are being rented to third parties. The Petitioner, Kenneth Thomas, owns a third home at 15215 Dakota Trail West, Prior Lake, Minnesota 55372 ("the Reservation Home"), on lands held in trust by the United States of America within the Shakopee Mdewakanton Sioux Community Reservation.
6. The parties do not own real property in Canada. The Respondent and the parties' children live in a rented home located at 4520 Woodgreen Drive, West Vancouver, British Columbia V7s 2V1.
7. On September 5, 2008, the Respondent signed a letter addressed "To Whom it May Concern" summarizing the status of the parties' three homes, saying "We occupy and divide our time between all three properties".
8. On April 7, 2009, the Respondent entered into a contract with the University of British Columbia pursuant to which she became an Assistant Professor in the University's First Nations Studies Program and its Department of Political Science. The contract created a "tenure track" position, and it was renewed for a second three-year period on January 31, 2012.
9. During the January 31, 2014 evidentiary hearing in this matter, the Respondent testified that when, in 2009, she accepted the appointment to the faculty of the University of British Columbia, it was her intention to move her family to British Columbia. The Court finds this testimony to be credible. The parties and their children moved to Vancouver, British Columbia in July, 2009.
10. During the January 31, 2014 evidentiary hearing in this matter, the Petitioner testified that in 2009 he believed that the family's relocation to Vancouver, British Columbia was a temporary move to facilitate the Respondent's career. The Court finds this testimony also to be credible.
11. During the January 31, 2014 evidentiary hearing in this matter, the Respondent testified that although the University of British Columbia's policy states that "Full-time UBC faculty members

with tenured or tenure-track appointments who are not citizens or permanent residents of Canada are expected to apply for and obtain a Permanent Resident Visa (PRV) in order to maintain their employment in Canada", she continues to work Canada under a temporary work permit, and has not yet applied for Permanent Resident Status in Canada. Her current temporary work permit will expire on June 30, 2015.

12. During the January 31, 2014 evidentiary hearing in this matter, the Petitioner submitted tables prepared by the Respondent summarizing the number of days, including partial days, that each party spent at the Reservation Home, from March 16, 2013 through October 16, 2013. According to the charts, during that period the Petitioner spent 155 days at the Reservation Home and the Respondent spent 34 days at the Reservation Home. .
13. Since the autumn of 2009, the parties' two children have attended school in Vancouver, British Columbia. The Exhibits presented by the parties during the January 31, 2014 hearing establish that when the children have stayed staying at the Reservation Home they have participated in activities with friends, but that the great majority of their out-of-school activities, since the autumn of 2009, have taken place in British Columbia.
14. From the summer of 2009 through some time in 2011, both parties and their children primarily lived in homes that the parties rented in Vancouver, British Columbia. Thereafter, the Petitioner has lived primarily in the Reservation Home, and has visited the Respondent and the children in Vancouver, while the Respondent and the parties' children have primarily lied in Vancouver and have periodically stayed at the Reservation Home.
15. From the summer of 2009 until the commencement of these proceedings the parties and their children regularly spent Christmas holidays, and at least some summer vacation time, at the Reservation Home.
16. From the summer of 2009 through the summer of 2013, when the parties' children were present in the Reservation Home they periodically utilized the services of the Shakopee Mdewakanton Dakota Medical Clinic and Dental Clinic.
17. During the January 31, 2014 evidentiary hearing in this matter, both parties testified that during September, 2012, while they were staying at the Reservation Home, the Respondent was diagnosed with breast cancer. She therefore took a medical leave of absence from the University of British Columbia and underwent three surgeries in Minnesota. During her recovery period, from September, 2012 through February, 2013, she remained at the Reservation Home.
18. In September, 2012, following the Respondent's first surgery, the Petitioner, at the request of the Respondent, travelled to Vancouver, British Columbia with the parties' children, in order that the children could continue their education at the school they had attended since the autumn of 2009.

The Respondent returned to her Vancouver home from the Reservation Home at the end of February, 2013, and shortly thereafter the Petitioner returned to the Reservation Home.

19. During the January 31, 2014 evidentiary hearing in this matter, Professor Allan Tupper, the Head of the Department of Political Science at the University of British Columbia, testified that the Respondent is a permanent, full-time member of the faculty of the University of British Columbia, and that her employment contract obliges her to be present at the University twelve months per year, save only for a one-month authorized leave, and for medical leave. Professor Tupper testified that during the period from August, 2013 through October, 2013 he had normal, daily interaction with the Respondent on the University's campus. Professor Tupper also testified that he did not know where the Respondent spent her holidays. The Court finds this testimony to be credible.

20. During the January 31, 2014 evidentiary hearing in this matter, Professor Glen Coulthard, an Assistant Professor in the First Nations Studies and Political Science Departments of the University of British Columbia, testified that during the period from August, 2013 through October, 2013 he saw the Respondent daily on the University's campus. Professor Coulthard also testified that he was unaware of where the Respondent spent her holidays. The Court finds this testimony to be credible.

21. During the January 31, 2014 evidentiary hearing in this matter, Professor Linc Kesler, the Senior Advisor to the President on Aboriginal Affairs and Director of the Fist Nations House of Learning at the University of British Columbia, testified that the Respondent had recently been awarded a Canada Research Chair, as a result of her very high level of performance at the University. The award involves a five-year commitment. Professor Kesler also testified that the Respondent was obliged to be present at the University twelve months a year; that he had seen the Respondent on the University campus routinely during the period from August, 2013 through October, 2013; and that he expected the Respondent to apply for permanent resident status in Canada. The Court finds this testimony to be credible.

22. During the January 31, 2014 evidentiary hearing in this matter, Professors Dory Nason and Daniel Heath Justice , each of whom teach in the First Nations Studies Program of the University of British Columbia, testified that they had regular contact with the Respondent during the period from August, 2013 through October, 2013; and Professor Justice, who is the head of the First Nations Studies Program, testified that it is very likely that the Respondent ultimately will be given tenure at the University. The Court finds this testimony to be credible.

23. The Petitioner and the Respondent voted in the 2012 federal and state elections at the polling place in Prior Lake, Minnesota that serves the residents of the Shakopee Mdewakanton Sioux Reservation. In the prior two federal and state elections the Respondent voted by absentee ballot.
24. As of October, 2013, the Respondent had a substantial amount of clothing in closets at the Reservation Home, and a large number of books on shelves in an office in the Reservation Home.
25. Both parties testified that during the term of their marriage, the Respondent prepared the parties' tax returns and was in charge of the parties' finances. The Court finds this testimony to be credible.
26. The parties jointly filed income tax returns for the calendar years 1996 through 2012. On the tax returns filed from 1996 through 2005, the parties stated that their home address was 15162 Dakota Trail North, Prior Lake, Minnesota 55372. That home lies on the Reservation of the Shakopee Mdewakanton Sioux Community, and was a predecessor to the Reservation Home. On the tax returns filed from 2006 through 2012, the parties stated that the Reservation Home was their home.
27. With the parties' United States income tax return for 2012, the Respondent filed an Internal Revenue Service Form 2555 "Foreign Earned Income", on which she stated that her foreign address was 4520 Woodgreen Drive, West Vancouver, British Columbia, Canada V7S 2V1. On the Form 2555 the Respondent stated that during 2012 she had been present in the United States for twenty-six days; on line 15d of the form, in response to the question "Did you maintain a home in the United States while living abroad?," the Respondent answered "Yes"; and on line 15e of the form, which says "If 'Yes', enter address of your home, whether it was rented, the names of the occupants, and their relationship to you", the Respondent entered "15215 Dakota Tr W Prior Lake MN 55372 Kenneth Thomas Spouse".
28. During the January 31, 2014 evidentiary hearing in this matter, the Respondent testified that her use of the Reservation Home on the tax returns that the parties filed with the State of Minnesota and the United States government was merely as "a mailing address". In light of the not inconsiderable connection, both in terms of the time she spent there and in terms of the property that she kept within the Reservation Home, the Court does not find that testimony to be credible.
29. On August 25, 2013, the Petitioner signed a letter addressed to the Canada Revenue Agency, stating that "I am the father of [redacted] ... and [redacted] . . I share custody of both children with Sheryl R. Lightfoot. I currently live at [15215 Dakota Trail West, Prior Lake, Minnesot0a 55372] in the United States. The children reside with their mother at 4520 Woodgreen Dr, West Vancouver BC V7s 2V1. Sheryl R. Lightfoot is entitled to claim both daughters as her dependants [sic] on her Canadian Income Tax and Benefit Return." That letter

