2011 WL 7153816 (S.D.) (Appellate Brief)
Supreme Court of South Dakota.

CELESTINE and Bahwashung Merrill, Plaintiff and Appellants,
v.
Adam ALTMAN, Defendant and Appellee.

No. 25950.
July 14, 2011.

Appeal from the Circuit Court Fifth Judicial Circuit Brown County, South Dakota
The Honorable Eugene E. Dobberpuhl Circuit Court Judge (Ret.)

Appellee's Brief

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***1 JURISDICTIONAL STATEMENT**

The Appellants, Celestine and Bahwashung Merrill (hereinafter "Merrills"), appeal from the Trial Court's Order dated February 28,2011. Notice of Appeal was filed on March 28,2011. The Defendant and Appellee, Adam Altman (hereinafter "Altman") agrees that jurisdiction over the minor child Elias Justice Merrill Altman is proper and should remain with the South Dakota State Court.

STATEMENT OF THE ISSUE

I. WHETHER THE TRIBAL COURT HAS JURISDICTION OVER THE MINOR CHILD, ELIAS JUSTICE MERRILL.

II. WHETHER THE INDIAN CHILD WELFARE ACT (ICWA) TRUMPS THE RIGHTS OF A NATURAL PARENT.

PREFACE

To maintain consistency in this appeal, Altman will utilize the same abbreviations utilized by the Merrills in their brief. The minor child Elias Justice Merrill Altman shall hereinafter be referred to as "Elias". Appellant's Brief will be referred to as "AB", followed by the page number of the corresponding reference. The Custody Order and Findings of Fact and Conclusions of Law dated November 16,2007 will be referred to as "CT" followed by the page number of the corresponding reference. The Order Adopting Mediated Agreement will be referred to as "OAMA" followed by the page number of the corresponding reference. The Order from the Emergency Hearing held on April 14,2010 will be referred to as "EO" followed by the page

number of the corresponding reference. The Tribal Court Temporary Order will be referred to as "TCTO" followed by the page number of the corresponding reference. The Tribal Court Order will be referred to as "TCO" followed by the page number of the corresponding reference. The Emergency ***2** Hearing Findings of Fact and Conclusions of Law will be referred to as "ETFFCO" followed by the page number of the corresponding reference. The Petition for Guardianship will be referred to as "PG" followed by the page number of the corresponding reference. The Order for Continuance will be referred to as "OC" followed by the page number of the corresponding reference. The Findings of Fact, Conclusions of Law and Order from the Tribal Court will be referred to as "FFCLO" followed by the page number of the corresponding reference.

STATEMENT OF THE CASE

Nature of the Case: A Motion to Recognize Tribal Court Order was filed on October 20, 2011 before the Honorable Eugene E. Dobberpuhl, Circuit Court Judge, Fifth Judicial Circuit.

Procedural History: On November 16, 2007 a Custody Order with corresponding Findings of Fact and Conclusions of Law were entered in the case of Adam Henry Altman v. Natasha Merrill, Civ. 06-350. According to said Order, the parties had joint legal custody of the minor child, with primary physical with Natasha Merrill. This Order further ordered that Natasha Merrill "shall not remove the children from within 20 miles of the 494/694 loop. Neither Natasha nor the children shall reside on reservation or trust land" nor "Natasha shall not relocate the children's primary residence without first giving 30 days' written notice to Adam". CT. 1.

On December 15, 2008 an Order Adopting Mediated Agreement was entered in the case of Adam Henry Altman v. Natasha Merrill, Civ. 06-350. According to said Order, the parties were to continue to have joint legal custody of the minor child with Natasha having the primary physical custody. This Order further ordered "concerning ***3** the issue of any future re-location of Natasha's place of residence, the parties shall simply follow the requirements of SDCL 25-4A-17 through 25-4A-19, without further restriction or presumption". OAMA. 6.

An Emergency Hearing was held on April 14, 2010 and subsequent Order was entered on April 26, 2010. Said Order found that "[Altman] was entitled to legal and physical care, custody and control of the parties' minor child, Elias Altman, following the Defendant's death..." EO, 1. This Order further outlined that the Merrill's could file a motion to intervene if they choose to. EO. 1.

The Merrills filed a Motion to Recognize Tribal Court Order on October 12, 2010. A hearing was held on said motion on October 20, 2011. The Honorable Eugene E. Dobberpuhl denied said motion, holding that the Tribal Court lacked jurisdiction. R. 1. An Order, with accompanying Findings of Fact and Conclusions of Law, were entered on February 28, 2011.

