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

IN THE COURT OF APPEALS

In Re the Matter of the Welfare of: Case No. 2011 APP 01

A.B.,
Minor Child.

DECISION ON APPEAL

INTRODUCTION

Appellant, the Non-Removable Mille Lacs Band of Ojibwe Indians (the "Band"), on behalf of the minor child A.B., appeals from the District Court's dismissal of the Band's Child In Need Of Protection or Services ("CHIPS") Petition for lack of personal jurisdiction where the child resides outside the exterior boundaries of the Mille Lacs Band Reservation. Appellant argues that Band statutes authorize the District Court to exercise jurisdiction over CHIPS proceedings involving children who are enrolled Band members, even when they reside off of the reservation, and also challenges the District Court's conclusion that the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. (the "ICWA), restricts the Band's authority to exercise jurisdiction over this child.. Appellee T.J. is a legal custodian of A.B., and is an enrolled member of the Band. Appellee T.J. joins in the challenge of the District Court's order on appeal, and argues that the district court should have exercised jurisdiction over A.B., at least, as she is an enrolled member of the Band. This Court concludes that, Mille Lacs Band Statutes establish the scope of District Court jurisdiction, and also Mille Lacs Band Statutes grant the District Court discretion to apply the provisions of the ICWA, and for those reasons the District Court's decision is **REVERSED**.

FACTS

Appellant filed a CHIPS petition on December 8, 2010, alleging that A.B. and six siblings were endangered in the home of their adoptive father J.J., and that temporary out-of-home placement with the mother T.J. was necessary to prevent imminent harm to the children. The CHIPS petition alleged a long family history of involvement with Child Protective Services, for various reasons. The family includes eight children. Four children were adopted by T.J. and her estranged husband J.J. Two children were adopted by T.J. only but consider J.J. their father. Permanent guardianship of A.B., the child of this matter was established with T.J. and J.J. by order of the Mille Lacs Band Court of Central Jurisdiction in 2005. The eighth child, A.P., is a foster child of T.J. and J.J., under the jurisdiction of the Court of Central Jurisdiction and thus, is already subject to the continuing jurisdiction of the Mille Lacs Band Tribal Court.

J.J. filed for divorce in June 2010, in Mille Lacs County Court, and the CHIPS petition indicates that J.J. was awarded temporary sole physical custody of A.B., and three other children. T.J. and J.J. are separated and do not reside together, although it is unclear from the record when T.J. left the family home.

Sometime in 2010, J.J. admitted that he had sexually abused one of the adopted children in 2008. Mille Lacs County substantiated the report of sexual abuse by J.J. The Band revoked J.J.'s foster care license in August of 2010. Mille Lacs Band Family Services ("Family Services") substantiated allegations of neglect on September 17, 2010, when the parents continued to provide inadequate supervision of the children. The record does not indicate that the Mille Lacs County Court was ever informed of these findings or asked to take any action with respect to the custody of the children.

The family initially complied voluntarily with services that were offered by Family Services beginning on September 17, 2010. The Band historically has provided services to families who reside within a thirty-mile radius of the reservation. T.J. completed a psychological evaluation in early October 2010 with Dr. Kate Sand; Dr. Sand had some recommendations for T.J., but had no concerns for T.J.'s ability to parent the children. J.J. completed a psychosexual evaluation with Melissa Hegland from Project Pathfinder in mid-late October 2010, which found that J.J. "does not accept full responsibility for offending; continuing to explain his actions as merely a response to his ex-wife and adopted daughter's behaviors. Mr. J. reported himself to authorities two years after offending ... [and his] current presentation and psychological testing

reflect remarkably minimal insights", and concludes that J.J. should have "no contact with minors, male and female, including adopted and foster children, until he has completed a significant portion of sexual offender treatment and has received approval by treating therapist". Additionally, once contact was approved J.J. would be supervised and would be subject to additional testing and monitoring to ensure appropriate behavior and interaction with children.

A December 6, 2010, meeting was set to discuss the family's compliance with the terms of the voluntary service agreement. Family Services found T.J. was engaged in the case plan and following the recommendations of the psychological evaluation, but J.J. refused to comply with any of the recommendations of his psychosexual evaluation. Additionally, between October and December 2010, it was reported and had been found after investigation by Family Services that J.J. had exposed the children to known sex offenders, allowed the children to be exposed to pornography while in his care, and exposed the children to alcohol use and firearms.

Therefore, on the evening of December 6, 2010, Family Services removed the children from the care of J.J. and placed them with T.J. The Appellant filed the CHIPS petition in the District Court on December 8, 2010. The White Earth Band of Ojibwe and Mille Lacs County Social Services both supported removal of the children and both agreed that the CHIPS case should be initially filed in Mille Lacs Band Tribal Court. The District Court then directed the Appellant to file a brief in support of its assertion that the District Court had jurisdiction to hear the case, which the Appellant did on December 9, 2010. In its brief, Appellant argued, among other things, that Mille Lacs Band Statutes provide the District Court with jurisdiction over enrolled members who are under the age of eighteen (18), and Appellant specifically requested the opportunity to have a hearing on the issue of jurisdiction before the District Court decided the issue, or at least to stay an order dismissing the action until the following day, December 10, 2010, to allow another court an opportunity to assert jurisdiction over the case.