was prepared by the Respondent, and was signed by the Petitioner, while the Respondent was visiting the Reservation Home.

30. The Respondent holds a driver's license, issued on April 11, 2013, by the Province of British Columbia.

31. The parties jointly own various saving accounts, checking accounts, and investment accounts in the United States and in Canada.

Conclusions of Law

1. In American jurisprudence, a legal distinction exists between the term "Domicile" and the term "Residence". "Domicile" denotes a person's permanent, established home, as distinguished from a temporary, although actual, place of residence. Domicile is the place where a person intends to remain permanently, or for an indefinite length of time. A person may have more than one residence.

2. Chapter III, section 1 of the Shakopee Mdewakanton Sioux Community Domestic Relations Code gives the Community and this Court "jurisdiction over all persons who have resided on its Reservation or on any allotted or tribally purchased lands, or any public domain land designated for Tribal use, for at least 90 days prior to commencing any action for the dissolution of a marriage before the Courts of the Shakopee Mdewakanton Sioux (Dakota) Community".

3. Marriage and residency on Community lands within the Reservation of the Shakopee Mdewakanton Sioux Community meet the requirement of a consensual relationship under Montana v. United States, 450 U.S. 544 (1981).; and the governance of domestic relations of the Community's members and their spouses on the lands of the Shakopee Reservation plainly is central to the health and welfare of the tribe. Jacobs v. Jacobs, 405 N.W.2d 668, 672 (Wis. 1987) , holding that "[d]ivorce, like marriage, is of concern not only to the immediate parties. Both the state and the tribe have interests to be protected."

4. 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 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.

5. The evidence before the Court clearly establishes that the Respondent is, and since the summer of 2009 has been, a resident of and a domiciliary of Vancouver, British Columbia. She intends Vancouver to be her home, and she resides there most of the time. But the evidence also establishes that the Respondent has a residence on the Reservation of the Shakopee Mdewakanton Sioux Community. She regularly has spent time there, including time during the ninety days preceding the filing of this matter; she has availed herself of services there; and she has kept, and still keeps, personal property there. She therefore is a resident of the Shakopee Reservation, as well as of Vancouver, British Columbia.
6. The Petitioner is, and at least since 2011 has been, both a resident and a domiciliary on the Reservation of the Shakopee Mdewakanton Sioux Community.
7. Given the fact that both parties are residents of the Shakopee Reservation, this Court has personal jurisdiction over the parties and subject matter jurisdiction over their marriage.
8. The fact that a Court possesses jurisdiction over parties and a cause of action does not require the Court to exercise all or any of that the jurisdiction. It may well be appropriate for a Court to defer exercise of its jurisdiction over all or part of a cause of action, given the circumstances of a particular case.
9. In this matter, given the strong connection that the children of the parties have to their home in British Columbia, it is plain that if the Courts of the Province of British Columbia conclude that they have jurisdiction over the parties and their marriage, the Court of the Shakopee Mdewakanton Sioux Community should not exercise jurisdiction over questions concerning the physical or legal custody of the children.
10. In this matter, if the Courts of the Province of British Columbia conclude that they have jurisdiction over the parties and their marriage, it may be appropriate for this Court to work with those Courts to allocate the exercise of jurisdiction over other aspects of the issues that are pending between the parties.

ORDER

For the foregoing reasons, and based upon all of the pleadings and materials filed herein, it is ORDERED:

1. That the Respondent's motion to dismiss is denied; and
2. That these proceedings are stayed pending a decision, by the Supreme Court of British Columbia

in the proceedings captioned Sheryl Rae Lightfoot, Claimant and Kenneth Jo Thomas, Respondent, concerning that Court's jurisdiction.

Dated: February 10, 2014

John E. Jacobson, Chief Judge
Tribal Court of the Shakopee Mdewakanton
Sioux Community

IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Pranee Rose, Employee, vs. SMSC Gaming Enterprise, Employer, and Berkley Risk Administrators Company, Administrator.	Court File No. 675-10

Memorandum Opinion and Order

Introduction

This Court's review in workers'-compensation appeals is very narrow. We may hear only appeals concerning "legal issues," and "there shall be no further review of factual decisions made by a hearing examiner."[1] Thus, to prevail, an appellant must demonstrate that the hearing examiner made an error of law. If the court finds such an error, it may remand the matter back to the hearing examiner for additional factual determinations.[2]

In this case, appellant—the employee, Ms. Rose—alleges that the error the hearing examiner committed was relying on the opinion of Dr. Joel Gedan, who served as an

[1] SMSC Workers' Compensation Ordinance, § F.8.
[2] *Id.*

independent medical examiner in this case.[3] The Respondents, the Gaming Enterprise and Berkley Risk Administrators, did not respond to Ms. Rose's appeal.[4] The Court concludes, however, that it is without jurisdiction to overturn the Hearing Examiner's finding of fact that Dr. Gedan's medical opinions were more credible than those of Ms. Rose's doctor, Sarah Benish.

Factual Background

Ms. Rose works at the Gaming Enterprise as a slot service specialist, and has been employed with the Gaming Enterprise since 2000.[5] On October 28, 2007, a slot-machine door fell on the arch of her left foot.[6] She was treated for her injury, and received partial or complete disability payments from November 3, 2008 to June 6, 2009 (except for one week in March 2009). [7] After receiving many treatments for her injury and undergoing a "work hardening" program at Saunders Physical Therapy, she returned to her usual job at the Gaming Enterprise on June 7, 2009.[8]

---

[3] *See* Employee's Brief at 1. Ms. Rose represented herself in this appeal. She also requested review of the denial of coverage for her acupuncture treatments, particularly because she was not given prior notice and attended several acupuncture sessions before learning that they would not be covered and had to pay for them herself. These complaints, for treatments received in 2009, were not within the scope of the Enterprise's denial of her disability benefits from which she appealed, however, and therefore were not properly before the Hearing Examiner and are not within the scope of this appeal. Because those issues were not part of the denial of her claim, Ms. Rose may be able to take them up with the Enterprise informally now.

[4] The Court's scheduling order, giving the Respondents until January 12 to respond to Ms. Rose's opening brief, was mailed to Debra McAlister at Berkley Risk Administration and Kathy Klein at the SMSC Gaming Enterprise.

