

**TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS
TURTLE MOUNTAIN BAND APPELLATE COURT**

CINDY MALATERRE,)	
)	
Appellant,)	TMAC No. 05-007
)	Tribal Court Civil No. 04-10135
v.)	
)	ORDER AND OPINION
)	
ESTATE OF BERMILIA ST. CLAIRE)	
)	
Appellee.)	
)	
_____)	

Before: Acting Chief Justice MONIQUE VONDALL-RIEKE, and Justices JERILYN
 DECOTEAU and MATTHEW L.M. FLETCHER

Appearances: Donald G. Bruce, for the Appellant

Richard Frederick, for the Appellee

By Justice FLETCHER for a unanimous Court.

ORDER

For reasons stated in the opinion below, the lower court's Order of May 3, 2005 is
AFFIRMED IN PART, VACATED IN PART, and REMANDED in accordance with the
following:

1. Judge Cain's Order that Cindy Malaterre may remain in the home she received
from Alex and Bermilia St. Claire is AFFIRMED. *See* Tribal Court Order at ¶ 1.

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In addition, the tribal court will oversee the immediate transfer of necessary deeds and/or titles.

2. Judge Cain's Order that Cindy Malaterre must pay \$1000 in installments to the St. Claire Estate is VACATED. *See* Tribal Court Order at ¶¶ 2-3, 6-9. We do, however, remand to the Tribal Court for a hearing; provided, however, that the Estate of Bermilia St. Claire files a request for reconsideration of the decision to vacate the \$1000 award in the Tribal Court within thirty (30) days of the filing of this Order and Opinion. In such an event, the Tribal Court is ordered to conduct a full evidentiary hearing and make findings of fact and conclusions of law *on this point only*. In the event the Estate does not file a motion for reconsideration at the conclusion of the thirty (30) days, the Tribal Court must issue an order that the Estate's claim to the \$1000 is dismissed.
3. All other portions of Judge Cain's Order are AFFIRMED.

OPINION

I. Procedural History and Facts

On June 30, 2004, Appellant Cindy Malaterre sued Bermilia St. Claire and the Estate of Alex St. Claire, Bermilia's deceased husband. All parties are enrolled members of the Turtle Mountain Band of Chippewa Indians and resided within the exterior boundaries of the Turtle Mountain Band's reservation centered around Belcourt, North Dakota. Since the filing of this suit, Bermilia St. Claire has walked on and the Estate of Bermilia St. Claire is substituted in her place as the Appellee.

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Cindy Malaterre and her husband at that time, Todd St. Claire, lived in a Mutual Help home beginning in 1996. *See* Petition/Complaint at ¶¶ 5-6. Alex and Bermilia St. Claire were Todd’s parents and Cindy’s in-laws. *See* Tribal Court Order, Findings of Fact and Conclusions of Law at ¶ 4; Petition/Complaint at ¶ 7. Alex and Bermilia lived in an older home, purchased in 1993. *See* Oral Argument (December 12, 2005); Warranty Deed (April 23, 1993). In 2000, Alex St. Claire was severely injured in an automobile accident and became disabled. *See* Petition/Complaint at ¶ 8; Civil Court Hearing, Testimony of Cindy Malaterre (Nov. 12, 2004). Alex and Bermilia’s home was of insufficient size to accommodate Alex’s disability. *See* Petition/Complaint at ¶ 8.

On April 2, 2001, Cindy and Todd executed a letter stating that they “would like to gift” their home to Alex and Bermilia. *See* Letter from Todd & Cindy St. Claire to Turtle Mountain Housing Authority (Apr. 2, 2001). Alex and Bermilia then moved into Cindy and Todd’s home; Cindy and Todd moved into Alex and Bermilia’s home. *See* Tribal Court’s Order, Findings of Fact and Conclusions of Law at ¶¶ 7, 9. Cindy alleged and the Estate’s counsel conceded at oral argument that the arrangement amounted to a “trade.” Petition/Complaint at ¶ 15; Oral Argument of Richard Frederick. This last fact is consistent with the lower court’s findings as well. *See* Tribal Court’s Order, Findings of Fact and Conclusions of Law at ¶ 9.

In 2003, Cindy and Todd divorced. *See* Tribal Court’s Order, Findings of Fact and Conclusions of Law at ¶ 9; *St. Claire v. Malaterre St. Claire*, Order for Dissolution of Marriage, No. 03-5106 (Turtle Mountain Band Tribal Court, Oct. 9, 2003). In the hearing before the lower court in this matter, Cindy testified – and the Tribal Court found – that Todd St. Claire had used violence or the threat of violence to force Cindy to enter into the

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“trade.” *See* Tribal Court’s Order, Findings of Fact and Conclusions of Law at ¶ 14; Civil Court Hearing, Testimony of Cindy Malaterre (Nov. 12, 2004).