The District Court judge did neither and immediately issued an Order dismissing the CHIPS case without a hearing, finding that while Band Statutes seem to give the District Court jurisdiction over the child A.B., as she is an enrolled member of the Mille Lacs Band, "that jurisdiction is not exclusive because the child is domiciled off the Reservation" and under § 1911 (b) of the ICWA the tribe has concurrent jurisdiction which "is limited to accepting transfer of state court case [sic] involving this child. This is because she is not domiciled within the exterior boundaries of the Mille Lacs Reservation." *District Court Order, December 10, 2010, page 5.*

This appeal, which involves only the minor child A.B., followed.

I. Tribal Inherent Jurisdiction

The matter currently before the Mille Lacs Court of Appeals involves important issues of tribal court jurisdiction and the Band's relationship with the United States Federal Government and the role of the State of Minnesota in child protection cases involving Band member children. As a review and important backdrop the Court will discuss the interplay of the three sovereigns under what are known as the principals of Federal Indian Law as developed through treaties, case law and the course of dealing over the past 200 plus years.

There are three kinds of sovereign governments in the United States – the federal government, state governments and tribal governments. The U.S. Constitution provides that the federal government is the "supreme sovereign," and under the supremacy clause of the U.S. Constitution federal laws pre-empt state laws. State governments also are sovereign; states retain the powers not specifically granted to the federal government under the Constitution. The Tenth Amendment provides for what is popularly known as reserved rights of the states and provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Indian tribes have no comparable limitations imposed upon their retained inherent sovereignty. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

Indian Tribes are "domestic dependant nations," which exercise inherent sovereignty, *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 8 L.Ed. 25, 25 (1831) and function as "distinct, independent political communities, retaining their original natural rights." *Worchester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). The right of Tribes to govern their members and territories flows from this preexisting sovereignty, a sovereignty which pre-dates the United States Constitution, as was recognized by the U.S. Supreme Court decision in *Cherokee Nation.*

The powers of Indian Tribes are "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler,* 435 U.S. 313, 322 (1978), *citing* F. Cohen, *Handbook of Federal Indian Law,* 122 (1945). The Supreme Court has held "Indian tribes possess those attributes of sovereignty not withdrawn by treaty or statute, or by implication

as a necessary result of their dependent status." *Wheeler,* 435 U.S. at 323; *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 197 (1978).This inherent power is not a delegated power from either the federal or state government. Indian tribal governments, which existed long before Europeans arrived on the North American continent, have inherent sovereignty. Each Tribe retains the inherent authority to "make its own laws and be ruled by them." *William v. Lee*, 358 U.S. 217, (1959). The Band has inherent rights to regulate its own internal and social relations, and to make the Band's own internal laws, and be subject to them. *See, Santa Clara Pueblo,* 436 U.S. at 55-56 (Indians have the right to regulate their own substantive law in internal matters, and to enforce the law in their own forum)(citations omitted).

Only the federal government has the power to deal with and regulate the tribes; the states are excluded unless congress delegated power to them. (See, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987)) State law generally does not apply on Indian reservations absent congressional consent. Id. at 216 n. 18. See also, *State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997) (dismissing criminal prosecution of traffic offenses occurring on the reservation because the laws are regulatory, even if subject to criminal penalties).[1] While tribal sovereignty is a source of inherent tribal power and as a shield against state intrusions, the U.S. Congress is legally free to limit tribal sovereignty at any time, subject only to United States constitutional constraints. *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). State laws generally have no force and effect within Indian Country. *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

Examples of an intrusion on tribal jurisdiction by Congress include the Indian Civil Rights Act 25 U.S.C.A. § 1301 et seq. and the Major Crimes Act, 18 U.S.C.A. § 1153 passed by the U.S. Congress. Public Law 280 is also an example of Congressional action intruding upon areas which traditionally are left to tribal governments. P.L. 280 provided a Federal delegation to the State of Minnesota to exercise criminal jurisdiction on reservations found within the State's boundaries. The civil component of PL-280 granting civil jurisdiction to Minnesota State Courts is limited to jurisdiction over "civil laws of general application to private persons or property" or to suits between private litigants who reside on reservations. See, *Bryan v. Itasca*

[1] "State Court jurisdiction over matters involving Indians is governed by federal statute or case law. The Supreme Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory.' This sovereignty is 'dependent on, and subordinate to, only the Federal Government, not the States.' However, it is established that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *Stone*, 572 N.W.2d at 728 (citations omitted).