[5] Hearing Examiner's Findings & Order at 2.

[6] *Id.*

[7] *Id.*

[8] *Id.*

After returning to work, Ms. Rose continued to experience pain in her foot that sometimes radiated up her leg, and began seeing neurologist Sarah Benish in January 2010.[9] In February 2010 Dr. Benish found that Ms. Rose's symptoms were "consistent with a complex regional pain syndrome, otherwise known as RSD."[10] She recommended job restrictions (limiting the amount of time Ms. Rose would be standing without a break), pain medication, and "to reinitiate the acupuncture."[11]

Berkley hired Dr. Gedan as an independent medical examiner,[12] and he examined Ms. Rose in August 2010 and concluded that she did not have complex regional pain syndrome and did not require additional work restrictions, pain medication, or treatments for her injury.[13] Based on Dr. Gedan's report, the Enterprise denied any further benefits or job restrictions to Ms. Rose on August 24, 2010.[14] Ms. Rose appealed the Enterprise's denial of claims to Berkley, and the Hearing Examiner upheld the denial on September 29, 2010.[15]

Analysis

As noted above, under Community law, this Court cannot second-guess the factual findings of the Hearing Examiner. But that is precisely what Ms. Rose has requested. She has asked the Court to find that the Hearing Examiner's decision to find Dr. Gedan's conclusions more credible than Dr. Benish's was wrong. She submitted comments made by

---

[9] *Id.*; *see also* Report of Dr. Sarah Benish (Jan. 21, 2010) at 1.
[10] Report of Dr. Sarah Benish (Feb. 5, 2010) at 1.
[11] *Id.*
[12] Under the Community's Workers' Compensation Ordinance, "[a]n injured Employee must submit to reasonable examinations by a physician or other health care provider if requested by the Administrator." Part D.8.
[13] Dr. Gedan's Report at 11-13.
[14] SMSC Notice of Denial at 3 ("Based upon [Dr. Gedan's] report, no further medical benefits will be paid on this claim. In addition, no further disability benefits, including Permanent Partial Disability benefits, will be paid on the claim.")
[15] *See* Findings & Order of the Hearing Examiner at 3.

Dr. Gedan to an administrative law judge about a proposed change to the Minnesota Department of Labor and Industry's Permanent Partial Disability Schedule. She suggests that in his comment, Dr. Gedan notes that diagnosing complex regional pain disorder is "challenging and controversial," yet he only spent one hour examining her and was able to conclude that she did not have the disorder.[16] In contrast, she met with Dr. Benish, who diagnosed the disorder, five times.[17]

Credibility determinations are factual findings, however, and are therefore outside the Court's authority to review. The only power the Court has with respect to a hearing examiner's factual findings is to remand issues back to the hearing examiner if it determines that the factual record is inadequate.[18] That is not the case here. Ms. Rose does not complain that the hearing examiner failed to consider facts; she simply thinks he got them wrong when he chose to rely on Dr. Gedan rather than Dr. Benish. Under the Workers' Compensation Ordinance, however, even if the Court were to agree that this was so, it could not overturn the hearing examiner's findings of fact.

Accordingly, the decision of the hearing examiner is AFFIRMED and Rose's appeal is DENIED.

So ordered.

February 11, 2011

Vanya S. Hogen, Judge

[16] Employee's Brief at 1.
[17] *See* Reports of Dr. Benish's visits with Rose dated January 21, February 5, April 15, May 13, and July 13, 2010.
[18] Workers' Compensation Ordinance, § F.8.

IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Ronald Brossart, Employee, vs. SMSC Gaming Enterprise, Employer, and Berkley Risk Administrators Company, Administrator.	Court File No. WC-700-11-VSH

Memorandum Opinion and Order

Introduction

This Court's review in workers'-compensation appeals is very limited. We may hear only appeals concerning "legal issues," and can make "no further review of factual decisions made by a hearing examiner."[1] Thus, to prevail, an appellant must demonstrate that the hearing examiner made an error of law. If the court finds such an error, it may reverse or modify the decision or remand the matter back to the hearing examiner for additional factual determinations.[2]

[1] SMSC Workers' Compensation Ordinance, § F.8.
[2] *Id.*

Under the Community's Workers' Compensation Ordinance, no benefits are allowed for injuries caused by pre-existing conditions. In this case, the employee, Ronald Brossart, alleges that the error the hearing examiner committed was finding that Brossart suffered from a pre-existing condition that caused his injury when "there is no medical evidence from before [the date of injury] documenting that the Employee was suffering from any type of pre-existing condition."[3] He also provides some new chiropractic records not in the record below, which he contends demonstrate that the Hearing Examiner improperly rejected the opinion of his chiropractor. The Gaming Enterprise contends that under the Community's Workers' Compensation Ordinance, the existence of a pre-existing condition can be proved by pre- or post-injury evidence, and that the Hearing Examiner correctly found that both were present in this case.[4] And although the Gaming Enterprise concedes that this Court could remand this matter to the Hearing Examiner to consider the additional evidence Brossart included on appeal, it argues that the new evidence doesn't help Brossart's case in any event.[5] The Court concurs with the Gaming Enterprise that pre-injury evidence of a pre-existing condition was not necessary under the Ordinance, and finds that because Brossart neglected to supply the Hearing Examiner with the records on which he now relies, the Hearing Examiner's decision must be affirmed.

Factual Background

Mr. Brossart has been employed at the Gaming Enterprise since 2003, and was working as a valet attendant on March 11, 2011. On that day, he was getting into a vehicle and felt a sharp pain in his low back. He reported his injury to his supervisor and sought

[3] *See* Employee's Brief at 7.
[4] *See* Respondents' Brief at 7.
[5] *Id.* at 5.

treatment that same day at the Shakopee Dakota Clinic. The note from that office visit says "'onset 3-4 day (history of) pain in the left lower pack. Worse today constant 9/10 pain.'"[6]

A few days later, Brossart had an MRI at the St. Francis Regional Medical Center Emergency Department, and—as the hearing examiner found—"the findings indicate[d that] the Employee has degenerative changes in his lumbar spine."[7] Brossart saw a physician's assistant at the Shakopee Dakota clinic several times, and on March 21, 2011, the P.A. reported that "Ronald has evidence of spondylosis and degenerative disc disease at multiple levels of his lumbar spine which is known to cause pain, nerve root inflammation, disc bulging, herniation, spinal stenosis and associated disability."[8] Shakopee Dakota Clinic chiropractor Shirley Himanga also included in her notes of a March 28, 2011 visit with Mr. Brossart that she "advised him that djd [degenerative joint disease] is normal but usually progresses consistently and not only in certain segments, he's had previous injury that has caused spine to djd faster and progress slower."[9]

Brossart also saw another chiropractor, Dr. Cole Lucier, who opined that Mr. Brossart's injury was work-related, but the Hearing Examiner rejected Lucier's opinion because it did not state how many times he had seen Brossart, did not contain any medical history of Brossart, and did not reference Brossart's MRI results or an x-ray that Brossart had undergone.[10] Based on the evidence in the record, the Hearing Examiner concluded that Brossart had a pre-existing condition that caused or contributed to his injury and affirmed the Administrator's denial of coverage.

---

[6] Hearing Examiner's Findings and Order at 2 (quoting clinic note).
[7] *Id.*
[8] March 21, 2011 "Response to WC for Medical Opinion" from David Collins, P.A.
[9] March 28, 2011 Office Visit note from Shirley Himanga, D.C.
[10] Hearing Examiner's Findings and Order at 3-4.

