25950

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

Case No. 25950

CELESTINE and BAHWASUNG MERRILL,

Appellants,

v.

ADAM ALTMAN,

Appellant.

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

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

APPELLANTS' BRIEF

Adam G. Bridge
Sisseton-Wahpeton Oyate
Public Defender's Office
P.O. Box 746
Agency Village, SD 57262
Counsel for Appellants

Jodi L. Brown
Brown Law Office, P.C.
103 E. Main St.
P.O. Box 108
Aberdeen, SD 57401
Counsel for Appellee

Notice of Appeal filed March 28, 2011

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PRELIMINARY STATEMENT

Throughout this 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 motion hearing transcript will be denoted with "MT," followed by the page number. References to the emergency hearing transcript will be denoted with "ET," followed by the page number. Any other references or abbreviations will be noted as they appear.

JURISDICTIONAL STATEMENT

This appeal is taken from an order denying the Merrills' Amended Motion to Recognize Tribal Court Order. R 33, 67. Jurisdiction is proper pursuant to SDCL § 15-26A-23(4).

The Honorable Eugene E. Dobberpuhl signed the order on February 28, 2011. R 67. The Brown County Clerk of Courts filed and entered the order on the same day. R 67. The Merrills filed a timely Notice of Appeal on March 28, 2011. R 69.

Pursuant to SDCL § 15-26A-10, the Merrills appeal all matters appearing on the record relevant to the issue presented.

ISSUE

1. Did the Tribal Court have jurisdiction over the Merrills' guardianship action?

The Circuit Court held that it did not.

Case Law: *In re Guardianship of J.C.D.*, 2004 SD 96, 686 N.W.2d 647; *People in Interest of G.R.F.*, 1997 SD 112, 569 N.W.2d 29; *Wagner v. Truesdell*, 1998 SD 9, 574 N.W.2d 29

Constitutional and Statutory Provisions: 25 U.S.C. §§ 1903(1), 1903(4) 1911(a), and 1911(d).

STATEMENT OF THE CASE

This is an appeal from the Brown County Circuit Court. This Court appointed the Honorable Eugene E. Dobberpuhl, a retired judge from the Fifth Judicial Circuit, to hear and decide the case. R 25.

Judge Dobberpuhl was asked to rule on a motion to recognize and enforce a Tribal Court order giving the Merrills guardianship over their grandson. Judge Dobberpuhl denied the motion, holding that the Tribal Court did not have jurisdiction.

STATEMENT OF FACTS

This case has a complex history involving two jurisdictions. However, everything leading up to this appeal, regardless of where it occurred, concerns the custody of Elias Altman ("Elias").

Elias is the child of Natasha Merrill ("Ms. Merrill") and Mr. Altman. Elias is an enrolled member of the Sisseton-Wahpeton Oyate. MT 27. Ms.

Merrill died unexpectedly on April 6, 2010. R 67. At the time of her death, Ms. Merrill and Mr. Altman shared joint legal custody of Elias pursuant to a South Dakota custody order. Id. Ms. Merrill had primary physical custody while Mr. Altman had visitation rights. Id.

After Ms. Merrill's death, and while Elias was living with them, the Merrill's initiated guardianship proceedings in Tribal Court. Tribal Court Findings of Fact, Conclusions of Law and Order at 1, attached as Exhibit 2. The Tribal Court held an initial hearing on April 12, 2010. Id. Mr. Altman appeared by telephone to contest jurisdiction. Id. The Tribal Court took Mr. Altman's objections under advisement and ordered that Elias was to remain with his grandparents until the court could decide whether it had jurisdiction. Id.

On April 14, 2010, the Brown County Circuit Court held an emergency custody hearing. ET 2. The record reflects that Mr. Altman appeared personally and the Merrills appeared telephonically. Id. Both sides presented argument and the Merrills advised the Circuit Court of the Tribal Court proceedings. ET 20. The Circuit Court held that Mr. Altman was entitled to immediate custody of his son. ET 18.

The Tribal Court also entered an order on April 14, 2010, holding that it had jurisdiction over the guardianship action under ICWA. Tribal Court Findings of Fact, Conclusions of Law and Order at 1. The Tribal Court also awarded the Merrills temporary custody pending further proceedings. Id.

Shortly thereafter, Mr. Altman came onto the Mille Lacs Band Reservation, removed Elias from school, and took him to Aberdeen, South Dakota. After learning of this, the Merrill's filed a motion in Tribal Court to have Mr. Altman held in contempt. Order of Contempt at 1, attached as Exhibit 3. The Tribal Court found Mr. Altman in contempt for "[taking] the law into his own hands" and "[pulling] his son from school in open contravention of an oral directive given to him and the grandparents at the initial hearing." Id. at 2.

The Merrills persisted in their guardianship action. On May 14, 2010, they amended their petition to seek permanent guardianship. Tribal Court Findings of Fact, Conclusions of Law and Order at 1. On August 27, 2010, the Tribal Court held a hearing on their petition. Id. at 2. According to the Tribal Court's findings of fact, Mr. Altman was served with notice of the hearing but elected not to participate. Id. at 2,4. After taking evidence from the Merrills, the Tribal Court awarded them permanent guardianship subject to Mr. Altman's right to reasonable parenting time. Id. at 5.

On September 14, 2010, the Merrills filed a *pro se* Motion to Recognize Tribal Court Order in Brown County Circuit Court. R 1. On October 14, 2010, the Merrills filed an Amended Motion to Recognize and Enforce Tribal Court Order. R 31.

On October 20, 2010, a hearing was held before Judge Dobberpuhl. The Merrills argued for recognition and enforcement of the Tribal Court

guardianship order under ICWA's full faith and credit clause. Mr. Altman raised various arguments in opposition. Judge Dobberpuhl took the matter under advisement and promised to issue a decision after all matters were fully briefed. MT 33.

On December 13, 2010, Judge Dobberpuhl issued a Memorandum Decision denying the motion. R 56. Judge Dobberpuhl held that the Tribal Court did not have jurisdiction over the guardianship action. Id. Judge Dobberpuhl further held that without jurisdiction, he could not give full faith and credit to the Tribal Court order. Id.

The Memorandum Decision was eventually converted into an Order with accompanying Findings of Fact and Conclusions of Law. R 62, 67. The Merrills filed several objections, and this appeal followed. R 59, 69.

ARGUMENT

I. THE TRIBAL COURT HAD JURISDICTION UNDER ICWA.

The Merrills respectfully submit that ICWA controls this case. ICWA gives a tribal court exclusive jurisdiction over a child custody proceeding involving an Indian child residing on an Indian reservation. 25 U.S.C. § 1911(a).

ICWA sets forth three jurisdictional prerequisites: (1) the case must involve an Indian child; (2) the case must involve a child custody proceeding; and (3) the child must be residing upon an Indian reservation. 25 U.S.C. 1911(a). All three jurisdictional prerequisites were met in this case.

A. Elias is an Indian Child

Elias is an Indian child within the meaning of ICWA. ICWA defines an Indian child as an "unmarried person who is under eighteen years of age" who is a "member of an Indian tribe." 25 U.S.C. §1903(4). Elias is an enrolled member of the Sisseton-Wahpeton Oyate. A copy of his enrollment certificate was filed with the Circuit Court and served on Mr. Altman at the motion hearing. MT 27.

B. Guardianship Actions are "Child Custody Proceedings"

Guardianship placements implicate ICWA under the plain meaning of the Act and this Court's prior precedent. This Court has previously adopted a four-part test for determining what constitutes a "child custody proceeding" for purposes of ICWA. The guardianship action in this case meets that test.

Under *In re Guardianship of J.C.D.*, a guardianship placement qualifies as a foster care placement, and by extension a child custody proceeding, if the placement: (1) involves the removal of an Indian child from the child's parent or Indian custodian; (2) involves placement of the child in the home of a guardian; (3) does not permit the parent or Indian guardian to have the child returned upon demand; and (4) does not involve the termination of parental rights. 2004 SD 96, ¶ 9, 686 N.W.2d 647, 649; 25 U.S.C. § 1903(1).

In this case, the Tribal Court guardianship actions involved the removal of Elias from his father for placement with the Merrills as

guardians. Tribal Court Findings of Fact, Conclusions of Law and Order at 5. Under the Tribal Court order, Mr. Altman cannot have Elias returned upon demand. Id. And finally, the guardianship action does not terminate Mr. Altman's parental rights. Id. Thus, under ICWA's plain meaning and this Court's four-part test, the Tribal Court guardianship action is a "child custody" proceeding for purposes of ICWA.

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

Elias was residing with the Merrills on the Mille Lacs Band Reservation when they initiated their guardianship action in Tribal Court. However, the Circuit Court held that Elias's part-time residence on the reservation was "not enough to satisfy 'residence' under [ICWA]." R 63. The Court's holding defies the ordinary meaning of residence.

ICWA does not define "residence." However, it is defined elsewhere in the United States Code. *See* 8 U.S.C. § 1101(33) (defining residence as the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent). This court has defined residence as the place where one lives or stays. *Wagner v. Truesdell*, 1998 SD 9, ¶ 21, 574 N.W.2d 627, 631 (Gilbertson, J. concurring); *People in Interest of G.R.F.*, 1997 S.D. 112, ¶ 16, 569 N.W.2d 29, 33 (citing Black's Law Dictionary for the proposition that residence "signifies living in a particular locality") (internal citation omitted).

Under any of these definitions, Elias was residing on the Mille Lacs Band Reservation when the Merrills filed for guardianship. The Tribal Court record reflects that Elias was living on the reservation at least part-time before his mother's death because of Ms. Merrill's employment with the tribe. Tribal Court's Findings of Fact, Conclusions of Law and Order at 2. That is all ICWA requires. Moreover, it is well settled that jurisdiction attaches at the time an action is filed and cannot be voided by later events. *People in Interest of G.R.F.* at ¶ 19.

The Circuit Court held that Elias's part-time residence on the reservation was insufficient for purposes of ICWA. R 64. This was erroneous. Tellingly, the Circuit Court does not cite any authority for this proposition. The Circuit Court was clearly distracted by the merits of the case and uncomfortable with the idea of removing Elias from his father's custody. The Circuit Court's concerns are understandable, but they do not change the jurisdictional analysis.

ICWA gave the Tribal Court exclusive jurisdiction over the Merrills' guardianship action; therefore, the Tribal Court order is entitled to full faith and credit.

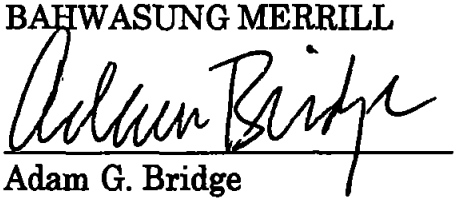
CONCLUSION

For all the foregoing reasons, the Merrills respectfully submit that the Tribal Court had jurisdiction over the guardianship action. The Merrills request (1) that the Circuit Court's order be reversed, and (2) that the Tribal

Court's guardianship order be given full faith and credit under 25 U.S.C. § 1911(d).

Dated this 12th day of May, 2011.

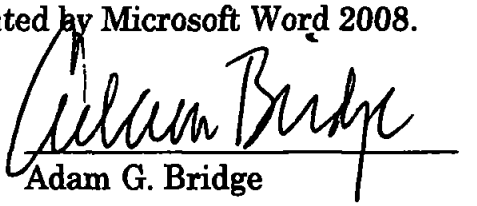
Respectfully Submitted:
CELESTINE and
BAHWASUNG MERRILL

By: 

Adam G. Bridge
Sisseton Wahpeton Oyate
Public Defender's Office
P.O. Box 746
Agency Village, SD 57262
P: 698-3076 | F: 698-4992
adamb@swo-nsn.gov

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

The undersigned hereby certifies that the Appellant's Brief complies with the type volume limitation set forth at SDCL § 15-26A-66(b). This brief contains 9 pages and 1,833 words as calculated by Microsoft Word 2008.



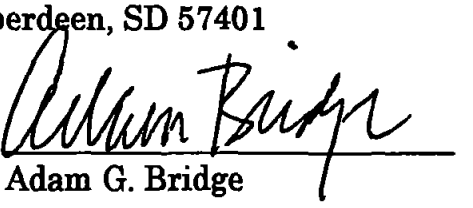
Adam G. Bridge

REQUEST FOR ORAL ARGUMENT

The Merrills request twenty minutes for oral argument.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 12, 2011, two true and correct copies of the Appellant's Brief were served by U.S. Mail upon the Appellee's Attorney, Jodi L. Brown, at the following address: Brown Law Firm, P.C., 103 E. Main St., P.O. Box 108, Aberdeen, SD 57401



Adam G. Bridge

IN THE SUPREME COURT

STATE OF SOUTH DAKOTA

Case No. 25950

CELESTINE and BAHWASUNG MERRILL,

Appellants,

v.

ADAM ALTMAN,

Appellant.

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

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

APPELLANTS' APPENDIX

Adam G. Bridge
Sisseton-Wahpeton Oyate
Public Defender's Office
P.O. Box 746
Agency Village, SD 57262
Counsel for Appellants

Jodi L. Brown
Brown Law Office, P.C.
103 E. Main St.
P.O. Box 108
Aberdeen, SD 57401
Counsel for Appellee

Notice of Appeal filed March 28, 2011

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FEB 28 2011

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT
By SS

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF BROWN FIFTH JUDICIAL CIRCUIT

****

CELESTINE AND BAHWASHUNG MERRILL, CIV. 10-828
Petitioners,

-vs- **ORDER**

ADAAM ALTMAN,
Respondent.

****

The above-entitled matter having come on regularly for hearing pursuant to Petitioner's Amended Motion to Recognize Tribal Court Order before the Honorable Eugene E. Dobberpuhl, Circuit Court Judge, in and for Brown County, South Dakota, on the 20th day of October, 2010, and the Petitioners, Celestine and Bahwashung Merrill, appearing in person and by their attorney, Adam Bridge of Sisseton-Wahpeton Oyate Public Defender's Office, and the Respondent, Adam Altman, appearing in person and by his attorney, Jodi L. Brown of Brown Law Firm, P.C., and the Court having heard the evidence, testimony, pre-trial briefs and post-trial briefs of the parties and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the Court's Findings of Fact and Conclusions of Law, attached and incorporated herein and dated February 25, , 2011 are in all respects hereby approved and adopted, and by this reference is incorporated in and made a part of this Order.

2. That jurisdiction over this minor child shall remain with the South Dakota State Court.

Dated this 25th day of February, 2011.