The Merrills appealed said decision.

STATEMENT OF FACTS

Elias Altman was born in Rapid City, South Dakota on XX/XX/2001 to Natasha Merrill and Adam Altman. In 2004 Altman and Natasha's relationship deteriorated and a state court action was commenced to determine the custody of Elias. Since that time, the South Dakota state courts have exercised continuous, active jurisdiction [1] over all custody matters relating to Elias, first in Pennington County, then in Brown County. At all times during this case, Natasha and Altman shared legal custody ***4** of Elias Altman. At all times during this case Altman played an important role in Elias' life and upbringing and had consistent and regular parenting time with Elias Altaman.

Since the initiation of the South Dakota state court action between Altman and Natasha in regards to Elias, there was on-going attempt to forum shop by Natasha. Said forum shopping included actions that were started in Mille Lacs County, Minnesota State Court, Mille Lacs Tribal Court, and the Sisseton-Wahpeton Oyate Tribal Court.

During the South Dakota State Court action, Natasha Merrill was found to be in contempt of the State Court Order numerous times. Said Orders on contempt were for Natasha's refusal to allow Altman his court ordered time with Elias, refusal to allow court order telephone contact with Elias, refusal to move off of the reservation in violation of Court Order, and moving outside of the geographical area as ordered by the Court. The last Court Order involving the action between Altman and Natasha Merrill found Natasha in contempt and further ordered that she not move outside of the Loop of which she had resided without giving the South Dakota Statutory Notice of her intent to do the same. No such notice was ever filed with the South Dakota court.

Natasha Merrill died in a one-vehicle accident on April 6, 2010. The accident occurred in Crow Wing County, Minnesota. Natasha was driving her own vehicle when it left the roadway and overturned, killing Natasha and one passenger, and injuring another passenger. Alcohol was a factor in the accident. At no time on April 6, 2010, or the following six days, did the Merrills inform Altman of Natasha's death.

***5** Following Natasha's death, the Merrills petitioned the Mille Lacs Band of Ojibwe Tribal Court for permanent guardianship on April 12, 2010[2]. Said Guardianship Petition was not properly served upon Altman. Instead, a copy of the Guardianship Petition was faxed to Altman's business office at approximately 11:30 a.m. on April 12, 2010. Included was a Notice of Hearing that was scheduled for the same day, April 12, 2010 at 4:00 p.m.

The Mille Lacs Band of Ojibwe Tribal Court held a hearing as scheduled on April 12, 2010, with Altman making a telephonic special appearance for the limited purpose of challenging jurisdiction. The Tribal Judge indicated to the Merrills and Altman that he needed to research the jurisdiction question and would be putting his ruling into a written order in the near future. On April 14, 2010,[3] the Tribal Court, fully aware of the South Dakota custody action and ruling, and without hearing any evidence, and without proper service on Altman, stripped Altman of his parental rights and granted temporary custody to the Merrills. TCTO. 6.

Simultaneously, the Merrills had contacted Natasha Merrill's attorney, Thomas Linngren, who scheduled an emergency hearing in the South Dakota State Court to hear the issue of guardianship. A hearing on guardianship was held on April 14, 2010 at which the Merrills appeared telephonically with Thomas Linngren and another attorney, ***6** Ms. Stephanie Shook. At said hearing the Merrills informed the Circuit Court that they were requesting temporary guardianship only until the school year was out. The Merrills stated that the only serious detriment to the child is not having the ability to finish the school year there. ET. 18. The Circuit Court ruled that “it's presumed to be in the best interest of a child to be in the care, custody and control of the child's parents. And the parent shall be afforded the constitutional protections as determined by the United States Supreme Court and the South Dakota Supreme Court” ET. 16. The Circuit Court denied grandparents' request for guardianship, finding that Elias belonged with his father, a natural parent. However, the Circuit Court ordered that the Merrills could intervene in the South Dakota state custody case, should they file a petition to do so. ET.19.
With the assistance of local law enforcement, Altman brought Elias home to Aberdeen on April 14, 2010.

To date the Merrills have never sought to intervene in the state court action, and instead pursued guardianship ex parte in the tribal court. Two hearings have been held, and two subsequent orders have been entered in Tribal Court to address the issue of guardianship to the Merrills. In both Orders by Special Magistrate Judge B. J. Jones, the Merrills were requesting guardianship only until the current school year was complete. Further, they represented that the order would only last until the South Dakota court ruled on the issue of guardianship. TCTO. 6 and TCO. 4 and 5. In both Orders, Special Magistrate Judge B. J. Jones granted temporary custody of Elias Altman to the Merrills until the end of the present school term at which time they were to return him to the custody of his father Altman, unless South Dakota determined otherwise. TCTO. 6 and TCO. 4 and 5.