Co., 426 U.S. 373 (1976). States do not have the power to impose civil regulatory statutes on reservations.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), the Supreme Court recognized that P.L. 280 did not remove regulatory jurisdiction from Indian tribes. *Id.* at 280 ("prohibitory/regulatory distinction is consistent with *Bryan's* construction of P.L. 280."), and the state law generally does not apply on Indian reservations absent congressional consent. *Id.* at 216 n. 18. See also, *State v. Stone*, 572 N.W.2d 725, 728 (Minn. 1997) (dismissing criminal prosecutions of traffic offenses for lack of jurisdiction because the laws were regulatory, even if subject to criminal penalties). Accordingly, Indian tribes continue to maintain at least concurrent jurisdiction over family law matters, which are indisputably civil/regulatory legal issues, rather than criminal issues. It is well settled that P.L. 280 did not diminish the civil adjudicatory jurisdiction of tribal courts. This grant of jurisdictional authority did not divest tribal courts of concurrent tribal court jurisdiction with the state court. See, *Gavle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996).

With this backdrop in mind, the Indian Child Welfare Act, 25 U.S.C.A. § 1901 et seq. (the "ICWA") was enacted by Congress in 1978. The question before the District Court is whether the ICWA as federal law limited the jurisdiction of the Mille Lacs Band Tribal Courts. The answer is no. This Court begins its inquiry with an analysis of whether the Mille Lacs Band statutes confer on the District Court subject matter and personal jurisdiction over the Mille Lacs Band child in question. This Court will then move to the second inquiry of whether the ICWA in any way diminishes the District Court's jurisdiction.

II. <u>Mille Lacs Band Tribal Court Jurisdiction</u>

The District Court has jurisdiction over this matter pursuant to the Band's own laws. "Except as otherwise provided for by law the Court of Central Jurisdiction shall have all judicial authority extending to cases in law and equity." 5 MLBSA §101. The historical and statutory notes for Title 5 entitled Judicial Authority and Jurisdiction of Mille Lacs Band Statutes Annotated clearly indicate that the purpose of the establishment of the Judicial Branch is to:

> promote the general welfare, preserve and maintain justice and to protect the rights of all persons under the jurisdiction of the Non-Removable Mille Lacs Band of Chippewa Indians consistent with a judicial philosophy of a search for truth and justice. This statute is enacted by the inherent aboriginal and sovereign

> rights of the members of the Non-Removable Mille Lacs Band of Chippewa Indians to be self-governing since time-immemorial…

citing Band Statute 1303-MLC-4, §1.

The Child/Family Protection Statute, 8 MLBSA Chapter 13 "shall be liberally construed to fulfill the following expressed purposes: (a) to provide for the welfare, care and protection of children and families under the jurisdiction of the Mille Lacs Band." 8 MLBSA §3102. The Band has established a special Children's Court to hear Child/Family Protection matters, and has determined the scope and parameters of the jurisdiction of the Children's Court in 8 MLBSA §3111. Interpretation of that particular provision of the Band's Statutes is at the core of the issue on appeal in the present case.

The Appellant asserts that the District Court's jurisdiction squarely extends to the case at bar, as the child who is the subject of this matter is an enrolled Band member. The District Court found that although the plain language of the Band Statute (8 MLBSA §3111) granted jurisdiction to the Mille Lacs Band, the District Court could not exercise exclusive jurisdiction over the case but, rather, the District Court was limited to accepting transfer of jurisdiction over the case from the state court. Therefore, the case must be brought initially in state court and then subsequently transferred to the Mille Lacs Band pursuant to provisions of the federal ICWA. This Court is charged with determining which interpretation of the same statutory jurisdictional provision of Band law is proper.

A. Plain Language Doctrine

Statutory interpretation is the process of interpreting and applying legislation to the particular facts of the case. Some amount of interpretation is always necessary when a case involves a statute, as is the case here. Among the tools used to find the meanings of statutes, Courts utilize various methods of statutory interpretation, including traditional canons of statutory interpretation, legislative history, and legislative purpose. This Court has adopted the plain meaning rule of statutory construction as follows "the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of the statute will produce a result demonstrably at odds with the intentions of its drafters." *In the Matter of the Opinion of the Solicitor General*, 15-OSG-92, 92 CV 5358, at 6.The "meaning of a statute must first be sought in the language of the statute itself." *Id* at 6. "Consistent with this canon of law, we also

believe that the meaning of a statute must, in the first instance, be sought in the language in which the legislation is framed, and if that is plain, the sole function of courts is to enforce it according to its terms. In this regard, we will follow those cases of federal law holding that the starting point in every case involving construction of a statue is the language itself. *Id.* (citations omitted). Therefore, if the meaning of the statute is plain then the courts will not look behind the statute to the legislative history for interpretation of a particular statue. Appellant argues, and Appellee agrees, that the plain language of 8 MLBSA §3111 establishes the jurisdiction of the Mille Lacs Band Tribal Court, and that the Mille Lacs Band Tribal Court has personal jurisdiction over the child A.B. in the case presently under consideration. We agree.