BY THE COURT:

Eugene E. Dobberphul
Circuit Court Judge

ATTEST:

Marla R Zastrow, Clerk

By: , Deputy.

(SEAL)

STATE OF SOUTH DAKOTA
Fifth Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date.

FEB 28 2011

Marla R Zastrow
Brown County Clerk of Courts
By

STATE OF SOUTH DAKOTA IN CIRCUIT COURT

COUNTY OF BROWN FIFTH JUDICIAL CIRCUIT

****

CELESTINE AND BAHWASHUNG MERRILL, CIV. 10-828
Petitioners,

-vs-

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ADAM ALTMAN,
Respondent.

****

The above-entitled matter having come on regularly for hearing pursuant to Petitioner's Amended Motion to Recognize Tribal Court Order on October 20th, 2010 before the Honorable Eugene E. Dobberpuhl, Circuit Court Judge, in and for the Circuit Court, Fifth Judicial Circuit, State of South Dakota; the Petitioners appearing in person and by their attorney, Adam Bridge of Sisseton-Wahpeton Oyate Public Defender's Office; the Respondent appearing in person and by his attorney, Jodi L. Brown of Brown Law Firm, P.C.; the Court having heard and considered the evidence, testimony, pre-trial briefs, and post trial briefs of the parties and being fully advised in the premises; the Court makes and files herein the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Elias Justice Merrill Altman ("Elias") was born on December 11, 2001, to Natasha Rene Merrill ("Natasha") and Adam Henry Altman ("Adam"). Elias was born in Rapid City, Pennington County, South Dakota.

2. Natasha died unexpectedly on April 6, 2010.

3. Undoubtedly, the period after Natasha's untimely death was difficult for the Petitioners.

4. The Court recognizes that the most likely scenario during this time was for Elias to stay with his grandparent's. the Petitioner's during the days leading up to the funeral.

5. However, the fact that the child stayed with the Petitioners on the reservation for six days in no way established the child's residence as the Mille Lacs Band reservation.

6. This is especially true under the facts of this case because of the previous orders prohibiting Elias from residing on a reservation.

7. At the time of her death, Natasha and the Respondent shared joint legal custody of Elias Altman by virtue of a South Dakota Court Order. Primary physical custody of Elias was with Natasha, subject to the Respondent's rights of visitation. Attached hereto and incorporated herein, and marked as Exhibit 1 is the Order Adopting Mediated Agreement dated December 15, 2008.

8. Following Natasha's death, the Petitioner's failed to inform the Respondent of Natasha Merrill's death and kept Elias with them without permission from the Respondent for six days. The Petitioners reside on the Mille Lacs Band of Ojibwe Indian Reservation in Isle, Minnesota.

9. Previously on November 16, 2007, this Court entered a Custody Order in which it explicitly ordered that neither Natasha nor Elias shall reside on either reservation or trust land. That Order was necessary due to Natasha's attempts to seek remedies in tribal courts. Attached hereto and incorporated herein, and marked as Exhibit 2 is the Custody Order dated November 16, 2007.

10. On December 9, 2008, this Court issued an Order Adopting Mediated Agreement between the Respondent and Natasha. This Order did not specifically prohibit Natasha or Elias from residing on reservation or trust land. However, it did require Natasha to follow the relocation statutes set forth in SDCL 25-4A-17 through 25-4A-19. Attached hereto and incorporated herein, and marked as Exhibit 1 is the Order Adopting Mediated Agreement dated December 15, 2008.

11. On August 4, 2009, this Court denied Natasha's motion to relocate with the child onto the Mille Lacs Indian Reservation. The Court's concern was that Natasha would try to make yet another attempt to bring suit in tribal court. The Court made it clear to Natasha that she could not move with Elias onto the Mille Lacs Band reservation. The Court's concern was that Natasha would make yet another attempt to bring suit in tribal court. This was the reason for denying her motion to relocate.

12. On April 12, 2010, Grandparents filed their "Petition for Permanent Guardianship" in Mille Lacs Band Tribal Court, and a copy was faxed to Adam. Adam was not previously aware of Natasha's death.

13. If at any time Elias was residing on the Mille Lacs Band Reservation, he was doing so in violation of this Court's Order. That is true whether Elias was living on the reservation before or after Natasha's death.

14. It was appropriate for Elias to stay with Grandparents following Natasha's death; however, the fact that he stayed with Grandparents 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 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.

15. Neither Natasha nor the Petitioner's may circumvent a previous order of this Court to establish jurisdiction in another court.

16. When Natasha passed away, the Respondent in this case would have been entirely within his rights to retrieve his son immediately upon learning of Natasha's passing.

CONCLUSIONS OF LAW

1. This case can be resolved by the jurisdictional issue of whether the tribal court had jurisdiction to hear the initial guardianship procedure.
2. That question can best be answered by review of the previous litigation between the Respondent and Natasha Merrill.
3. There is no dispute that this Court had proper jurisdiction over the Respondent and Natasha Merrill and the case during all child custody proceedings.
4. A parent's right to the care, custody and control of his child is among the oldest liberty interests recognized in law. ***Troxel v. Granville***, 530 U.S. 57, 65 (2000).
5. Further, in cases of divorce it is generally recognized that upon the death of one parent the other parent receives custody provided that party is a fit parent. ***Sweeney v. Joneson***, 63 N.W. 2d 249, 251 (S.D. 1954); ***In re Custody of N.A.K.***, 649 N.W.2d 166, 175 (Minn., 2002); see also ***Righst to Custody of Child as Affected by Death of Custodian Appointed by Divorce***, 39 A.L.R.2d 258 (stating the rule of most jurisdiction is the "when a divorce decree gives the custody of a child to one of the parents and the parent custodian dies, the so-called right to custody immediately and automatically inures, or accrues or reverts, to the surviving parent.")

6. Elias's short stay with the Grandparents is not sufficient to establish "residence" under the Indian Child Welfare Act (ICWA), particularly in light of the facts of this case.
7. Grandparents may not circumvent a previous order of this Court in an attempt to establish jurisdiction in another court.
8. The tribal court did not have jurisdiction under the Indian Child Welfare Act (ICWA) to hear Grandparents' Petition for Permanent Guardianship.
9. Absent jurisdiction under the Indian Child Welfare Act (ICWA), there is no statutory mechanism for South Dakota courts to grant full faith and credit to the tribal court's order. U.S. Constitution Art. IV, §1; 28 U.S.C. §1738.

NOW, THEREFORE, BE IT HEREBY ORDERED, ADJUDGED, AND DECREED that the Petitioners' Amended Motion to Recognize Tribal Court Order is hereby DENIED and further that jurisdiction over this minor child shall remain in the South Dakota State Court.

Dated this 25th day of February, 2011.

BY THE COURT:

By Eugene E Dobberpuhl
Eugene E. Dobberpuhl
Circuit Court Judge

ATTEST:

Marla R. Zastrow, Clerk

By: Kelly L Smith, Deputy.

(SEAL)

FILED

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
: SS
COUNTY OF BROWN) FIFTH JUDICIAL CIRCUIT

DEC 15 2008
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT
By

CIV 06-350/124

Adam Henry Altman,

Plaintiff,

v.

Natasha Merrill,

Defendant.

ORDER ADOPTING MEDIATED AGREEMENT

This matter came on for hearing on the Defendant's Motion for Adoption of Mediated Agreement. Hearing was held on November 25, 2008, at 1:00 p.m. in the second floor courtroom of the Brown County Courthouse, Aberdeen, South Dakota. The Plaintiff appeared personally, along with his attorney, William D. Gerdes. The Defendant appeared telephonically and her attorney, Thomas J. Linngren, appeared personally. The Court has considered the arguments of counsel as well as the record herein, including specifically, the following: There is presently pending before the Court the Plaintiff's Motion, dated March 7, 2008, and his Supplemental Motion, dated May 20, 2008, both of which have been continued indefinitely by the Court pending completion of mediation. The parties participated in mediation on June 26, 2008, pursuant to the Court's Order Regarding Mediation, dated June 14, 2008. Through mediation, the parties were able to reach a mutually agreeable resolution to the issues they perceived to be outstanding in this matter. Based on that undisputed agreement, as presented to the Court at hearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Plaintiff (Adam) and the Defendant (Natasha) shall continue to have joint legal custody of their minor child, Elias.

2. Primary physical custody of Elias shall remain with Natasha.

3. Adam shall have visitation with Elias on the following schedule:

a. Every third weekend, during the school year.
b. Half of the Christmas vacation from school, alternating the first and second half between the parties.
c. In lieu of spending time with Elias over the Thanksgiving holiday (Elias shall be with Natasha each Thanksgiving as that is a holiday when her family gets together), Adam shall have an extended weekend with Elias (as part of one of his alternating third weekends) from after school on Wednesday through Sunday at 5:00 p.m., in order that Elias may go deer hunting with Adam.
d. In lieu of extended visitation over Spring Break, Elias shall participate in Adam's family trip each spring, generally not to exceed seven days.
e. During the summer, Elias shall spend eight weeks with Adam, beginning one week after school is dismissed. During this time, Natasha shall be entitled to spend two separate weekends in South Dakota with Elias.

4. Visitation exchanges shall continue to take place at the Byerly's near the Ridgedale Mall. Unless otherwise specifically provided as part of the parties' periodic calendars, described more specifically herein, weekend exchanges shall take place at 7:30 p.m. on Fridays and at 12:00 p.m. on Sundays.

5. The parties shall use the foregoing schedule to negotiate a written calendar for each school year and each summer. To the extent the parties cannot agree to the form of a calendar for any school year or summer period, they shall submit their separate proposed calendars to the Court thirty days prior to the start of

the school year, or thirty days prior to summer vacation from school, as the case may be, and the Court shall then determine the appropriate calendar for the relevant time period without further notice or hearing, taking into consideration the general concepts set forth in the foregoing visitation format. Once a calendar is agreed upon and signed by the parties, or adopted by the Court as its Order, neither party shall have any authority or basis to ignore the schedule set out within that calendar or Order without the agreement of the other party or further Order of the Court.

For the balance of the 2008-2009 school year, and the 2009 summer vacation, Adam shall have visitation with Elias on the following dates:

a. December 5-7, 2008
b. December 27-January 3, 2009 (winter break)
c. January 23-25, 2009
d. February 13-16, 2009
e. March 13-15, 2009
f. April 3-5, 2009
g. April 24-26, 2009
h. May 15-17, 2009
i. June 20, 2009 Summer Break visitation begins (12:00 noon pickup)
j. August 16, 2009 Summer visitation ends (12:00 noon drop off)

6. It is expected that the visitation schedule set forth above shall be followed in good faith and not unilaterally modified, but unexpected circumstances do come up. If visitation is to be missed or cancelled for any reason by either party, notice shall be promptly given. Any missed or cancelled visitation will be made up as follows:

a. Any visitation which is cancelled by Adam for any reason other than weather shall not be made up.

b Any visitation cancelled by Natasha for any reason other than weather, including specifically Elias being ill, shall be made up in the form of three additional days of summer visitation per each cancellation during the summer immediately following.

c. Any visitation reasonably cancelled by either party due to inclement weather will be made up in the form of two additional days of summer visitation per each cancellation during the summer immediately following.

d. Any visitation cancelled due to Elias' illness shall be supported by the written opinion of a treating physician.

7. To the extent consistent herewith, the parties shall abide by the South Dakota Shared Parenting Guidelines, both having acknowledged receipt and review of a copy of the Guidelines. Specifically, without limiting the importance of any other provisions contained within the Guidelines, the parties shall abide by the Guideline provisions concerning telephone contact with Elias by each parent. In furtherance thereof, Adam shall include Natasha's phone number on Elias' pre-set numbers on his phone. Any overages caused by Natasha's conversations with Elias on the phone which result in additional charges to Adam's bill will be promptly reimbursed to Adam by Natasha upon receipt of a copy of the bill for which he is claiming reimbursement.

Elias shall telephone Adam using the phone Adam provides not less than three (3) times per week. Regular call times shall be between 7:00 p.m. and 8:00 p.m. on Sunday, Tuesday and Thursday evenings. Adam shall be allowed to call Elias at any reasonable time. Natasha shall keep Elias' phone turned on and charged.

8. Elias' passport will be promptly delivered to Natasha's

counsel, to be held in trust. Thereafter, either party may request delivery of the passport for Elias' travel out of the country, and so long as the planned trip is to be made consistent with the foregcing custody and visitation schedule, counsel shall promptly deliver the passport to the party requesting it without prior notice to the other party. However, written notice of delivery shall be provided to the other party simultaneous to delivery. Upon return from travel, the passport shall then be promptly re-delivered to counsel for further safekeeping. If Natasha terminates her representation with current counsel, the parties shall attempt to come to a mutual agreement as to who should then hold the passport for them, and if they cannot agree, then the Court shall designate such person after each party has submitted the name of his or nominee to the Court, without the need for further hearing on the matter.

9. Whenever either party travels out of Minnesota or South Dakota with Elias, he or she shall advise the other party where they are going, how they can be reached in the event of an emergency, and how long they will be out of State. The other party shall have no authority to prevent the trip from taking place, so long as the time gone is consistent with the foregoing (or then-current) custody and visitation schedule.

10. From time to time, upon written agreement of both parties, it may be in the best interest of Elias, or otherwise necessary or advantageous, to refrain from the enforcement of a right or responsibility concerning the custody and visitation

outlined above. The lack of enforcement of such right or responsibility on a previous occasion shall in no way constitute a waiver of said right or responsibility; nor shall a party be prevented from enforcing said right or responsibility in the future.

11. Concerning 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.

12. Adam shall pay one-half of Elias' child care costs incurred by Natasha due to her employment outside of the home, and paid to an accredited day-care provider who is not a member of Natasha's immediate or extended family. Natasha shall provide proof of payment to Adam before reimbursement is required. Adam shall similarly pay one-half of Elias' fees, costs and expenses related to extra-curricular activities, but he shall be entitled to pay his share of the costs directly to the administrators of the programs.

13. Adam presently has two separate monetary claims pending against Natasha. One is a part of the continued proceedings referred to above, seeking reimbursement of attorney fees and costs incurred in defending a protection order proceeding initiated by Natasha in Minnesota. The other is a small claims action commenced by Adam against Natasha in Brown County seeking judgment for $2,000 for money Adam claims was paid to Natasha, or for her benefit, to assist her in moving back to Aberdeen, which she then never did.

