¶5 ¶10 ¶15 ¶20 ¶25 ¶30 ¶35 ¶40 ¶45 Endnote

IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 98-377

IN RE THE CHILD CUSTODY OF:

R. W. O. E.
ESLEY OLD ELK,
Petitioner/Appellee,

vs.

MARY MATT,
Respondent/Appellant.

Decided May 25, 2001

[Cite as 2001 CROW 5]

Before Greybull, J., LaFountain, J., and Watt, J.

OPINION

¶1 This is an appeal by the mother, Respondent Mary Matt, from the Order of the Tribal Court (Stewart, J.) entered on June 11, 1999, awarding permanent custody of the parties' child to his father, Petitioner Esley Old Elk. Under the Tribal Court's Order, the mother is entitled to visitation on alternating weekends and holidays and for two weeks during the summer.

¶2 After a careful review of the record in this and related cases, we hold that the Crow Tribal Court properly exercised jurisdiction of the father's custody petition, and affirm its order granting permanent custody to the father.

A. Facts and Course of Proceedings

¶3 The facts recited in this Opinion are the undisputed facts as set forth in the parties' pleadings, videotape testimony at the hearing held on April 16, 1999, and the statements of

proceedings filed by the parties pursuant to Rule 7(b) of the Crow Rules of Appellate Procedure. This court has also examined the documents on file in Cause No. 98-369, in Mary's Petition to Register and Enforce Foreign Order which was granted by the Crow Tribal Court on December 11, 1998, as discussed more fully below. Because of the jurisdictional issue involved in this case, we will review the previous custody proceedings in some detail.

¶4 Petitioner Esley Old Elk is a member of the Crow Tribe. At all pertinent times, he resided in Lodge Grass on the Crow Reservation, and is a truck driver by occupation.

¶5 Respondent Mary Matt is a member of the Northern Cheyenne Tribe. During the proceedings in this case, she resided in Ronan, Montana on the Flathead Reservation, and was studying nursing at the Confederated Salish and Kootenai College in Pablo.

¶6 The parties' child whose custody is at issue in this appeal was born on September 30, 1994 while the parents resided together in Billings. He is an enrolled member of the Crow Tribe. When the petition was filed in this case, he was with his mother and his older brother (who has a different father) in Ronan.

¶7 The first court case involving the custody of the parties' child was a proceeding in the Crow Juvenile Court begun in 1996. Following a hearing attended by both parents and both grandmothers, and with the agreement of all involved, the Crow Juvenile Court (White, C.J.) concluded that proceeding by ordering that the child be returned to his natural mother in Billings. *In re. Matter of R.O.E.*, (DOB 9/30/94), Juv. No. 96-313, Findings of Fact, Conclusions of Law and Order (Crow Juv. Ct., March 7, 1997). After July 1, 1997, the child began residing primarily with Esley and his family in Lodge Grass.

¶8 In October 1997, Mary planned to enlist in the Army. A custody agreement was reached whereby Esley had "joint custody" with the child's maternal grandmother who resided in Busby, Montana, on the Northern Cheyenne Reservation. According to the agreement, Esley had "primary physical custody commencing October 1, 1997," and the maternal grandmother was to have custody for six weeks in the summer, one week around Christmas, and two weekends per month. Esley's signature on the agreement was notarized on October 23, 1997. The next day, the maternal grandmother petitioned the Northern Cheyenne Tribal Court to recognize the custody agreement. Following a hearing attended by Mary and her mother, with Esley appearing only by way of his notarized statement, the Northern Cheyenne Tribal Court entered an order granting joint custody of the child pursuant to the parties' agreement "until he reaches the age of majority or until emancipation occurs[.]" *In re. Matter of C.M.B. and R.W.O.E.*, Joint Custody Order, JC97-309 (N. Cheyenne Tribal Ct., Oct. 24, 1997). Pursuant to this joint custody arrangement,

Esley had primary physical custody of the child until shortly before Esley filed his petition in the present case.