The statute at issue reads as follows:

§ 3111. General Jurisdiction

(b) The Children's Court shall have jurisdiction over the following persons:

(1) Members of the Band under the age of eighteen (18) years;
(2) Persons under the age of eighteen (18) years who are eligible to become members of the Band;
(3) Indians, as defined in § 3103(r) of this chapter, who are under the age of eighteen (18) years and who are residing within the exterior boundaries of the reservation;
(4) Children of members of the Band or other Indians, as defined in § 3103(r) of this chapter, including adopted children, who reside within the exterior boundaries of the reservation;
(5) Children residing within the exterior boundaries of the reservation, for whatever reason, in the home of a member of the Band or other Indians, as defined in §3103(r) of this chapter, as long as the parents, guardians, or custodians have consented to the jurisdiction of the Children's Court. Such consent, once given, may be revoked only with permission of the Children's Court; and
(6) Incompetent persons residing or domiciled within the exterior boundaries of the reservation.

The District Court judge found that "On its face, 8 MLBSA §3111(b)(1) and (b)(2) gives the Court jurisdiction over this child. However, that jurisdiction is not exclusive because the child is domiciled off the Reservation. See 25 USC §1911(a) and (b)." *District Court December 10, 2010 Order, page 3.* Thus, the District Court took two separate considerations into account in determining whether the District Court could exercise jurisdiction: (1) whether Band statutes conferred jurisdiction on the tribal court; and (2) whether federal law limited the exercise of

tribal jurisdiction over child welfare proceedings. The District Court utilized this two-tiered test to determine personal jurisdiction over the child in this matter. This two-tiered test to personal jurisdiction has no basis in Band statute or Band case law with regard to child welfare cases.

On appeal, this Court must determine whether the District Court properly interpreted and applied the Band's laws. In so doing, this Court must always look first to tribal law for guidance. See, MLBSA § 2007. . The statutes squarely address the question of choice of law and direct that:

> In all civil cases the Court of Central Jurisdiction shall apply the written statutory and case law of the Non-Removable Mille Lacs Band of Chippewa Indians. In the event of the lack of written Band law, the Court shall apply any pertinent laws of the United States of America. In the event of the lack of existence of said written law, the Court shall apply any written laws of the State of Minnesota that do not conflict with the unwritten customs and traditions of the Band since time immemorial.

24 MLBSA §2007. Here, Band statutes prescribe the District Court's jurisdiction, and thus, there is no need to look beyond the Band's own laws to define the District Court's jurisdiction.

The District Court judge recognized that the MLBSA § 3111 plain language grants the court jurisdiction over the Band member child, but the judge looked beyond that plain language in determining whether it could exercise jurisdiction, and interpreted the statute's application to be limited by an outside source of law, the ICWA. The District Court erred in applying this law as a limitation on the personal jurisdiction of the Mille Lacs Band Tribal Court. First, there is no legal basis for this limitation either under Band law or federal Indian law. Second, even if this Court did look to the ICWA the District Court's conclusion is in error because the ICWA does not limit the personal jurisdiction over a non- resident Band member child.

Appellant and Appellee argue that the language of the statute extends District Court jurisdiction to Band member children who are the subjects of CHIPS petitions, whether they reside on the Mille Lacs reservation or not. The statute provides that the Children's Court *shall* have jurisdiction over child abuse and neglect matters involving members of the Band who are under the age of eighteen (emphasis added). 8 MLBSA §3111 (b)(1). There are no limits or restrictions on this category of persons who are subject to the jurisdiction of the District Court. That is not the case for other categories of persons who may be subject to the jurisdiction of the District Court – the statute clearly restricts jurisdiction over children who are not members, or eligible for membership in the Band, to those children who "reside within the exterior boundaries

of the reservation". 8 MLBSA 3111 (b)(3)-(6). The use of this limiting language in some but not all of the categories of persons is consistent with the interpretation that the limitation is not intended to apply to those categories where it is not included. The legislature clearly knew how to limit the jurisdiction over a class of persons, and the Court must assume that the lack of such limiting language is evidence of the legislature's intentional determination not to place any such limits on jurisdiction over children who are Band members or eligible for membership in the Band. The plain language of the statute allows the Court to exercise jurisdiction over Band members who reside off of the reservation.