To settle both of these claims in total, Natasha has agreed to immediately pay Adam the sum of $500.00, and then Adam shall additionally be entitled to an offset against his child support for the months of December this year and January next year in the amount of $500.00 each month, making the total amount paid by Natasha to Adam to settle these claims the sum of $1,500.00. Upon receipt of these amounts by actual payment or offset, Adam has agreed to satisfy the judgment he took against Natasha in the small claims action in full. The Court has specifically found that Adam did not proceed to judgment for any improper purpose to improve his negotiating position regarding the issue.

14. Natasha's son, Ricardo, shall be evaluated by a qualified mental health professional (QMHP) within 30 days of entry of this Order, at Adam's expense, in order that the evaluator may give an opinion as to whether it is in Ricardo's best interest to maintain an ongoing relationship with Adam. Natasha shall promptly provide the name of a proposed QMHP to Adam, and unless Adam has a good-faith, articulated objection to using that QMHP's services, Natasha shall then schedule the evaluation with that person. If a proper objection is raised by Adam, then Natasha shall promptly provide the name of another QMHP, and this process shall be repeated until such time that an acceptable QMHP is found.

Neither party is obligated to follow the recommendation of the evaluator, but either party may utilize the opinion in further court proceedings if such proceedings are initiated by either party. Pending the completion of the evaluation, and further Order

of the Court (specifically including an ex parte Order if immediate and irreparable harm is articulated and circumstances warrant), Adam's visitation with Ricardo is suspended.

15. This Order is intended as a new start in these proceedings, and both parties have agreed to make a good faith effort to abide by its terms in a spirit of seeking out what is in the best interests of Elias rather than technical interpretation of the Order. Except to the extent consistent with this Order, all prior Orders and Judgments entered in this matter concerning the issues of custody and visitation are without further force or effect. All prior Orders and Judgments entered in this matter concerning the issues of Elias' support, including, but not limited to issues of insurance, unreimbursed medical costs, and income tax exemptions, shall remain in full force and effect except to the extent specifically modified or supplemented herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the relief requested in Adam's Motion, dated March 7, 2008, and his Supplemental Motion, dated May 20, 2008, is denied.

DONE this 9th day of December, 2008.

BY THE COURT:

ATTEST: Marla R Zastrow

Clerk of Courts
(SEAL)

Eugene E Hoffmann
Judge of the Circuit Court

STATE OF SOUTH DAKOTA
Fifth Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:

APR 12 2010

Marla R Zastrow
Brown County Clerk of Courts
By:

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

COUNTY OF BROWN) FIFTH JUDICIAL CIRCUIT

ADAM HENRY ALTMAN,
Plaintiff,

-vs-

NATASHA MERRILL,
Defendant.

Civ. 06-350

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

On September 14, 2007, the Court held a hearing on Petitioner's Motion for Contempt and Motion to Change Custody. The Petitioner appeared personally and with counsel William Gerdes. The Respondent appeared personally, without counsel. Based on the evidence presented to the Court, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Adam Henry Altman (Adam) and Natasha Renne Merrill ("Natasha") are the parents of Elias Justice Merrill Altman, DOB 12/13/01.

2. Natasha is the mother of Ricardo Kevin James Reilly ("Ricky").

3. Adam and Ricky have closely bonded as parent and child, and have formed a significant and substantial relationship.

4. Natasha and Adam have joint legal custody of Elias. Adam has visitation with Elias and Ricky pursuant to this Court's order of December 29, 2006. That Order requires, inter alia, the following:

   a. Natasha is required to have the children call Adam three times per week.

   b. Natasha is required to make sure the children's phone is always on and charged so that Plaintiff can call the children at any time.

   c. Natasha was required to move within 25 miles of the 494/694 loop in the Minneapolis/St. Paul metro area by June 16, 2007.

5. Natasha has knowledge of the Order dated December 29, 2007 and has knowledge of its requirements.

6. Natasha has the ability to comply with the Order dated December 29, 2007.

7. Since the entry of the Order dated December 29, 2006, Natasha has wilfully and contumaciously failed or refused to follow with the requirements of the Order. The Court specifically finds:

a. Natasha has failed or refused to deliver Ricky and Elias at the appointed drop off time on several occasions.

b. Natasha has not made the children call Adam three times per week.

c. Natasha has not kept the children's cell phone charged and turned on.

d. Natasha did not move within 25 miles of the 494/694 loop until September 1, 2007.

8. By her conduct, Natasha has effectively denied Adam visitation and telephone contact with Ricky and Elias.

9. Natasha has failed to cooperate with Adam and has interfered with his visitation rights.

10. Adam is entitled to remedial visitation to compensate for those times that Natasha has interfered with his visitation.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. Natasha should be required to comply with the prior visitation order and should be required to allow additional visitation as is appropriate and as can be arranged between the parties.

3. Because Natasha has interfered with Adam's visitation rights, Adam is entitled to remedial visitation.

Dated November 16th, 2007.

BY THE COURT:

Eugene E. Dobberpuhl

Circuit Court Judge

ATTEST:

Marla R Zastrow, Clerk of Courts

By: Judy Lundling, Deputy

(SEAL)

STATE OF SOUTH DAKOTA
Fifth Judicial Circuit Court
I hereby certify that the foregoing instrument is a true and correct copy of the original as the same appears on file in my office on this date:

NOV 16 2007

Marla R. Zastrow
Brown County Clerk of Courts

By: Judy Lundling

FILED

NOV 16 2007

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT

STATE OF SOUTH DAKOTA) SS
COUNTY OF BROWN)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

ADAM HENRY ALTMAN,
Plaintiff,

-vs-

NATASHA MERRILL,
Defendant.

Civ. 06-350

CUSTODY ORDER

On September 14, 2007, the Court held a hearing on Petitioner's Motion for Contempt and Motion to Change Custody. The Petitioner (Adam) appeared personally and with counsel William Gerdes. The Respondent (Natasha) appeared personally, without counsel. Based on the evidence presented to the Court, the Court made its Findings of Fact and Conclusions of Law and now makes the following Custody Order.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Adam and Natasha shall continue to have joint legal custody of Elias.

2. Primary physical placement of Elias shall remain with Natasha.

3. Natasha 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.

4. Natasha shall not relocate the children's primary residence without first giving 30 days' written notice to Adam.

5. Adam shall be allowed to attend parent-teacher conferences with Ricky's teacher and with Elias's teacher and shall be allowed access to all school records for both children.

6. Natasha shall provide Adam with copies of all report cards for both children.

7. Natasha shall provide Adam in writing with the names of all doctors Elias sees, including the dates and times of all appointments made in advance.

8. Natasha shall be required to have the boys call Adam on Sunday, Tuesday, and Thursday evenings between 7:00 and 8:00 p.m.

9. Natasha shall ensure at all times that Ricky and Elias's cell phone is turned on and charged so that Adam can call the children at any time.

10. All phone calls from Elias and Ricky shall be made on the cell phone provided by Adam.

11. Natasha shall not use Elias and Ricky's phone to contact Adam.

12. Adam shall have visitation with Ricky and Elias as follows:

a. September 14-16, 2007
b. September 28-30, 2007
c. October 12-14, 2007
d. October 19-22, 2007 (three day weekend with both boys)
e. November 2-4, 2007
f. November 16-18, 2007
g. Thanksgiving holiday from 7:00 p.m. on November 21, 2007 until 7:00 p.m. on November 25, 2007
h. November 30-December 2, 2007
i. December 14-16, 2007
j. December 16-22, 2007 (Make up week with Elias and Ricky)
k. December 22-30, 2007 (Week with Elias only).
l. December 30, 2007-January 5, 2008 (Make up week with Elias and Ricky)
m. January 18-20, 2008
n. February 1-3, 2008
o. February 15-17, 2008
p. February 29-March 2, 2008
q. March 14-16, 2008
r. March 28-30, 2008
s. April 11-13, 2008
t. April 25-27, 2008
u. May 9-11, 2008
v. May 23-25, 2008
w. June 13-July 27, 2008 (½ summer break)

13. In addition to the foregoing, if Adam intends to take the children on a family vacation/fishing trip to Mexico in March of 2008, both children shall be allowed to go. Natasha shall deliver the children to the Minneapolis Airport in conjunction with the scheduled flights, and shall provide signed originals of all required documents (including passports) to Adam not less than six weeks prior to any departure date.

14. The parties shall stipulate to a visitation schedule for the ensuing school year on or before July 27, 2008, or bring the matter back before the court for hearing.

15. All visitation exchanges shall take place at the Byerly's near the Ridgedale Mall. Visitation shall include both children; provided, however, that Adam shall not have visitation with Ricky when Ricky is with his biological father Keith Reilly. Visitation exchange shall take place at 7:30 p.m. on Fridays and at 12:00 noon on Sundays. If Natasha is more than 30 minutes late for visitation she shall be assessed a civil penalty of $50.00 payable to Adam.

16. Natasha may not cancel visits for any reason other than illness. If a visit is cancelled for illness, Natasha shall provide a written doctor's statement that it is not in the child's best interest for visitation to take place. If such a doctor's statement is provided, the visit shall automatically be made up on a weekend of Adam's choosing, but in any case within six weeks of the canceled visit.

17. In addition to the foregoing schedule, Natasha shall allow additional visitation as the parties time and locations may conveniently allow. For example, if Natasha is in the area of Adam's home or if Adam is in the area of Natasha's home, Adam shall be allowed visitation with the children unless some significant, legitimate reason prevents such additional visitation.

Dated November 16th, 2007.

BY THE COURT:

Eugene H. Doyle

Circuit Court Judge

ATTEST:

Marla R Zastrow, Clerk of Courts

By: Judy Dundling, Deputy
(SEAL)

STATE OF SOUTH DAKOTA
Fifth Judicial Circuit
I hereby certify that the foregoing instrument is a true and correct copy of the original thereof as the same appears on file in my office of record.

NOV 16 2007

Marla R. Zastrow
Brown County, Clerk of Courts

By Judy Dundling

Ex. 2

Court of Central Jurisdiction
MP

NON-REMOVABLE MILLE LACS BAND OF CHIPPEWA INDIANS DISTRICT OF NAY AH SHING

2010 SEP -7 AM 8:09

IN THE COURT OF CENTRAL JURISDICTION

In Re the Matter of the Guardianship of:

Case No. 10-FA-20

Elias Merrill-Altman

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came before the Court on August 27, 2010 on a petition for permanent guardianship of the minor child, Elias Merrill-Altman. The petitioners were represented by Stephanie Shook, Band Member Legal Aid. The respondent did not appear by phone or in person at the hearing. The respondent was given notice of the hearing by the Court and confirmed notice of the hearing to Ms. Shook via email on August 16, 2010. Testimony was taken from Celestine Merrill, Bahwasung Merrill, and Ricardo Reilly.

PROCEDURAL HISTORY:

1. Petitioners filed a petition of guardianship over the minor child on April 12, 2010 after the death of his mother, Natasha Merrill on April 6, 2010 in a car accident.
2. The Court had a hearing on April 12, 2010 where petitioners appeared in person and respondent appeared by telephone.
3. Respondent objected to the matter being heard in Tribal Court.
4. The Court orally ordered that the minor child remain with the Petitioners until a determination of jurisdiction could be determined.
5. An order was filed on April 14, 2010 establishing jurisdiction within the Mille Lacs Band Tribal Court and granted emergency guardianship of the minor child to petitioners.
6. On May 11, 2010 the Court found Respondent in violation of the Court's order and found him in contempt as he had taken the minor child in violation of the Court's order of April 12th and April 14th and had refused to return the minor child to Petitioners.
7. That on May 14, 2010 a motion was filed by the Petitioners requesting permanent guardianship of the minor child.
8. That in July 2010 the Petitioners were awarded permanent custody of Ricardo Reilly by agreement with his father Keith Riley with jurisdiction being concurrent between Tribal Court and Wisconsin.
9. That a hearing was held on July 22nd, 2010 on the motion for permanent guardianship but it was determined that Respondent had not been served with the motion.

10. That the Court ordered on July 22nd, 2010 that Respondent immediately return the minor child to the Petitioners.
11. That Respondent was served with the motion on July 27th, 2010 by mail.
12. That a hearing was held on August 27th, 2010 on the petition for permanent guardianship of the minor child.

Based upon the testimony and arguments of counsel the Court finds:

1. Natasha Merrill and Adam Altman (Respondent) were in a relationship and had Elias Merrill-Altman (Elias) on December 13, 2001. The parties were never married.
2. Physical custody of Elias was granted to Natasha Merrill by South Dakota Circuit Court. The custody matter in South Dakota was started in 2006 with an order adopting a mediated agreement in 2008.
3. Natasha Merrill also has another minor child named Ricardo Riley with Keith Riley.
4. Natasha Merrill died unexpectedly on April 6, 2010 as the result of a car accident.
5. At the time of her death, Ms. Merrill had physical custody of Elias.
6. Elias and Ricardo have been living with their mother and grandparents (Celestine and Bahwasung Merrill) in Isle, MN located on the Mille Lacs Band Reservation. Ms. Natasha Merrill was residing part-time in Anoka, MN and Isle, MN due to her working for the Mille Lacs Band.
7. Both children are enrolled in the Sisseton-Wahpeton Oyate as was their mother and grandmother, Celestine Merrill. Bahwasung Merrill is enrolled with the Mille Lacs Band of Ojibwe. The children had been attending the Isle Public School since the beginning of the school year.
8. Elias has been living with Petitioners since September 2009.
9. That Petitioners originally requested temporary guardianship but based upon further research by counsel determined that they could request permanent guardianship as they were not a party to the South Dakota order for custody of the minor child.
10. The children have a close bond with the Petitioners as they have always been a part of their lives. They have had almost daily contact with their many aunts and uncles as well as their ten cousins, the majority of which reside within 30 miles of Petitioners.
11. Ms. Celestine Merrill testified in Court on April 12, 2010 regarding her concern about the potential emotional abuse by Respondent on Elias as well as past concerns regarding emotional abuse towards her daughter Natasha. She believes it is very important that the children reside together during this difficult time in their lives.
12. Ms. Merrill further testified on April 12, 2010 that she was given verbal guardianship over the children by their mother because Natasha Merrill was not always present as she was working.
13. Ms. Merrill testified that the children have told her they do not want to live with their fathers and want to stay together.
14. On August 27, 2010 Ms. Merrill testified as to the reasons for permanent guardianship. In addition to her previous testimony she stated that:
    a. Since Respondent removed the child she has only had phone contact with him

b. The minor child has indicated to her that he wishes to return to Minnesota and live with Petitioners and his brother.
c. That during conversations with the minor child and his request for visits the Respondent has told her through the minor child that he will contact the Petitioners to arrange for visitation.
d. That the Respondent has failed to return phone calls from Petitioners and has never contacted them regarding visitation with the minor child.
e. The minor child has many close relatives in the area that had at least weekly contact with him prior to his removal from the State of Minnesota.
f. That Respondent had previously petitioned the South Dakota Court for custody of both minor children although he is not the biological father to Ricky Reilly.
g. That Respondent was previously court ordered in South Dakota to complete a Psychological Evaluation and Petitioners do not believe that ever took place.
h. That Respondent and Natasha Merrill mediated their custody arrangement and he had visitation rights with Elias Merrill-Altman and not with Ricardo Reilly.
i. That Respondent was previously employed by the Mille Lacs Band as an attorney with the Office of Solicitor General.
j. That Respondent was subsequently terminated from that position.
k. That Respondent was then employed as the Rapid City Attorney in South Dakota.
l. That Respondent was then terminated from that employment.
m. That Respondent is currently employed as the City Attorney in Aberdeen, South Dakota.
n. That Respondent emotionally and mentally abused her daughter, Natasha Merrill both during their relationship and after their relationship ended.
o. That the minor child has been heavily involved with his extended family in Minnesota and is a fundamental part of Petitioners family.
p. The Petitioners have helped raise the child since he was born and have incorporated the Native traditions in their everyday life.
q. That the Petitioners have provided food, clothing, and shelter for the minor child.