¶9 After Mary was unable to enlist in the Army due to medical reasons, she decided to go to back to school. In June 1998, Mary requested the Northern Cheyenne Tribal Court to modify the joint custody order entered the previous October, and to give her sole custody. By affidavit, she stated that child was being cared for primarily by Esley's relatives, that they interfered with the maternal grandmother's visitation rights, and that she was concerned that the child was being neglected. On July 13, 1998, the Northern Cheyenne Tribal Court entered an order granting temporary custody of the child and his brother to Mary, "until the Court notifies the fathers and schedules and [sic] hearing on this matter." *In re. Matter of C. B. and R. W.O.E.*, No. JC97-309 (N. Cheyenne Tribal Ct., July 13, 1998). The language quoted from the order confirms Esley's contention that he never received notice of Mary's modification request before the temporary order was issued.

¶10 On December 11, 1998, Mary petitioned the Crow Tribal Court to recognize the Northern Cheyenne Tribal Court's temporary custody order. *In re. Matter of R.W.O.E.*, No. 98-369. Mary stated in her affidavit that she had established residency in Ronan to attend school, and that Esley and his family were refusing to allow her and her mother to see the child or to honor the modified court order. Mary also filed copies of the custody agreement and orders from the Northern Cheyenne Tribal Court, and a letter from her mother stating that the child needed to be with his mother. The same day, the Crow Tribal Court (Birdinground, C.J.) entered an Order granting Mary's petition and recognizing the Northern Cheyenne Tribal Court's order of July 13, 1998. The Crow Tribal Court's order also directed the Crow Tribal Police to assist Mary in regaining physical custody of the child until the Northern Cheyenne Tribal Court could conduct further proceedings. *In re. Matter of R.W.O. E.*, No. 98-369, Order to Register and Enforce Foreign Order (Crow Tribal Ct., Dec. 11, 1998). The file in that case indicates that no prior notice was given to Esley and no hearing was held before the Tribal Court granted Mary's petition. On the basis of the Tribal Court's order, it appears that Mary took the child back to Ronan with her.

¶11 Esley filed his Petition for Child Custody in the present case, Civil No. 98-377, on December 15, 1998, four days after the Tribal Court's order in No. 98-369 was served on him. In the jurisdictional allegations of his petition, Esley stated under oath that the child had resided with him in Lodge Grass for approximately the past 2 years, and that the child was currently absent from the Reservation because of his removal by the person claiming custody.

¶12 Mary immediately moved the court to dismiss Esley's petition based on the Crow Tribal

Court's Order of December 11, 1998 in Case No. 98-369, recognizing the Northern Cheyenne Tribal Court's order that awarded temporary custody to her. *See* Motion to Dismiss dated January 22, 1999. After giving notice to the parties, the Tribal Court (Gros-Ventre, J.) held a hearing on Mary's dismissal motion on February 19, 1999. Mary failed to appear at the hearing. Esley appeared with his lay counsel, and argued that the Crow Juvenile Court's 1996 order established the Crow courts' exclusive jurisdiction over the child's custody. Following the hearing, the Tribal Court denied Mary's motion to dismiss, vacated the Tribal Court's recognition order in No. 98-369, granted temporary custody to Esley, and ordered Mary to show cause at a hearing on March 10 why permanent custody should not be awarded to Esley. *See* Temporary Custody and Order to Show Cause, February 19, 1999.

¶13 At Mary's request, the March 10 hearing was continued until April 16, 1999 because of her final exams. Mary appeared with counsel via telephone at the April 16 show cause hearing, and Mary's mother and Esley were present to give testimony. At the close of the hearing, the Tribal Court (Stewart, J.) continued the hearing until May 5, ordered Mary to appear personally for that hearing, and ordered the parties to file their briefs by April 30.

¶14 After the parties filed their briefs, Mary personally appeared with her counsel and gave testimony at the final hearing on May 5. In her brief and in her testimony, Mary expressed a preference for sole custody of the child, but offered a joint custody parenting plan as an alternative. Under Mary's proposed plan, she would have primary physical custody. The father would have custody on alternating holidays during the school year and for six weeks during the summer. The father would be allowed liberal visitation during the weekends, or the option of sole custody during alternating weekends. *See* Parenting Plan filed with Mary's Brief in Support of Joint Custody dated April 30, 1999.