B. Legal Precedent

The District Court may have one opinion of this Court, issued in 1998, as a basis to dismiss the petition in the case at bar. The District Court's reliance on this case is misplaced. In *BLM v. PLJ*, this Court interpreted the jurisdictional statutory provisions in effect at that time and concluded that the Court had jurisdiction over "minors not domiciled or residing on territory under the jurisdiction of the Band only when jurisdiction is transferred by another court". *BLM v. PLJ*, 98 APP 01, at page 4. That analysis was based upon the plain language of the jurisdictional provision in effect at that time, which clearly restricted and limited the District Court's authority to cases involving minors domiciled or residing on the reservation. *Id*

That case is distinguished from the present case on the facts and legal issues raised. In *BLM* the question was whether the District Court should or could exercise jurisdiction over a **child custody** action between parents, which is a very different type of proceeding than the child protection case currently before this Court. A custody action is a family law proceeding involving a dispute between parents. In contrast, a child protection proceeding is a proceeding where a government is alleging imminent harm to the child as a result of action or inaction the parents. Here, both the Band Family Services and Mille Lacs County Social Services agencies made a determination that custody of the child must be immediately removed from the parent in order to protect the child from imminent harm. Further, the parties in *BLM* were already involved in a parallel custody action involving the same children in Hennepin County Court, and furthermore, both parties had consented to the jurisdiction of the Hennepin County Court. The Hennepin County Court granted custody of the children to mother. In response, the father filed an emergency action in Mille Lacs Band District Court and was awarded temporary custody by the District Court which was in direct contraction to the Order of Hennepin County. Appellant's

action was dismissed on appeal to the Mille Lacs Band Appellate Court as the children were not properly within the territory of the Band when the action was filed, and this Court recognized that the District Court "Order for Dismissal dated March 16, 1998 recognized the potential of conflicting decrees since similar child custody actions were pending in Hennepin County court". *Id* at page 6. The *BLM* case is a typical custody case where a second jurisdiction recognizes the first jurisdiction's authority thus preventing a parent from the abuses of forum shopping by crossing jurisdictional boundaries and obtaining conflicting custody orders over the same child.

The facts found in *BLM* are not present in this matter. Here, a prior Order was issued by the Mille Lacs County Court in a divorce action awarding temporary custody of some of the children to each of the parents. Subsequently, a CHIPS Petition alleged serious issues had developed subsequent to the Order for temporary custody. The CHIPS case was initiated by the Band, who was not a party to the District Court divorce case. Not only are the two cases different case types, involving different issues, the cases also involve different parties.[2] If the two cases had both been filed within the state court, the CHIPS case in juvenile court would take precedence over the divorce case in family court due to the immediate need to take action to protect the child. For these reasons, it is not appropriate to apply the analysis of *BLM* in the present case.

Since this Court issued its decision in *BLM*, there have been significant developments in the infrastructure of the Mille Lacs Band government, as well as in the Band's statutory framework. The Band has developed more services and enhanced programming, and more responsibility has been assumed by Band government and Family Services for services to its Band members, including social services and an expanded judicial forum. At the time of the *BLM* decision, the Band's statutes provided for more limited jurisdiction than now provided. This Court notes that there is a difference between possessing inherent authority and jurisdiction and exercising that jurisdiction. This evolution is typical of most tribal court development which expands the exercise of its inherent jurisdiction as the capacity of its courts, its services and the tribal government also expands. As the Band statutes have been revised, the Court must apply the laws as written and cannot, by judicial action, add any conditions or restrictions to the

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[2] The issue of whether the tribal court should exercise jurisdiction if/when another action is pending before a State Court, and under what circumstances is not presently before the Court, and thus, is not addressed here further.

jurisdictional provisions of the Band's laws that are not included by Band Assembly in the statutes.

The Band notes that Family Services provides case management and other services to members who reside off of the reservation but within a 30 mile radius of the reservation boundaries. This policy recognizes the fact that many Band members do not reside within the boundaries of the reservation for a variety of reasons, including housing, employment, and education, to name a few. The family involved in this case is one of those families – a family that includes a Band member, whose residence is not on the reservation, and who is receiving services from the Band. Additionally, this particular child was previously a ward of the District Court and came to be part of the family by Order of the District Court granting guardianship of A.B. to the Appellee and her husband several years ago after the child had been removed from the birth parents. The District Court in that previous case placed the child in the physical home of this family off the reservation and supervised the placement of this child in the foster home of this family until granting permanent placement through guardianship with the same family. Now, in this case the same child is being removed from the same home that the District Court placed her in. Thus, the District Court was being the responsible authority when the child was previously found to be neglected or abused should be reasonably expected to assume that same duty and authority when new allegations of neglect or abuse arise from that same placement.

Finally, as agued by the Band below no party in this case was objecting to the District Court's exercise of jurisdiction in this matter – all parties consented to the case being filed in the tribal court, including the Mille Lacs County Family Services Department. Unlike *BLM*, where the mother strenuously objected to this District Court exercising jurisdiction over the same issue that was being litigated in state court, here this same issue was *not* being addressed in the state court proceeding. Indeed, the *BLM* issue was not even raised below as all interested parties agreed that the best forum to bring the child protection case would be in the Mille Lacs Band District Court. In fact, after the dismissal of the case by the District Court, the matter was filed by Mille Lacs County Family Services in state court only to then be transferred back to the Mille Lacs Tribal Court, where the case proceeded. Under the circumstances, all parties were taken aback by the District Court's decision to dismiss and this action resulted in an incredible waste of time, human resources and fiscal resources of the Band and the County. The most egregious part of the District Court's action was placing a Band member child in an unsafe and precarious

situation when the District Court failed to ensure the child's safety. The District Court dismissed the case outright without any sort of plan to ensure that another jurisdiction would assume the responsibility in a timely fashion. The District Court's dismissal is contrary to the stated purposes of the Band's child protection statutes: "to take such actions as may be necessary and feasible to prevent the abuse, neglect or abandonment of children" and to "secure the rights of and ensure fairness to the children, parents, guardians, custodians and other parties who come before the children's court under the provisions of this chapter." 8 MLBSA §3102 (c) and (e).