On appeal, Brossart submits additional documents from Dr. Lucier that detail several visits to Dr. Luicier's office (although they do not specifically reference the MRI or x-ray results).[11] In his appeal to the Hearing Examiner, Brossart included only the summary report from Dr. Lucier, and Brossart offers no explanation for why the more detailed records he now provides were not submitted to the Hearing Examiner. The Hearing Examiner sent a letter to Brossart outlining the documents contained in the record he received from the Administrator and gave Brossart three weeks to "provide additional records, reports, documents, statements, or anything else to support or explain [his] claim."[12]

Analysis

Brossart's first argument, that the Hearing Examiner's decision should be reversed because the record contains no pre-injury records of a pre-existing condition, is easily disposed of. The Ordinance excludes coverage for injuries, disabilities, or medical treatment caused or necessitated by a pre-existing condition "including but not limited to a degenerative condition, established by medical evidence *pre- or post-injury*, ..."[13] So it does not matter that the records on which the hearing examiner relied to find a pre-existing condition were created after Brossart hurt his back while working as a valet on March 11, 2011.[14] Post-injury evidence can, as a matter of Community law, establish the existence of a pre-existing condition that precludes coverage.

---

[11] A note from an April 6, 2011 visit simply contains a vague reference to "radiographic analyses[] and other test results."
[12] April 19, 2011 letter from Hearing Examiner to Brossart.
[13] Ordinance at § C.3.n (emphasis added).
[14] Brossart also argues that the Hearing Examiner erred by not taking proper account of the fact that Brossart was injured in the course of his employment. Brossart Brief at 7-8. But the Hearing Examiner made a specific finding that Brossart "sustained an injury to his lumbar

Brossart's second argument, that Dr. Lucier's records demonstrate that Brossart's injury was not caused by a pre-existing condition, must also fail. Brossart notes in his brief that "a review of the Hearing Examiner's file indicated that only the [Lucier's] report and not the records contained in Exhibit I [i.e., the more detailed clinic-visit notes] were considered by the Hearing Examiner."[15] What that means, however, is that despite the fact that the Hearing Examiner gave Mr. Brossart an opportunity to provide "additional records, reports, documents, statements, or anything else to support or explain [his] claim,"[16] the records on which he now wishes to rely were not in the record before the Hearing Examiner.[17] And Brossart provides no reason for his failure to supply them to the Hearing Examiner before his time to do so expired nor any reason for the Court to order the Hearing Examiner to consider them now.

"This Court has ruled on several occasions that a claimant who fails to make her factual case to the [h]earing [e]xaminer cannot use the appeal process to get a second bite at the apple."[18] Furthermore, the Court can only remand matters to a hearing examiner if it determines that the factual record is inadequate. Here, the Hearing Examiner made specific findings to support his conclusion that Mr. Brossart's injury was caused or aggravated by a pre-existing condition,[19] and particularly in the absence of any argument from Brossart about why the new evidence was not submitted to the Hearing Examiner or why it should be

---

spine on March 11, 2011, and this injury occurred in the course and scope of his employment at the SMSC Gaming Enterprise." Hearing Examiner's Findings and Order, Finding 5.

[15] Employee's Brief at 9.

[16] April 19, 2011 Letter from Hearing Examiner to Ronald Brossart.

[17] The Hearing Examiner filed the record of the appeal with the Court on June 28, 2011 and certified that the parties were being served with copies at the same time.

[18] *Kloeppner v. SMSC Gaming Enterprise*, 5 Shak. T.C. 137, 141 (May 17, 2009) (internal citations omitted).

[19] Hearing Examiner's Findings and Order, Findings 8, 10, 12-14.

considered now, the Court declines to remand this matter to the Hearing Examiner to consider Dr. Lucier's notes.[20]

Accordingly, the decision of the hearing examiner is AFFIRMED and Brossart's appeal is DENIED.

So ordered.

January 4, 2012

Vanya S. Hogen, Judge

[20] *Cf. Hanka v. The Hardware*, 343 N.W.2d 46 (Minn. Ct. App. 1984) (remanding unemployment-compensation appeal to Commissioner of Economic Security where appellant employee had attempted to introduce evidence but had been denied the ability to do so and Commissioner's findings were not reasonably supported by evidence).

IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Shakopee Mdewakanton Sioux (Dakota)
Gaming Enterprise,

Plaintiff,

vs. Court File No. 436-00

Leonard Prescott, individually, and as
current and former officer and/or director
of Little Six, Inc.

MEMORANDUM OF DECISION AND ORDER RE:
PLAINTIFF'S MOTION FOR CONTEMPT AND SANCTIONS

This matter comes before the Court pursuant to the Plaintiff, Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise's Motion for Contempt and Sanctions against the Defendant Leonard Prescott pursuant to Rules 24 and 33 of the Shakopee Mdewakanton Sioux Community Rules of Civil Procedure (hereinafter "SMSC R. Civ. P.") The Plaintiff seeks an order: (1) finding Defendant in contempt of court for failure to obey the Court's November 24, 2009 Order to provide discovery (hereinafter "Discovery Order"), (2) imposing civil sanctions in the amount of one thousand ($1,000.00) dollars per day until such time that the Defendant has fully complied with the Discovery Order, (3) awarding attorneys' fees and costs related to Plaintiff's efforts to obtain responsive records (including efforts connected to the Motion for Contempt and Sanctions), and (4) for other relief as the "Court deems just and necessary."

The basis for this current proceeding in this long-standing controversy is this Court's award to Plaintiff of a judgment against the Defendant in the amount of $526,871.36 plus interest and attorneys' fees in the amount of $185,810.08. Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v.

Prescott, 2 Shak. App. Ct. 1 (2006). On November 24, 2009, Judge John E. Jacobson, granted the Plaintiff's motion to compel discovery pursuant to SMSC R. Civ. P. 24, finding that Defendant had failed to meet his burden of demonstrating that the requested discovery is improper. Memorandum Decision and Order, (Nov. 22, 2009) at 2. The Court observed:

> . . . obtaining a judgment often is far easier than collecting it. That may prove to be the case here. But nothing precludes the Plaintiff from using all appropriate discovery mechanisms to determine the facts, and it is the opinion of this Court that the Plaintiff's requests for production of documents are not improper here. It may be that the Defendant possesses no assets in a jurisdiction that permits the enforcement of this Court's judgment. *But it may not be, as well, and the Plaintiff is entitled to learn the answer.*

Id. at 3 (Emphasis supplied.)

This Court proceeded to order that the Defendant "produce for inspection, copying and use at deposition all of the documents and other tangible things requested in Plaintiff's Revised Notice of Taking of Deposition and Request for Production of Documents dated July 7, 2009"; that the Defendant attend a rescheduled deposition and fully answer questions relating to his financial and asset information in order to facilitate the execution of this Court's judgment; and denied the Defendant's motion for an award of fees and costs. Id. at 3.