¶15 The Crow Tribal Court (Stewart, J.) entered its final order on Esley's custody petition on June 11, 1999. The court ordered that it was in the child's best interest for Esley to have custody. The Tribal Court also ordered that Mary have visitation on alternating weekends and holidays, and for two weeks during the summer. It is from this order that Mary here appeals.

B. Jurisdiction

¶16 In the first issue she raises on appeal, Mary argues that the Tribal Court's order was made on unlawful procedure, because the custody dispute was already conclusively settled by the Tribal Court's previous order in Juvenile Case No. 98-369, which recognized the Northern Cheyenne Tribal Court's temporary custody order, and which Esley did not appeal. In response, Esley argues that the Crow Tribal courts assumed original jurisdiction

in the matter of the child's custody when the Juvenile Court entered its Order on March 7, 1997. Thus, according to Esley, the Northern Cheyenne Tribal Court erred by taking jurisdiction, and the Crow Tribal Court erred by ceding its original jurisdiction in its recognition order of December 11, 1998 in Case No. 98-369.

¶17 Child custody orders are, by their nature, subject to modification in the best interest of the child as changes in circumstances dictate. *See, e.g.*, Crow Tribal Code 10-1-136 (modification of custody orders). Accordingly, they are not forever binding and "conclusive" under the principles of res judicata, as Appellant has argued with respect to the Northern Cheyenne Tribal Court's temporary custody order and the Crow Tribal Court's recognition order in Case No. 98-369. By the same token, the Crow Juvenile Court's 1997 order cannot be regarded as forever establishing the Crow Tribal Court's exclusive jurisdiction over any future custody dispute between the parents.

¶18 Viewed in this context, the first issue can best be restated as whether or not the Crow Tribal Court had jurisdiction to modify the earlier custody orders issued by the Northern Cheyenne Tribal Court. The request for modification was effectively raised by Esley's new petition, which in any event was filed within the time for appealing the recognition order in Case No. 98-369. In the absence of any prejudice, Mary's procedural objection to Esley filing a new petition rather than appealing in No. 98-369 is overruled.

1. Tribal Code Provisions

¶19 The first step in determining the Tribal Court's jurisdiction is to see whether it is granted by the Crow Tribal Code. Jurisdiction of custody disputes between parents is governed by Tribal Code Section 10-1-130(1), which reads in pertinent part:

> The Crow Tribal Court, competent to decide child custody matters, has jurisdiction to make a child custody determination by initial or modification decree if:
>
> (a) The Crow Indian Reservation:
>
> (i) Is the home of the child at the time of commencement of the proceedings; or
>
> (ii) Has been the child's home within six (6) months before commencement of proceedings and the child is absent from this home because of his removal or retention by the person claiming custody or for other reasons, and a parent

> or person acting as parent continues to live within the Crow Indian Reservation; or
>
> * * *
>
> (d)
>
> (i) No other state or tribe has jurisdiction under prerequisites substantially in accordance with subsections 1(a) . . .or another state or tribe has declined to exercise jurisdiction on the ground that the Crow Indian Reservation is the more appropriate forum to determine custody of the child; and
>
> (ii) It is in his best interest that the court assume jurisdiction.

¶20 This Tribal Code jurisdictional provision is modeled after Section 401 of the Uniform Marriage and Divorce Act ("UMDA"), which in turn was intended to track the interstate jurisdictional provisions of the Uniform Child Custody Jurisdiction Act ("UCCJA"). *See* Comment UMDA § 401, Uniform Laws Annotated. Under the UCCJA, the child's home is where he has lived for the past consecutive 6 months, coinciding with what is regarded as a reasonable period for a child to be "integrated into an American community," and the additional 6 months after the child has been removed from the home is intended "to protect a parent who has been left by his spouse taking the child along." Comment to UCCJA (U.L. A.) § 3.