C. Other Applications of 8 MLBSA §3111.

The Court next examined numerous cases involving Band member children residing off the reservation which were decided by the District Court over the past few years. This Court makes the following observations from that examination. The same jurisdictional provisions of 8 MLBSA §3111 applies to other case types, including Guardianship and Conservatorship proceedings. The District Court determined in those cases[3] that the Band statutes confer jurisdiction over minor members of the Band, *without* regard to where they reside. If these types of cases are subject to the District Court's jurisdiction, so must the present case – to do otherwise results in an uneven and unfair application of Band statutes. The consistent application of Band jurisdictional statutes supports a finding of jurisdiction over the present case. This Court finds the District Court improperly dismissed this matter as the District Court clearly has jurisdiction over Band member children without regard to where they reside.

III. Indian Child Welfare Act Jurisdiction

The Indian Child Welfare Act is a federal statute that was adopted in 1978 to govern *state court* proceedings involving Indian children, after Congress found that: "the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. §1901(5). The jurisdictional provisions of the statute apply "In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child." *Id.* The statute does not apply to tribal courts, unless adopted by the Tribe.

[3] The Court is unable to cite the cases as the cases are confidential and not subject to disclosure under Band law.

The Mille Lacs Band Statutes specifically address the Indian Child Welfare Act, and its application in tribal court, in a number of different provisions. Discussed above is the Band's choice of law provision of 24 MLBSA §2007, that requires application of Band law in the first instance, and then application of federal law in the event Band statutes are silent on the issue. The Band statutes are not silent here, and specifically address the issue of jurisdiction as discussed herein. Further, 8 MLBSA § 3114 specifically addresses the application of the ICWA: "The Children's Court *may* apply the policies of the Indian Child Welfare Act, 25 U.S.C. § 1901-1963, where they do not conflict with the provisions of this chapter. The procedures for state courts in the Indian Child Welfare Act *shall not be binding* upon the Children's Court unless specifically provided for in this chapter" (emphasis added).

The ICWA recognizes a dual jurisdictional scheme where tribes retain exclusive jurisdiction over matters involving Indian children who reside or are domiciled on the reservation, and where tribes have concurrent jurisdiction with the separate states over Indian children residing and domiciled off the reservation. 25 U.S.C. §1911. The United States Supreme Court recognized that this scheme presumes tribal jurisdiction in the first instance. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989). See also, *In re the Welfare of the Children of T.T.B. and G.W.*, 724 N.W.2d 300 (Minn. 2006) at 305. Of course, every tribe is entitled to define the extent to which its own tribal court exercises jurisdiction - such jurisdictional definitions may or may not authorize exercise of subject matter jurisdiction under a particular set of circumstances. However, the extent that a tribe decides to exercise its inherent jurisdiction is a determination solely made by that particular tribe, not by Congress. Here, the District Court judge determined that, under ICWA the tribe has concurrent jurisdiction but then further limited the Band's ability to exercise its concurrent jurisdiction by finding that the District Court "is limited to accepting transfer of state court case [sic] involving this child. This is because she is not domiciled within the exterior boundaries of the Mille Lacs Reservation". This determination was clear error.

As stated above, the source of the tribe's authority is inherent sovereignty, not delegated federal authority or federal law. The ICWA recognizes the tribe's inherent right to exercise jurisdiction over members who live off of the reservations (it does not create it) but also the ICWA granted states the right to exercise jurisdiction over tribal members as not all tribes have tribal courts, or courts of competent jurisdiction to hear child welfare cases. In those instances,

the ICWA delegated to states the federal government's authority. The ICWA does not grant jurisdiction to the tribes, but recognizes the inherent authority of the tribes which has always existed. The ICWA certainly does not diminish the authority of tribes.

It has long been recognized that tribes have the ability to regulate "domestic relations" of tribal members. *Fisher v Dis. Ct.*, 424 U.S. 382 (1976), This applies to off reservation activities as well. Generally a tribal court can only exercise civil jurisdiction over a cause of action that arises within the boundaries of its own reservation or within Indian Country. The exceptions to this general rule include the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 et seq. (the "ICWA"), tribal membership determinations or environmental regulations. The ICWA and tribal membership are both central issues in this present case.