Plaintiff alleges that subsequent to this Court's order on November 24, 2009 that Defendant has failed to produce any documentation of his financial and asset information for property located outside of the Community's reservation. It is also alleged that "Defendant has reneged on his promise to provide full financial and asset information for property located within the SMSC Reservation." Mem. of Law in Support of Pl's Mot. Contempt and Sanctions at 2 citing Affidavit of Todd M. Roen at Ex. A, ¶ 3. It is further alleged that Defendant only produced "two relatively meaningless documents," consisting of a letter from the Tribal Controller reciting the Defendant's home mortgage balance (without identifying

the mortgaged property) and a screen shot from an unidentified financial institution showing the balance, payment and due dates for an auto loan and a line of credit. Id. at 2 (internal citation omitted). The following documents had been sought from the Defendant by the Plaintiff and were ordered to be provided by the Court:

- Defendant's federal and state income tax returns from 2005 to the present
- Defendant's bank, savings and loan association or credit union statements for 2008 and 2009, for both individually owned and joint accounts, including: any and all checking accounts, savings accounts, certificates of deposit, investment funds and retirement accounts
- Documents relating to securities owned by the Defendant
- Real property ownership documents in which Defendant has an ownership interest
- Appraisals on real property in which Defendant has an ownership interest
- Written instruments recording debts Defendant owes or money owed to Defendant since October 27, 2005, including all settlement or closing papers reflecting mortgages, financing and refinancing of all property in which Defendant has an ownership interest
- Documents reflecting any of Defendant's financial transactions with family members since October 27, 2005
- Books and records of Defendant's income and business affairs since October 27, 2005
- All ownership documents for Defendant's assets worth at least $2,000, including but not limited to motor vehicles, watercraft and recreational vehicles
- All documents showing the name, address and telephone number of anyone with whom Defendant has joint ownership of any real estate, asset or account

Additional Briefing in Support of Pl's Mot. Contempt. and Sanctions, at 4.

Defendant's response to the motion for contempt and sanctions is that, ". . . Plaintiff already has all of the information in regard to Defendant's property within the jurisdiction of the Tribal Court." Supp. Brief in Opp. to Pl.'s Mot. for Contempt and Sanctions at 3. The Defendant does not controvert the Plaintiff's statement that he has only provided two documents, the mortgage statement and the

unidentified financial institution's report regarding an auto loan and a line of credit. This Court's order sustaining the motion to compel discovery explicitly and properly rejected Defendant's argument that discovery should be limited to assets located within the Community's jurisdiction. The Defendant erroneously conflates the issue of permissible post-judgment discovery with that of execution.

The Shakopee Mdewakanton Sioux Community has adopted a three part process for the enforcement of unsatisfied Tribal Court judgments: (1) determining the judgment debtor's assets; (2) once the nature and description of the judgment debtor's assets are determined then a writ of execution may be issued; and (3) a sheriff (or tribal law enforcement officer), judgment creditor or judgment creditor's attorney may enforce the writ. See SMSC R. Civ. P. 30. The present motion for contempt is solely concerned with the first step—discovering the debtor's assets. Rule 30 of the Shakopee Mdewakanton Sioux Community Rules of Civil Procedure, entitled "Execution of Judgments," incorporates by reference the provisions of Rule 69(a) of the Federal Rules of Civil Procedure. See id. ("The provisions of Rule 69(a) of the Federal Rules of Civil Procedure relating to the enforcement of a judgment for the payment of money shall apply to actions before the Court of the Shakopee Mdewakanton Sioux Community.") Federal Rule of Civil Procedure 69(a)(1) provides that "[a] money judgment is enforced by a writ of execution" and that "the procedure on execution . . . must accord with the procedure of the state where the court is located." Therefore, this Court must look to State of Minnesota procedure governing executions of judgments for guidance on the permissible scope of post-judgment discovery. Minnesota Statute section 550.011, "Judgment Debtor Disclosure" sets out the procedure by which a judgment creditor may obtain information regarding, ". . . the nature, amount, identity, and locations of *all* the debtor's assets, liabilities, and personal earnings."[1] (Emphasis supplied.)

[1] The statute, M.S.A. § 550.011, provides in full:

> Unless the parties have otherwise agreed, if a judgment has been docketed in district court for at least 30 days, and the judgment is not satisfied, the judgment creditor's attorney as an officer of the court may or the

Notably, the statute does not limit the judgment debtor's duty to disclose only to assets, liabilities and personal earnings to those within the jurisdiction of the State of Minnesota.

Once a judgment is entered and not satisfied within thirty days, then the judgment creditor's attorney, acting as an officer of the court, or the court itself shall, at the request of the judgment creditor, ". . . order the judgment debtor to mail to the judgment creditor . . . information as to the nature, amount, identity, and locations of all the debtor's assets, liabilities, and personal earnings." M.S.A. § 550.011 (2010). Under Minnesota law, adopted as Community rule of procedure, by operation of Fed. R.Civ.P. 69(a)(1), "[a]ll property, real and personal, including rights and shares in the stock of corporations, money, book accounts, credits, negotiable instruments, and all other evidences of indebtedness, may be levied upon and sold on execution." M.S.A. § 550.10. The debtor is to list the information on a form prescribed by the Minnesota Supreme Court, "and the information shall be sufficiently detailed to enable the judgment creditor to obtain satisfaction of the judgment by way of execution on nonexempt assets and earnings of the judgment debtor." Id. This form is Minnesota Judicial Branch Form JGM301, "Financial Disclosure Form."

Under M.S.A. § 550.011, if the judgment debtor fails to fill out the financial disclosure form and mail it by certified mail to the judgment creditor within ten days then a citation for civil contempt of court may be issued. Id. Additionally, if the debtor is cited for civil contempt of court, and posts cash bail as a result, that bail "may be ordered payable to the creditor to satisfy the judgment." Id. (The

---

district court in the county in which the judgment originated shall, upon request of the judgment creditor, order the judgment debtor to mail by certified mail to the judgment creditor information as to the nature, amount, identity, and locations of all the debtor's assets, liabilities, and personal earnings. The information must be provided on a form prescribed by the Supreme Court, and the information shall be sufficiently detailed to enable the judgment creditor to obtain satisfaction of the judgment by way of execution on nonexempt assets and earnings of the judgment debtor. The order must contain a notice that failure to complete the form and mail it to the judgment creditor within ten days after service of the order may result in a citation for civil contempt of court. Cash bail posted as a result of being cited for civil contempt of court order under this section may be ordered payable to the creditor to satisfy the judgment, either partially or fully.

Community does not have a detention facility to hold the Defendant until he complies, thus the posting of cash bail is not a remedy available to the Tribal Court.)

In this case, Plaintiff did not follow the procedure sets forth in M.S.A. § 550.011, made applicable by operation of Fed. R. Civ. P. 69(a) by incorporation by SMSC R. Civ. P. 30. While the post-judgment discovery requests and the order subsequently granting the Plaintiff's motion to compel, would garner much of the same information required by the Financial Disclosure Form, certain requested items exceed the scope of the form, most notably the request for supporting documentation such as income tax returns, bank statements, real estate documents, business records and ownership documents for assets worth at least $2,000.00. In view of the fact, that the Plaintiff has not properly followed the procedure set out and adopted by SMSC R. Civ. P. 30, the matter is not ripe for a motion for contempt and sanctions. Therefore the Motion for Contempt and Sanctions is DENIED.

However, due to the Court's earlier order granting the motion to compel which has confused the post-judgment proceedings, this Court issues the following orders:

1. The Clerk of Court shall provide a copy of this Memorandum of Decision and Order Re: Plaintiff's Motion for Contempt to counsel of record by facsimile or email and by regular first class U.S. mail.