15. Mr. Merrill also testified at the hearing on August 27, 2010 and testified that:
a. He is the grandfather of Elias Merrill-Altman
b. That he is an enrolled member with the Mille Lacs Band of Ojibwe.
c. That he has been involved in raising the minor child since he was born.
d. That he has always discussed the Native American Heritage with the minor child.
e. That he has discussed the Ojibwe traditions as well as the Sisseton-Wahpeton traditions with the minor child.
f. That he has been teaching the minor child the Ojibwe language.
g. That he believes that the minor child sees him as a father-figure more than a grandfather.
h. That Respondent attempted to sue the Mille Lacs Band of Ojibwe after his termination from employment but was unsuccessful.

i. That he believes it is in the best interest of the minor child to be placed with him and to reside with his brother.

16. Ricardo Reilly testified at the hearing on August 27, 2010
    a. He is the half-brother of the minor child.
    b. He has always lived with his brother and his mother.
    c. That he has been living with Petitioners since his mother's death.
    d. That he does not want any contact with Respondent as he is uncomfortable and Respondent has tried to get custody of him in the past.
    e. That he wants his brother to live with him and the Petitioners.
17. The Court attempted to get a Court Appointed Special Advocate appointed for the minor child
18. That Ms. Shook contacted CASA in South Dakota regarding the pending guardianship case but was informed that they would be unable to handle the matter and be appointed as a guardian ad litem for the minor child due to their daily contact with Respondent.
19. That Respondent has failed to make any showings as to why the Petitioners should not be granted permanent guardianship as he has failed to attend any hearings since April 2010.
20. According to the Customs and traditions of the Native Americans when a mother dies her family is required to play a critical role in the rearing of the children.

CONCLUSIONS OF LAW:

1. That the Court of Central Jurisdiction has jurisdiction over this matter pursuant to 8 MSLSA §702 and MLB Ordinance 01-96, Section 25.01.
2. The Indian Child Welfare Act (ICWA), 25 USC 1901 establishes jurisdiction over the guardianship petition. There are jurisdictional provisions of the law that stipulate when a tribal court would have exclusive and transfer jurisdiction over "child custody proceedings" involving Indian children.
3. A Tribal Court may have exclusive jurisdiction over a child custody proceeding where an Indian child is residing on a reservation, 25 USC 1911 (a) and (b).
4. The Minnesota Indian Family Preservation Act, Section 260.771, notes that the State of Minnesota vests exclusive jurisdiction in the Tribal Court over child custody proceedings involving Indian children.
5. The Courts have found that ICWA applies to custody matters involving grandparents, In re the Matter of Custody of A.K.H. 502 N.W. 2d 79 (Minn. App. 1993).
6. That the South Dakota Supreme Court has held that ICWA does apply to guardianship actions commenced by the grandparents, relying upon the Minnesota Court of Appeal's Decision in A.K.H. See In Re Guardianship of J.C.D. 686 N.W.2d 647 (SD 2004).
7. ICWA is a federal law and under the supremacy clause of the United States Constitution the UCCJEA does not trump the Court's exclusive jurisdiction under the Indian Child Welfare Act.
8. That it is in the best interests of the minor child to reside with Petitioners and his brother Ricky Reilly pursuant to MLBS Title 8 Chapter 13 Subchapter 5.

9. That the Mille Lacs Band Tribal Court shall have exclusive jurisdiction over future custody proceeding involving the minor child, Elias Altman, date of birth December 13, 2001. The Mille Lacs Band Tribal Court shall have concurrent jurisdiction over custody proceedings involving the minor child, Ricky Kevin James Reilly, born March 5, 1995, as was stipulated to in Court File number 99-FA-247.

10. That foreign courts shall give full faith and credit to the custody determination and judicial proceedings of this Mille Lacs Band Tribal Court to the same extent that the foreign court gives full faith and credit to those of any other entity, as such treatment is required under the Indian Child Welfare Act 25 USC §1911.

11. That either the parent, petitioners, or the Indian child's tribe may, orally or in writing, request a foreign Court reviewing this matter to transfer the Indian child custody proceeding to the Mille Lacs Band Tribal Court. The request shall be made promptly after receiving notice of the proceeding. If the request is made orally it shall be reduced to writing by the court and made a part of the record.

ORDER:

It is hereby ordered:

1. That the Mille Lacs Band Tribal Court has exclusive jurisdiction over the guardianship of Elias Merrill-Altman; and
2. That Permanent Guardianship shall be awarded to the Petitioner's Celestine and Bahwasung Merrill subject to Respondent's rights to reasonable parenting time.

Dated this 3rd day of September 2010.

BY ORDER OF THE COURT:

B.J. Jones

Special Magistrate

[redacted]

Ex. 3

NON-REMOVABLE MILLE LACS BAND OF OJIBWE INDIANS

District of Nay-Ah-Shing

IN THE COURT OF CENTRAL JURISDICTION

In the Matter of: Docket # 10FA20

Elias Merrill-Altman,
Ricardo KJ Reilly
Attorney at Law ORDER OF CONTEMPT

A hearing was held on the 7th day of May 2010 on the motion of the maternal grandparents to hold Adam Altman in contempt of Court for coming upon the Mille Lacs Band Indian reservation to remove his son from the reservation after this Court orally directed that the child remain with the grandparents while the Court resolved a jurisdictional challenge to a guardianship petition filed by the grandparents. The movants also contend that Mr. Altman has refused to abide by subsequent orders directing that he return the child to their custody until the end of the present school term. The petitioners appeared in person along with legal counsel and Mr. Altman failed to appear in person or by phone. He did, however, submit his written defense to the Court to the motion. In that submission Mr. Altman challenged the authority of the Court over his son and contended that his actions were justified because he obtained an order from Brown County Circuit Court in South Dakota directing the immediate return of the child to his custody and he was relying upon that order when he retrieved his son from his son's school.[1]

In order to find Mr. Altman in contempt of Court this Court must find that Mr. Altman had knowledge of the order in question, had the ability to comply with it and willfully and contumaciously refused to do so. This Court has ruled twice now that it had jurisdiction over the guardianship petition that initiated the legal proceedings in this case. Those two decisions are hereby incorporated into this order as if fully set forth hereinafter. The grandparents commenced a guardianship petition regarding their two minor grandchildren, both of whom are Indian children and both of who resided or were domiciled upon the Mille Lacs reservation at the time the action was commenced. Both the Minnesota Court of Appeals and the South Dakota Supreme Court have ruled that the provisions of the Indian Child Welfare Act govern guardianship petitions commenced by

[1] Mr. Altman also contends in his response that the presiding Judge is biased in this case because he acknowledged presiding over a legal proceeding in the Sisseton-Wahpeton Tribal Court involving the other minor children, Ricardo KJ Reilly, in which this Judge deferred to a Wisconsin court on custody of that child. The Court would note that prior to the first hearing in this case Mr. Altman was notified of this and chose not to file a motion to recuse. The Court does not feel it is biased in this matter and has exercised its jurisdiction responsibly and in the minor child's best interests.

grandparents over Indian children. The Indian Child Welfare Act, as well as the Minnesota Indian Family Preservation Act, therefore vested this Court with exclusive jurisdiction over the guardianship petition.

Mr. Altman contends that this Court's exercise of jurisdiction was a sham and was designed to deny him his lawful custodial rights. This argument is spurious. This Court is ethically bound to exercise its lawful jurisdiction when called upon to do so and cannot cower from doing so because a non-Indian parent is involved. It should be noted that even before this Court had the chance to rule on Mr. Altman's legal challenge to jurisdiction, Mr. Altman opted 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. The fact that Mr. Altman was able to obtain an order from a South Dakota Circuit Court, ignoring this Court's jurisdiction even under South Dakota Supreme Court precedents, granting him custody does not absolve him of his actions on the Mille Lacs Indian reservation. A party is not permitted to cross into another jurisdiction with a foreign court order and enforce that order unilaterally in violation of the local jurisdiction's order. Had a Minnesota state court ordered Elias to remain with his grandparents pending resolution of Mr. Altman's legal challenge Mr. Altman would certainly not be able to defend against a contempt action or criminal action on the ground that he was able to obtain a foreign court order contravening the Minnesota state court order.

At hearing the petitioners and their counsel attempted to prove to this Court that under the provisions of South Dakota Codified Law §1-1-25 the South Dakota courts should grant comity to this Court's orders directing that Elias remain with his grandparents until the end of the current school year. The Court halted that presentation because the argument was being made to the wrong court. First of all, the governing standard for recognition of the orders of this Court is 25 USC§1911(d), which clearly requires state courts to grant full faith and credit to tribal court orders in child custody proceedings. SDCL §1-1-25 cannot trump this and indeed does not attempt to as it clearly states that it applies only to tribal court orders not subject to full faith and credit under federal law.

Second, it is up to the petitioners to file something in the South Dakota Circuit Court where Elias is currently located to have this Court's orders honored. This Court has already held that the guardianship granted the petitioners will expire at the end of the present school year and that the South Dakota order in place will govern custody at that time. This ruling belies Mr. Altman's contention that this Court is unfair to him and is being used by the grandparents to carry out a vendetta.

Mr. Altman is certainly in contempt of this Court. The issue thus becomes what are the civil contempt powers of a tribal court over a non-Indian. There is not much case law on this subject. In general a court is permitted to use whatever coercive sanctions are necessary to bring a party into compliance with a court order. This would include monetary penalties and incarceration if necessary. Certainly this Court could not incarcerate Mr. Altman in order to punish him as that would violate the United States

Supreme Court's decision in Oliphant holding that tribal courts lack criminal jurisdiction over non-Indians. However, if federal law grants this Court jurisdiction over an Indian child, see 25 U.S.C. §1911(a), and if a non-Indian is the parent of an Indian child over which this Court is exercising lawful jurisdiction this Court must have some civil contempt authority over non-Indians necessary to preserve its jurisdiction. In light of the Court's April 28, 2010 order clearly indicating that the petitioners, nor this Court, intend to subvert the jurisdiction of South Dakota and Wisconsin over the ultimate issue of custody, this Court will give Mr. Altman one further opportunity to come into compliance with this Court's orders before it imposes the sanction of incarceration.

ORDERED, ADJUDGED, AND DECREED that Adam Altman is found to be in contempt of this Court and is hereby directed to return Elias Merrill-Altman to his grandparents, Celestine Merrill and Bahwahsung Merrill, on or before May 13, 2010. Should he fail to comply the Court directs that Mr. Altman be arrested and detained until he comes into compliance with this Court's orders. The Court requests the assistance of tribal, county and state law enforcement in enforcing this order.

So ordered this 11th day of May 2010.

B.J. Jones
Special Magistrate

ATTEST: _____
Clerk of Courts

Adam Altman
38720 128th Street
Aberdeen, SD 57401
(605) 228-8279

May 7, 2010

Hon. B.J. Jones
District Court Judge
Court of Central Jurisdiction
Mille Lacs Band Tribal Court

By Fax to 320-532-3153 and e-mail to
jones@law.und.edu and darla.roache@millelacsband.com

Re: In Re: Altman and Reilly, No. 2010-FA-0020.

Dear Judge Jones:

I am in receipt of the Court's Order to Show Cause in the above-referenced matter, set for hearing on May 7, 2010. Please be advised that I will again not be participating in the hearing. I respond for the sole purpose of informing the Court of this, and make no general appearance hereby. I do not by this correspondence intend to submit myself to the jurisdiction of the Mille Lacs Band's tribal court, and maintain my explicit challenge to this Court's jurisdiction.

With all due respect to the tribal court, I repeat the litany of reasons that the Mille Lacs Band tribal court is without authority to hear this case:

1. The Mille Lacs Tribal Court has no personal jurisdiction over me, as I am a non-Indian and am not present, do not reside, and am not domiciled on tribal land, trust land, or anywhere in Indian Country. I am not married to or a descendent of an Indian person. I have not transacted business with the Band or any Indian tribe since well before Elias's birth.

2. The Tribal Court has no personal jurisdiction over Elias Altman, as he is a non-Mille Lacs Band Member who is not present, does not reside, and is not domiciled on tribal land, trust land, or anywhere in Indian Country. Further, Elias has not **legally** resided or been domiciled on tribal land, trust land, or anywhere in Indian Country in his entire life.

3. The Court does not have personal or subject matter jurisdiction under the Mille Lacs Band guardianship statutes, as the child is not a person "who ha[s] no guardian." 8 MLBSA §3201.

4. Even if the tribal court did have jurisdiction, it cannot summarily order a guardianship without first ordering a guardianship report on the proposed guardian, and the proposed

EX.3

ward. See 8 MLBSA §3208. The Court's order for Guardianship is therefore *ultra vires* and invalid.[1]

5. The Court does not have personal or subject matter jurisdiction under the UCCJEA, as the Band has not adopted the UCCJEA.

6. The Court does not have personal or subject matter jurisdiction under ICWA, as this is not a "child custody hearing" as defined in 21 U.S.C. §1903.