The United States has long recognized that "[t]ribal jurisdiction over Indian child custody proceedings in not a novelty of ICWA." *Holyfield*, 490 U.S. at 42 (citing Fisher v Dis. Ct., 424 U.S. 382 (1976) (tribal court had exclusive jurisdiction over adoption proceeding where all parties were tribal members and reservation residents); *Wisc. Potowatomies v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973) (tribal court had exclusive jurisdiction over custody of Indian children found to have been domiciled on reservation; *Wakefield v. Little Light*, 347 A.2d 228 (Md. 1975) (same) *In Re Adoption of Buehl*, 555 P.2d 1334 (Wash. 1976) (state court lacked jurisdiction over custody of Indian children placed in off-reservation foster care by tribal court order); *In re Lelah-puc-ka-chee*, 98 F. 429 (N.D. Iowa 1899) (state court lacked jurisdiction to appoint guardian for Indian child living on reservation)) (See also, *Carney v. Chapman*, 247 U.S. 102 (1918), and *No Fire v. United States*, 164 U.S. 657 (1897) (marriage among tribal members); *Conroy v. Conroy*, 575 F.2d 175 (8th Cir. 1978) (divorce and property distribution among Indians). In ICWA, Congress affirmed this inherent jurisdiction and provided *additional* safeguards and remedies. See, The Indian Child Welfare Act of 1977, S. Rep. No. 95-597 (Nov. 3, 1977) ("Senate Report") at 10 (ICWA "statutorily defines the respective jurisdiction of State and tribal governments" and "is declarative of law as developed by judicial decision."

The tribes have the same authority that they have had since time immemorial, and the only question is whether a particular tribe has developed the governmental resources to exercise that authority. Here, there is no question that the Mille Lacs Band has a court of competent jurisdiction, and has the statutory authority to exercise jurisdiction in this case. The Appellant is

correct in asserting that the action of the District Court here is an unnecessary intrusion on Mille Lacs Band law and its sovereignty, and has the effect of undermining tribal sovereignty.

Where an Indian child resides off of the reservation, jurisdiction between a tribe and the state is concurrent, but presumptively tribal. 25 U.S.C §1911 (b) (1978). The Minnesota Supreme Court has explained that "ICWA and Minnesota law recognize concurrent but *presumptively tribal jurisdiction* allowing the child's tribe to intervene 'at any point' in the state court proceedings." *In re Welfare of Child of T.T.B. & G.W.*, 724 N.W.2d 300, 305 (Minn. 2006) (emphasis added). When a request to transfer jurisdiction of a child custody proceeding under ICWA is made, "transfer of jurisdiction over Indian child custody matters to tribal authorities is mandated by the Indian Child Welfare Act whenever possible." *In re the Matter of the Welfare of B.W.*, 454 N.W.2d 437, 446 (Minn. Ct. App. 1990); Minnesota Tribal/State Indian Child Welfare Agreement as amended in 2007, Part I.C. (Feb. 22, 2007). While transfer of jurisdiction from state court to tribal court is mandated "whenever possible", under the ICWA state court exercises some level of discretion to determine whether there is "good cause" to deny the request to transfer jurisdiction to the tribal court. Thus, the Band's right to exercise jurisdiction over tribal members is not guaranteed if the proceeding is initiated in state court.

In the present case, the parties assert that concurrent jurisdiction allows them to choose which court to *initiate* the action in, and that the District Court judge should have allowed this matter to proceed in tribal court without first requiring the case to be filed in state court and then transferred to the tribal court. Indeed, Appellant cites the definition of the term "concurrent jurisdiction" as "jurisdiction exercised simultaneously by more than one court over the same subject matter and within the same territory with the litigant having the right to choose the court in which to file the action." *Black's Law Dictionary* (2d pocket ed. 2001). Here, both tribal court and state court have concurrent jurisdiction, or the right to assert jurisdiction over child protection matters involving Indian children who reside off of the reservation. The decision of the District Court here, to require the matter to be first filed in state court and then transferred to tribal court, interprets tribal law to only guarantee that the *state* has an opportunity to exercise jurisdiction, as transfer to tribal court is within the discretion of the state court judge. This interpretation severely limits, and could completely eliminate the tribe's authority over Band member children if transfer of jurisdiction were to be denied by the state court. This interpretation is not consistent with the philosophy of the Band statutes overall, and denies the

litigants the right to *choose* the court in which to proceed. This Court holds that the exercise of the Band's concurrent jurisdiction is not limited to instances where proceedings are initiated in state court and transferred to tribal court; child protection actions involving children who are members of the Band or eligible for membership in the Band, who reside or are domiciled off of the reservation may be initiated in the tribal court. The Mille Lacs Band has a vital interest in its children regardless of their residence. "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C.A. § 1901(3).

IV. Hearings in Children's Court

One issue that has been raised in the context of this appeal is the importance of hearings on matters arising in the Children's Court. When the Band was directed to submit a brief on the issue of whether the District Court had jurisdiction to hear the case, the Solicitor General specifically requested a hearing on the matter prior to a final determination of jurisdiction[4], however that request was denied by the District Court and the matter was dismissed outright.

