

25950

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

Case No. 25950

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUL 18 2011

Shirley A. Johnson Long
Clerk

CELESTINE and BAHWASUNG MERRILL,

Appellants,

v.

ADAM ALTMAN,

Appellee.

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
BROWN COUNTY, SOUTH DAKOTA

THE HONORABLE EUGENE E. DOBBERPUHL
Circuit Court Judge (Ret.)

APPELLANTS' REPLY BRIEF

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Notice of Appeal filed March 28, 2011

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PRELIMINARY STATEMENT

Throughout this reply brief, the Plaintiffs and Appellants, Celestine and Bahwasung Merrill, will be referred to as “the Merrills.” The Defendant and Appellee, Adam Altman, will be referred to as “Mr. Altman.” The Non-Removable Mille Lacs Band of Chippewa Indians Tribal Court will be referred to as “the Tribal Court.” References to the record on appeal will be denoted with “R,” followed by the page number. References to the Appellee’s Brief will be denoted with “AB,” followed by the page or exhibit number. References to state and tribal court orders will follow the abbreviations used in the Appellee’s Brief, where possible. Any other references or abbreviations will be noted as they appear.

INTRODUCTION

This appeal is about jurisdiction – in other words, whether the Tribal Court had the power to make a custody determination under the Indian Child Welfare Act (“ICWA” or “the Act”). This appeal is not about revisiting what that custody determination should have been. Therefore, the Merrills will respond only to the issues germane to jurisdiction – namely: whether Elias was residing on an Indian Reservation at the time jurisdiction attached; whether the guardianship action constituted a “child custody proceeding” for purposes of ICWA; and whether the guardianship ship order is entitled to full faith and credit.¹

¹ Evidently, Mr. Altman now concedes that Elias is an Indian Child.

A. *Elias was Residing on the Mille Lacs Band Reservation when Jurisdiction Attached.*

Elias was residing on the Mille Lacs Band Reservation when the Merrills initiated their guardianship action. ICWA, of course, does not define residence, but for purposes of a guardianship petition, it can only mean that the child is living within the tribal court's jurisdiction, without regard to domicile, intent, or prior custody proceedings in another jurisdiction.

Mr. Altman's brief does not offer a definition of residence. Presumably, he agrees with the definitions and authorities cited by the Appellants. He also fails to cite any authority for the durational requirement imposed by the Circuit Court. Instead, Mr. Altman argues: (1) that Elias was legally prohibited from residing on the Mille Lacs Band Reservation; (2) that his mother did not comply with South Dakota's statutory requirements for changing his residence; and (3) that jurisdiction cannot attach from an illegal change of residence. AB 8-12.

Mr. Altman's argument is fallacious because it purports to equate residency under ICWA with residency under South Dakota custody law. In reality, these are separate and distinct concepts, just as residency for purposes of immigration law differs from residency for purposes of obtaining a South Dakota driver's license. The United State Supreme Court has also cautioned against applying state law definitions in interpreting federal law because "federal statutes are generally intended to have uniform nationwide

application.” *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989).

Mr. Altman also fails to recognize the implications of the Supremacy Clause on his argument. ICWA, being a federal law, trumps a state residency statute like SDCL § 25-4A-17. Thus, a child can reside on an Indian Reservation for purposes of ICWA without complying with state requirements for relocating the child’s residence. In fact, a child could even reside on an Indian Reservation “illegally” for purposes of state law and jurisdiction could still be proper under ICWA as long as that residence complies with federal law.

This makes sense considering that ICWA is, after all, a child welfare law. The Court need only consider a hypothetical outside the context of ICWA to illustrate the point. If, for example, a child was subject to a custody order in South Dakota and the custodial mother visited relatives in Nebraska and died there, the contention that a Nebraska court could not assert its jurisdiction to protect the child’s welfare would clearly erroneous. That does not mean that the Nebraska court should not, in the end, defer to the South Dakota custody order and return the child to the father. But the ultimate determination of where a child should be placed is not part of the jurisdictional analysis. Mr. Altman confuses the merits with the jurisdictional framework throughout his brief.

For all the foregoing reasons, for those contained in the Appellants' opening brief, and for those that become apparent at oral argument, the Merrills respectfully submit that Elias was residing on the Mille Lacs Band Reservation within the meaning of ICWA.

B. Guardianship Actions are "Child Custody Proceedings" under ICWA

Mr. Altman's analysis of what constitutes a "child custody proceeding" runs afoul of the Act's plain meaning and this Court's prior precedent.