In her complaint, Cindy Mataterre sought to have the house in which she and Todd St. Claire lived returned to her possession. *See* Petition/Complaint, Prayer for Relief, at ¶ 19. The lower court, per Judge Shirley Cain, heard testimony on this matter on November 11, 2004. Judge Cain found that the Cindy and Todd had “gifted” their home to Alex and Bermilia for the purpose of allowing Alex to reside in a home that was handicap-accessible. *See* Tribal Court’s Order, Findings of Fact and Conclusions of Law at ¶ 5. Judge Cain further found that Alex and Bermilia “gifted” their home to Cindy and Todd “in return.” Tribal Court’s Order, Findings of Fact and Conclusions of Law at ¶ 9.

II. Standard of Review

This Court reviews the findings of fact made by the trial court with a great deal of deference. As this Court stated long ago, “[D]etermination of fact issues is primarily the responsibility of the trial court, the appellate court being responsible only for ascertaining that a factual conclusion is reasonably supported by the evidence.” *Laducer v. Laducer*, Memorandum Decision, at 3-4 (TMAC 1990). If “substantial evidence [exists] to support the trial court’s finding,” then this Court must uphold those findings of fact. *Id.* at 4. As a result, we have more recently held that the factual determinations made by the tribal court in child custody matters be reviewed using a “clearly erroneous” standard, where tribal court findings will be disturbed only if found by this Court to be clearly erroneous and not supported by substantial evidence. *See Wilkie v. Solberg*, No. 04-002, at 2-3 (TMAC 2005); *Keplin v. Keplin*, No. 03-5014-1, at 9 (TMAC 2005). We see no reason to depart

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from that standard in non-child custody cases and therefore hold that this Court will review the findings of fact made by the tribal court under a clearly erroneous standard.

Conversely, this Court will review the conclusions of law made by the tribal court without similar deference but instead under a *de novo* standard. *See Turtle Mountain Judicial Board v. Turtle Mountain Band of Chippewa Indians*, No. 04-007, at 10 (TMAC 2005) (citing *LaFontaine-Gladue v. Ojibwe Indian School*, No. 94-004, at 3 (TMAC 1996)); *General Motors Acceptance Corp. v. Mathiason*, No. 05-002, at 4-5 (TMAC 2005). We “gran[t] no special deference to the tribal court’s conclusions of law.” *Turtle Mountain Judicial Board, supra*, at 10.

III. Discussion

A. The “Trade” of Homes

Given the deferential standard of review that constrains this Court’s review of the findings of fact by the tribal court, we affirm the tribal court’s determination that a contract had been formed between the two families resulting in the “trade” of the two homes. As a general matter, whether a contract has been formed is a question of fact. *E.g., Colville Tribal Enterprise Corp. v. Orr*, No. 98-008, 1998.NACC.0000009, at ¶ 19 (Colville Confederated Tribes Court of Appeals 1998) (holding that whether an implied contract has been formed is a question of fact); *Hood v. Bordy*, No. 07-90, 1991.NANN.0000005, at ¶ 28 (Navajo Nation Supreme Court 1991) (holding that the tribal court’s findings that an oral contract had been formed were conclusive). Under tribal law, a contract may be written or oral. *See* TURTLE MOUNTAIN BAND TRIBAL CODE

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§ 7.0602. The tribal court, after taking testimony from the parties and several others in this matter, found as a matter of fact that Todd and Cindy had “gifted” their home in 2001 to Alex and Bermilia. *See* Tribal Court’s Order, Findings of Fact and Conclusions of Law at ¶ 7. Alex and Bermilia “gifted” their home “in return” to Todd and Cindy. *See id.* at ¶ 9. This mutual “gifting” of homes meets the requirement under tribal law that the consideration must “resul[t] in a benefit to the promisor or a detriment to the promisee,” TURTLE MOUNTAIN BAND TRIBAL CODE § 7.0502, and that it “must be of some legal value,” *id.* at § 7.0503. Moreover, a written instrument signed by Todd and Cindy provided evidence of the mutual “gifting” sufficient to generate a presumption that a contract existed. *See id.* at § 7.0505. As a result, a “trade” was consummated, a contract was formed, and this Court affirms the determination of the tribal court that ownership of the homes was transferred.

We are mindful that there is no writing that demonstrates the “gifting” of Alex and Bermilia’s home to Cindy and Todd. We note that the Tribal Code adopts the Anglo-American notion of the Statute of Frauds for real estate transactions, but with the exception that the tribal court retains the power “to compel specific performance of any agreement for the sale of real estate in case of part performance thereof.” TURTLE MOUNTAIN BAND TRIBAL CODE § 7.06.03(3) But we are influenced by the fact that, in many tribal cultures, “[n]either writing, nor consideration, nor witnesses is required.” Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts (Part II of II)*, 46 AM. J. COMP. L. 509, 548 (1998). Moreover, “[i]n a culture in which so much rests on oral tradition, a given word weighs much more than in a culture that writes. Therefore, an oral pledge is valid, even without

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consideration.” *Id.* at 548 n. 90. Here, we are comforted that the “trade” of these homes is consistent with the relationship of the parties at the time of the transaction. *See generally id.* at 547 (“Tribal people tend to form long-run relationships.... Long run relationships build trust and reliance among the parties.”); *see also* Petition/Complaint at ¶ 9 (alleging that Cindy Malaterre agreed to transfer her home to the St. Claires “in good faith”). Moreover, we agree with the implicit finding of the tribal court that affirming the existence of a contract will work no fraud or deceit on either party. *See* TURTLE MOUNTAIN BAND TRIBAL CODE § 7.0604 (implying that prevention of “fraud or deceit” were purposes of enacting a Statute of Frauds). As a result, as a matter of law, we hold that the fact that there is no complete writing proving the existence of a contract is not a bar to the finding of the formation of the contract by the tribal court.

