IN THE CROW COURT OF APPEALS

IN AND FOR THE CROW INDIAN RESERVATION
CROW AGENCY, MONTANA

CIV. APP. DOCKET NO. 98-16 (II)

In re. Marriage of:

WARREN HARMON REDFOX,
Petitioner/Appellee,

vs.

TINA MARIE REDFOX,
Respondent/Appellant.

Decided November 23, 2001

Decision entered December 18, 2001

[Cite as 2001 CROW 13]

Before Stewart, J., Greybull, J., and Watt, J.

OPINION

¶1 This is an appeal by respondent Tine Marie Redfox from the Final Decree and Dissolution of Marriage entered by the Tribal Court (Gros-Ventre, J.) on June 27, 2000. Based on our findings that the Tribal Court may have lacked jurisdiction as a matter of federal law, and in any event should have deferred to the Northern Cheyenne Tribal Court's prior decree in a matter involving enrolled members of that Tribe, this court reverses and vacates the Crow Tribal Court's decree.

A. Facts and Procedural History

¶2 The husband in this case is an enrolled member of the Northern Cheyenne Tribe. The wife is non-Indian. The parties' three children, born in 1985-91, are all enrolled members of the Northern Cheyenne Tribe.

¶3 This case is part of the tortuous maze of litigation surrounding the dissolution of the parties' 14-year marriage. This is the second time this case has come before the Court of Appeals. In our first opinion, we dismissed without prejudice Tina's interlocutory appeal on the issue of subject matter jurisdiction, because the Tribal Court's order denying her motion to dismiss was not an appealable "final order" within this court's jurisdiction. *See In re. Marriage of Warren and Tina Redfox*, 2000 CROW 3 (March 23, 2000)(*Redfox I*). A partial history of the parties' litigation up to that time in the Crow Tribal Court, the Northern Cheyenne Tribal Court, and the State District Court in Rosebud County were outlined in that opinion. *See id.*, ¶¶ 7-9. Because of its significance to the jurisdictional issues in this case, we review that history in further detail below.

¶4 Warren filed his petition for dissolution with the Crow Tribal Court on January 15, 1998. Prior to that time, the parties had lived with Warren's parents at Dunmore on fee land within the Crow Reservation.[1] Tina had moved to Colstrip with the children a few days earlier, and process was served on her in Billings.[2]

¶5 Tina filed a motion to dismiss for lack of jurisdiction on February 27, 1998. In her brief, Tina argued that the Crow Tribal Court lacked jurisdiction because she and children no longer lived on the Crow Reservation, she was a non-Indian and none of the parties were enrolled at Crow, Warren had claimed that he lived on the Northern Cheyenne Reservation in the earlier custody case he filed there, and Warren had not contested the Rosebud Justice Court's jurisdiction in the earlier protective order proceeding. Thus, Tina argued, the Crow Tribal Court should dismiss as a matter of comity and defer to either the Northern Cheyenne or State courts. Warren never filed a written answer to Tina's dismissal motion.

¶6 The Crow Tribal Court scheduled several hearings over the next few months, but at least two of them were continued at Tina's request. At a hearing on November 13, 1998, Chief Judge Birdinground recused himself and granted a further continuance requested by Warren. [3]

¶7 Thereafter, Judge Gros-Ventre held hearings on the matter on February 10 and 17, 1999. During the latter hearing, the Tribal Court denied Tina's motion to dismiss for lack of jurisdiction. That order was the subject of Tina's first appeal. *See Redfox I*, 2000 CROW 3 (dismissing as premature). Also on February 17, the Tribal Court held a compromise discussion with the parties, but nothing was settled and Judge Gros-Ventre excused himself from the case. However, in a written order issued two weeks later, Judge Gros-Ventre stated that after further consideration he had decided not to excuse himself, and granted custody of the children to Warren, subject to Tina's visitation rights. *See* Temporary Custody Order dated March 5, 1999.