***7** The Merrills petitioned the Brown County Circuit Court to Recognize and Enforce the Tribal Order in Brown County Circuit Court. R 1. On October 14, 2010, a hearing was held before the Honorable Eugene Dobberpuhl and oral arguments were

made by both parties. In addition, Pre-Hearing Briefs were submitted by both parties. Judge Dobberpuhl took the matter under advisement and allowed both parties to submit Post-Hearing Briefs. MT. 33.

The Honorable Eugene Dobberpuhl issued his Memorandum Decision on December 13, 2010. Judge Dobberpuhl held that the Tribal Court did not have jurisdiction over the guardianship action. Id. Judge Dobberpuhl further held that without jurisdiction, the Court could not give full faith and credit to the Tribal Court Order. Id. An Order with accompanying Findings of Fact and Conclusions of Law was entered on February 28, 2011. The Merrills subsequently appealed this decision.

ARGUMENT

I. THE TRIBAL COURT LACKED JURISDICTION OVER THE MINOR CHILD, ELIAS JUSTICE MERRILL ALTMAN AND ICWA DOES NOT APPLY TO THIS CASE.

The Tribal Court purported to exercise jurisdiction over the tribal guardianship matter solely under the Indian Child Welfare Act, 25 U.S.C. §1901 et seq. ("ICWA"). It found no other basis for jurisdiction. TCTO. 3, 4, 5 and 6 and TCO. 2, 3, and 6. Thus, if ICWA does not apply to this case, the Tribal Court order is (1) void in its inception; and (2) not entitled to full faith and credit under ICWA. See 25 U.S.C. 1911.

In order for a case to qualify for exclusive Tribal Court jurisdiction under ICWA, each of the following elements must be satisfied:

***8** (1) the case must involve an Indian child; and

(2) the case must involve a child custody proceeding; and

(3) the child must be resident or domiciled on the reservation.

25 U.S.C. 1911 (a).

Here, only one of these criteria is met: Elias is indeed an Indian child, as defined by ICWA. Neither of the other criteria applies.

A. ELIAS WAS NOT RESIDING ON AN INDIAN RESERVATION.

The Trial Court found that Elias did not reside on the Mille Lacs Band Reservation.

[T]he fact that [Elias] stayed with Petitioners on the reservation for six (6) days in no way establishes the child's residence as the Mille Lacs Band reservation.

Elias's short stay with the Petitioner's [sic] after Natasha's passing is not enough to satisfy 'residence' under the Indian Child Welfare Act, particularly in light of the facts of this case"

ETFCCO, 2 and 3. The language "particularly in light of the facts of this case" refers to the explicit court orders prohibiting Elias' residence on the reservation.

1. ELIAS WAS LEGALLY PROHIBITED FROM RESIDING ON THE RESERVATION.

On August 4, 2009, the Circuit Court, presiding over the custody case, specifically prohibited Natasha Merrill from changing Elias' residence from Anoka, Minnesota to the Mille Lacs reservation. ETFCCO 3. On that date, the Circuit Court held a hearing at which Natasha specifically requested permission to relocate Elias onto the Mille Lacs Reservation. This Court denied her request. Id. No subsequent motion was made regarding relocation, and no subsequent order issued allowing relocation.

***9** The Circuit Court denied Natasha's motion to relocate due to Natasha's history of forum-shopping. ETFCCO. 3. The Circuit Court had authority to do so under SDCL 25-5-13 (a parent may "change [a child's] residence, *subject to the power of the circuit court to restrain a removal which would prejudice the rights of the child"* [emphasis added]). The Circuit Court was concerned that Natasha would make yet another attempt to avail herself of Tribal Court jurisdiction. *Id.* In fact, it was not Natasha, but the Merrills, who chose to circumvent the South Dakota court and apply to the tribal court for permanent guardianship. [4] Although no one could have predicted the tragic events that actually occurred, the Circuit Court's denial of Natasha's request now seems prescient indeed.

2. NATASHA DID NOT COMPLY WITH THE STATUTORY REQUIREMENTS FOR CHANGING ELIAS' RESIDENCE.

The South Dakota legislature has set a clearly-defined protocol by which a child's residence may be changed. SDCL §25-4A-17 through §25-4A-19 provide a statutory framework by which a parent may change the "residence" of the child, where the child is subject to a "custody order or other enforceable agreement." SDCL 25-4A-17. Without following these statutes, a child's residence may not be changed.