According to Mr. Altman, "the facts of [*In re Guardianship of J.C.D.*] are so vastly different from the case at bar that any claim that [it] controls is misplaced." AB 12. This argument is without merit. *In re Guardianship of J.C.D.* simply sets forth the legal test that applies to the jurisdictional analysis, which of course is derived from the Act itself. See 25 U.S.C. § 1903(1)(i) (defining a "foster care placement" as any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated).

Under the test set forth in *In re Guardianship of J.C.D.*, the guardianship proceedings at issue qualify as a "foster care placement" because (1) the placement would involve the removal of Elias from his father's custody; (2) the placement would put Elias in the home of guardians; (3) the placement would not permit Mr. Altman to have Elias returned to him

upon demand; and (4) the placement would not terminate Mr. Altman's parental rights.

Mr. Altman's brief never squarely addresses the four-part test contained in *In re Guardianship of J.C.D.* Instead, Mr. Altman conjures up his own test. Under his test, ICWA only applies after "a prior removal from the parents." AB 13. This must be true, he argues, because without such a prerequisite, "ICWA would apply in ever single divorce/child custody case in which the child is an Indian" and "any time a child visits a reservation, the grandparents (or other extended family members, unrelated acquaintances, or even strangers) could simply file a guardianship petition in Tribal Court, and the Tribal Court would have exclusive jurisdiction over the child." AB 13.

Mr. Altman's reasoning is unsound. Neither ICWA nor *In re Guardianship of J.C.D.* stands for these propositions. Furthermore, the "Altman test" ignores the plain meaning of the Act, which already excludes custody disputes arising from divorce proceedings, among others. 25 U.S.C. § 1903(1). To quote the Alaska Supreme Court, "[it] is clear, then, that there were certain internal family disputes which Congress intended to except from the provisions of the Act." *A.B.M. v. M.H.*, 651 P.2d 1170, 1173 (Alaska 1982). These exceptions are clearly delineated and the Defendant has not articulated any basis for implying another.

For all the foregoing reasons, for those that appear in the Appellants' opening brief, and for those that become apparent at oral argument, the

Merrills respectfully submit that their guardianship action constitutes a “child custody proceeding.”

C. *The Tribal Court Order is entitled to Full Faith and Credit*

Mr. Altman’s brief does not address full faith and credit under 25 U.S.C. § 1911(d). Instead, Mr. Altman reverts to his familiar tactic of substituting state law for federal law where he finds it more expedient. In doing so, Mr. Altman fails to recognize that the comity statute does not apply to tribal court orders from outside South Dakota. Any suggestion to the contrary would contravene the statute’s plain meaning and this Court’s prior precedent.

Under SDCL § 1-1-25, “no order or judgment of a tribal court *in the State of South Dakota* may be recognized as a matter of comity in the state courts of South Dakota” without satisfying certain conditions. SDCL § 1-1-25 (emphasis added). Therefore, under the statute’s plain meaning, the comity statute does not apply to tribal court orders issued outside South Dakota.

The only case addressing the reach of the South Dakota comity statute is *Red Fox v. Hettich*, 494 N.W.2d 638 (S.D. 1993). In *Red Fox*, a tribal member from Standing Rock obtained a tort judgment in tribal court against a non-member and sought to have the judgment enforced in the Eighth Judicial Circuit. *Id.* at 640. The Circuit Court granted summary judgment to the defendant because Red Fox could not prove that his tribal court order complied with the South Dakota comity statute. *Id.* On appeal, Red Fox

argued that his judgment should be enforced under the federal full faith and credit statute, not the comity statute, because the Standing Rock Sioux Reservation has its headquarters in North Dakota and thus is not a “tribal court in the State of South Dakota.” *Id.*

This Court disagreed and held that the Standing Rock Reservation is a “tribal court in the State of South Dakota” because the Standing Rock Sioux Tribal Court “exercises its jurisdiction throughout the Standing Rock Reservation, including that substantial portion which lies in South Dakota.” *Id.* Therefore, under *Red Fox*, a tribal court order is subject to the comity statute if all or part of the tribal court’s jurisdiction lies within South Dakota.

In this case, the Mille Lacs Band Reservation lies wholly within Minnesota. Therefore, under the plain meaning of SDCL § 1-1-25 and this Court’s holding in *Red Fox*, the comity statute does not apply to this case and the Court must apply a full faith and credit analysis under 25 U.S.C. § 1911(d).

An order is entitled to full faith if the court “had jurisdiction over the parties and the subject matter.” *In re J.D.M.C.*, 2007 SD 97, ¶ 37, 739 N.W.2d 796, 808 (internal citations omitted). In this case, there is no question that the Tribal Court had subject matter jurisdiction over an ICWA case. Apart from ICWA, the Tribal Court also relied upon the Tribe’s child and family protection ordinance, which includes a subsection regarding guardianship. See FFCLO ¶¶ 1-6.