¶8 While her appeal in *Redfox I* was pending, Tina filed a new dissolution petition in the Northern Cheyenne Tribal Court. By then, Tina had lived in Lame Deer on the Northern Cheyenne Reservation for more than a year, and the three children had lived there with her at least half time. Warren moved to dismiss in favor of the previously filed proceedings in the Crow Tribal Court and the Montana District Court, but did not appear at the hearing on August 17, 1999. Tina's counsel repeated their objections to jurisdiction by the Crow Tribal Court. Tina also presented an order from the Montana Sixteenth Judicial District Court for Rosebud County stating that, in view of the residency and Tribal membership of the children, it would defer to the jurisdiction of the Northern Cheyenne Tribal Court. *In re. Marriage of Redfox,* DR98-89 (Memorandum and Order, Aug. 5, 1999)(Hegel, J.).[4]

¶9 Following the hearing, the Northern Cheyenne Tribal Court entered a full decree for the parties' divorce which, among other things, dissolved the parties' marriage, awarded the parties' Arizona home and its debt to Warren, gave primary custody of the three children to Tina, and ordered Warren to pay child support of $200 per child per month. *In re. Matter of Tina and Warren Redfox,* C99-141 (Dissolution Decree, August 24, 1999)(Wilson, J.). According to the Northern Cheyenne Court of Appeals, Warren appealed the decree, but his appeal was never perfected and is not actively pending.

In view of these other Tribal and State court orders, and the jurisdictional questions raised by Tina, this court in *Redfox I* remanded to the Tribal court with directions to review its jurisdiction as the next step before conducting further proceedings. As guidance for the Tribal Court in analyzing its jurisdiction, we stated:

> [T]he Crow Tribal Court on remand should first consider whether it has exclusive or concurrent jurisdiction to decide this matter, or whether it is required by federal law, including 28 U.S.C. § 1738B, to give "full faith and credit" to any part of the Northern Cheyenne Tribal Court's recent Decree. If it finds that it has concurrent jurisdiction, the Tribal Court should also consider whether or not it would be prudent or appropriate, as a matter of comity, to defer to the Northern Cheyenne Tribal Court's Decree in this case.

Redfox I, 2000 CROW 3, ¶ 10. On remand, the Tribal Court issued a notice on June 6, 2000 inviting the Crow Tribe to defend against Tina's jurisdictional challenge, but the Tribe's counsel declined to intervene. There is no record of any further proceedings by the Tribal Court to reconsider its jurisdiction.

Meanwhile, the Tribal Court received a letter dated June 6, 2000 from Warren's counsel requesting that his original petition be granted, and offering to submit a proposed decree. Then, by letter dated June 21, Warren's counsel sent the Court a proposed Decree and a Parenting Plan, and expressed Warren's desire to resolve the matter as soon as possible.[5] On June 27, 2000, the Tribal Court issued the Decree and Parenting Plan in the form proposed by Warren.

¶10 The Crow Tribal Court's Decree, which incorporated the attached Parenting Plan, recites that it was based on the parties' agreement to its terms, and pursuant to a hearing conducted on March 5, 1999. Among other things, the Decree ordered the marriage dissolved, awarded the parties' Arizona home and the "current debt" to Tina, ordered that Warren have primary custody of the three children, and ordered Tina to pay child support to Warren.

¶11 There are obvious errors and defects in the Decree. Actually, the Tribal court's last hearing was held on February 17, 1999, to which the Decree undoubtedly intended to refer. More importantly, there is no evidence that Tina ever agreed to any of the terms in the Decree (or even knew about them before it was issued by the Court), and no other evidence was taken in the hearings to support the findings in the Decree. Also, the amount of the child support is uncertain – the Decree states that it would be determined by the Montana child support guidelines (which do not apply in the Crow Tribal Court), whereas the Parenting Plan states that "the Mother shall pay child support in the amount of $200.00 per child per month[.]" The operation of the Decree was stayed by order of this court on August 31, 2000 pending the conclusion of this appeal.

¶12 This court is not called upon to decide the merits of the Tribal Court's Decree, because we decide this appeal on jurisdiction and comity grounds. We therefore need not address the parties' arguments on due process and civil rights violations.

B. Jurisdiction

¶13 Initially, both parties argue that the other has waived his or her jurisdictional argument. Tina argues that her motion to dismiss should be deemed granted because of Warren's failure to ever file an opposition brief or answer (Appellant's Reply at 5). On the other hand, Warren argues that Tina submitted to the Crow Tribal Court's jurisdiction when she appeared and filed her extension motion (Appellee's Brief at 3).

¶14 Neither of those waiver arguments is persuasive when the Tribal Court's subject matter jurisdiction is the issue. We agree with Warren that the Tribal Court had personal jurisdiction of Tina, based not only on a possible technical waiver but on her significant contacts with the Crow Reservation during the year or more that the family resided at Warren's parents' home. But subject matter jurisdiction cannot be waived, and can be raised at any time by the court or the parties. *Edwards v. Neal,* 1998 CROW 4, ¶ 12 (parties' stipulation as to jurisdiction held ineffective); *see also, Insurance Corp. of Ireland v. Compagnie des Bauxites de Guniee,* 456 U.S. 694, 702 (1982). Even if the issue is not raised by the parties, the Tribal Court has an independent obligation to analyze its subject matter jurisdiction in cases involving a non-Tribal member defendant or respondent. And although we agree with Tina that granting a motion is often proper when the other party fails to file an opposition, a party's neglect is not a good reason for the Crow Tribal Court to surrender its subject matter jurisdiction over Reservation activities.