¶21 Consistent with this intent, it is clear that the Crow Tribal Court had jurisdiction of the present case under Section 10-1-130(1)(a), because the Crow Reservation was the child's primary home for more than a year before Esley filed his petition, the child had been removed by the other parent only days earlier, and Esley was still living on the Crow Reservation.

2. Federal Parental Kidnapping Protection Act

¶22 The second step in determining jurisdiction is to see whether it is limited by Federal law.

¶23 *See, e.g.*, Crow Tribal Code Section 3-2-204(2), 3-1-104(1); *Crow Tribe v. Gregori*, 1998 CROW 2, ¶ 52. The limits of Tribal court jurisdiction are ultimately matters of federal law which the Tribal Courts are competent to apply and, by the same token, obliged to follow. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-57 (1985).

¶24 Because the subject matter of this dispute is the custody of a child who is an enrolled member of the Crow Tribe, the general limitation on Tribes' inherent jurisdiction over nonmembers (such as the mother in this case) with respect to claims arising on non-Indian fee lands does not appear to be relevant. *See Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997). Even if it were, the Tribal Court would have jurisdiction to adjudicate the non-member's interest in the child's custody under either of the exceptions in *Montana v. United States*, 450 U.S. 544, 565-66 (1981)(consensual relationships with Tribal members or health and welfare of the Tribe). It is beyond dispute that determining custody of a Crow child in a case such as this is essential to preserve "the right of reservation Indians to make their own laws and be ruled by them." *Strate*, 520 U.S. at 459, *quoting Williams v. Lee*, 358 U.S. 217, 220 (1959); see also, Sanders v. Robinson, 864 F.2d 630 (9th Cir. 1988)(Northern Cheyenne Tribal Court had at least concurrent jurisdiction of dissolution involving Tribal member and non-member spouse who had resided on the Reservation during the marriage).

¶25 Congress has specifically addressed inter-jurisdictional conflicts related to child custody in the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (the "PKPA"). Among other things, the purpose of the PKPA is to "avoid jurisdictional competition and conflict between State courts in matters of child custody and visitation which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being [.]" Pub. L. 96-611, § 7 (Dec. 28, 1980). To accomplish this purpose, the PKPA prescribes the conditions under which State courts must give "full faith and credit" to custody determinations of other State courts. As we read the PKPA, once a State court has commenced a custody proceeding with jurisdiction based on the residence of the child and one parent, all other State courts must defer to the jurisdiction of this "home State" (and refrain from modifying its decrees) so long as at least one of the parents still resides there. *See* 28 U.S.C. § 1738A(c)(2), (d), (f) and (g).

¶26 The PKPA, however, does not specifically include Tribes or Indian Country in its definition of "State." 28 U.S.C. § 1738A(b)(8). Despite this exclusion, cases from other jurisdictions have held that Tribes were intended to fall within this definition. *See, e.g., In re. Larch*, 872 F.2d 66 (4th Cir. 1989)(Cherokee Tribe was a "state" within the meaning of

the PKPA); *see also DeMent v. Oglala Sioux Tribal Court*, 874 F.2d 510, 514 n.4 (8th Cir. 1989)(Tribes as "territories," but holding that federal courts lack jurisdiction to determine the issue unless raised in Tribal court and Tribal remedies exhausted). In our view, however, when Congress wishes to include Tribes within the ambit of full faith and credit legislation, it expresses that intent somewhat more clearly. *See, e.g.*, Child Support Act, 28 U.S.C. § 1738B(b)(including "Indian country" in definition of "State" in regard to full faith and credit for child support orders). According to one commentator, the PKPA's legislative history "does not suggest that Congress considered Indian tribes to fall within the statutory definition of 'state' ...[and] very few courts have concluded that the Act applies literally to Indian tribes." Atwood, B.A., Identity and Assimilation: Changing Definitions of Tribal Power Over Children, 83 Minn. L. Rev. 927, 953-54 (1999).