Personal jurisdiction over Mr. Altman was unnecessary under the status exception. The status exception to *in personam* jurisdiction permits a court to adjudicate the status of a person within its jurisdiction even though a party to the action is outside the forum's jurisdiction and cannot be served within the forum. *In re J.D.M.C.* at ¶ 47 (citing *Schaffer v. Heitner*, 433 U.S. 186, 201 (1977)). Child custody "is a typical area where the status exception is applied." *Id.*

Of course, in the typical case the child is actually present within the forum throughout the proceedings. In this case, Elias was present in the forum when the action commenced, which is when jurisdiction attached. *People in Interest of G.R.F.*, 1997 SD 112, ¶ 19, 569 N.W.2d 29, 34 (internal citations omitted). It would be untenable for Mr. Altman to argue that Elias was not present within the forum because he would have been if not for Mr. Altman's contemptuous actions.

For all the foregoing reasons, and for those that become apparent at oral argument, the Merrills respectfully submit that their Tribal Court order is entitled to full faith and credit.

D. Policy Considerations

In closing, the Merrills would like to offer a brief response to some of the "basic fairness" and "public policy" concerns raised by Mr. Altman. AB 13. For the most part, they are completely irrelevant to the jurisdictional analysis and deserve no consideration by this Court. The Merrills would also

point out that he raises these equitable issues with unclean hands after having been found in contempt by the Tribal Court. And finally, he chooses to completely ignore the public policy concerns underlying ICWA, “which basis jurisdiction on the child's relationship with the tribe through residency, domicile, or as a ward of the tribal court.” *People in Interest of G.R.F* at ¶ 17.

As the Tribal Court wrote in its order of April 26, 2010, its jurisdictional finding “did not preordain that Mr. Altman would not receive the custody of his child back.” AB, Appendix Exhibit 10 at 2. To the contrary, if Mr. Altman had participated meaningfully in the Tribal Court proceedings, the guardianship petition might have been dismissed for the very reasons set forth in his brief. Mr. Altman will have every opportunity to raise these arguments again once this case is properly before the Tribal Court. The fact remains, however, that these issues are irrelevant to this Court’s jurisdictional analysis and should have played no part in the proceedings below.

Unfortunately for everyone involved, especially Elias, Mr. Altman chose not to address the merits of this case. Instead, he decided to “take the law into his own hands and come to the Mille Lacs Reservation and pull his son from school in open contravention of an oral directive given to him and the grandparents at the initial hearing in this case.” AB, Appendix Exhibit 9 at 2.

So why did Mr. Altman take such drastic action? Why would he choose not to participate in the Tribal Court proceedings? Section II of his brief might hold the answer. At page 14, Mr. Altman accuses the Merrills of exploiting their “unique status as tribal members.” AB 14. He goes on to argue that “[had he] not been familiar with jurisdictional issues in Indian Country, he may never have seen his child again.” AB 14. The latter part of this statement is pure hyperbole. But the first clause suggests that Mr. Altman might have been motivated by the fear that he, as a non-Indian, could not receive a fair hearing in the Tribal Court.

Mr. Altman’s concerns about the disparate treatment of non-Indians in Indian Country courts are xenophobic and completely unfounded. In fact, the Tribal Court proceedings suggest that Judge Jones conducted a thoughtful analysis of the jurisdictional issues and gave full consideration to Mr. Altman’s objections, even after he had absconded with his son and withdrawn from the proceedings. Given his conduct, this was probably more than Mr. Altman deserved. It should reassure Mr. Altman and this Court that he will receive a fair and impartial hearing – and the opportunity to regain custody of his son – after the guardianship proceedings are remanded to the Tribal Court.

CONCLUSION

For all the foregoing reasons, for those contained in their opening brief, and for those that become apparent at oral argument, the Merrills

respectfully request that the Circuit Court's order be reversed and that this Court give full faith and credit to the Tribal Court Order. In the alternative, the Merrills request whatever other relief the Court deems just.

Dated this 8th day of July, 2011.

Respectfully Submitted:
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CERTIFICATE OF COMPLIANCE WITH SDCL § 15-26A-66(b)

The undersigned hereby certifies that the Appellants' Reply Brief complies with the length and type volume limitation set forth at SDCL §§ 15-26A-66(a) and (b)(2). This brief contains 11 pages and 2,415 words as calculated by Microsoft Word 2010.



Adam G. Bridge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July ¹⁵~~8~~, 2011, two true and correct copies of the Appellants' Reply Brief were served by U.S. Mail upon the Appellee's attorney, Jodi Brown, at the following address: Brown Law Firm, P.C., 103 E. Main St., P.O. Box 108, Aberdeen, SD 57401. ~


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