¶15 We therefore proceed to the general analysis of jurisdiction in this case that we asked the Tribal Court to do in the first appeal. *See Redfox I,* 2000 CROW 3, ¶ 10 (quoted above). In another recent domestic relations case involving conflicting orders from the Crow and Northern Cheyenne Tribal Courts, this court followed a 3-step process for analyzing jurisdiction and the recognition of foreign court orders: (1) whether the Crow Tribal Court has jurisdiction under the Tribal Code; (2) whether there are any Federal laws that limit or otherwise affect that jurisdiction; and (3) even if it has jurisdiction, whether the Crow Tribal Court should defer to the other court as a matter of comity. *In re. Custody of R.W.O.E.,* Civ. App. Dkt. No. 98-377 (May 25, 2001), 2001 CROW 5, ¶¶ 19-34. The parties' other arguments on appeal will be addressed at each step in this process.

1. Tribal Code Jurisdictional Provisions

¶16 The provisions of the Crow Tribal Code support Warren's position that the Crow Tribal Court had jurisdiction. Section 3-2-205 of the Code confers jurisdiction of "all civil causes of action arising within the exterior boundaries of the Crow Indian Reservation."

¶17 More specifically, in order to grant a dissolution of marriage, the Tribal Court must find that "one of the parties, at the time of the action commenced, was domiciled within the Crow Indian Reservation for ninety (90) days next proceeding [sic] the making of the findings [.]" Crow Tribal Code § 10-1-115(a). Contrary to Tina's argument (*see* Appellant's Reply at 3), the requirement that the parties have lived apart for 180 days in Section 10-1-116(c)(i) is not jurisdictional, and is only one basis for granting a divorce (the "serious marital discord" alternative being the more common one).

¶18 Despite his earlier statement in his petition to the Northern Cheyenne Tribal Court that he resided in Lame Deer, we will accept as true Warren's later statements to both courts that he had actually resided at his parents' home on the Crow Reservation for approximately 18 months when he filed this case in the Crow Tribal Court on January 15, 1998. It appears that he was still living there at the time the Court entered its findings in June of 2000. Thus, based on Warren's residency, the Code requirements for jurisdiction of Warren's divorce action were fulfilled, including jurisdiction to dissolve the marriage, divide the property, and order payment of alimony.

¶19 As for jurisdiction of the parents' dispute over child custody, the Code provisions are based on the Uniform Marriage and Divorce Act ("UMDA") and the Uniform Child Custody Jurisdiction Act of ("UCCJA"), and provide several alternate bases for jurisdiction. *See In re. Custody of R.W.O.E.*, 2001 CROW 5, ¶ 20; Comment to UMDA § 401. The one most pertinent to this case is based on the child's residency:

> (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[.]

Crow Tribal Code Section 10-1-130(1). Subparagraph (ii) quoted above was intended to cover situations just like the present case, when the family had lived on the Crow Reservation for more than a year up until the time that Tina moved off the Reservation with the children a few days before Warren filed his petition. [6] *See* Comment to UCCJA § 3 ("The main objective is to protect a parent who has been left by his spouse taking the child along.").

¶20 Thus, there can be no question that according to the Tribal Code, the Crow Tribal Court had full subject matter jurisdiction of this case when Warren filed commenced the proceedings by filing his petition in January 1998. However, that jurisdiction was not necessarily exclusive, and the Tribal Code does not address the situation where another court with concurrent jurisdiction has already dissolved the parties' marriage and issued different orders regarding the division of property, custody of the children, and child support. Also, the jurisdiction granted by the Tribal Code may be subject to Federal-law limitations in actions involving multiple courts and non-members of the Tribe.

2. Effects of Federal Law on Jurisdiction.

A.

¶21 Congress has enacted two pieces of legislation to address the problems with inter-jurisdictional conflicts in the areas of child custody and support – the Parental Kidnapping Protection Act, 28 U.S.C. § 1738A (the "PKPA"), and the Full Faith and Credit for Child Support Orders Act, 28 U.S.C. § 1738B (the "FFCCSOA"). Despite our requests, the parties did not address these Acts in their briefs.