One of the requirements set forth in SDCL 25-4A-17 is that the parent desiring to move the child's residence must provide "reasonable notice" to the other party and file proof of such notice with the court, absent a waiver from the court of such filing. Indeed, the Circuit Court specifically "require[d] Natasha to follow the relocation stated set forth ***10** in SDCL 25-4A-17 through 25-4A-19." ETFCCO. 3 (referencing the "Order Adopting Mediated Agreement" dated December 9, 2008).

Thus, in order for Natasha to comply with SDCL 25-4A-17, the Circuit Court's file would have to contain either proof of notice given to Altman, or waiver of such notice. Neither can be found in that file because neither exists. Since Natasha failed to follow the legislature's requirements, Elias' residence could not have changed from Anoka to the Mille Lacs reservation.

3. JURISDICTION CANNOT ATTACH FROM NATASHA'S ILLEGAL CHANGE OF RESIDENCE

In their brief, Merrills made no mention of SDCL 25-4A-17. They make no mention of the Circuit Court orders prohibiting Elias from residing on the Mille Lacs reservation. The Merrills make no mention of the Circuit Courts Finding of Fact No. 13: "If at any time Elias was residing on the Mille Lacs Reservation, he was doing so in violation of this Court's Order." ETFCCO. 3. Instead, the Merrills simply choose to ignore the illegality of Natasha's actions and forum shop - just as Natasha had done repeatedly.

The Merrills do not, and cannot, cite any authority for the proposition that a person can gain residence under ICWA by illegally absconding onto a reservation. The Merrills do not and cannot cite any authority showing that non-custodial grandparents can single-handedly choose their grandchild's place of residence, trumping the custodial parent's choice. The Merrills do not cite these authorities because such authorities do not exist.

***11** There is no question that Natasha ignored the Circuit Court's explicit order, as well as statutory law, when she moved Elias onto the reservation. The question then becomes whether jurisdiction can be gained by an illegal act.

The Merrills' brief provides the answer to this question: "Moreover, it is well settled that jurisdiction attaches at the time an action is filed, and cannot be voided by later events." AB. 8. citing *People in Interest of G.R.F*, 569 N.W.2d 29, 34. The Merrills inadvertently, but correctly, point out the rule that the Circuit Court's jurisdiction was not voided by Natasha's removing Elias to an Indian reservation in violation of this Court's order.

Neither Natasha's alleged relocation onto the reservation, nor the Merrills' actions in hiding Elias from Altman until mere hours before a hearing on their petition for permanent guardianship, invests the Tribal Court with jurisdiction. As stated by the Colorado Supreme Court:

If respondent's conduct respecting the minor child is here approved, we would sanction and reward one who fled from one jurisdiction into another to evade the orderly process of the court which he conceded had jurisdiction, not only with reference to matrimonial differences but also as to the care and custody of his child, and this conduct does not appeal to us as one deserving commendation.

Crocker v. Crocker, 219 P.2d 311 at 315 (Co. 1950).

ICWA's legislative history supports the proposition that ICWA's exclusive jurisdiction provision will not apply unless the child is on the reservation legally. In one of several hearings held to consider the passage of ICWA, the Secretary of the Interior offered the following testimony in his written report: "We believe that [25 U.S.C. §1911(a)] should be amended to make explicit that an Indian tribe has exclusive jurisdiction if the Indian child is residing on the reservation *with a parent who has legal* ***12** *custody."* Report No. 1386, 95th Congress, 2nd Session, U.S. House of Representatives, dated July 24, 1978, p. 31 (emphasis added). Upon further consideration chairman of the Committee on Interior and Insular affairs, Mr. Udall, responded: "Many suggestions of the Departments of Interior, [Department of] Justice, and [Department of Health Education and Welfare] have been included in the text. In fact, some 30 specific suggestions made by Justice and Interior which are contained in their letters in the committee report, twenty-two are now part of the bill. Those not included were considered and found either unnecessary or not meritorious." Cong. Rec., 95th Cong., Oct 14, 1978, p. 38103. This suggests that ICWA's drafters considered Department of Interior's suggestions and found them to be unnecessary-i.e., that residence on a reservation must be legal in order to confer exclusive custody in a tribal court.[5] In this case, of course, such residence was not legal. Accordingly, ICWA does not apply, and cannot be used to gain jurisdiction in the Tribal Court.