¶27 We therefore decline to make an expansive interpretation of a Federal statute that could have the effect of limiting the Crow Tribe's jurisdiction over its members, and hold that the PKPA does not apply directly to the Crow Tribal Court. *See, e.g., Wilson v. Marchington,* 127 F.3d 805, 809 (9th Cir. 1997)(declining to judicially extend full faith and credit to Tribal judgments when not extended by Constitution or Congress).

¶28 Although the PKPA is thus not binding on the Tribal Court, it may be useful as a guideline for determining whether or not the Tribal Court should exercise its jurisdiction when another court has previously assumed jurisdiction of the same dispute (*see* discussion of comity below). Applying the PKPA in the present case would not limit the Crow Tribal Court's jurisdiction for two reasons.

¶29 First, the PKPA requires that before a child custody determination is entitled to recognition by other courts, the contestants must receive "reasonable notice and opportunity to be heard." 28 U.S.C. § 1738A(e). In the present case, these basic due process rights were not afforded to the father before the Northern Cheyenne Tribal Court entered its July 1998 order granting temporary custody to the mother. By its terms, that order was intended to remain in effect only "until the Court notifies the fathers and schedules and [sic] hearing on this matter." Rather than carrying out this intent, the mother filed the order five months later with the Crow Tribal Court to enforce it as a foreign court order. Under the PKPA, such a temporary *ex parte* order would not be entitled to full faith and credit.

¶30 Second, as alluded to above, the PKPA only limits jurisdiction to modify another court's custody order so long as any contestant continues to reside within that originating court's territorial jurisdiction. 28 U.S.C. § 1738A(d). For the purpose of this analysis, we will assume that the Northern Cheyenne Tribal Court had jurisdiction in the first place as a "home State" by virtue of the maternal grandmother's joint custody. However, once the

Northern Cheyenne Tribal Court modified the joint custody order with the grandmother's consent in July 1998, and the mother moved to Ronan, there were no longer any contestants residing on the Northern Cheyenne Reservation. Therefore, by the time Esley's custody petition was filed in the Crow Tribal Court, the Northern Cheyenne Tribal Court had lost jurisdiction of the matter under the PKPA.

¶31 Based on the foregoing, even if the PKPA were applied as a guideline, it would not limit the Tribal Court's jurisdiction in this case.

3. Comity

¶32 In cases involving the modification of another court's child custody orders, a third and final consideration in the Tribal Court's decision to take jurisdiction is whether or not it should defer to the other court as a matter of comity. "Comity" is the respect that the tribunals of foreign nations give to each other's judgments. *See, e.g., Wilson v. Marchington*, 127 F.3d 805, 808 (1997). [1] In the area of child custody determinations and modifications, where the Tribal Court's jurisdiction may often be *concurrent* with that of another court, applying principles of comity may be necessary to control the contestants' tendency to involve multiple forums in their custody disputes. Preventing these inter-jurisdictional conflicts in the best interests of the children is the basic policy behind all of the Tribal Code's custody jurisdiction provisions, the UCCJA, and the PKPA.

¶33 Comity is, of course, a two-way street. It is through comity that judgments of the Crow Tribal Court are recognized by Federal, State and other Tribal courts. *Wilson v. Marchington,* 127 F.3d at 808. Thus, as a matter of comity, the Montana Supreme Court has held that Tribal Courts have jurisdiction, exclusive of State courts, when the child and one parent are enrolled members living on their reservation. *In re. Marriage of Skillen,* 956 P.2d 1, 17 (Mont. 1998). In a case such as the present one, where the father and child were Tribal members living on the Reservation, the Crow Tribal Court would unquestionably have exclusive jurisdiction under *Skillen* to determine the child's custody, or to modify a custody order of a Montana State court.

¶34 In these circumstances, we no reason why the Crow Tribal Court should have deferred to the Northern Cheyenne Tribal Court's *ex parte* order modifying the parties' joint custody arrangement and granting custody to the mother. As we have already discussed above, that order would not be entitled to recognition if we were to apply the PKPA jurisdiction provisions as a matter of comity. To the contrary, in a case involving a child who is a Crow Tribal member, whose primary residence for at least the past year has been with his Crow

father on the Crow Reservation, and whose Northern Cheyenne mother has moved to the other end of the state, we have every reason to believe that the Northern Cheyenne Tribal Court would, as a matter of comity, defer to the Crow Tribal Court in further proceedings.