¶22 The PKPA requires State courts to grant full faith and credit to previous child custody orders of other State courts whose jurisdiction is deemed "continuing" under the Act, as long as the original State "remains the residence of the child or of any contestant [*i.e.,* parent]." 28 U.S.C. §§ 1738A(d) and (f)-(g). However, this court has held that the PKPA does not apply directly to the Crow Tribal Court, because Tribes and Reservations are not included in the PKPA's definition of "State." *In re. Custody of R.W.O.E.,* 2001 CROW 5, ¶¶ 25-26. This court declined to adopt the PKPA judicially, because it could potentially limit jurisdiction over Crow children, but noted that it may be useful as a guideline for making jurisdictional determinations in custody cases involving other Tribal or State courts. *Id.*, ¶ 27.

¶23 Applying the PKPA as a guideline in this case would tend to support Crow Tribal Court jurisdiction, to the exclusion of the Northern Cheyenne Tribal Court. The Crow Reservation was the children's residence at the time Warren filed his petition pursuant to the UCCJA provision quoted above (which is also incorporated into the PKPA), and the Crow Reservation "remain[ed] the residence of [a] contestant," *i.e.,* Warren, through the time that the Crow Tribal Court issued its Decree in June 2000. [7] In other words, under the PKPA, the Northern Cheyenne Tribal Court would have been required to defer to the Crow Tribal Court's initial Temporary Custody Order issued in March 1999, rather than issuing its own Decree in August 1999.

¶24 The opposite result occurs, however, with respect to the courts' conflicting child support orders under the FFCCSOA. That is because the Crow Tribal Court's order of March 5, 1999 did not pertain to child support. Instead, the first child support order was made by the Northern Cheyenne Tribal Court in its final Decree in August 1999. That honorable Court therefore retained "continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant," 28 U.S.C. § 1738B(d). In other words, once it issued its decree, the Northern Cheyenne Tribal Court had continuing, exclusive jurisdiction over child support under the FFCCSOA so long as at least one parent (*i.e.,* Tina) continued to live on the Northern Cheyenne Reservation.

¶25 Unlike the PKPA, the Full Faith and Credit for Child Support Orders Act does include "Indian Country" in its definition of "State." 28 U.S.C. § 1738B(b). Thus, the FFCCSOA apparently requires, as a matter of Federal law, that Tribal court child support orders such as the one issued by the Northern Cheyenne Tribal Court in this case be given full faith and credit by the State courts and other Tribal courts. *See, e.g., Day v. State,* 272 Mont. 170, 900 P.2d 296 (1995)(Montana district court required give full faith and credit to Fort Peck Tribal Court child support order under FFCCSOA).

¶26 As we have seen from the above discussion, mechanically applying the jurisdictional provisions of these two Federal acts could result in the Crow Tribal Court being required to recognize the Northern Cheyenne Tribal Court's order that Warren pay child support to Tina, while also requiring the Northern Cheyenne Tribal Court to recognize the Crow Tribal Court's conflicting order granting custody to Warren. Such a nonsensical result is avoided in this case because the PKPA does not apply directly in Indian Country, so the Crow Tribal Court's custody order was not entitled to full faith and credit as a matter of Federal law.

B.

¶27 Even if the PKPA were extended by Congress to apply to Tribal court custody orders, it is doubtful that it would require their recognition in cases where the Tribal court did not have subject matter jurisdiction in the first place. In this regard, Tina argues as she has from the beginning that the Crow Tribal Court lacked jurisdiction because none of the parties are members of the Crow Tribe and she is a non-Indian, relying on *Strate v. A-1 Contractors,* 520 U.S. 438 (1997) (no Tribal court jurisdiction over accident involving non-members on State highway). *See* Appellant's Brief at 16-17; Defendant's Motion to Dismiss at 1. In response, Warren argues that *Strate* was a tort

case, and does not control domestic relations cases such as the present one (Appellee's Brief at 4).

