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)

REDACTED
PETITIONER WATSO'S POST-EVIDENTIARY HEARING MEMORANDUM ON TRIBAL COURT JURISDICTION

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ARGUMENT AND LEGAL ISSUE

Whether the Shakopee Mdewakanton Sioux Community Tribal Court has jurisdiction over the child custody proceeding involving C.P.[1]

The specific point of disagreement between the parties, whether tribal court jurisdiction exists over C.P., is rooted in the applicable federal legal standard regarding limitations of tribal court jurisdiction over non-member and non-domiciled minor children such as C.P.[2]

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

Under 28 U.S.C. § 1360 (Public Law 280), 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, here, does not include C.P.[3] The Respondents reject the facts as applied to the law in the instant case.

The origins of this case started with Scott County asserting custody of the children C.P. and C.H (through the 72-hour hold) because the County has concurrent jurisdiction over Shakopee member children such as C.H. and exclusive jurisdiction over non-Shakopee member children such as C.P. C.H. is eligible to be a Shakopee Community member because his father, Isaac hall is a member. C.P. is not a Community member because neither of his

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[1] Here, there appears to be no disagreement between the parties. *See* Community Resp. Mot. in Limine Memo. at 2 (Aug. 22, 2016).
[2] *See* Verified Petition for Habeas Corpus at ¶¶ 157-242.
[3] *Id.*

parents are Community members.[4] Donald Perkins, C.P.'s father, is a Red Lake Nation member as is C.P. Watso, C.P.'s mother, is not a Native American and is neither a member of the Shakopee Community nor the Red Lake Band of Chippewa Indians.

Regardless, after the Tribal Court proceeding was initiated, Scott County inexplicably transferred C.P. (along with C.H) – without a hearing – to Shakopee Tribal Court jurisdiction. 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. Shakopee Tribal Court has no jurisdiction over C.P. because he is not a Shakopee member (and does not live within the Community's boundaries).

Consistently, the Shakopee Domestic Relations Code[5] recognizes that the original jurisdiction of the Tribal Court is limited by federal law. The Code only applies to minor children who are Shakopee members. The Code's introduction identifies the purposeful limitation with a discussion about the significance of tribal customs and traditions being passed onto children of Community members.[6] Section 3 recognizes that the tribal court's "original jurisdiction in all proceedings" is subject to preemption by federal law.[7] Section 5 recognizes that a child protection proceeding can not be initiated for minor children who are not tribal members (such as C.P.):

> Section 5 How to Start Proceedings
>
> a. Petition. Proceeding s under this Chapter shall be initiated by filing a petition.

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[4] C.P. is a member of Red Lake Nation.
[5] Pet. Ex. G.
[6] SMSC Domestic Relations Code at 69-70.
[7] *Id.* at 73.

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.[8]

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.[9] But even there, Section 1(e) only authorizes tribal court judges "to intervene on behalf of the Community in all matters addressed by the ICWA involving a Tribal Child, whether or not enrolled."[10] Again, Sections 3 and 5 recognize, under federal law, that the Shakopee Tribal Court has no original jurisdiction over non-members. Accordingly, Scott County has exclusive jurisdiction over non-members such as C.P. – consistent with the Shakopee Domestic Relations Code as explained above.

II. The U.S. District Court standard of review on issues of tribal court jurisdiction over non-members such as C.P. is de novo.

The instant matter is not an appeal of the Shakopee Mdewakanton Sioux (Dakota) Community ("Shakopee") Tribal Court order;[11] no procedure provides for it in federal court. Instead, the U.S. District Court conducts a de novo review of the Tribal Court's jurisdiction to protect the civil rights of C.P. and his mother – while C.P. remains wrongfully under the

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[8] *Id.*
[9] *Id.* at 71.
[10] *Id.*
[11] In error since our first filing we referred to the Children's Court as the Tribal Court. To avoid confusion at this stage, we continue to use the misidentifying term.

jurisdiction of the Shakopee Tribal Court. Therefore, all relevant evidence introduced before this Court during the recent evidentiary hearing, regardless of whether it was before the Tribal Court or not, pertains to the instant Petition before this Court and relates to the Court protecting C.P.'s rights and Ms. Watso's parental rights under the Indian Civil Rights Act.