The finding of fact by the tribal court that Cindy Malaterre “gifted” her marriage home to the St. Claires under duress gives this Court a great deal of consternation, but after a great deal of consideration, this finding does not alter our conclusion. Under tribal law, “duress” and “undue influence,” which we hold includes without limitation physical violence or the threat of physical violence, are factors sufficient to render a contract voidable. *See* TURTLE MOUNTAIN BAND TRIBAL CODE §§ 7.0302(1), (3). *Cf. Lewis v. Mashantucket Pequot Gaming Commission*, No. 97-117, 1997.NAMP.0000016, at ¶ 42-43 (Mashantucket Pequot Tribal Court 1997) (holding that a resignation of employment may be found to be involuntary if made under duress). The tribal court found that Cindy “gifted” her home “under duress by her ex-husband, Todd St. Claire,” Tribal Court Order, Findings of Fact and Conclusions of Law at ¶ 14, and that “during her marriage to Todd St. Claire, Cindy Malaterre was a victim of domestic violence,” *id.* at ¶ 15. We are

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not satisfied that the tribal court took this fact into consideration when making the finding of fact that a contract had been formed. However, we decline to reverse the tribal court's ruling and rely upon the failure of counsel to appeal the "duress" issue by raising it in the appellant's brief. As a corollary, we note that Cindy Malaterre never alleged duress in her original complaint. *See* Petition/Complaint at ¶ 9 (alleging that Cindy Malaterre agreed to transfer her home to the St. Claires "in good faith"). As we have held elsewhere, the failure to raise this issue in the appellate brief operates to waive the question. *See Turtle Mountain Judicial Board, supra*, at 16.

B. Due Process

We decline to make a decision regarding the due process argument made by Cindy Malaterre on appeal on the basis that the argument is directed against a non-party. A claim against a person or entity that is not party to a lawsuit must be dismissed absent joinder of that person or entity. *Cf. Turtle Mountain Judicial Board, supra* at 21 ("The critical purpose of the compulsory joinder rule is 'to ensure that a lawsuit will not proceed absent a party that has an interest in the litigation.'") (quoting Matthew L.M. Fletcher, *The Comparative Rights of Indispensable Sovereigns*, 40 GONZAGA L. REV. 1, 6 (2004/2005)); *LaDue v. Trenton Indian Service Area Election Board*, No. 05-012, at 3 (TMAC 2005) (holding that parties who were not party to the tribal court's decision had no standing to appeal that decision). Cindy Malaterre's central argument on appeal is that the Turtle Mountain Housing Authority has violated her due process rights by allegedly approving the initial "trade" or in its actions after the initial "trade." *See generally* Appellant's Brief at 3. However, we must refuse to decide this issue on the grounds that

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Ms. Malaterre's attorney simply never brought suit against the Turtle Mountain Housing Authority. There were not party to the tribal court matter and are not party in the appeal of that matter.

C. Order for Cindy Malaterre's Payment of \$1000 to the Estate

We vacate the tribal court's order for Cindy Malaterre to make \$1000 in payments on the home in which she currently resides before ownership may be finally transferred to her name. Tribal Judge Carey Vicenti (Jicarilla Apache) has stated that, in the tribal common law of contracts, "[r]epairing the relationship between the parties is the primary legal goal." Cooter & Fikentscher, *supra*, at 549 (quoting Carey Vicenti). Money damages are not a favored remedy. *See id.* at 547-49 (noting that specific performance is a more appropriate remedy, where possible). We note here that the tribal court ordered that Cindy may stay in her current residence but that she must pay \$1000 to the St. Claire Estate. *See* Tribal Court Order at ¶¶ 2-3, 6-9.

The origin of the \$1000 payment is unclear from the record. The November 11, 2004 hearing is silent as to the origin of this obligation. The only document in the record noting a \$1000 obligation is a Warranty Deed purporting to convey Cindy Malaterre's current residence to Richard L. Gourneau. *See* Warranty Deed from Bermilia St. Claire to Richard L. Gorneau (April 21, 2003). It is not clear from the record why Cindy Malaterre should be obligated to pay \$1000 to the Estate. As a result, we vacate this portion of the Order.

We note, however, that there may be a very legitimate reason to obligate Cindy Malaterre to pay \$1000 to the estate of Bermilia St. Claire. We therefore leave open the

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right of the Estate to file a motion for reconsideration with the tribal court in order to attempt to prove that Cindy Malaterre is obligated to pay \$1000 to the Estate.

Dated: _____

Signed: _____
Matthew L.M. Fletcher
Justice
Turtle Mountain Band Court of Appeals

Acting Chief Justice VONDALL and Justice DECOTEAU concur.

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