¶28 As Tina argues, *Strate* made clear that the main rule from *Montana v. United States* sharply limits Tribal courts' jurisdiction to adjudicate disputes involving non-member defendants arising on non-Indian fee lands . *Strate*, 520 U.S. at 453; *Montana v. United States,* 450 U.S. 544, 565 (1981)(the Big Horn River case). It is true that the Supreme Court has never applied *Montana* and *Strate* in a domestic relations case. However, it recently clarified that the *Montana* rule also applies to Tribal taxation jurisdiction. *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. ___, 121 S. Ct. 1825 (2001). Also, as the Court in *Strate* mentioned twice, the *Montana* opinion lists a domestic relations case as an example of its second exception. *See Strate,* 520 U.S. at 452 and 458, *citing Fischer v. District Court of Sixteenth Judicial Dist. of Montana,* 424 U.S. 382 (1976)(Northern Cheyenne Tribal Court had exclusive jurisdiction of adoption when all parties were Tribal members residing on the reservation), Therefore, we believe that a majority of the Supreme Court would likely hold that *Montana* also applies to domestic relations cases involving non-members.

¶29 Applying *Strate* and *Montana* to the present case, and after establishing the Tribal affiliation (or non-affiliation) of the parties, Tina argues that it is necessary to determine the ownership status of the land on which the case arose (Appellant's Brief at 16). In *Strate* and in the *Atkinson Trading* majority opinion, the Supreme Court was careful to limit the main *Montana* rule against Tribal jurisdiction to cases arising on "lands held in fee by non-Indians**."** *Atkinson Trading,* 121 S. Ct. at 1830, *quoting Montana,* 450 U.S. at 559. Even more recently, though, the Supreme Court has said that the *Montana* rule applies even if the case arose on Tribal or trust land, and land ownership is "only one factor" in the determination of Tribal Court jurisdiction. *Nevada v. Hicks,* 533 U.S. ___, 121 S. Ct. 2304, 2310 (June 25, 2001); *see also, Atkinson Trading*, 121 S. Ct. at 1835 (Souter, J, concurring)(stating the belief of three Justices that *Montana* applies to all cases involving non-member defendants, even if the matter arises on Tribal trust land).

¶30 Although it is difficult to say what the precise *situs* of a divorce is, the parties in this case resided on fee land owned by Warren's parents, at least one of whom is a member of the Northern Cheyenne Tribe. Analyzing the land ownership as simply one factor pursuant to *Hicks* allows us to avoid basing our jurisdictional decision in this case on whether the non-member-Indian-owned fee land in this case falls within the definition of "non-Indian fee land" in *Montana*, *Strate,* and *Atkinson Trading*. Rather, under *Hicks,* this case probably must fit within one of the *Montana* exceptions in order for the Crow Tribal Court to have jurisdiction.

¶31 Under the two exceptions to the main *Montana* rule, Tribes may exercise civil jurisdiction over non-members if (1) they "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements[,]" or (2) the non-members' conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S. at 565-66. In *Strate*, the Court clarified that the second exception is quite narrow, lest it "severely shrink" the main rule against Tribal jurisdiction. *Strate*, 520 U.S. at 458 (although careless drivers on public highway running through reservation "surely jeopardize the safety of tribal members," second exception not applicable). The Court also rejected the second exception in *Atkinson Trading* because the hotel activity which employed over 100 Tribal members at a facility surrounded by Tribal lands did not "endanger the Navajo Nation's political integrity." *Atkinson Trading,* 121 S. Ct. at 1835.

¶32 Concerned that the first exception may also "swallow the rule," the Court has clarified that the first exception, the "consensual relationship" test, must also be construed somewhat narrowly. *Atkinson Trading,* 121 S.Ct. at 1833. It is not fulfilled by the nonmember's "actual or potential receipt of tribal police, fire, and medical services," or the other "advantages of a civilized society" that Tribal governments generally provide within their Reservations. *Id.* As the Court explained: "*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself. . . . A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in for a Pound.'" *Atkinson Trading,* 121 S. Ct. at 1834-35.

¶33 In the present case, Tina argues that the marriage between a member of the Northern Cheyenne Tribe and a non-Indian does not involve any qualifying "consensual relationship" with the Crow Tribe or its members (Appellant's Brief at 17). We must agree. That observation would also apply to all incidents of the marriage, including the parties' property (located on fee land) and their children. As for the second exception, compared to other cases in which it has been rejected by the Supreme Court, it is difficult to see how the breakup of the parties' marriage, and the resulting issues concerning support and custody of their non-member children, are matters that sufficiently "endanger the political integrity" or jeopardize the health and welfare of the Crow Tribe.