In addition:

7. By the Court's own admission, the Court has a conflict of interest, and cannot neutrally rule on this matter. To the extent a specific demand for recusal is required, it is made hereby.[2]

8. There is no action pending before the Court, as I have never been served with a summons, petition, or any document other than a Notice of Hearing on the instant Order to Show Cause.

9. The South Dakota court has exclusive jurisdiction over Elias's custody, and has since 2002.

10. Petitioners have claimed to the Tribal Court that they only wanted to preserve the *status quo* until the South Dakota court could hear the matter. See, Temporary Order, Mille Lacs Band Tribal Court, April 14, 2010, ¶2. The South Dakota court has heard the matter, including Petitioner Tina Merrill's testimony. Petitioners were represented at that hearing by counsel. The South Dakota court refused to order the return of Elias to Petitioners. *See, Transcript of Emergency Hearing, April 14, 2010, Fifth Circuit Court, Brown County, SD, No. 06-350, attached.*

11. The South Dakota Court has made it clear that the grandparents can intervene in the South Dakota action. *See South Dakota Order dated April 27, 2010; Transcript of Emergency Hearing, April 14, 2010, Fifth Circuit Court, Brown County, SD, No. 06-350.* Rather than avail themselves of a court which has specifically authorized them to intervene, Petitioners instead continue to forum-shop in the Tribal Court.

Finally, I address the contempt allegations proper: Contempt is either civil or criminal. One need not even address the criminal aspect of contempt over non-Indians. Oliphant, 435 U.S.

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1 Of course, the Court has no background information whatsoever on the grandparents, the aunts and uncles, nor any other member of the Petitioners' household with whom the Court has purported to place my son. The only information the Court has regarding any of the parties is that Petitioners are Indian and Respondent is non-Indian. Cf. the South Dakota Court, which has been involved in my life and my relationship with Elias since 2002, and has at all times found it appropriate to order joint legal custody with liberal visitation.

2 Some argument could perhaps be made that the Court had the ability to narrowly consider a true emergency without violating ethics laws (if, for example, no other judge were available). Even so, the Court certainly may not continue to sit on this case knowing full well that it has a conflict of interest.

191. Petitioners, then seek civil contempt, which is coercive, and not punitive. "Further, the purpose of "civil contempt proceedings is remedial and compensatory ..." Upjohn Co. v. Medtron Labs., Inc., 894 F.Supp. 126, 135 (S.D.N.Y.1995), citing Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467, 469 (2d Cir.1958); Huber v. Marine Midland Bank, 51 F.3d 5, 10 (2d Cir.1995) (stating that a civil contempt order is coercive rather than punitive in nature). If the South Dakota Court were silent on the matter, or deferred jurisdiction to the tribal court, I would of course follow the order of this Court. However, where the South Dakota court has specifically found my actions to be proper, no coercion from the Tribal Court will have effect. Petitioners must therefore take the matter up with the South Dakota court.

Moreover, Petitioners have not even identified which tribal court order I am failing to follow.[3] For each tribal court order purporting to strip me of legal and/or physical custody of Elias, there was/is an equivalent South Dakota State Court order affirming my ongoing parental rights. *See, e.g., South Dakota Orders dated December 15, 2008, November 17, 2009, Bench Order April 14, 2010, reduced to writing in Order, dated April 26, 2010.* At the very least, the Court must recognize that while it may disagree with the South Dakota Court, I have at all times had reason for the good-faith belief that I was acting in conformance with the law, and not contumaciously ignoring this court's order. Had the South Dakota Court deferred to the tribal court, Petitioners' argument would make sense. However, given the validity of the contradictory but undeniably-valid South Dakota orders, contempt does not lie and must not be entered.

For the reasons stated herein, and again for the purpose of a special appearance and without submitting myself to the jurisdiction of the Court, I respectfully request that the motion fro contempt be dismissed.

I further request that the underlying guardianship action be dismissed, Petitioners being able to bring their case before the South Dakota courts.

Sincerely,

Adam Altman

cc. Ms. Shook, Stephanie.shook@millelacsband.com

[3] Consider the due process implications of being held in contempt without being informed of what order one is purportedly disobeying.

Ex. 4

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF BROWN) FIFTH JUDICIAL CIRCUIT

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CELESTINE MERRILL and BAHWASUNG MERRILL,

Plaintiff,

vs.

ADAM ALTMAN

Defendant.

CIV. 10-828

MOTION TO RECOGNIZE TRIBAL COURT ORDER

COPY

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DATE & TIME: October 20, 2010
9:00 a.m.

BEFORE: THE HONORABLE EUGENE DOBBERPUHL
RET. CIRCUIT COURT JUDGE
Brown County Courthouse
Aberdeen, South Dakota, 57401

LOCATION: BROWN COUNTY CIRCUIT COURTROOM
BROWN COUNTY COURTHOUSE
Aberdeen, South Dakota

APPEARANCES: For the Plaintiff:

Mr. Adam G. Bridge
Attorney at Law
PO Box 746
Agency Village, SD 57262

For the Defendant:

Ms. Jodi L. Brown
Attorney at Law
PO Box 118
Aberdeen, SD 57402

THE COURT: Apparently everybody is present.

MS. BROWN: Yes, Your Honor. Your Honor, we would ask that the courtroom be sequestered and that the only people be allowed in here are the parties.

THE COURT: Are you going to have testimony?

MR. BRIDGE: I anticipate one witness on the issue of the child's enrollment, Your Honor.

THE COURT: Okay. Otherwise you wouldn't need to sequester. But if you're going to have testimony then the parties who may be testifying, if there is anybody else but that one witness -- is there?

MR. BRIDGE: No, Your Honor.

THE COURT: Do you have -- Ms. Brown, do you have any witnesses?

MS. BROWN: I do not, Your Honor.

THE COURT: Then we wouldn't have to sequester.

MS. BROWN: Under a child custody action, Your Honor, isn't it permissible to sequester a courtroom?

THE COURT: You're right. Go ahead. So except for the witness, the other parties will have to leave. The Merills are the plaintiffs and they should go first. So you want to call your witness now?

MR. BRIDGE: Your Honor, first I'd like to begin with -- and again, for the record, my name is Adam Bridge. I'm the public defender for the Sisseton Wahpeton Sioux Tribe out of Agency

Village, South Dakota.

And just for the record, I would like to make sure that the Court has received and reviewed both motions that I've filed in this case. First an amended motion to -- excuse me, a motion to amend the original pro se filing by the Merills, so we would ask for leave to file our amended motion to recognize and enforce a tribal court order.

We have filed that previously, haven't had any objection from counsel for the defendant, but just wanted to make a record on that, Your Honor, that I have filed that and we would seek an order from the Court admitting that amended motion for our purposes here today.

THE COURT: Those documents may be admitted. I just received, also by fax, a voluminous submission by the defendant. Do you understand that?

MR. BRIDGE: Yes, Your Honor, I was just served with that this morning and I have not had a chance to review all of it. I have given it a cursory review this morning the best I could in preparation for today's hearing, but --

THE COURT: To be fair, I will not be able to make a decision today. I haven't even read it. And if you want to submit something, have some time to review their material and submit anything else, you're going to have that opportunity, do you understand that?

MR. BRIDGE: I do, Your Honor. And just for the record, I

would say that a lot of the things in that motion do not go to the issue of jurisdiction. I think a lot of that is merit-based stuff that really is neither here nor there for our proceedings here today.

We are prepared to proceed on our motion, which in our view, relates solely to whether the tribal court had jurisdiction over these proceedings and whether the tribal court should then be recognized. In our view, the merits of the custody -- merits of the disposition of the case should be resolved by another court at another time.

THE COURT: I haven't read the documents so I really don't know what's in them. So you may proceed on the matter of jurisdiction.

MR. BRIDGE: Thank you, Your Honor.

THE COURT: That's the main reason.

MR. BRIDGE: In our view. And I understand that the defendant takes issue with this. This is an ICWA case, and it's an ICWA case because, first and foremost, it involves an Indian child. EMA -- we'll just refer to him as that for our purposes here today -- is an Indian child within the meaning of US -- 25 U.S.C. 1903 subsection 4, because he is an unmarried person under the age of 18 years, and he is a member of an Indian tribe.

Specifically, he is a member of Sisseton Wahpeton Sioux Tribe and we would be able to provide some proof of that through testimony of his grandmother, and also we can file proof of his

enrollment, which I don't, unfortunately, have today. But given we're going to have a chance to respond in writing to the defendant's brief, we will file it.

For our purposes here today, assuming he is an Indian child, question then becomes whether these Tribal Court had subject matter jurisdiction over the case and also personal jurisdiction, if necessary. It's our contention, Your Honor, that the comity statute in South Dakota Section 1-1-25 is not applicable to this case.

So the issues that the defendant raises in her -- in his responsive brief, we wouldn't get into until, I suppose, she raises it. But this is not a case that originates in Tribal Court of South Dakota, and I'm aware of no precedent expanding that comity statute to Tribal Courts beyond South Dakota.

There is a case that speaks to the Standing Rock Reservation, but I believe that reservation straddles both North and South Dakota. And so I'm aware of nothing on that that would broaden that provision to require the Merills to comply with any of those other conditions. We're seeking full faith and credit, which in our view, is limited only to subject and personal jurisdiction.

The issue of personal jurisdiction, there is an exception of course to personal jurisdiction if -- in a child custody case, that's a well-established exception to the in personam jurisdiction that would ordinarily be required.

Child custody matters are akin to in rem actions, and as long as the child is residing on the reservation it's our contention that the status exception would apply and Mr. Altman's arguments about his not having minimum contacts and going into the International Shoe type of analysis would not be defenses to this action.

As for subject matter jurisdiction, it's clear that the Mille Lacs Band Reservation had subject matter jurisdiction under the Indian Child Welfare Act and it's own law that has a provision for guardianship. Under the Indian Child Welfare Act the action must involve a child custody proceeding; the matter must involve an Indian child; and the Indian child must reside upon the reservation.

I see that Mr. Altman goes into some length discussing the issue of domicile. Really, that's not neither here nor there since domicile, we concede as matter of law, goes to a child's parent or surviving parent. But domicile has an intent element to it, as well. One can have many residences but only one domicile.

The key issue here is residence, and at the time jurisdiction attached, which in this case was a time the Merrill's filed their petition on April 14 or April 12. Jurisdiction: The Indian child was clearly residing on the Mille Lacs Band Reservation in Isle, Minnesota with his grandparents.

The fact that Mr. Altman removed the child from the

reservation does not defeat jurisdiction, since jurisdiction attaches again at the time the matter is filed and commenced. Subsequent actions don't do anything to vitiate jurisdiction.

And the issue involves -- this matter involves child custody proceeding. Under South Dakota law, under Minnesota law, a petition by grandparents for the custody of a child implicate the Indian Child Welfare Act. Specifically the -- strike that.

Go back to the South Dakota Supreme Court has held that guardianship placements like this one implicate ICWA so long as an Indian child is removed from a child's parent or Indian custodian, that the child is temporarily placed in the home of a guardian, the parent cannot have the child returned upon demand, and the parental rights have not been terminated.

All of those things are met here. All those predicates are present. If you find all those to be present and you find in personam jurisdiction to be unnecessary because of the status exception to in personam jurisdiction, the Mille Lacs Band Tribal Court had jurisdiction in this case. And if it had jurisdiction in this case this Court has duty to grant full faith and credit to that Tribal Court action under Section 1911(d) of the Indian Child Welfare Act.

And I suppose I'll just wait for Mr. Altman to raise his arguments in response to that, but that is our prima facie showing. We believe we have made a showing and we're entitled to judgment as matter of law.

THE COURT: Ms. Brown.

MS. BROWN: Thank you, Your Honor. I believe this Court is very aware of the pre-petition for guardian -- or for recognition of a Tribal Court of this matter involving my client Mr. Altman, as well as the deceased biological mother Natasha Merrill, and a lot of that is outlined in our premotion brief.

We intend, Your Honor, upon receiving a post-brief, or whatever writing it is from Mr. Bridges (sic) after the hearing today, to submit a supplemental post-hearing brief at that time, and we would request that the Court grant us an opportunity to do that, as well as a sufficient time period in which to do that.

For purposes of today, Your Honor, I'm not going to go into the factual history between Mr. Altman and Natasha Merrill to any great extent. I do think it's very important that we do touch on some of the factors that are going to be used as argument as to why this Court should not give full faith and credit to a tribal order.

The first argument, Your Honor, is, of course, we have no idea if we're dealing with an Indian child. We've never been presented with any legal documentation that says that this child is an enrolled member of any particular tribe, or for that matter a tribe that's been recognized.

Secondly, Your Honor, I think domicile is the most pivotal thing that this Court has got to look at. This Court is fully aware that over the history between Mr. Altman and Natasha

Merrill that there was ongoing, very contentious custody litigation that spanned over an eight-year period. Much of that litigation revolved around Natasha Merrill's moving on to the reservation and/or being prohibited from moving on to the reservation.

And if this Court recollects in the last hearing that was held, this Court specifically told her, Natasha Merrill, that if she were to move to the reservation she would be in contempt of this Court's order, and further, in violation of South Dakota law which mandates a certain notice requirement to my client.

That was never received, Your Honor. There's never been any filing as required by statute, and that statute, Your Honor, is 25 -- 25-4A-17, 18 and 19. That statute is very clear. Notice has to be given.

The notice has to have certain requirements in it. It has to be served by certified mail or admission of service to my client. Then that notice has to be filed with this Court, which means you would have gotten it. And then my client would have 45 days in which to contest the relocation. That was never complied with.

Therefore, Your Honor, domicile is not on the reservation in the Mille Lacs, domicile is in Anoka, Minnesota where mom was to live and where, by the own admission of the Merrills, as well as the Tribal Court judge, they stated she lived there and that she would leave the kids with the Merrills

when she would go to work.

That clearly does not establish domicile on the reservation. Her domicile was in Anoka. On that alone, Your Honor, ICWA should not even be looked at. We should not have to proceed any further because, if in fact she were living there, that would be in contravention of this Court's order -- a number of them -- as well as South Dakota law.

She cannot boot-strap a fraudulent act to somehow then come to this Court months and years later to state that ICWA should apply to make it more convenient for them to take the child away from a biological, natural father. ICWA could not have -- the purpose of ICWA could not have been for a child -- for a tribe to obtain jurisdiction in that fraudulent manner.

If the Court finds that the child was domiciled on the Mille Lacs Reservation the Court has to acknowledge that that domicile was by a fraudulent act, therefore ICWA should not be triggered.