2. The Defendant shall complete the Financial Disclosure Form which accompanies this Memorandum of Decision and mail it by certified mail to Plaintiff's counsel on or before November 8, 2010. The Defendant shall provide information sufficiently detailed to enable the Plaintiff to obtain satisfaction of the judgment by way of execution on nonexempt assets and earnings of the Defendant. The Defendant must disclose all income and asset information requested by the form regardless of location. If the Defendant claims an exemption from execution for any income or asset, that claim, including citation to legal authority if any, must be separately stated. Such claimed exemption (for example, that per capita distribution payments are not subject to attachment) shall not relieve Defendant of the obligation to disclose such income or assets.

3. If Defendant fails to complete the form in its entirety and mail it by certified mail to the Plaintiff's counsel on or before November 8, 2010, the Court will entertain a renewed Plaintiff's motion to find Defendant in contempt for his failure to do so.

Dated this 26th of October 2010.

Judge Jill E. Tompkins
Pro Tem

IN THE TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Shakopee Mdewakanton Sioux (Dakota)
Gaming Enterprise,

Plaintiff,

vs. Court File No. 436-00

Leonard Prescott, individually, and as
current and former officer and/or director
of Little Six, Inc.

MEMORANDUM OF DECISION AND ORDER RE:
AMENDMENT OF JUDGMENT

This matter comes before the Court pursuant to the Plaintiff, Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise's Motion for Reconsideration dated November 3, 2010 of this Court's October 26, 2010 order denying Plaintiff's motion for contempt and sanctions. Earlier in this case, the Court found that motions to reconsider are not contemplated by the Shakopee Mdewakanton Sioux Community Court Rules of Civil Procedure. *Shakopee Mdewakanton Sioux Community Gaming Enterprise v. Leonard Prescott* (Mem. Opinion and Order, Aug. 6, 2008) 1, 2. The Court found however that:

> Motions to reconsider, as such are not contemplated by this Court's Rules of Civil Procedure. Our Rule 28 does, however, incorporate Rules 59 and 60 of the Federal Rules of Civil Procedure which, respectively, deal with "amendment of" and "relief from" judgments; and a body of federal case law exists under which a motion to reconsider will be treated as a motion for amendment of judgment under Rule 59(e), if the motion is filed [no later than 28 days after the entry of judgment] . . .

Id. at 2. (Internal citations omitted.) In this instance the Plaintiff filed its motion eight days after entry of the order at issue. This Court will consider the motion as a timely motion to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e) as adopted by SMSC R. Civ. P. 28.

In support of its motion, the Plaintiff asserts that:

> The Court did properly find that SMSC R. Civ. P. 30 incorporates by reference the provision of Fed. R. Civ. P. 69(a). However, the Court then pointed to Fed. R. Civ. P. 69(a)(1) as authority for the position that the Court must look to State of Minnesota procedure for guidance on proper post-judgment discovery. . . . The proper procedure for post-judgment discovery is not governed by Fed. R. Civ. P. 69(a)(a), but rather by Fed. R. Civ. P. 69(a)(2).

Pl. Mem. In Support of M. for Recon. 2. This Court agrees with the Plaintiff's reading of Fed. R. Civ. P. 69(a)(1) and (a)(2). Rule 69(a)(1) addresses judgment *execution* procedure whereas Rule 69(a)(2) controls post-judgment *discovery*. 1 Fed. R. Civ. P., Rules and Commentary, Rule 69. The Commentary to Rule 69, notes that the judgment creditor under the post-judgment discovery provision, 69(a)(2), "has the choice of using either the federal discovery rules or state discovery rules. *Id.* citing *In re Clerici,* 481 F.3d 1324, 1336-1337 (11th Cir. 2007), cert. denied, 552 U.S. 1140 (20080; *British Intern. Ins. Co. v. Seguros La Republica, S.A.*, 200 F.R.D., 586, 594 (W.D. Tex. 2000). The Rules Commentary also instructs that, "[t]he scope of post-judgment discovery is very broad to permit a judgment creditor to discover assets upon which execution may be made." Commentary citing *F.D.I.C. v. LeGrand,* 43 F. 3d 163, 172 (5th Cir. 1995) (additional citations omitted.) This Court finds that it erroneously limited Plaintiff's discovery to that permitted by state law in its October 26, 2010 order.

Judge John E. Jacobson, finding that Plaintiff's discovery requests were proper, previously ordered that the Defendant "produce for inspection, copying and use at deposition all of the documents and other tangible things requested in Plaintiff's Revised Notice of Taking of Deposition and Request for

Production of Documents dated July 7, 2009"; that the Defendant attend a rescheduled deposition and fully answer questions relating to his financial and asset information in order to facilitate the execution of this Court's judgment; and denied the Defendant's motion for an award of fees and costs..

Memorandum Decision and Order, (Nov. 22, 2009) at 3.

The following documents are sought from the Defendant by the Plaintiff and were ordered to be provided by the Court under Judge Jacobson's order:

- Defendant's federal and state income tax returns from 2005 to the present
- Defendant's bank, savings and loan association or credit union statements for 2008 and 2009, for both individually owned and joint accounts, including: any and all checking accounts, savings accounts, certificates of deposit, investment funds and retirement accounts
- Documents relating to securities owned by the Defendant
- Real property ownership documents in which Defendant has an ownership interest
- Appraisals on real property in which Defendant has an ownership interest
- Written instruments recording debts Defendant owes or money owed to Defendant since October 27, 2005, including all settlement or closing papers reflecting mortgages, financing and refinancing of all property in which Defendant has an ownership interest
- Documents reflecting any of Defendant's financial transactions with family members since October 27, 2005
- Books and records of Defendant's income and business affairs since October 27, 2005
- All ownership documents for Defendant's assets worth at least $2,000, including but not limited to motor vehicles, watercraft and recreational vehicles
- All documents showing the name, address and telephone number of anyone with whom Defendant has joint ownership of any real estate, asset or account

Additional Briefing in Support of Pl's Mot. Contempt. and Sanctions, at 4.

This Court's order regarding Plaintiff's Motion for Contempt and Sanctions had erroneously restricted Plaintiff's discovery to that permitted by Minnesota state law, M.S.A. § 550.011. The Defendant has however made significant efforts to comply with that order. Def. Supp. Resp. at 3 ("A good faith attempt was made by Defendant to acquire all necessary documentation.") Defendant has served on Plaintiff's counsel and provided the Court with a very large package of financial information apparently in response to this Court's October 26, 2010 order. Plaintiff's counsel in his Reply Memorandum (regarding the motion for reconsideration) asserts that the Defendant has still failed to comply entirely--even in regard to this Court's unduly restrictive discovery order of October 26, 2010. Pl. Reply Mem. 4. Plaintiff asserts that Defendant has not complied in the following ways:

- Failed to complete, sign and date the Financial Disclosure Form
- Failed to list account numbers for his checking and savings accounts at Prior Lake State Bank and SMFCU in response to question 20 of the Financial Disclosure Form
- Failed to list the address for the Fairbault, Minnesota property, as well as the estimated value of the Fairbault, Minnesota and Thunderbird Circle properties in question 23 of the Financial Disclosure Form
- Failed to list motor vehicles, motorcycles, boats, snowmobiles, trailers, etc. in question 24 of the Financial Disclosure Form. Although Defendant lists "LLP Vehicle" there is no indication what LLP refers to or the license plate numbers, market value, or amounts owed for these vehicles.
- Failed to provide a full description of the cash, household goods, life insurance policy, National Housing Authority business, and Jordan Properties, as well as the location, estimated value, amount owed and to whom in question 25 of the Financial Disclosure Form

Id. at 4-5. The Plaintiff continues to press for this Court to find Defendant in contempt for failure to comply with this Court's discovery mandates. More than one year has passed since Judge Jacobson issued his order to Defendant to comply with Plaintiff's discovery requests. Moreover, the Defendant failed to fully comply with this Court's more limited discovery order of October 26, 2010. Nonetheless, while Defendant's compliance has been imperfect and incomplete, he has provided to the Plaintiff with a significant amount of documentation, at least some of which, was included in Judge Jacobsen's discovery order. It has been the rule of this case that this Court's contempt powers "must be used very carefully . . . " *SMSC v. Prescott,* (Mem. Opinion and Order, Aug. 6, 2008) at 3. It also continues to be the hope of this Court that the parties might reach a settlement of the means by which the judgment in this matter may be paid. Defendant appears to be cooperating in providing discovery in a way that he has not done so before. However, there is still a great deal of documentation and specific information that is missing from what Defendant has provided thus far.