The testimony provided confirms the arguments of the Petitioner. Notably, Shakopee, its agents, representatives, or other officials do not claim C.P. is a Shakopee member. They do not because they cannot; C.P. is a member of the Red Lake Nation. Since C.P. is not a Shakopee member, the Tribal Court does not share concurrent jurisdiction with Scott County regarding matters involving child protection. Regardless of whether the Tribal Court or Scott County believed they had concurrent jurisdiction over C.P. and regardless of whether Scott County relinquished its jurisdiction over to the Shakopee Community, the facts reveal both parties as mistaken. Because C.P. is not a Shakopee Community member, Shakopee cannot assert jurisdiction over C.P. The evidence presented at the hearing reveals that C.P. is not a Shakopee member, and is not domiciled nor is temporarily located within Shakopee's boundaries. Further, the evidence shows that C.P. has been living with his maternal grandmother Kaleen Dietrich for years prior to the unfortunate circumstances that gave rise to the tribal court child protection proceedings.

III. The habeas corpus petition was necessary; facts relied upon by the Tribal Court and Appellate Court reveal the courts mistaken; C.P. is not a Shakopee member nor does he live within that Community's boundaries.

The Court is well-versed in the procedural background regarding the underlying Petition. Briefly, the Petitioner Kimberly Watso, on behalf of her minor child C.P., filed a petition for habeas corpus under 25 U.S.C. § 1303, the Indian Civil Rights Act, to return her

child to her. Watso is not a Native American and is not a member of the Shakopee Community. Likewise, C.P. is not a member of the Shakopee Community, but as a child of a Native American father is a member of the Red Lake Nation. Notably, as the facts revealed in the recent evidentiary hearing, C.P. has not lived within the boundaries of the Shakopee Community to be considered "domiciled" -- nor lived there temporarily. C.P has resided with his maternal grandmother, Kaleen Dietrich for most of his life. Dietrich is not a Shakopee Community member nor has she lived within the Community's boundaries.

Nevertheless, the habeas corpus petition was a necessity because the Shakopee Tribal Court has taken, mistakenly, C.P. under its jurisdiction and custody through Shakopee Community's child protection services. Despite Shakopee Community officials having some knowledge conveyed to them of C.P.'s non-membership and non-residency within the Community's boundaries, the Tribal Court and its appellate court failed to recognize or further investigate the jurisdictional fact issue. If any court has jurisdiction over C.P., it would be Scott County or the Red Lake Nation Tribal Court; however, no proceeding exists in either jurisdiction at the present time to assert their respective jurisdiction.

Since the jurisdictional question rests on a factual determination of C.P.'s residence, at the request of the Petitioner Watso through her attorney, this Court held an evidentiary hearing. The testimony is revealing as it confirms Watso's position, consistent since arguing before the Tribal Court at the very first hearing, that the Tribal Court did not have jurisdiction over C.P. as a non-member.

A. There is no dispute C.P. is not a Shakopee Community member.

First, we begin with the basics. C.P. is a five-year old minor child.[12] And, there is no dispute C.P. is not a Shakopee Community member.[13] Second, no testimony was offered by any witness to contradict these facts. Finally, C.P. is a member of the Red Lake Band of Chippewa Indians. His father, Donald Perkins, is a Native American and a member of the Red Lake Nation.[14] Notably, C.P.'s mother Watso is not a Native American. Moreover, she is not a Shakopee Community member.

B. C.P. did not live within the boundaries of the Shakopee Community at any time, but did occasionally visit.

Did C.P. visit his mother and his minor brother C.H. when Wasto and C.H. lived within the Shakopee Community boundaries? Yes, REDACTED

[12] C.P. was born on July 1, 2011. Hring Transcr. 34:24-25 (Aug. 25, 2016).
[13] Hring Transcr., generally.
[14] Hring Transcr. 36: 18-25; 37: 1; 69: 20-25; 70: 1.

While the dates are not entirely clear, it is evident that Dietrich did not live at any time within the Shakopee Community's boundaries. Further, the Respondents offered no testimony or evidence to contradict Dietrich's testimony.[15] Moreover, the lease agreements offered into evidence reveal who lived with Dietrich. REDACTED

[15] *See e.g.* Hring Transcr. 53:1-22.

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CONCLUSION

The Court should issue the writ because the Shakopee Tribal Court has no jurisdiction over C.P. because he is not a Shakopee member.

Dated: September 23, 2016. MOHRMAN, KAARDAL & ERICKSON, P.A.

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