Your Honor, I need to address the Parental Kidnapping Prevention Act. The purpose for this act is to prevent exactly what happened here. We have established child custody orders in the State of South Dakota. Those orders span out over an eight-year period, beginning in Pennington County and then being transferred to Brown County.

This matter was never transferred to Minnesota. So South Dakota is the state that has the ability to hear this

matter and decide what should be happening with this child.

Again, Your Honor, I think it's important in regards to the PKPA, one cannot do a fraudulent act in order to secure jurisdiction which is going to assist them in their master plan of taking away a child from a natural father. That's why we have the PKPA. She can't just take that child there against all the orders, against dad's blessings, and then state that their laws apply.

We would argue, Your Honor, that ICWA doesn't apply for the already given reasons. In addition, there has to be a child custody proceeding. And then it goes on further to define foster care placement, which is any action removing an Indian child from its parent. We don't have that. My client has legal custody of the child. He's always had legal custody.

This custody was given by this Court in South Dakota. He's always had legal custody. That cannot be just arbitrarily stripped by taking a child fraudulently to a reservation and then stating that the child is domiciled there. So we don't even have that.

It also states, Your Honor, that the child had to have been previously removed. That's not the case here. The cases cited by the Merrills in their amended motion, Your Honor, are no longer good law. The cases -- and they're not even analogous to the facts we have here.

We have searched for a very analogous case to the facts

that we have at hand here. There is none. Why is that? Because parents, by public policy, should have the right to have their children and not have that stripped away from them. We don't have a case like that because it doesn't make any sense.

In addition, Your Honor, the case that they have -- their case in chief is a case where the child had already been removed from a mother, a biological mother, and the father wasn't involved at all.

Then years afterwards, the parents moved to have a permanent guardianship granted for this child. The father then got involved. Those facts are not anywhere near analogous to the facts we have at hand.

I think it's important for this Court to know that there is a case that is very similar, and that's the case that we want the Court to look at, and that's Gerber versus Eastman. That's 673 NW2d 854. It's a 2004 case. There a Minnesota Court held that ICWA does not apply to a case involving a non-Indian parent seeking custody. It just doesn't apply, Your Honor.

In addition, the Merrills have contended throughout all of this, both here in South Dakota where they appeared with Tom Linngren, as well as in Tribal Court on the Mille Lacs Reservation, that their intent was not to take the child away from my client.

They had repeatedly stated that, Your Honor, our intent is not to take the child away from Mr. Altman, we merely want the

child to finish school here. We're far beyond that. Why are we still here? Because everybody knows that they are continuing to perpetrate fraud not only on this Court, but as well as the Mille Lacs Tribal Court.

This was a very detailed, methodical plan to arbitrarily take this child away from a very fit father, and the Court has to acknowledge that. The Court has to punish the Merrills for doing this.

Judge Jones is the judge presiding in the Mille Lacs Tribal Court. We would argue, Your Honor, that there was a conflict noted by him as to him presiding on this case. That's one flaw in this case. That's a conflict.

We have another conflict. Tina Merrill works for that Tribal Court. Your Honor, if that isn't about the most blatant conflict there is. They should have referred it to somebody else. This is not a case that should have been heard by Judge Jones or by that Tribal Court.

They should have referred it out to get an impartial tribunal. We don't have that. Judge Jones -- if the Court's not going to buy that argument, Your Honor -- indicates -- Judge Jones has written a book on Indian law, and he has stated that State courts need to look beyond the Tribal Court's order and ensure that subject matter jurisdiction and personal jurisdiction requirements have been met, and then he entered orders without ever having looked at whether those really exist.

We want the Court to look at South Dakota statute -- South Dakota law 1-1-25. I think Mr. Bridges (sic) said it best when he stated --

MR. BRIDGE: My name is Bridge.

MS. BROWN: Bridge. I apologize -- when he stated that Standing Rock was the only case in South Dakota that looked at 1-1-25. I think the most important thing he said, Your Honor, is that that reservation straddles South Dakota and North Dakota.

So that statute has been broadened. It does include other reservations outside of South Dakota. That statute needs to be applied in this case and they have a burden of overcoming all of the requirements of that statute. The Merrills have not met, Your Honor, any of those.

In that statute it states that the Tribal Court order may be recognized in State court as a matter of comity except by -- but it has to be established by clear and convincing evidence, and what they have to show is that the Tribal Court had both subject matter jurisdiction and personal jurisdiction.

We claim, Your Honor, that's not been satisfied. The Tribal Court order was not fraudulently obtained. I've already outlined a number of fraudulent acts by the Merrills that would thereby prevent them from the tribe -- from us recognizing the tribal order.

In addition, the order or judgment that was obtained by process that assures the requisite of an impartial

administration, we don't have that. We have conflicts all over the place. It has to also show that the judgment and order complies with the laws, ordinance and regulations of the jurisdiction from which it was obtained; and finally, the order or judgment does not contravene the public policy of the State of South Dakota. And I'd like to touch on each one of those briefly, Your Honor.

In regards to subject matter jurisdiction, the Merrills argue MLBSA Section 702 as their first basis for having subject matter jurisdiction. I would like to contend to this Court that no such section even exists. It's also my understanding, Your Honor, they also refer to MLB Ordinance 0196 Section 25.01. It is our contention, Your Honor, that that also does not exist. So their argument for subject matter jurisdiction fails.

The Merrills argue that ICWA gives subject matter jurisdiction. This argument has already been made. ICWA doesn't apply. Merills argue that the Minnesota Indian Family Prevention Act gives them subject matter jurisdiction. This argument must fail, as Minnesota law applies no more to Tribal Court than South Dakota law does.

MR. BRIDGE: I'd object. We haven't made any argument on that ground, Your Honor.

MS. BROWN: In addition, the Minnesota Indian Family Preservation Act, as it specifically states, it shall not be construed as conferring jurisdiction on an Indian tribe.

In regards to personal jurisdiction, Your Honor, it cannot be the intent of this Court or the Tribal Court to strip my client of his rights to life and liberty and to raise his child.

Their contention is that personal jurisdiction is just an exception for the tribe, that they get to just make decisions and take away things that are very important to my client because their laws state that they have personal jurisdiction because the child was there.

But he wasn't. He was not domiciled there, Your Honor. And if he was, it was in violation of this Court's order, as well as South Dakota law. My client has made no minimum contacts with that tribe that would warrant a long-arm personal jurisdiction ruling.

Fraud is big here, Your Honor. The Tribal Court cannot use this child's physical presence on the reservation to establish jurisdiction, as he was domiciled in Anoka. And if he was there it was in violation of court -- of this Court's order.

In addition, his presence was in violation of SDCL 25-4A-17, 18 and 19 already mentioned. The laws and orders of this Court cannot just be ignored, and then the fraudulent party be rewarded by their actions.

In addition, the Merrills' forum shopping is another basis to show fraud as to why we should not give full faith and credit to this order. The Merrills -- and this is very

important, Your Honor. We're dealing with a little more than a week's time. Natasha Merrill died on April 12, 2010. April 6, I apologize, Your Honor.

My client continued to try to contact his child for six days after the death of this child's mother. Nobody would answer the phone. My question to you is why? Because they were already conspiring to fraudulently, in any way they could, take this child away from my client.

Nobody even called. Do you want to know how my client found out this little guy's mother passed away? A petition for guardianship was faxed to his office. That's how he found out that Natasha Merrill was killed in a car accident.

And during that week's time they refused to promote any relationship between my client and this child. They outright refused to answer not one phone call. Why? Because they were conspiring. They were going to do anything they could to take this child away.

April 12. April 12, my client was served -- excuse me, strike that. My client received a fax that said that the Merrills were petitioning the Tribal Court for a guardianship over this child. The basis for that guardianship was that the kids needed to stay together until the end of the school year.

That had been the common testimony from the Merrills. Where does that rise to any level of emotional abuse or physical abuse? It doesn't. And this Court said it very good when he had

our hearing on April 14. This Court said this child's going to be traumatized -- is already traumatized by the death of his mother. So regardless of where he's going to live, whether it's with dad or grandma, this child, unfortunately, is going to go through some rough times. That does not rise to the level of emotional abuse perpetrated by my client any more than it would have been by the Merrills.

On April 12, 2010, that's when my client received the fax. That fax was received roughly, Your Honor, around 11:30 a.m. with a notice of a hearing that was going to be held that very same day at 4:00 o'clock p.m.

What about notice? So let's look at the Mille Lacs statutory notice. Their laws state my client is entitled to a ten-day prior notice before a hearing is held. He wasn't even given one day, and a hearing was held stripping him of what he had. He had legal custody of this child.

They filed that action in Tribal Court. At the same time, Your Honor -- and this Court, I assume, recalls the events that occurred within those next two days. Tom Linngren was representing the Merrills and he was demanding an emergency hearing to grant temporary guardianship to the Merrills until the end of the school year.

The Court graciously allowed for a hearing to be held on April 14, 2010. On that particular day oral arguments were made to Your Honor by myself and by Tom Linngren. And this Court

ruled that by public policy, by South Dakota law, Adam Altman was entitled to the custody of his child.

In that hearing -- and a copy of that transcript is attached to our prehearing brief -- Tina Merrill testified that all she wanted -- and I'm paraphrasing, Your Honor. Okay. All she wanted was the Court to allow this child to remain on the reservation until the end of the school year.

She further went on to state, via her attorney, that they weren't stating that Adam was an unfit father, they just felt it was in the best interest of the child to stay with his brother and finish the school year.

The Court didn't buy into that. The Court did the right thing, granted my client custody. That happened on the 14th. Also on that day, Your Honor, the Tribal Court entered a written order granting the Merrills temporary custody -- or temporary guardianship. Who was forum shopping?

This is exactly the same behaviors that Natasha Merrill did to this Court. She forum shopped. She was in Sisseton Wahpeton bringing actions. She was in -- I can't think of the name of the other tribe, Your Honor. She was in Pennington. She was in Brown County.

We have exactly the same situation going on now with the grandparents that we struggled with for eight years. They don't get the right to forum shop. And when they didn't like your answer then they went and got the answer they wanted from a

Tribal Court who didn't even follow their own law.

Thereafter, Your Honor, after Judge Jones granted temporary guardianship to the Merrills, there were ongoing hearings and orders wherein the Merrills, as well as Judge Jones from the Tribal Court, indicated repeatedly that this was a temporary thing just until school got out. School got out June 2 of 2010. We're beyond that day.

They've never once said that my client has ever done any kind of abuse, emotional or physical, to this child. In fact, in the findings of fact and conclusions of law by Judge Jones he states that the Merrills testified that there may be potential emotional abuse.

Your Honor, I'm not trying to be disrespectful to the Tribal Court, but that's like stating that I'm going to wear a raincoat all day because I know it's going to rain when I have no idea any more than the weather man what's going to happen today with the weather. We can't grant custody or guardianship to somebody for a potential future harm.

Judge Jones, when they switched -- the Merrills switched to wanting a permanent guardianship -- made it clear to the Merrills that he wasn't happy with them. He went on to state that they are going to have a high burden to overcome their already prior testimonial facts to the Court, which I have repeated, I'm sure, more than the Court needs to hear.

I want to talk about the impartial administration and

application of the tribal law. My client has never been served properly with any summons, with any petitions. For whatever reason, they just fax them. That's not proper service, Your Honor. We've not waived service. So it's -- everything should be void for failure to serve properly.

The Court -- the Tribal Court is bound by their laws. If they don't follow their laws then we don't have to give them full faith and credit. They made no inquiry to the fitness of the Merrills whatsoever. None. Zero. They were just assumed fit.

My client, on the other hand, who has legal custody of his child and -- well, physical now -- and spent an enormous amount of time, prior to the mother's death, with this child is deemed unknown. That just seems contrary, Your Honor.

How can, without knowing anything, they be deemed fit and my client is not even considered. That's contrary to their own laws. They indicated that the best interest of the child was that the permanent guardianship be granted. That's fatally flawed. Their own laws require them to retain an expert and to have that expert testify before any granting of a permanent guardianship.

Findings of fact, conclusions of law, all the orders from the Tribal Court are void of any expert who went in, who looked at the Merills as far as being fit, who met with my client to see if he was fit, to even check on the child in question.

Nothing was done. Not a thing. They violated their own law. Their orders should be void and we should not grant full faith and credit.

In addition, their guardianship laws state that a guardianship report has to be completed prior to granting of any guardianship. Again, everything from the Tribal Court is replete with any mention of a guardianship report. Why? Because they just ignored it. They never got a guardianship report. They violated their own laws.

In addition, the tribal law states that they have to notify the child's alleged tribe. We're contending we don't know for sure if he's an Indian child based on ICWA. But even if he is, by their own laws, they have to give that tribe notice. They've never done that. And by failure to give that tribe notice, all of the orders are void. This is their law.

The Tribal Court granted a guardianship when their laws state a guardianship can only be granted when the child is without a guardian or a parent. We have a parent, Your Honor. He had legal custody.

In addition, their law indicated that they had the burden of showing that all of the things that I've just told you -- which they failed to do -- they have to prove beyond clear and convincing evidence. Again, not done.

Now we need to look at the public policy of South Dakota. This Court is very familiar with South Dakota public

policy on children being with their parents. We have an entire section 25 which dictates what parental rights are.

We wouldn't have such a vast amount of laws as to what rights a parent has if it weren't important to the State of South Dakota. It is very important. The public policy in South Dakota dictates that a child is to be with a parent unless there is some kind of abuse. We have none.

And even if there were, they would have to prove it, Your Honor. Something more has to be done. We just can't put a bunch of words on a piece of paper and take a child away. That is contrary not only to South Dakota law, Minnesota law; it's got to be contrary to tribal law.

There is no way that this Court, given the facts and the procedures that this has spanned out to be over the last six months, that this Court should give any full faith and credit to the orders from the Tribal Court, and we shouldn't give them comity, either, Your Honor.

This Court needs to maintain exclusive jurisdiction -- I need to digress, and I apologize, Your Honor. This Court made it clear to the Merrills on April 14, 2010 that they had every right to intervene in the South Dakota Court's action. They failed to do that. Why? Because they're getting what they want fraudulently and without applying their own tribal laws. We respectively request that the Court maintain exclusive jurisdiction over this child.

MR. BRIDGE: Your Honor, if I may respond.

THE COURT: Yes, you may.