The Plaintiff's motion for reconsideration, recast as a motion to alter or amend judgment, is hereby GRANTED. The Court finds however that the Defendant has made significant efforts to comply with the Court's October 26, 2010 discovery order and thus declines to hold him in contempt at this time. In accordance with this ruling, the Court hereby ORDERS THAT:

1. The Defendant shall complete and sign the Financial Disclosure Form and send it by certified mail to Plaintiff's counsel on or before December 4, 2010.

2. The Defendant shall provide to Plaintiff, as previously ordered by Judge Robertson, "for inspection, copying and use at deposition all of the documents and other tangible things requested in Plaintiff's Revised Notice of Taking of Deposition and Request for Production of Documents dated July 7, 2009," those items that remain missing, on or before December 10, 2010.

3. In the event the Plaintiff wishes to reschedule a deposition of Defendant, the Defendant is ordered to attend such deposition and fully answer questions relating to his financial and asset information in order to facilitate the execution of this Court's judgment.[1]

Dated this 23rd day of November 2010.

Judge Jill E. Tompkins
Pro Tem

[1]This Court is aware that Defendant has filed a Complaint and Motion to Enjoin to curtail the interception of SMSC Community Business Proceeds Distribution Funds ordinarily allocated for his benefit pursuant the Writ of Execution issued in this matter. (*Prescott v. Shakopee Mdewanton Sioux (Dakota) Community,* Court file no. 677-10). Without deciding the issue of whether the interception of the Business Proceeds Distribution Funds is lawful, this Court encourages the Defendant to continue to cooperate and to fully disclose his assets so that alternatives to the interception of the funds may be explored as a means of satisfying the judgment.

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

COUNTY OF SCOTT STATE OF MINNESOTA

Estate of Tracy L. Stade-Rapasky, Decedent	Court File No.: 698-11 **FINDINGS OF FACT AND ORDER FOR DISTRIBUTION**

This matter is before the Court on Jeffrey Rapasky's motion for an order authorizing the distribution to him of $212,675.68 representing the balance of the proceeds from the sale of the house and transfer of the land assignment of the property at 14580 Mystic Lake Drive NW, Prior Lake, MN. Jeffrey Rapasky is the decedent's husband and the Estate's personal representative. By order dated April 23, 2012, the Court appointed Jody M. Alholinna as Guardian Ad Litem in this matter for [redacted] the intended beneficiary of a devise of the land assignment and home. Ms. Alholinna submitted a very detailed report of her comprehensive investigation on May 31, 2012. Jeffrey Rapasky, filed a reply to the Guardian Ad Litem's report on June 12, 2012. As asserted by Mr. Rapasky in his reply, the underlying facts in this matter are undisputed and he relies on the facts and documents submitted to the Court at the April 13. 2012 hearing and in the Guardian Ad Litem's report.

FINDINGS OF FACT

The decedent, Tracy Lee Stade-Rapasky, died testate on May 25, 2011 at the age of forty-four due to complications associated with deep venous thrombosis. Decedent was an enrolled member of the Shakopee Mdewakanton Sioux (Dakota) Community (hereinafter "Community"). At the time of her death, she was survived by her spouse, Jeffrey Rapasky, three adult children, Kristina Stade-Rapasky, Krystal Wendland and Jonathan Stade-Rapasky. Her husband is not a Community member but all of her children are. The decedent was also survived by five grandchildren. [redacted] the oldest of her grandchildren, (date of birth July 21, 2004) was seven years old at the time her grandmother passed. [redacted] is an enrolled member of the Community. According to [redacted] mother, Krystal Wendland, [redacted] and the decedent had a special bond. They had a particularly close relationship with one another in significant part because the decedent reportedly raised [redacted] for the first year or more of her life.

Three months prior to her death, on February 4, 2011, decedent executed a will prepared by Attorney Leif Rasmussen. The will was admitted to probate in this Court on July 20, 2011 and on that same day, Jeffrey Rapasky accepted appointment as personal representative of his wife's estate.

At issue is Article 2.2. of Decedent's will which provides in pertinent part:

> 2.2. Land Assignment. In accordance with the laws of the Shakopee Mdewakanton Sioux Community, I give my land assignment and house, commonly referred to as 14580 Mystic Lake Drive NW, Prior Lake Minnesota to my granddaughter, [redacted] if she survives me, if she does not survive me, to my descendants who survive me per stirpes. Should my granddaughter, [redacted] be less than 18 years of age at the time of my death, the land assignment and house

shall be given to my trustee, in trust to be administered as provided in Article Four.

Finally, in Article 5.2 of the will, the Decedent appointed her friend, Lisa Fulton, as trustee.

CONCLUSIONS OF LAW

The Shakopee Mdewakanton Sioux Community Consolidated Land Management Ordinance (hereinafter "Ordinance"), passed by General Council Resolution No. 06-28-02-005 (and as later amended) establishes a comprehensive land management system for the Community. Section 1.2, Purpose. The Ordinance applies to the following property and all interests in such property:

(A) Reservation and trust lands;

(B) Lands acquired of to be acquired by the Community or the United State in trust for the Community;

(C) When specified in this Ordinance, the lands owned in fee by the Community not yet held in trust by the United States;

(D) All buildings and other improvements of a permanent nature now or hereafter located on tribal lands;

(E) Any conveyance, assignment, lease, transfer, or encumbrance of Reservation or trust lands; and

(F) The use, platting and zoning of Reservation or trust lands.

Section 1.4 Application

Pursuant to Section 2.1, the General Council has delegated its authority to the Business Council to assign available residential land in accordance with Chapter 3.

Disposition of available parcels of land for assignment are governed by Chapter 3, Section 3.1, Land Assignment Priorities. In general, "[e]nrolled members of the Community by order of birth shall have priority to receive assignments of land for residential uses . . . " Id. at Section 3.1.1. An exception is made in the situation of an enrolled Community member who is terminally ill, gravely ill or at an advanced age. Id. Such a member may request relinquishment of his or her land assignment. Id. The holder of a valid assignment and lease may relinquish her or his right in assignment and lease to another enrolled member or to the Community—"regardless of the priority lists." Ch., 4.14., Relinquishment. The holder of the assignment must file a request for relinquishment with the Business Council, who must in turn approve the request by a unanimous vote. Id. Thus, had the decedent been aware that she was gravely or terminally ill, she could have submitted a request for relinquishment.