The facts of the case were complicated and there were several levels of relief that the District Court was being asked to consider. The Band made every effort to ensure that the health and safety of the children at issue would be protected by requesting that the District Court (1) exercise jurisdiction, (2) grant an opportunity to the parties to be heard pursuant to 8 MLBSA §3148, (3) transfer jurisdiction over the non-member children to either Mille Lacs County District Court or White Earth Tribal Court pursuant to 8 MLBSA §3115, or (4) stay an order for dismissal until another court asserts jurisdiction or until 5:00 p.m. December 10, 2010, whichever occurs first.[5] The District Court, in its order for dismissal, fails to address why it declined to consider any of these alternative forms of relief that were sought by the Band.

The children who are subjects of this action are young and vulnerable, and the allegations of the underlying petition were serious in nature and required immediate action on behalf of the minor children. Further, there were no objections that were raised to the District Court's assertion of jurisdiction by the parties to the case, in fact, the Band asserted that both the Mille

[4] *See* Petitioner's Brief in Support of Jurisdiction, filed Dec. 9, 2010.
[5] Given that the Band's brief was filed at 9:51 a.m. on December 9, it appears that the Band anticipated a ruling from the Court on that date, thus the requested relief would have provided at least one business day to the parties to seek an alternative form of protection for the minor children. However, the Court denied all forms of relief and did not issue an order until 3:11 p.m. on December 10, making it virtually impossible for any alternative form of relief to be sought on behalf of the children in a timely manner.

Lacs County and White Earth Tribal social services agencies supported not only the removal of the children, but also the filing of the CHIPS petition in the Mille Lacs Band Court of Central Jurisdiction, and that the parents/custodians of the children would also consent to jurisdiction if given an opportunity to do so. The County and two tribes insisted that the children were at risk of imminent harm or danger, but the court found that argument "unconvincing" because the Band first attempted to offer voluntary services to the family before bringing the matter to court and the District Court concluded "If the children were in danger, they should have been removed, by the appropriate jurisdiction, when the accusations were substantiated." *District Court Order, December 10, 2010, at page 3*. This language implies that the District Court did not agree with the approach of the service providers who were working with the family, and that because of the approach chosen, the District Court would not accept the assertion that the children were in danger and that it was in their best interests to be removed from the home. Yet, the District Court also concluded that Mille Lacs County could file a petition on behalf of the children, which is what ultimately happened. Subsequently, state court found that it was necessary and in the best interest of the children to remove them, and the matter as it relates to the Band member child was ultimately transferred back to the District Court, where it appears that the removal of the child was then continued.

Band statutes provide for options in cases such as the instant one that are designed to avoid any gaps in the court's ability to protect children who are alleged to be abused or neglected. Any of the specific forms of relief requested here, short of exercising jurisdiction, would have provided some level of protection for the children. The District Court should have at least granted an opportunity to the parties to be heard on the matter in accordance with Band statutes 8 MLBSA §3148 which provides that an initial hearing *shall be* held for the purpose of determining whether it is reasonable to believe that continuing absence from the home is necessary to protect the well-being of the child. It is unclear why the District Court declined to transfer the matter to Mille Lacs County as authorized by 8 MLBSA §3115, or to issue an order that was stayed to allow time to initiate another proceeding in another jurisdiction. Either of those options would have been preferable to dismissing the case and returning the children to a situation where they were at risk of serious emotional or physical harm.

CONCLUSION

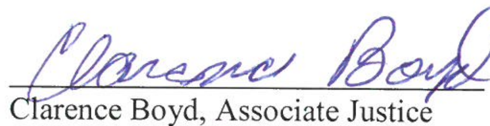
Mille Lacs Band Statutes provide that the Court of Central Jurisdiction, Children's Court shall have jurisdiction over members of the Band under the age of eighteen (18) years and persons who are under the age of eighteen (18) years who are eligible to become members of the Band regardless of whether they reside or are domiciled on the reservation. For the foregoing reasons, the decision of the District Court is **REVERSED.**

BY THE COURT OF APPEALS:

Dated: June 6, 2011.

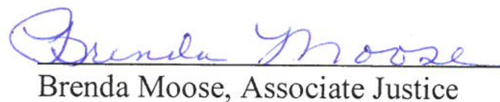
Rayna Mattinas, Chief Justice

Dated: June 3, 2011.



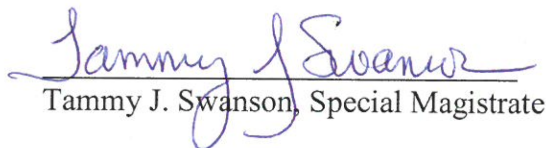
Clarence Boyd, Associate Justice

Dated: June 3, 2011.



Brenda Moose, Associate Justice

Dated: June 2, 2011.



Tammy J. Swanson, Special Magistrate