MR. BRIDGE: Thank you. With all respect to Mr. Altman and his arguments of counsel, I think the Court can sense a theme here. There is a lot of merits-based arguments. There is a lot about what should happen in the disposition of this child, and with all respect to those issues, they are irrelevant as far as we are concerned here today.

The only thing we care about here today is which Court should decide where this child goes. The fact is, the Tribal Court made a decision because Mr. Altman decided that he did not want to participate in the proceedings.

He appeared specially by phone to contest jurisdiction, and contrary to what Ms. Brown says about the order of April 12; on April 12 there is an order, an oral directive from the Tribal Court -- and I have an exhibit here I'm prepared to file with the Court, which is a transcript of all the proceedings, Your Honor -- an oral directive directing all the parties to maintain the status quo while the Tribal Court examines the issues raised by Mr. Altman in his own defense on the issue of jurisdiction.

So there is no order divesting Mr. Altman of his custody, contrary to Ms. Brown's assertion. The only thing that happens on April 12 is, everyone, just hold tight while I look at the issues raised by Mr. Altman and the concerns of Indian Child

Welfare Act and the obvious concerns raised by a custody order from South Dakota.

Now what does Mr. Altman elect to do before there is a chance for even a ruling to be held -- or to be made? He comes upon the reservation, takes the child from school and takes him to South Dakota. So I don't think there is any issue about who is forum shopping or who is not.

I mean, I think the merits of the case are if he would have stuck around and participated in the proceeding they probably would have gone his way. If he would have participated and filed his copy of his custody order and all that, I think, you know, this could have very well turned out differently. The fact is it quickly evolved into an acrimonious deal that was akin to what happened between him and his deceased ex-wife.

But as I mentioned, the merits-based arguments made by Mr. Altman's attorney are irrelevant here, as is the issue of domicile. She keeps harping on the issue of domicile. Indian Child Welfare Act does not require domicile, it requires residence, and residence is simply a physical presence in a place or another.

There is no intent. There is no obvious default by operation of law that a child would take the residence of a parent on the death of another non-custodial parent. Residence is simply where you're found, and residence is an issue on jurisdiction.

Because jurisdiction attaches at the time something is commenced and that happened on April 6 or April 12, whenever this petition was filed, and that's not defeated by the fact that the child was removed from the Malle Lacs Reservation.

There has also been a reference to the Parental Kidnapping Act. I imagine this is some type of veiled reference to ICWAs requirements that it comply with other federal law that would vest jurisdiction in another court or custody in another court.

That's clearly not implicated here. Not only does the Parental Kidnapping Act require that the Court -- the child actually reside in the jurisdiction, clearly the purpose of the Parental Kidnapping Act is to prevent a parent from coming into another place and taking the kid off and then hiding behind the jurisdiction -- the second jurisdiction. That's really not implicated here.

The issue of whether this is a child custody proceeding, I think, has been misinterpreted by the defendant. I don't believe there is any case law that supports their view that this is not a child custody proceeding.

In fact, it seems rather unanimous from the other states that have interpreted this issue that guardianship and the issue of grandparents, as clearly implicates ICWA. ICWAs whole purpose is to expand the rights of the non-nuclear people in the family to give them increased rights to preserve tribal identity

and things of that nature.

And every case that I've read, including ones from this Court, say that guardianship implicates ICWA as long as it's an Indian child. And on that matter, Your Honor, I would note that, for the record, I do have an exhibit that I'll file forthwith that certifies that EMA, as we'll call him here, is enrolled in the Sisseton Wahpeton Tribal Court and Sisseton Wahpeton Oyate and I'll provide a copy to Mr. Altman and his counsel, as well. So issue whether this is an Indian child, considered it resolved. He is.

Now issues of whether the Merrills should be estopped from changing from a temporary guardianship petition to a permanent guardianship petition, whether there is a conflict of interest between Judge Jones and the parties in the matter, those don't go to jurisdiction. Those are merits-based arguments.

Those are actually arguments that the judge and the Tribal Court was kind enough to address, not withstanding Mr. Altman's obvious contentious actions and his effort to kind of selectively participate by letter, as I've filed with the Court. He's made these arguments, he's made these objections in writing and they've been addressed. They didn't have to be addressed, because he decided he didn't want to participate.

I think the Tribal Court should be given credit for going beyond what it was required to do in this case to try to give Mr. Altman the benefit of the doubt and even hear some of

his arguments, even though he decided not to participate in these proceedings.

And, again, the issue of whether comity applies to this case, I'll simply rest on my brief, Your Honor. There is simply no case law that supports the notion that the comity statute in this state applies to out-of-state Tribal Court orders in any way.

The whole purpose of the case I cited that refers to Standing Rock is to the State Court's attempt not to have to go beyond the plain language of the statute by saying in effect that because the Standing Rock Reservation is also in South Dakota, they don't need to expand it beyond its plain meaning.

You clearly can't use that case as an attempt to defy the plain meaning of the act. If they had -- if the legislature here had wanted to require that of all Tribal Court orders, out-of-state, in-state, whatever, it clearly would have put that in it's preamble and it's introduction to the statute, which it clearly didn't.

So the fact we're going into this comity analysis, I think it should all be pretty much discarded. It doesn't matter. Personal jurisdiction, I'd also note, Mr. Altman continues to make reference to in personam jurisdiction.

And, again, on the issue of domicile, as if that really mattered. It doesn't matter. Indian Child Welfare Act does not require domicile, it requires residence. And the issue of a

status exception is a common law principle of federal and state jurisdiction.

There is no special rule in the Tribal Court that allows you to adjudicate the status of a child based on what the equivalent of in rem jurisdiction. That is a common law principle. Anyone that went to law school knows that. Mr. Altman knows that.

And just on a final note on the interpretation of tribal law, this Court, Ms. Brown, Mr. Altman, even myself, we are not here to reinterpret tribal law. We don't have the authority do it as long as it doesn't effect jurisdiction.

Whether he wants -- if he wants to relitigate the findings of fact and the conclusions of law of the Tribal Court, I urge him to go to the Mille Lacs Reservation and do so. He had an opportunity to do so, he waived it.

If he wants to go do it I encourage him to do it, but that's not my concern. The fact is, they couldn't really follow many of the provisions of Tribal Court law because he had already taken the kid off the reservation.

Who was going to be appointed a guardian? No one would have even gone and done it. He tries to defeat tribal law by his own contentious actions. And, again, it's not my job here to reinterpret that law. There is extensive findings of fact, conclusions of law. We should defer the Tribal Court's interpretation of those matters.

And the issue of notice, I believe the exhibits I will file, which are the transcripts, make clear that they did everything they could to serve Mr. Altman with notice, including involving the sheriff, serving him by mail.

He refused service, and then when he received something and refused service, he would then write an e-mail to Malle Lacs Band Ojibwe legal aid contesting jurisdiction and saying he's not going to participate in the proceedings.

I mean, the proceedings are ripe with statements by the Mille Lacs Band attorneys on the record saying that they've had continuous contact with Mr. Altman and he's continually deciding not to participate.

So the issue of whether he had notice or an opportunity to be present, I think it's clear he made a conscious decision not to participate and now he's trying to defeat that under the guise of hiding behind of comity statute, which he can't do because it doesn't apply.

So we would respectfully ask the Court to ignore all the merits-based arguments raised by Ms. Brown and Mr. Altman, confine itself to issues of jurisdiction and find that subject matter jurisdiction is clearly present. This is an ICWA case.

In personam jurisdiction is unnecessary because this is a custody case; and enter a finding that the Court had jurisdiction, enforce the order and leave it to a Court on another day to resolve the actual disposition of this case. But

it certainly doesn't belong here. Thank you.

THE COURT: Any response?

MS. BROWN: Just, Your Honor, a couple of things. Mr. Bridge indicated that my client's custody was not divested on April 12 when the Tribal Court stated that we should have a status quo, according to his oral arguments. How is his custody not divested unless the child were with him?

In addition, he argues -- in addition, if it wasn't divested then he had the right to go get the child, which he did. In addition, Mr. Bridge stated that the Parental Kidnapping Acts purpose -- and I'm trying to paraphrase what he said -- was to prevent somebody from taking their child and then hiding behind a second state's jurisdiction in order to keep that child. He said it best. That's exactly what we have here.

MR. BRIDGE: On the issue, Your Honor, of whether Mr. Altman had the right to come in with a custody order and enforce it, I think the Tribal Court put it best. If this had been the State of Minnesota saying that, listen, let's abide by status quo until we can resolve the issue of jurisdiction, and Mr. Altman has decided to take his South Dakota order and take his child from the state of Minnesota, he'd be in contempt.

It's obvious he just had a complete disregard to the Tribal Court's authority in the case and decided to do what fit him best, and he shouldn't benefit from that, Your Honor.

THE COURT: Anything else, then?

MS. BROWN: Thank you, Your Honor.

THE COURT: Did you wish to have a witness?

MR. BRIDGE: No, Your Honor, I'll file the exhibit that -- as proof of EMA's enrollment, Your Honor.

THE COURT: Okay. To get this in perspective as far as what else is going to be presented, the defendant has presented a brief and you're going to respond to that then?

MR. BRIDGE: Yes, I would ask for leave to respond, Your Honor.

THE COURT: And then do you need any more time, Ms. Brown? I'll rule as soon as everybody makes their submissions, but I'm not going to rule until everybody thinks they've had an opportunity to present their case, and as soon as I get both sides, I'll make a decision.

MS. BROWN: And that's all we would ask, Your Honor, is upon us getting Mr. Bridge's response to our premotion brief, then we would like an equal opportunity to respond again. And once we submit that, then, yes, we would like the Court to rule.

MR. BRIDGE: I guess, Your Honor, the burden is ours, I guess. I mean, if I'm an appellant in an appeal, the appellee doesn't get to keep responding to my brief. At some point this has to stop. I mean, she's filed a voluminous brief. I would ask that I get the final word on the pleadings in the matter.

THE COURT: I kind of think that both sides, almost, already, presented everything they can present and it's

redundant. So is it possible that he could just respond to yours and I'll just evaluate and make a decision?

MS. BROWN: Your Honor, I don't think that's right because we don't know what he's going to file.

THE COURT: Okay. I'll let you respond, and then if he sees anything, he can respond. This is has got to end. Do you have any kind of time frame this can be done in?

MR. BRIDGE: I need a couple weeks, Judge, to file a response.

THE COURT: Okay. When will you have yours? You're going to file in two weeks; right?

MR. BRIDGE: Yeah.

THE COURT: How about if I give you 15 days from today to file a response. And then she has another ten days to file a response to yours. And if there is something really necessary, you let me know, and I'll even let you respond again.

MS. BROWN: Thank you, Your Honor.

THE COURT: I want everybody to know that they can present what they want and I'll make a decision as soon as I get everything finished.

MR. BRIDGE: And, Your Honor, there is the issue of these transcripts. I requested these from the Mille Lacs Band reservation. Apparently they have an audio recording system and they're not transcribed as they are here.

I'd like to submit them as a supplemental exhibit. And

I'm not sure if counsel is okay with this. I could copy the CDs and send them to you. I could have a court reporter from South Dakota transcribe them, or from Minnesota transcribe them. But just want to make sure that the Court's aware of what happened there outside of the orders here.

THE COURT: I'm reluctant to listen to audio. I'd rather have something in writing.

MR. BRIDGE: I'll hire a reporter to do it.

THE COURT: Anything else then?

MS. BROWN: No, Your Honor. Thank you.

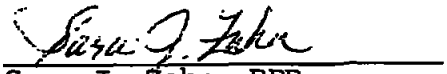
THE COURT: Okay. We're in recess. Thank you all.

(Whereupon, the proceedings were adjourned at 10:20 a.m.)

STATE OF SOUTH DAKOTA)
:SS CERTIFICATE
COUNTY OF BROWN)

I, Sara J. Zahn, Notary Public and Court Reporter in the above-named County and State, do certify that I reported in stenotype the proceedings of the foregoing matter; that I thereafter transcribed said stenotype notes into typewriting; that the foregoing pages, 1 through 34, inclusive, are a true, full and correct transcription of my stenotype notes.

IN TESTIMONY WHEREOF, I hereto set my hand and official seal this 18th day of April, 2011.



Sara J. Zahn, RPR
Official Court Reporter
My Commission Expires:
January 2, 2016

Ex. 5

Exhibit 2

STATE OF SOUTH DAKOTA — IN CIRCUIT COURT

COUNTY OF BROWN — FIFTH JUDICIAL CIRCUIT

ADAM ALTMAN,
Plaintiff,

vs.

NATASHA MERRILL,
Defendant.

CIV 06-350

EMERGENCY HEARING

Date & Time: [redacted] 2010
4:00 p.m.

Before: THE HONORABLE EUGENE DOBBERPUHL
Retired Circuit Court Judge
PO Box 1087, Aberdeen, South Dakota

Location: Brown County Courthouse
Aberdeen, SD 57401

APPEARANCES:

For the Plaintiff:

JODI BROWN
Attorney at Law
PO Box 118
Aberdeen, SD 57402

For the Defendant:

THOMAS LINNGREN
Attorney at Law
PO Box 1600
Watertown, SD 57201

THE COURT: Let the record show this is the time and place set for a hearing in the matter of Adam Altman -- and it was Natasha -- vs. Natasha Merrill and I understand that she's now deceased, is that correct?

MR. LINNGREN: Correct.

THE COURT: And present today in the courtroom is Jodi Brown, attorney, who represents Adam Altman and Tom Linngren who was the counsel for Natasha Merrill and I understand on the phone is an attorney from Minnesota who represents the maternal grandparents and they're present with you at the present time?

MS. SCHOCK: Ms. Merrill is with me right now, Your Honor. Obviously I don't practice in South Dakota so I'm not making an official appearance. I'm really here to help facilitate that Tina Merrill is able to appear by phone.

THE COURT: That's fine. Now as I understand it, the reason why we're here is because of an unfortunate situation where Natasha was killed about a week ago.

MR. LINNGREN: April 6, Your Honor.

THE COURT: And the issue here is the custody arrangement for Elias Justin Altman and

he's eight at the present time and would be nine in December, right?

MR. LINNGREN: That's correct. He is eight at the present time.

THE COURT: As I understand it, what happened from a conversation I had with the two of you this morning, the attorney for Adam Altman indicated to me that Adam had already picked up the child, is that correct?

MS. BROWN: That's correct, Your Honor.