B. THE TRIBAL COURT GUARDIANSHIP PROCEEDING WAS NOT A "CHILD CUSTODY ACTION."

The Merrills maintain an unqualified assertion that "guardianship placements qualify as 'child custody proceedings' under ICWA." AB. 6. To support this claim, the Merrills cite two cases, one from South Dakota, and one from Minnesota. However, neither case applies here.

***13** In *In the Matter of the Guardianship of J.C.D.*, 686 N.W.2d 647 (S.D. 2004), the South Dakota Supreme Court found that ICWA applied. However, the facts of *J.C.D.* are so vastly different from the case at bar that any claim that *J.C.D.* controls is misplaced.

In *J.C.D.*, the grandparents had previously been awarded temporary guardianship because the parents were unable to care for this child. The parents did not oppose the temporary guardianship. When the grandparents moved for permanent guardianship, the case ripened and the ICWA analysis applied. In this case, the Merrills never had temporary guardianship. At all times during Elias' life, Altman and Natasha Merrill had been joint legal custodians. At the moment of Natasha's death, Altman obtained sole legal and physical custody of Elias. ETFCCO. 4. (citing *Sweeny v. Joneson*, 63 N.W.2d 249, 251 (S.D. 1954); *Rights to Custody of Child as Affected by Death of Custodian Appointed by Divorce*, 39A.L.R.2d 258.)

Unlike in *J.C.D.*, Elias' custody was never transferred to the Merrills, whether voluntarily or involuntarily. This distinction is crucial, because ICWA requires a prior removal from the parents. It is not sufficient that a potential outcome of a case is that one parent may lose custody of the child - if this were true, ICWA would apply in every single divorce/child custody case in which the child is an Indian.

C. IF J.C.D. APPLIES TO THIS CASE, IT MUST BE OVERRULED.

If this court finds that the present case is to be evaluated under *J.C.D.,* then J.C.D. must be overruled. No hypothetical is needed to demonstrate the basic unfairness and contra public policy of this state than the facts of the case at bar.

The application of *J.C.D.* to the case now before the Court stands South Dakota law on its head. To apply *J.C.D.* here would be to afford every person in the country ***14** with rights superior to those of a child's natural parent. If *J.C.D.* applies here, then any time a child visits a reservation, the grandparents (or other extended family members, unrelated acquaintances, or even strangers) could simply file a guardianship action in Tribal Court, and the Tribal Court would have exclusive jurisdiction over the child. Surely, *J.C.D.* cannot stand for the proposition that the mere presence of an Indian child on the reservation is sufficient to deprive a fit, natural parent of his or her right to determine how his or her child is raised.

II. ICWA DOES NOT TRUMP THE RIGHTS OF A FIT PARENT.

Should this Court find all of the prior arguments unpersuasive, Altman relies on the stated public policy of both the United States of America and South Dakota: A child belongs with his parents.

In *Troxel v. Granville*, the United States Supreme Court ruled that "so long as a parent adequately cares for his or her children (i.e., is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *530 U.S. 57. 68.120 S.Ct. 2054, 2061, 147 L.Ed.2d 49 (2000)* In this case, the Tribal Court, without looking at the Troxel case, injected itself into the raising of a child by a father who unquestionably "adequately cares" for Elias.

The public policy expressed in Troxel was reaffirmed recently by the South Dakota Supreme Court in *In re A.L. and S. L-Z,* 781 N.W.2d 482 (S.D. 2010). Following Troxel, the Court summarized the public policy of this State: "So long as a parent adequately cares for his or her children (i.e., is fit) there will normally be no reason for the State to inject itself into the private realm of the family." *Id., at 485, citing Troxel, supra,* at 530 U.S. 57. A dispute between a child's fit parent and a non-parent is not a dispute between equals. *In re A.L. and S. L-Z* at 488.

Had Altman not been familiar with jurisdictional issues in Indian Country, he may never have seen his child again. The Merrills improperly used their unique status as tribal members to attempt to deprive a good, fit, custodial parent of the right to raise, love, and nurture his child. The Tribal Court inexplicably stripped custody of a child from his fit, custodial parent. Both the Merrills and the Tribal Court ignore the U.S. Supreme Court's maxim that "the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel,* supra, 530 U.S. at 65.