¶35 We therefore hold that the Crow Tribal Court properly assumed jurisdiction to modify the Northern Cheyenne Tribal Court's previous custody orders.

C. Merits of the Custody Order

¶36 In her second issue on appeal, Mary argues that the Tribal Court erred in failing to adopt her proposed joint custody parenting plan. According to Mary, her proposed parenting plan was in the child's best interest because it would allow the child to live with his brother in Ronan where Mary also has other family, the mother's schedule was better suited to raising a child, and the father's family would still be able to participate in the child's upbringing.

¶37 Under the Crow Tribal Code, the Tribal Court must determine custody based on the best interests of the child, including the factors listed in Section 10-1-131. The Tribal Code's "best interest" test has been adopted from Section 402 of the Uniform Marriage and Divorce Act (the "UMDA"). Jurisdiction to make custody determinations has long been recognized as part the courts' inherent equitable powers. *See* Clark, H. H., *The Law of Domestic Relations of the United States*, § 19.1 (2d ed. 1988). Courts applying these UMDA provisions have generally been held to have broad discretion in determining the child's best interest, and their determinations should only be upset upon a showing of an abuse of that discretion. *Id.*, § 19.3.

1. Joint Custody

¶38 The concept of "joint custody" usually includes the parents sharing decision-making about the child's education, religion and general welfare, in addition to a sharing of physical custody. Clark, *supra*, § 19.5. A trend toward joint custody developed in the 1970's, in part due to the influence of fathers' rights advocates. *Id.* However, because of practical implementation problems and concerns with stability in some joint custody arrangements, courts have often been reluctant to order joint custody unless both parents agree. *Id.* In Montana, there was a presumption in favor of joint custody from 1981 until it was repealed in 1997. *See* Mont. Code Ann. § 40-4-224 (1995), *repealed* Sec. 39, Ch. 343, L. 1997.

¶39 Although it is not mentioned in the Code, the Tribal Court certainly has equitable jurisdiction and discretion to order joint custody arrangements where they are in the best

interest of the child. On the other hand, it is clearly not an abuse of discretion for the Tribal Court to decline to award joint custody at a parent's request.

¶40 In the present case, the joint-custody Parenting Plan proposed by Mary provided for the parents to jointly make major decisions on education, religion, and emergency health care, and included some other general provisions about communications, logistics and mediation of conflicts (Parenting Plan §§ 1.0, 3.1-3.3 and 4.0). With regard to physical custody, though, it would have had essentially the same practical effect as awarding sole custody to Mary, with Esley's visitation rights consisting of 6 weeks during the summer, alternating holidays, and alternating weekends (Parenting Plan §§ 2.1 – 2.3).

¶41 Instead, in the order being appealed, the Tribal Court found that it was in the best interest of the child for Esley to have custody, and that Mary have visitation on alternating weekends and holidays and 2 weeks during the summer. The effect of this order was to continue Esley's role as primary physical custodian of the child – the same role that he had under the parties' Custody Agreement confirmed by the Northern Cheyenne Tribal Court on October 24, 1997. The only modifications made by the Crow Tribal Court's order were to (1) reinstate Mary's visitation rights, rather than her mother being joint custodian, and (2) reduce the summertime visitation period away from Esley from 6 weeks to 2 weeks.

2. Custody Modification

¶42 Strictly speaking, the Tribal Code mandates a 2-year waiting period before any custody modification can be considered. Crow Tribal Code § 10-1-138(1)(exceptions for serious endangerment). Apart from the waiting period, Crow Tribal Code § 10-1-138(2) requires that some change in circumstances has occurred to justify a custody modification, and directs the court to "retain the custodian appointed pursuant to prior decree unless:

> (a) the custodian agrees to the modification;
>
> (b) The child has been integrated into the family of the [party seeking modification] with the consent of the custodian; or
>
> (c) The child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him."