Section 4.12.1, Law Governing Probate Land Transfer, provides that, "When a holder of an assignment and/or Residential Land Lease dies, any proposed transfer of the use interest in the assignment and/or lease, whether by devise pursuant to a valid will, intestate succession or otherwise, shall be subject to Community government approval, as provided in this Ordinance, and governed exclusively by Community law." Section 4.12.4, Posthumous Transfer of Land Assignment, elaborates that, "A posthumous transfer of residential land assignment to an enrolled Community member may be authorized by the General Council regardless of the receiving enrolled Community member's priority on any residential land assignment list . . . ." In order for such a transfer to be proper, certain conditions must be met. Relevant to the case at bar, a written document executed by the decedent and witnessed by two or more competent and

disinterested persons must state the decedent's desire to transfer the land and must name the person to whom the land is to pass. Section 4.12.4.2., Form of Writing. A last will and testament that conforms to the requirements of State of Minnesota law making the request is deemed to be a proper writing as required by Section 4.12.4.2. Id.

In the situation where a decedent's writing or will requests transfer of a residential land assignment and the accompanying improvements to more than one person, "the Business Council may approve recoupment to the decedent's estate for the improvements and disposition of the assignment may be given effect by the General Council provided that reimbursement of the recoupment amount be paid to the Community . . . Recoupment paid to the estate in this manner shall be the property of the estate for dispersal according to the decedent's writing." Section 4.12.4.4, Recoupment. Thus, a decedent's interest in the land assignment and the improvements may be liquidated into cash for distribution to the intended heirs.

Relinquishment is also a method by which an enrolled tribal member may make an inter vivos transfer of his or her assignment and lease to another enrolled Community member. Section 4.14, Relinquishment. This transfer, subject to Business Council approval, may be made without regard to the priority lists. Id. Section 4.14.1 of the Ordinance permits the enrolled living member to request that his or her interest be transferred to an adult biological child who is not enrolled but otherwise eligible for adoption except for the lack of a land assignment from the Community. Id.

Generally, most states, including Minnesota, permit a minor to hold title to real estate. However, state law usually restricts the child's ability to deal with the property. A minor is usually incompetent to sell, rent or mortgage the property and transactions

with a minor are voidable at the election of the minor. Carmina Y. D'Aversa ed., Tax, Estate and Lifetime Planning for Minors 296, ABA Publishing (2006); see M.S.A. § 501B.47, Tomlinson v. Simpson, 23 N.W. 864 (Minn. 1885.) The Ordinance does not explicitly state that only adult Community members are eligible to receive a land assignment. The Ordinance does mention children, but all references relate to "biological *adult* child[ren]." See e.g. Section 4.14.1, Relinquishment by Member to Adult Biological Child Not Enrolled. (Emphasis supplied.) The Court finds that it is implicit in the Ordinance that only adult Community members may hold a land assignment. The Ordinance does not contemplate the devise of a land assignment to a minor Community member either directly or in trust. See Section 4.12.4 ("A posthumous transfer of residential land assignment to an enrolled Community member may be authorized by the General Council . . . .")

The concept of "ademption by extinction" refers to the situation in which the testator's will makes a bequest of property that no longer exists in the testator's estate at death. James A. Casner & Jeffrey N. Pennell, Estate Planning, Vol. 1, 3062 §3.2.5.2. (7th ed. 2006). At common law, if the bequeathed property did not exist at the time of the decedent's death, the gift was "adeemed" and void. Wayne M. Gazur and Robert M. Phillips, Estate Planning: Principles and Problems, 60 (3rd ed. 2012). By General Council Resolution 05-12-90-022, the General Council "authorizes the Tribal Court to apply the Uniform Probate Code ("UPC") to all probate matters filed before it." Section 2-606 of the UPC is a modification of the doctrine of ademption by extinction intended to avoid harsh and unintentional consequences. Casner at 3062. Ademption is meant to be avoided to the fullest extent possible under § 2-606(a)(1), which provides that the

recipient of a specific bequest is entitled to any proceeds from the sale of the subject property: "(a) A specific devisee has a right to specifically devised property in the testator's estate at the testator's death and to: (1) any balance of the purchase price, together with any security agreement, owed by a purchaser at the testator's death by reason of sale of the property . . ." Id.; UPC § 2-606(a)(1). A pecuniary award equal to the value of otherwise adeemed property, applicable "to the extent it is established that ademption would be inconsistent with the testator's manifested plan of distribution or that . . . the testator did not intend ademption . . . ." is made available under § 2-606(a)(6). UPC § 2-606(a)(6). One probate authority noted that, "Local law may specify that sale by a personal representative rather than by the testator . . . works no ademption and the proceeds therefore would pass to the beneficiary . . . ." Casner citing 84 A.L.R.4th 462 (1991). In this situation, it is operation of the Community's law, effectuated by the directive of the Business Council, which forced the personal representative to sell decedent's land assignment and improvements and cause the property to be removed from the probate estate.

The existence of a special and close relationship between the decedent and Adriana is undisputed. It is clear from the express terms of the will and the evidence presented that the decedent wished for the assignment and the home to be passed to [redacted] This interest, seemingly unbeknownst to the testator, was not hers alone to give, but rather subject to the Business Council's approval. Moreover, it may have been impermissible under the Ordinance's land distribution scheme. The Court finds that the land assignment and the home were removed from the probate estate by operation of tribal law. Based on the evidence presented of the uniquely close relationship between

the decedent and the intended beneficiary, this Court finds that the testator did not intend the ademption of the devise of the land assignment and home. Therefore, under U.P.C. § 2-606(a)(6), [redacted] is entitled to receive the net proceeds from the sale of the land assignment and the home.

For the above-mentioned reasons, the motion for an order authorizing distribution of the proceeds from the sale of the land assignment and home located at 14580 Mystic Lake Drive NW, Prior Lake, MN to Jeffrey Rapasky is DENIED. The Court ORDERS that the proceeds at issue are to be distributed to the benefit of [redacted] the intended beneficiary.

Given that [redacted] is only seven years old, she needs an adult to safeguard and oversee expenditure of these funds. The decedent nominated her friend, Lisa Fulton, to be trustee if the land assignment and house could have been put into trust during [redacted] minority.[1] Therefore, if Ms. Fulton is willing to serve as custodian of the funds, Ms. Fulton shall establish an interest earning account at a local federally insured financial institution to deposit the proceeds in. The account funds shall be administered in the manner set forth in Article Four of the decedent's will until [redacted] reaches the age of eighteen. If Ms. Fulton declines to serve as custodian, the Guardian Ad Litem shall establish for [redacted] benefit a custodial account with a local reputable federally insured trust company or equivalent financial institution to receive and administer the

---

[1] Under the Shakopee Mdewakanton Sioux Community Enrollment Ordinance, 6-08-93-001, "Adult Member" is defined as "Any member of the Tribe 18 years of age or older."; see also Shakopee Mdewakanton Sioux (Dakota) Community Domestic Relations Code, Ch. VIII, Adoption, Section 2(a) "A minor means a person less than 18 years of age." The language of Article Four terminating the trust at age eighteen is consistent with the Community's decision that age eighteen is the age of majority.

proceeds in a manner consistent with the provisions of Article Four of the decedent's will.

Dated: June 27, 2012

Jill E. Tompkins, Judge *Pro Tempore*
Shakopee Mdewakanton Sioux (Dakota)
Community Tribal Court