A. EVEN IF ICWA APPLIES, THE TRIBAL COURT'S ORDER IS SO FLAWED THAT IT MUST NOT BE GIVEN FULL FAITH AND CREDIT.

Full faith and credit is not a rubber stamp. Even Special Magistrate B.J. Jones, who is the Tribal Judge dealing with the tribal guardianship matter has acknowledged the same. Special Magistrate B.J. Jones wrote as follows: "several courts have held that §1911 does not mandate blind allegiance to a tribal court order but instead permits a state court to look beyond an order to determine whether the issuing court had jurisdiction over the subject matter and parties when it entered the order...." Jones, B.J. et al., *Indian Child Welfare Handbook (2d ed.),* p. 111. Even if the Court were to somehow find that ICWA applied, and that the Tribal Court Order was entitled to full faith and credit, further inquiry is required before adopting the Tribal Court Order as an order of this state.

Before the Court may grant full faith and credit to the Tribal Court Order, the Merrills must show that the order meets the following standard:

***16** SDCL § 1-1-25. When order or judgment of tribal court may be recognized in state courts. 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, except under the following terms and conditions:

(1) Before a state court may consider recognizing a tribal court order or judgment the party seeking recognition shall establish by clear and convincing evidence that:

(a) The tribal court had jurisdiction over both the subject matter and the parties;

(b) The order or judgment was not fraudulently obtained;

(c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing;

(d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and

(e) The order or judgment does not contravene the public policy of the State of South Dakota.

(2) If a court is satisfied that all of the foregoing conditions exist, the court may recognize the tribal court order or judgment in any of the following circumstances:

(a) In any child custody or domestic relations case; or

(b) In any case in which the jurisdiction issuing the order or judgment also grants comity to orders and judgments of the South Dakota courts; or

(c) In other cases if exceptional circumstances warrant it; or

(d) Any order required or authorized to be recognized pursuant to 25 U.S.C., § 1911(d) or 25 U.S.C., § 1919.

The burden to make this showing lies on the one seeking enforcement of the order. Such a showing must be made by clear and convincing evidence. *State ex rel. Joseph v. Redwing,* 429 N.W.2d 49 (S.D. 1988), cert. denied 109 S.Ct. 2071; *Application of DeFender,* 435 N.W.2d 717 (SD 1989).

***17 1. SUBJECT MATTER AND PERSONAL JURISDICTION.**

Altman denies that the Tribal Court has subject matter jurisdiction over this matter.

a. Subject Matter Jurisdiction.

In the Tribal Court Order, Special Magistrate Jones recited a plethora of reasons why the Tribal Court had subject matter jurisdiction. They will be addressed individually:

i. The Tribal Court first claims subject matter jurisdiction under 8 MLBSA §702 and M[ille] L[acs] B[and] Ordinance 01-96, Section 25.01. Note that 8 MLBSA §702 does not exist.

No copy of MLB Ordinance 01-96 is available to Altman.

ii. The Tribal Court also claims that ICWA provides for subject matter jurisdiction. As detailed extensively above, ICWA does not apply, the Tribal Court is without jurisdiction to take up the matter, and its rulings are void *ab initio. Cale v. Union County Bd. Of County Com'rs,* 769 N.W.2d 817 (S.D. 2009).

iii. The Tribal Court further relies on Minnesota statutory law in establishing jurisdiction. The Tribal Court knows full well that Minnesota state law does not apply in Tribal Court. [6] Even if it did, it would not apply here, as "nothing in [the Minnesota Indian Family Preservation Law] shall be construed as conferring jurisdiction on an Indian tribe." Minn. Stat. §260.755, subd. (20).

***18** iv. The Tribal Court relies on the vague assertion that "the supremacy clause of the United States Constitution" prevents the UCCJEA from being applied. The UCCJEA has never been enacted by the Mille Lacs Band. TCTO. 4. (See "Temporary Order" of the Tribal Court dated April 14, 2010, p. 4.) The only persons ever to have claimed application of the UCCJEA in tribal court is the Merrills. *Id.*

b. PERSONAL JURISDICTION

Altman has no "minimum contacts" with the Mille Lacs reservation In fact Altman has made no contact with the reservation for years. Although the Tribal Court claims to exercise jurisdiction over Altman through the minor child's illegal presence on the Mille Lacs reservation, the Tribal Court fails to recite even one contact Altman has had with the Mille Lacs reservation in the past 11 years. This is, of course, because no such contacts exist. The Tribal Court simply chooses to ignore this fact by conveniently neglecting to apply even the most basic *"International Shoe"* type of analysis. See, *International Shoe v. Washington*, 326 U.S. 310 (1945).