According to the comments to UMDA § 409, on which these Code provisions were modeled,

the 2-year waiting period is based on the belief that finality and stability is more important to the child's best interest than which parent has custody. This same philosophy underlies the other requirements for custody modifications quoted above.

¶43 In the context of the present case, the modification substituting Mary for her mother in terms of visitation rights was the minimum necessary to accommodate the changed circumstances (Mary going to school rather than joining the Army), as well as Mary's parental right to visitation under Crow Tribal Code § 10-1-136. Mary has little basis for objecting to this change, after she and her mother requested both Tribal courts to transfer custody to Mary. In these circumstances, the Tribal Court did not err by making the modification before the end of the 2-year waiting period.

¶44 In contrast, the modification requested by Mary (and temporarily granted in *ex parte* proceedings before both Tribal courts) would have completely reversed the custodial roles of the parents, and resulted in the child's primary residence moving more than 400 miles away. There is no credible evidence in the record that such a modification would meet any of the criteria in Crow Tribal Code § 10-1-138(2). We conclude that the Tribal Court's order complied with Section 10-1-138 by retaining the custodian designated in the parties' 1997 custody agreement that was confirmed by the Northern Cheyenne Tribal Court.

3. Visitation Modification and Enforcement

¶45 A parent's visitation rights, and modification of those rights, are governed by Crow Tribal Code § 10-1-136. Under this Code provision, and the UMDA from which it was adopted, a parent's right to reasonable visitation may not be eliminated unless the court after hearing makes an "extraordinary finding" that visitation would "endanger seriously" the child's health. *See* Comment to UMDA Section 407; Crow Tribal Code § 10-1-136(a). "The same onerous standard is applicable when the custodial parent tries to have the noncustodial parent's visitation privileges restricted or eliminated." *Id*.; Crow Tribal Code § 10-1-136(b)

¶46 Although the Tribal Court's order reduced the 6-week summertime visitation period previously afforded to the maternal grandmother under the 1997 custody agreement to 2 weeks for the mother, this was not a substantial restriction of the mother's reasonable visitation rights, which also include alternating weekends and holidays. We cannot say that this reduction by itself was an abuse of discretion under Crow Tribal Code § 10-1-136(b).

¶47 In view of allegations by Mary and the maternal grandmother that Esley and his family have repeatedly interfered with their visitation rights in the past, a final comment is in

order. Under the Tribal Court's order and the Tribal Code, Mary's visitation rights are an integral part of the modified custody decree. It is only through this visitation that the bonds between mother and child may be maintained, and that the child may be also exposed to Mary's Tribal heritage. Esley is responsible for making sure that Mary is able to exercise her visitation rights, and failure to abide by the visitation schedule is a violation of the court's order. Thus, if Esley or any other member of his family interferes with the mother's lawful visitation rights, Esley will be subject to punishment for contempt of court.

D. Conclusion

¶48 Based on the residence of the child and his father, as members of the Crow Tribe residing on the Crow Reservation for more than a year preceding the father's petition, the Tribal Court properly assumed jurisdiction of the custody dispute. The Tribal Court properly vacated the order in No. 98-369 recognizing the Northern Cheyenne Tribal Court's *ex parte* order of July 13, 1998, because the father never received prior notice of either proceeding. The Tribal Court's order modifying the parties' previous joint custody arrangement of October 1997 by substituting the mother's visitation rights for those of the maternal grandmother, but retaining the father as the primary custodian, complied with the Crow Tribal Code and was not an abuse of discretion. The Tribal Court's order is therefore **AFFIRMED** in all respects.

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[1] Tribes are not subject to the Full Faith and Credit clause of the United States Constitution, art. IV, § 1, or Congress' implementing legislation in 28 U.S.C. § 1738. *Wilson v. Marchington*, 127 F.3d at 808. Thus, unless the Congress has legislated otherwise, recognition of Tribal court judgments by Federal and State courts "must inevitably rest on the principles of comity." *Id.* at 809. By the same token, Tribal courts are not required to give full faith and credit to orders of State courts or other Tribal courts, but recognize judgments of these coexisting sovereigns on the basis of comity.