¶34 We reached the opposite conclusion in a custody case when the father and child were both members of the Crow Tribe, finding that both exceptions were satisfied. *In re. Custody of R.W.O.E.*, 2001 CROW 5, ¶ 23. At the same time, it must be noted that the Northern Cheyenne Tribal Court undoubtedly had jurisdiction to render its Decree in this case under both of the *Montana* exceptions, based on the husband and the children being enrolled members of the Northern Cheyenne Tribe. The marriage being dissolved was a consensual relationship between the non-member and a Northern Cheyenne Tribal member. Tina presumably consented to the children being enrolled there as Tribal members. And any court could properly take judicial notice that a Tribe's children are its most precious constituents and assets. Thus, the custody and support of Warren and Tina's children after the breakup of their marriage directly affected the Tribe's political integrity and health and welfare, so the jurisdiction of the Northern Cheyenne Tribal Court was not limited by Federal law.

C.

¶35 We therefore conclude that, as a matter of Federal law, it is doubtful that the Crow Tribal Court had subject matter jurisdiction of the

divorce in this case, including matters related to property, child custody and support. Apart from the probable lack of general civil jurisdiction over non-members under *Montana*, the FFCCSOA expressly required the Crow Tribal Court to give full faith and credit to the Northern Cheyenne Tribal Court's child support orders so long as the latter court retained jurisdiction of the matter. However, as further explained below, the outcome of this appeal does not depend solely on our finding of a probable lack of jurisdiction.

3. Deferring as a Matter of Comity

¶36 In addition to her arguments on lack of jurisdiction, Tina argued in her Motion to Dismiss in February 1998 that the Crow Tribal Court should defer, as a matter of comity, to the previously filed proceedings in either Rosebud County or the Northern Cheyenne Tribal Court, citing *Hilton v. Guyot*, 159 U.S. 113 (1895). On appeal, Tina has renewed her argument that the Crow Tribal Court should recognize the Northern Cheyenne Tribal Court's prior Decree, which already dissolved the parties' marriage and has been recognized by the State District Court for Rosebud County (Appellant's Brief at 17-18). In response, Warren has argued that the Crow Tribal Court properly had jurisdiction when Warren filed his petition there, and it is Tina who has abused the process by filing in her petition in the Northern Cheyenne Tribal Court while proceedings were already pending in Crow.

¶37 "Comity" is the respect and deference that one sovereign nation gives to the court judgments of another sovereign, as a matter of courtesy and respect.[8] *See In re. Custody of R.W.O.E.*, 2001 CROW 5, ¶ 31, *citing Wilson v. Marchington*, 127 F.3d 805, 808 (9th Cir. 1997). In domestic relations cases where another Tribal or State court has issued 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." *Id. at ¶ 31.* The same principle applies to all the incidents of the divorce in the present case.

¶38 As this case illustrates, the exercise of comity is often essential to untangle the web of conflicting demands that parents involved in child custody disputes make in whatever tribunals that each thinks will be most sympathetic to his or her wishes. The parties in the present case, for example, have availed themselves of at least six different proceedings in four different courts, not including the Tribal appellate courts. This is possible because the various courts often have concurrent jurisdiction when the parents have separated and moved away to different states or reservations, and the children have lived with both parents after the separation. Also, if one of the parties to a divorce is a non-Indian, State courts will have jurisdiction concurrent with the Tribal Court where the Tribal-member spouse resides. *See In re. Marriage of Skillen*, 956 P.2d 1 (Mont. 1998). As discussed above, even Congress' efforts to channel this torrent of litigation to one particular court in the best interests of the children have not been completely successful, particularly with respect to child custody disputes involving Indian children and Tribal courts. In fact, unless Congress has legislated otherwise (as in the case of child support orders discussed above), Tribal court custody and other divorce orders are only enforceable by other courts under principles of comity, because the "full faith and credit" clause of the U.S. Constitution does not apply to Tribes. *In re. Custody of R.W.O.E.*, 2001 CROW 5, ¶ 31 n.1, *citing Marchington,* 127 F.3d at 808.

¶39 By "synthesizing the traditional elements of comity with the special requirements of Indian law," the Ninth Circuit has held that Tribal court judgments are generally entitled to recognition and enforcement by Federal courts as a matter of comity, and developed the following test for when Tribal court judgments are not entitled to recognition:

> [F]ederal courts must neither recognize nor enforce tribal judgments if:
>
> (1) the tribal court did not have both personal and subject matter jurisdiction; or
>
> (2) the defendant was not afforded due process of law.
>
> In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances:
>
> (1) the judgment was obtained by fraud;
>
> (2) the judgment conflicts with another final judgment that is entitled to recognition;
>
> (3) the judgment is inconsistent with the parties' contractual choice of forum; or
>
> (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought.

Wilson v. Marchington, 127 F.3d at 810. Although these general principles of comity were not tailored for a domestic relations case, they provide a sound test for determining whether to recognize and enforce a judgment or order of another Tribal or State court, and whether to decline to exercise jurisdiction to modify their orders.

