UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Kimberly Watso, individually and on behalf of C.P., minor child,

Petitioner,

v.

John E. Jacobson, in his official capacity as Chief Judge of Shakopee Mdewakanton Sioux Tribal Court, Henry M. Buffalo, Jr., in his official capacity as Judge of Shakopee Mdewakanton Sioux Tribal Court, Terry Mason Moore, in her official capacity as Judge of Shakopee Mdewakanton Sioux Tribal Court, Shakopee Mdewakanton Sioux Community Tribal Court, Donald Perkins,

Respondents.

Case No. 16-cv-00983 (PJS/HB)

PETITIONER WATSO'S MEMORANDUM IN OPPOSITION TO COMMUNITY RESPONDENTS' MOTION IN LIMINE TO EXCLUDE EVIDENCE AND TESTIMONY OF OR RELATED TO THE NOTICE OF NO TRESPASS ISSUED AGAINST PETITIONER

Petitioner Kimberly Watso opposes the Community Respondents' motion to prohibit Petitioner from offering evidence and testimony at the August 25, 2016 evidentiary hearing related to the Notice of No-Trespass ("No Trespass Notice") issued on October 28, 2015 against Petitioner by the Community's Business Council. Community Respondents' Ex. I (May 31, 2016) (Dck. No. 14).

The motion should be denied because, under federal law detailed in the Verified Petition for Habeas Corpus, tribal court jurisdiction for child protection proceedings is

limited to minor children who are both tribal members and residing on the reservation both at the commencement and during the pendency of the child protection proceedings.

So, contrary to the Community Respondents' arguments, the No Trespass Notice for Ms. Watso is relevant to whether C.P. is a tribal member residing on the reservation now.

ARGUMENT

Although there is a dispute regarding the motion in limine, Petitioner does agree with Community Respondents' statement on page 2 of the memorandum referring to only one question being before the court:

> Whether the Tribal Court of the Shakopee Mdewakanton Sioux Community ("Tribal Court") has jurisdiction over the child custody proceeding involving C.P.?

The specific point of disagreement between the parties regarding the admissibility of the No Trespass Notice is caused by the parties having a different understanding of what federal legal standard applies to determine the answer to the question presented.

I. Scott County has exclusive jurisdiction over non-Shakopee member minor children – which applies to C.P.; Scott County and tribal court have concurrent jurisdiction over Shakopee member minor children – which does not apply to C.P.

The Community Respondents' motion fails to inform the Court that Scott County Child Protection has exclusive jurisdiction over non-Shakopee member minor children including C.P.; whereas, Scott County and the tribal court have concurrent jurisdiction over Shakopee member minor children which does not include C.P.

The origins of this case included Scott County Child Protection initially taking custody of the children C.P. and C.H. C.H. is eligible to be a tribal member because his father is a tribal member. C.P. is not a tribal member because neither of his parents are tribal

members.[1] Then, after the tribal court proceeding was initiated, Scott County deferred – without a hearing – to tribal court jurisdiction over C.P. This was a mutual mistake regarding C.P. because Scott County, under federal limitations on tribal court jurisdiction, has exclusive jurisdiction over non-Shakopee members including C.P.

The Shakopee Domestic Relations Code[2] recognizes that the original jurisdiction of the tribal court is limited by federal law to only apply to minor children who are Shakopee members. The Code's introduction is limited to discussion of tribal customs and traditions being passed onto children of tribal members. SMSC Domestic Relations Code at 69-70. Section 3 recognizes that the tribal court's "original jurisdiction in all proceedings" is subject to preemption by federal law. *Id.* at 73. Section 5 recognizes that child protection proceeding can not be initiated for minor children who are not tribal members:

> Section 5 How to Start Proceedings
>
> a. Petition. Proceeding s under this Chapter shall be initiated by filing a petition.
> b. Residing on the Reservation. For a Tribal-member child residing on the Reservation, a petition may be filed by the Community, a family member, or another Tribal member residing on the reservation.
> c. Residing off the Reservation. For Tribal-member child residing off the reservation, a petition may be filed by the Community, a family member, another Tribal member, or a mandatory reporter under State law.

Id. Finally, Sections 1(d) and 1(e) recognize that it has no jurisdiction over non-Shakopee members except for post-state court proceedings under the Indian Child Welfare Act (ICWA) where non-Shakopee member Indian children may be involved. *Id.* at 71. But even there, Section 1(e) only authorizes the tribal court judges "to intervene on behalf of the

[1] C.P. is a member of Red Lake Nation.
[2] Kaardal Decl. Ex. A.

Community in all matters addressed by the ICWA involving a Tribal Child, whether or not enrolled." *Id.*

Again, Sections 3 and 5 recognize, under federal law, that it has no tribal court original jurisdiction over non-members. Instead, Scott County has exclusive jurisdiction over non-members.

II. The No Trespass Notice is relevant because Shakopee claims its tribal court jurisdiction extends to those non-member children who are "domiciled or temporary located" on the reservation.

The No Trespass Notice is relevant under Federal Rule of Evidence 402 because Shakopee claims its tribal court jurisdiction extends to those non-member children who are "domiciled or temporarily located" on the reservation. This argument arises from Section 2(d) of the SMSC Domestic Relations Code which states for the definition of a "Child in Need of Assistance":

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

However, as explained above, Section 5 limits petitions under the tribal court's original jurisdiction to Tribal Members. The only way a non-member Indian comes under the court's jurisdiction is the result of a state district court order transferring such jurisdiction under ICWA. That's not what occurred here.

Further, even Section 2(d) recognizes the federal limitations on tribal court jurisdiction as to residency. Even the non-member Indian child must be domiciled or

temporarily located on the SMSC reservation which is not the case for C.P. It would only be the case if Scott County District Court under ICWA had transferred the case to tribal court which is not the case here.

Nonetheless, the Community Respondents assert the federal legal standard for tribal court jurisdiction is residency of the non-member Indian child. We disagree. However, if it is the legal standard, then the federal law requires that residency on the reservation of the non-member child must be shown both at the commencement and during the pendency of the tribal court proceedings.

The tribal court proceedings commenced on or about January 22, 2015 and continue to the present. The No Trespass Notice was issued later on October 25, 2015. The No Trespass Notice is relevant to the question of whether C.P. is "domiciled or temporarily located" on the reservation now. If C.P. is not domiciled or temporarily located on the reservation now, the tribal court does not have jurisdiction under federal law under even the Community Respondents' theory. So, the No Tresspass Notice is relevant to the issue of tribal court jurisdiction.

CONCLUSION

The Petitioner believes that the federal law and SMSC Domestic Relations Code are clear that the tribal court has no jurisdiction over non-members. Instead, Scott County has jurisdiction. But, the Community Respondents – notwithstanding the federal law and the SMSC Domestic Relations Code – insist that the tribal court has jurisdiction over non-members who are domiciled or temporarily located on the Shakopee Reservation. Although the Petitioner disagrees with this federal legal standard for tribal court jurisdiction, if the

Court were to accept that standard, the No Trespass Notice is clearly admissible under Rule of Evidence 402 as to the question of whether C.P. is "domiciled or temporarily located" on the reservation now. The motion should be denied.

Dated: August 24, 2016.

/s/ Erick G. Kaardal

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