MR. LINNGREN: Your Honor, that happened today. Adam picked up Elias from school. There was -- and my client can inform the court otherwise or Ms. Schock but my understanding is that that happened without any interaction between the maternal grandmother and Elias and there's also -- as the court is aware from prior proceedings, there's a half brother involved here, Ricky. As far as I know Elias was not given an opportunity to tell goodbye to any of those individuals.

THE COURT: Taking Ricky first. As I remember the file and so forth, the only connection Adam had with Ricky was due to an order that was stipulated to by the parties from the 7th

Circuit in Rapid City.

MR. LINNGREN: Correct.

THE COURT: And that stipulation allowed Adam, who is not the biological father of Ricky, to have certain attachment to the child just because of the stipulation and the subsequent order, isn't that correct?

MR. LINNGREN: Correct.

THE COURT: So as far as that child is concerned, there's really no nexus to Adam or *anybody else right now, is there?*

MR. LINNGREN: I'm not suggesting there's nexus to Adam, I'm suggesting there's nexus to Elias.

THE COURT: Right. But I just wanted to get that out of the way so we're just focusing on Elias alone.

MS. BROWN: Your Honor, for the record, it's my understanding that law enforcement also assisted Ricardo's father in getting Ricardo today.

THE COURT: So Ricardo's father has picked him up then?

MS. BROWN: It's my understanding that that was in the works the last I spoke with my

client, Adam.

MR. LINNGREN: Your honor --

MS. SCHOCK: Your honor --

MR. LINNGREN: Just one second. Your Honor, if I may, my understanding of the situation is that Mr. Altman is the person who facilitated Ricky going with his father.

THE COURT: But in any regard, it looks to the court that since the only authority that Adam had for that child was through that order which was done by stipulation with the mother and the mother now being deceased looks to me, unless you can show me something different, that is an issue that we don't have to address any further.

MS. BROWN: I'd agree with that as far as Ricky goes.

THE COURT: I'm just talking about -- to eliminate that from the file.

MR. LINNGREN: That's correct.

THE COURT: Who wants to go first and make a presentation here today on what should be done here.

MR. LINNGREN: Well, I think Ms. Brown and I have established it's my hearing, so I'll go first if the court doesn't mind.

MS. BROWN: Your Honor, I'd like to object to any -- maybe I just need to make my objections right away. A, there's no standing for us to even have a hearing today. We're dealing with a deceased person; B, the statute is clear that any non-parent has to bring an action of some sort to even start a proceeding to have the ability to say that they should have custody of the child. That's not been done. There's no paperwork; C, there's a presumption that the father is fit and the child should be with the father with the burden shifting then to any non-parent to prove otherwise. Based on that, there should be no hearing. Dad wins by being biological father. He is presumed to be fit until proven otherwise.

MR. LINNGREN: May I respond?

THE COURT: Yes.

MR. LINNGREN: Ms. Brown is just not correct. I'm proceeding, Your Honor -- and I understand that there's no paperwork filed. We scheduled this hearing -- well, I received confirmation of this hearing being scheduled by Ms. Brown's office shortly before lunch, so I've not had a chance to prepare paperwork. This is --

in my opinion, I'm asking the court to consider this to be an emergency hearing for the best interest of this child. I'm here addressing one issue only and that is what should be done with Elias between now and the end of the school year. If Mr. and Mrs. Merrill, the maternal grandparents, wish to pursue something other than that, we'll schedule a different hearing in front of the court, we'll prepare proper paperwork and we'll address those issues. The current stipulation in the file says that beginning on June 5, under the current custody and visitation order, Mr. Altman is to have Elias here during the summer until school starts in the fall. We have plenty of time to address what happens next. I'm only here for today through the end of the school year in Minnesota. Now as far as addressing Ms. Brown's concerns, I'm proceeding under SDCL 25-5-29. And I would provide the statute to the court or the series of statutes to the court. The statute -- and this is Timmy's Law, Your Honor. Statute specifically provides that the court has authority in an existing action to allow intervention by any party seeking custody. And that's exactly what we're asking the court to do

first here today, is to allow Mr. and Mrs. Merrill to intervene as maternal grandparents under the circumstances of this case. If the court allows us to do that, I do not have to establish that Adam is an unfit parent. The legislature has clearly identified, because of the circumstances of Timmy Meldrum's case, that if the court concludes, and again, I'm only here today addressing a six week period and that's what I'm asking the court to consider. If the court concludes that there's a possibility of serious detriment to this child, that he come to Aberdeen for the next six weeks rather than staying in Minnesota to complete the school year, the court has all sorts of authority under that statute to allow that to happen, and that's what I'm asking the court to do. I don't have to start a new action on behalf of the grandparents. The court can allow the grandparents to intervene in this action whether Natasha is alive or not. So I think the first thing the court has to determine is whether the grandparents be allowed to intervene and if they are allowed to intervene then we can take up the next issue of what should be done with Elias in the next six weeks.

MS. BROWN: Thank you, Your Honor. Interpretation of that statute is completely misrepresented to the court -- or not stated correctly. Not misrepresented. What does it mean to intervene or file a petition? You have to do something. You can't just call an emergency hearing and expect the court to somehow just take everything under advisement and make a ruling. That's not what the intent of this statute is. To intervene is to follow the normal procedure which is to file the necessary paperwork. How much time has lapsed since this woman died? Over a week. And instead of doing it correctly, what did they do? They tried to get an emergency hearing on the reservation. Okay. When was my client served? He's never been served. I mean this is just wrong that we're even here. I mean they are not being successful there and so now they want to somehow manipulate the court into construing a statute the wrong way. You can't do that. They have to follow normal procedure. They can't just say because there's only six weeks of school left that they should get the child. That's not the test. The test is they have to be a party. They have to have some kind of -- they have to intervene or

file a petition. None of those are satisfied. There's a presumption. The child goes with dad. They have to rebut that. They can't rebut it without putting any evidence on. To allow this to happen is just contrary to public policy and, in fact, it's a violation of my client's 14th Amendment. What about due process? This is wrong. This child is supposed to be with his father. He's loving, caring and involved. This case has been going on since 2004. We don't have a Timmy case. And we need to force these people to do it the right way instead of trying to cut around the corners and violate the law. The child -- there's nothing wrong with my client. And if there is, they have to prove it. There's a presumption that he's fit and that's the best interest of the child. End of story. We can't hear anything further.

MR. LINNGREN: Your Honor, I'm not sitting here today saying there's anything wrong with Adam Altman. Okay. That's not the issue before the court right now. I want the court to take into consideration this eight year old boy, that's the only thing I'm asking you to do. This child lost his mother last week and what has

happened now is that he's going to be enrolled in a school in Aberdeen either tomorrow or Monday morning or whenever Adam chooses to enroll him. He's not going to know a soul in the classroom. He's not going to know his teacher. There's nothing wrong with allowing this child to finish the school year. I live under exactly the same circumstances, and I think that's why this probably hits me so hard.

MS. BROWN: And I'm going to object. That is not relevant.

MR. LINNGREN: It's argument, Your Honor.

THE COURT: Go ahead.

MR. LINNGREN: My son lives in Watertown, he goes to school in Watertown. My ex-wife lives in Bemidji. I could have been killed last week. I called my ex-wife this morning and I said, am I missing something here? You know, if I was killed last week, regardless of how much you want Michael to come and be in Bemidji, would you come to Watertown and take him to Bemidji to spend the last six weeks in Bemidji or would you wait until summer and come and get him then. That's all I'm asking the court to do

right now. I'm not asking for anything more. But, Your Honor, the best interests of this child clearly dictate that he be allowed to have some normalcy in his life under these circumstances until summer and then let the chips fall where they may as far as what Mr. and Mrs. Merrill might want to do after that, but it is not appropriate from the best interest of the child standpoint. Not from parental presumptions, not from who filed what paperwork when. This is an eight year old boy and he should have some normalcy in his life. He should have the companionship of his schoolmates, his teacher for the next six weeks. Adam can have his visitation that's scheduled on alternating weekends and spend as much -- Adam can go to Minnesota and spend every weekend with Elias if he wants to. But this child should not be enrolled in an Aberdeen school where he knows no one when he just lost his mother. That's not in the best interest of this child. That's all I'm asking the court to consider, and I do believe, regardless of whether the paperwork has been filed or not, this court has the ability for the best interest of a child to "cut corners" and make sure this child is properly cared for for the next six

weeks.

THE COURT: Anything else?

MS. BROWN: I'm sorry, Your Honor. That is not the law. The law doesn't allow us to cut corners. There's a presumption. They have not rebutted that. Everything that I have already argued is the law. We have to apply the law to this case. And they want to argue that he should finish school. Your Honor, he has missed 25 days of school. Nothing gets better for this kid. Maybe this is exactly what this kid needs is a fresh start knowing that he is going to go to school every day. And why are we talking about the best interest of the child? We're not there. They have not rebutted our presumption. They can't even go there yet. We don't have any evidence as to what is in this child's best interest. What we have is the law that says child goes to dad. Period. Until they prove otherwise. And they can't do that today.

THE COURT: Anything else?

MR. LINNGREN: Well, I'm going to respond to the 26 days of school, because I told the court that I'm not here to tell the court that Adam Altman is a good parent or bad parent, but I

was informed today for the first time, allegedly, Elias has missed 26 days of school during the past school year. And my response to that is, again, being in this situation, if I was not taking my child to school for 26 days, I will guarantee you that my ex-wife would have figured out that he wasn't in school for 26 days long before today and would have done something about that. And so if we're going to talk about, you know, Adam's qualifications as a father, why is it exactly, if he is so involved with his child that --

MS. BROWN: I'm going to object, Your Honor.

THE COURT: Go ahead.

MR. LINNGREN -- - he either didn't know that his child had been gone for 26 days from school as he alleges or he did nothing about it after he knew it. And then the last point I'm going to make, Your Honor, when Ms. Brown says we aren't there as far as the best interest of the child, that sums it up for me because every custody case there is, is all about the best interests of a child, nothing else. I don't have the book in front of me, I gave it to the court, but I know there's a statute in there that says

the court can enter any temporary orders regarding custody it wants to, to make sure that a child is properly protected, and that's what I'm asking the court to do.

THE COURT: Anything else then?

MS. BROWN: Just, Your Honor, him stating that my client's failure to file something because he's missed all that school and there's only two plausible explanations for that, that is misleading the court. This case has been going on since 2004. My client has tried repeatedly to get that child out of that situation without success. We can't even get a child support thing taking care of. Now, it's taken care of because she's gone. There's no resolution here. But the fact is, Your Honor, we have to follow the letter of the law.

THE COURT: Anything else then?

MR. LINNGREN: Mr. Altman has made no attempt in 2009 or 2010 to modify the current custody arrangement.

THE COURT: But we're not dealing with the current custody arrangement. This is a tragedy, there's no way around it. And whatever happens, the child is going to have to adapt to a

very unsettling situation, but the court has to look at it like a blank piece of paper. That's all I have is a blank piece of paper because there's no evidence that's been presented by anyone. I've had custody situations where a child has been seized from a parent or anything else when there's been affidavits filed by law enforcement or doctors something saying this child is in great danger, but that's an unusual situation. This is not the present situation. I mean, basically you look at the law and it's still the same here, it says 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. And they list several things where a parents' presumptive right can be rebutted. One, when he's an abandoned or neglected child. We don't have -- I don't have any evidence here. Two, the parent has forfeited or surrendered his parental rights to another person other than a parent. I don't have that evidence. The parent has abdicated his parental rights or responsibilities and so forth.

Basically, I have nothing to base any action to take the child away from the father. These people do have the right to intervene later, file for a hearing and try to rebut this presumption, but at the present time, I don't have that in front of me and I have to allow the father to keep custody until there's some further action.

MR. LINNGREN: And Your Honor, I'm asking the court to -- and I understand that's your ruling, but I'd like the court to consider that the next -- again, I don't have the statute in front of me, the court has the --

THE COURT: You can have the book here.

MR. LINNGREN: Your Honor, my position is, as you went down those items, paragraph number four, that other extraordinary circumstances exist which, if custody is awarded to the parent, would result in serious detriment to the child.

THE COURT: And that's what I've said. I've had cases before where they will come in and say this child has been beaten to pieces, you've got to do something, have an emergency hearing and sort it out later. I don't have that here.

MR. LINNGREN: Your Honor, I'm asking the court to consider, not based on any specific

evidence of this case, but based on exactly the way I explained it, that this child has lost his mother, and he has some normalcy with schoolmates and a teacher in Minnesota versus none of that here in Aberdeen, so I'm asking the court, based on paragraph four of the statute, to say that there is a remedy for a short term to allow this child to be with his maternal grandparents until the end of school, and then at that point I think the serious detriment we're talking about goes away.

THE COURT: But to me, you've not presented anything that rises to the level of a real emergency. This child is going to be traumatized whether he's down there or here. To lose your mother, I can't think of anything more devastating, but that's something that is going to be sorted out probably by mental experts, but right now I don't have enough in my judgment to take the child from the father.

MS. BROWN: Thank you, Your Honor.

MR. LINNGREN: Your Honor, may I ask the court and counsel -- because if Jodi can't stipulate to this, then I think we should find another date for a hearing. I will make a motion

to intervene. I'll file the paperwork to move to intervene whether it be for custody related purposes or grandparent visitation or whatever, but there's no question my clients will seek intervention. If Jodi won't stipulate to my clients intervening then we should find another hearing date.

THE COURT: Well, you have the right to intervene if you've got something that may be necessary for the court to consider. My advice to your client is, and he has to recognize that the child may have attachment to the grandparents and try to work out some arrangements so the child is not deprived of visitations, reasonable visitation with the grandparents, but if you can't work this out in your own -- between the two of you then you'll have to come back here. You have the right to intervene.

MR. LINNGREN: Is that the court's order --

THE COURT: But you have to file a -- you'll have to file a paper. As far as I'm concerned, the best interest of the child always has to be in the mind of the court but I don't know what's in the best interest of the child

MR. LINNGREN: Thank you, Your Honor.

(The hearing concluded at 4:20 p.m.)

STATE OF SOUTH DAKOTA)
:SS CERTIFICATE
COUNTY OF BROWN)

I, Michelle Gaikowski, Notary Public and Court Reporter in the above-named County and State, do certify that I reported in stenotype the proceedings of the foregoing matter; that I thereafter transcribed said stenotype notes into typewriting; that the foregoing 20 pages are a true, full and correct transcription of my stenotype notes.

IN TESTIMONY WHEREOF, I hereto set my hand and official seal this 27th day of April, 2010.

Michelle Gaikowski
Official Court Reporter
My Commission Expires:
April 28, 2010