¶40 Applying these principles to the Northern Cheyenne Tribal Court's Decree of August 1999, that honorable Court apparently had

personal and subject matter jurisdiction of the parties' divorce based on the residency of Tina and the children, as discussed above. Although Warren failed to attend the hearing, it is clear from his motion to dismiss that he did receive notice of the proceedings, and there is no allegation that he did not receive due process. Nor can Warren complain that the Decree was obtained by fraud. Tina's representations that the Crow Tribal Court lacked jurisdiction had merit, as we have discussed above. The Decree did not conflict with any other final judgment entitled to recognition – the Crow Tribal Court had only issued a temporary custody order 17 months earlier which, if the court lacked jurisdiction, would not be entitled to recognition anyway. Since this is not a contract case, the "choice of forum" principle does not directly apply, but the parents' decision to enroll their children in the Northern Cheyenne Tribe may be regarded as a similar agreement. Finally, it is necessary to decide whether the Decree was contrary to the public policy of the Crow Tribe (the "forum state" in the Ninth Circuit's last factor quoted above).

¶41 In order to preserve its authority over the remaining lands it has reserved under treaties with the United States of America, we perceive that the Crow Tribe has a strong policy of safeguarding its jurisdiction whenever possible and appropriate. Thus, there may be a certain reluctance, as a matter of Tribal public policy, to surrender Crow Tribal Court jurisdiction when it is authorized by the Tribal Code. However, we believe that there is a more important consideration that is particularly pertinent to domestic relations matters involving members of other recognized Tribes. That consideration arises from the unique relationship between Tribal-member parents and children on the one hand, and the Tribe to which they belong. In the context of competing jurisdictional claims in domestic relations cases, this Tribal affiliation is fundamentally different than the relationship that parents and their children have with a State in which they happen to reside at any given time. Of all the areas in which Tribal self-government is desirable, the ability to apply the Tribe's customs and traditions in divorce and custody proceedings involving Tribal-member children is certainly among the most important.

¶42 Thus, in a case such as the present one, the Crow Tribe's interest in protecting its jurisdiction must give way to the interest of the other Tribe in adjudicating the divorce and custody arrangements for its own members. Taking the unique nature of Tribal membership into account in jurisdictional determinations will also protect the Crow Tribe's interest in adjudicating such matters for its own members. For example, in *In re. Custody of R.W.O.E.*, 2001 CROW 5, ¶ 33, in which father and children were enrolled Crows residing on the Crow Reservation and the mother was a Northern Cheyenne, we held that there was no reason to defer to the Northern Cheyenne Tribal Court's previous orders as a matter of comity, and assumed that it would instead defer to the Crow Tribal Court.

¶43 This approach, of deferring to the Tribal court of the Tribe in which one of the parties or the children are enrolled, also mirrors the approach taken by the Montana courts in custody matters involving Indian children, and will avoid the additional conflict that arose in this case when the State court deferred to the Northern Cheyenne rather than the Crow Tribal Court.

¶44 In *In re. Marriage of Skillen,* 956 P.2d 1, 1998 MT 43 (Mont. 1998), the mother and the child were enrolled members of the Fort Peck Tribes, and the father was non-Indian, but it was not clear from the record whether the mother and child actually resided on the Fort Peck Reservation.[9] The *Skillen* court held that if the Tribal members did reside on the reservation, the Tribal court would have exclusive jurisdiction, because any State court involvement in such domestic matters that are "uniquely tribal in nature" would "threaten the tribe's political integrity and welfare, even though another party is a non-Indian who resides off the Reservation." *Id.,* 956 P.2d at 16-17, 1998 MT 43, ¶¶ 60 and 62. On the other hand, if the child lived off the reservation at the time the case was commenced, the *Skillen* court held that the State court would have jurisdiction concurrent with the Tribal court, but should consider deferring to the Tribal court as a matter of comity. *Id.* at 18, 1998 MT 43 at ¶¶ 68-70. In deciding whether to defer to the Tribal court, the Montana district courts are to consider the "best interest" factors listed in *In re. Bertelson*, 617 P.2d 121, 130 (Mont. 1980), giving "due consideration to the child's ethnic and cultural identity" and to the policy of not undermining Tribal authority. *Skillen,* 956 P.2d at 18, 1998 MT 43 at ¶ 70 .