2. THE TRIBAL COURT ORDER WAS OBTAINED BY FRAUD.

The Tribal Court order relied extensively on Elias' illegal presence on the Mille Lacs reservation in determining its initial jurisdiction. The Merrills fraudulently concealed the fact that they had improperly removed Elias from Altman and skirted him away to the jurisdiction of their choice.

***19** The Merrills committed fraud at every stage of the proceeding, alternating between seeking permanent guardianship or temporary guardianship, as they determined best fit their chances of success. In their original Petition for guardianship, the Merrills sought "Permanent" Guardianship. PG, p.2. Then, as it became clear that both the Tribal Court and the South Dakota court were questioning the need for permanent guardianship, Merrills changed their request and asked for guardianship only until the matter could be heard in the South Dakota court. ET. 7, 11, and 12 and TCT0.6.
Once the Merrills received their purported temporary guardianship in Tribal Court, they again changed their mind and requested permanent guardianship. This caused even the Tribal Court some consternation. OC. 1. This consternation was quickly forgotten, with Special Magistrate Judge Jones purporting to grant full, permanent guardianship to the Merrills a few short weeks later. FFCL. 5.

The Tribal Court also found that the Merrills obtained a "verbal guardianship over the children by their mother because Natasha Merrill was not always present as she was working." FFCL. 2. In fact, Natasha was apparently in and out of alcohol treatment, a fact which was intentionally kept from Altman and the courts.

3. IMPARTIAL ADMINISTRATION.

To this date, Altman has never been properly served with the Petition, a summons, or any other Tribal Court commencement documents. Essentially, the Tribal Court purports to terminate Altman's parental rights without even the formal commencement of a case.

***20** Moreover, a mere five (5) hours after receiving a faxed notice that Altman child's mother was dead and that Merrills were seeking to take away his child, the Tribal Court gave custody of his child to the Merrills. No inquiry was made as to the relative fitness of the parties. No inquiry was made as to the best interests of the child. No recognition was given to the eight years of

continuous administration and jurisdiction by the South Dakota courts. Instead, the Tribal Court summarily removed the child from his fit, but non-Indian parent, and placed the child with the Indian grandparents.

These actions are not those of an impartial tribunal. The Tribal Court's procedures do not even begin to assure fair and impartial administration of justice.

4. APPLICATION OF ITS OWN LAWS.

In the whole of its Findings of Fact and Conclusions of Law, the Tribal Court fails to ever mention 8 MLBSA Ch.13, Subchapter 5, the Mille Lacs Band guardianship law. 8 MLBSA §§3201 -3211. The Mille Lacs Band guardianship law specifically requires that a Guardianship Report be requested and further, that no determination can be made on a petition for guardianship until the report has been completed. 8 MLBSA § 3208.

The Tribal Court chooses to completely ignore its own laws; specifically as follows:

a. No "guardianship report" was ever ordered, despite 8 MLBSA §3208 which provides that "Upon the filing of a guardianship petition, the court shall immediately request that the Social Services Department or other qualified agency conduct a guardianship report on the proposed guardian and report on the ***21** proposed ward. The guardianship report shall contain all pertinent information necessary to assist the court in determining the best interests of the proposed ward. The Tribal Court awarded permanent guardianship of a minor child without ever having ordered this guardianship study.

b.Although expressly forbidden by statute, the Tribal Court made its initial determination on the Petition for guardianship mere hours after it was filed - ignoring the minimum 10-day requirement contained in 8 MLBSA §3208(b).

c.The Tribal Court failed to perform the first step of ICWA: notification of the Indian child's tribe. 25 USC §912(a). Where an Indian child's tribe is not notified, the proceedings are invalidated absent waiver by the Indian child's tribe. In re Custody of C.C.M., 202 P.3d 971 (Wash. 2009).

d. Furthermore, the Tribal Court heard no evidence from any expert witness, as required by 25 U.S.C §1912(e).

e. The Tribal Court awarded guardianship to the Indian grandparents, despite the undeniable fact that Elias was not and has never been a minor "who ha[s] no guardian legally appointed by will or need." 8 MLBSA §3201. As the tribal court was made aware, Elias has never been without a fit legal guardian-i.e., his natural parents.

f. At the very first hearing, Special Magistrate Jones acknowledged that he had a conflict of interest and was prohibited from hearing this matter as the Mille Lacs Tribal Court. TCTO. 1. Nevertheless, and despite Altman's request for recusal based on such conflict, Special Magistrate Jones maintained his supervision of the case. After Altman asked Special Magistrate Jones to recuse himself, Special Magistrate Jones sentenced Altman to jail and stripped him of legal custody of Elias. OC. 3.

g. The matter of Altman's tribal court-imposed jail sentence is not to be treated lightly. Since the US Supreme Court decided *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), it has been the universally-recognized law of the land that tribal courts may not exercise criminal jurisdiction over non-Indians.

h. Finally, the Court awarded custody of Elias to the Merrills finding "that it is in the best interests of the child to reside with Petitioners...." FFCLO. 4. This standard is absolutely incorrect. Under ICWA, the only way to remove a child from his parent is by making "a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C. §1912(e).

***22** The Tribal Court appears to pick and choose only those parts of the federal law that support its pre-ordained decision to place Elias with his Merrills. The Tribal Court alternately finds that ICWA applies as to jurisdiction, but not as to notice to the Indian child's tribe. It finds that all guardianships involving Indian children are subject to ICWA, and then declines to apply ICWA's placement preferences. It finds that Elias is to be placed with Merrills because it is "in the best interests of the minor child" even after Special Magistrate Jones has written and published the following:

A party, be it a state social services entity or a private party, attempting to effect a foster care placement of an Indian child...must satisfy the standards of proof established by the ICWA.... A party seeking to accomplish a foster care placement of an Indian child must establish (1) that active efforts have been made to provide remedial and rehabilitative services designed to prevent the breakup of the Indian family but which have been unsuccessful and (2) clear and convincing evidence, supported by the testimony of qualified expert witnesses, that the continued custody of the child by the parent...is likely to result in serious emotional or physical damage to the child.

Jones, B.J., et al. *Indian Child Welfare Handbook (2nd ed.)* p. 90-91.

5. PUBLIC POLICY OF THE STATE OF SOUTH DAKOTA.

Should this Court find all of the prior arguments unpersuasive, Altman relies on the stated public policy of South Dakota: A child belongs with his parents.

"In *Troxel v. Granville,* the United States Supreme Court ruled that "so long as a parent adequately cares for his or her children (i.e., is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *530 U.S. 57, 68,120 S.Ct. 2054,2061,147 L.Ed.2d 49 (2000).* In the case at ***23** bar, the tribal court ignored the *Troxel* case and injected itself into the raising of a child by a father who unquestionably "adequately cares" for Elias.

The public policy expressed in *Troxel* was reaffirmed recently by the South Dakota Supreme Court in *In re A.L and S. L-Z,* 781 N.W.2d 482 (S.D. 2010). Following *Troxel,* the Court summarized the public policy of this State: "So long as a parent adequately cares for his or her children (i.e., is fit) there will normally be no reason for the State to inject itself into the private realm of the family." *Id.,* at 485, citing *Troxel, supra,* at 530 U.S. 57. A dispute between a child's fit parent and a non-parent is not a dispute between equals. *Id* at 488.

CONCLUSION

For the reasons stated above, Altman hereby requests this honorable Court for an Order:

1. Affirming the circuit court Order dated February 28, 2011, that jurisdiction over the minor child should remain with the South Dakota State Court, and to further declining to recognize and enforce the Mille Lacs Tribal Court judgment dated September 7, 2010; and

2. Finding that at all times since Natasha Merrill's death on April 6, 2010, Altman has had and continues to have sole legal and physical custody of Elias Justice Merrill Altman; and

3. Finding that each and every action of the Mille Lacs Band tribal court as it relates to the purported guardianship is void ab initio, as the tribal court has never properly exercised jurisdiction over this matter; and

4. Awarding Altman all attorney's fees and costs associated with defending this matter; and

***24** 5. For such other and further relief as this court deems just and appropriate.

Dated this 11th day of July, 2011.

Appendix not available.

Footnotes

1 The custody case was highly contested, bitter and protracted. The parties were before the Court or a mediator on a regular basis.

2 This Petition is how Altman discovered that Natasha Merrill had passed away. This was the first contact made with Altman since Natasha's death.

3 The same day that the emergency hearing was held in the Fifth Judicial Circuit, Aberdeen, South Dakota wherein custody was given to biological father.

4 Note that Celestine Merrill, Plaintiff/Appellant herein, was employed by the Mille Lacs Tribal Court at the time of the filing of the guardianship application.

5 First, the text of §101(a) (25 U.S.C. §1911(a)) did not change between the July 24, 1978 and October 14, 1978 reports. Second, the drafters could not possibly be contemplating that ICWA would provide exclusive jurisdiction to the tribal court where the child was *illegally* on the reservation.

6 Special Magistrate Jones is the author of numerous publications relating to jurisdictional issues in Indian country.

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