¶45 Although the *Skillen* opinion did not specifically say that its holdings were limited to Tribal court proceedings on the Tribal members' home reservation, that conclusion is evident from the facts and reasoning of the case. After reviewing the *Skillen* decision, the Alaska Supreme Court has also recognized concurrent State and Tribal court jurisdiction, but only for the Tribal court of the Native Alaskan children's home Village. *Baker v. John,* 982 P.2d 738, 764 (Alaska, 1999).

¶46 Therefore, we conclude that in divorce and child custody cases involving children enrolled in another Tribe, the Crow Tribal Court must, as a matter of comity, defer to proceedings in the Tribal court for the children's home reservation if that court has jurisdiction based on the residence of the children or one of the parents. In the present case, this court holds that regardless of whether Federal law limited its jurisdiction, the Crow Tribal Court should have deferred to the Northern Cheyenne Tribal Court in this matter involving children of its Tribe once the latter Court obtained jurisdiction, and should have dismissed this case after that honorable Court issued its Decree in August 1999.

Conclusion

¶47 For the foregoing reasons, the Tribal Court's decisions to retain jurisdiction and enter its Decree on June 27, 2001 are **REVERSED**, and that Decree and all previous orders in this case are hereby **VACATED.** The Crow Tribal Court is directed to dismiss the case, and to recognize any orders of the Northern Cheyenne Tribal Court that may be presented to it in the future for enforcement. The Clerk will forward a copy of this Opinion to the Northern Cheyenne Tribal Court. No costs.

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

Endnotes

[1] On January 12, 1998, Warren had filed a custody petition in the Northern Cheyenne Tribal Court, stating that the family lived on the Northern Cheyenne Reservation, and that honorable Court issued a temporary order granting Warren custody of the children. However, at Warren's request, which stated that the children had lived on the Crow Reservation since June of 1996, and that the Crow Tribal Court had jurisdiction because of their residency, the Court terminated its temporary order and dismissed the case. *In re. Matter of: S.R., R.R., and I.R.,* JC98-137 (January 28, 1998).

[2] Also on January 12, 1998, Tina petitioned for and obtained a temporary civil order of protection from the Justice Court of Rosebud County. On the stipulation of Warren and his counsel at the hearing, that honorable Court continued the protective order (except with respect to the children) for one year. *Redfox v. Redfox,* 4829-CP098 (Jan. 29, 1998).

[3] Meanwhile, a children in need of care complaint filed by the Juvenile Prosecutor in February 1998 was dismissed by the Tribal Court (Gros-Ventre, J.) upon a finding that the Crow Tribal Court was a "forum non conviens." *In re. Matter of R.C.R., W.I.R., and S.C.R.,* Juv. No. 98-C14 (July 13, 1998). A separate custody petition filed under Cause No. 98-17 was apparently consolidated with the present case.

[4] Although not clear from the record, it appears that Tina also filed a divorce action in Rosebud County in 1998.

[5] It does not appear from the record that Warren's counsel sent copies of either letter or the proposed Decree/Parenting Plan to Tina or her counsel. In this court's scheduling order, we invited Warren to comment on "his role, if any, in providing the form of Decree used by the Tribal Court, and whether he served a copy on Appellant when it was submitted to the Tribal Court[.]" Those questions were not addressed in Warren's brief, however. Accordingly, this court can only conclude that copies of those documents were never served on Tina or her counsel prior to the Court's issuance of the Decree. Warren's counsel is admonished for failing to serve all papers on the opposing party as required by Rule 5(a) of the Crow Rules of Civil Procedure, which is applicable in divorce actions.

[6] Consistent with the intent of the UCCJA, "home" as used in Crow Tribal Code § 10-1-130 means that it was the child's home for a 6-month period. *See* Comment to UCCJA § 3 (and definition of "home state"). Thus, in order for subparagraph (ii) to apply, the child must have resided on the Reservation for a 6-month period ending sometime within the last 6 months before the petition was filed and the other parent took the child away.

[7] This result illustrates the fact that the PKPA does not give any special consideration to the jurisdiction of the Tribe in which the children are enrolled. That is precisely the reason that this court will not adopt it as binding law unless it is Congress expressly imposes it on the Tribe.

[8] A classic general definition of "comity" is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to the international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Marchington,* 127 F.3d at 810, *quoting Hilton v. Guyot,* 159 U.S. at 164.

[9] It is worth noting that the *Skillen* case was remanded to the Hon. Joe Hegel in Rosebud County on March 3, 1998, just five months before Judge Hegel issued his order deferring to the Northern Cheyenne Tribal Court proceedings in the *Redfox* case.