

**LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS
APPELLATE COURT**

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Case No: A-031-1215 (C-213-0915)

Appellant's Name and Address:

Appellee's Name and Address:

Nicole Moore, Appellant

v. Martin Serva, Appellee

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OPINION AND ORDER

The question before the court is whether the court has jurisdiction over a non-Indian mother who moved outside the tribe's territorial reservation boundaries after the birth of a child with a father who is a Little Traverse Bay Bands of Odawa Indians (LTBB or the Tribe) tribal member.

I. FACTS

Appellant Nicole Moore (Appellant), a non-Indian, and Appellee Martin Serva (Appellee), an LTBB member, are the parents of a child who is not eligible for membership in the Tribe. At the time of their child's birth in February of 2015, they leased a residence together in Harbor Springs, within the Tribe's exterior boundaries. Shortly thereafter, the Appellant and her child moved to Grayling, Michigan, approximately 54 miles outside the tribe's exterior reservation boundaries and 57 miles from the Little Traverse Bay Bands Tribal Court.

The record generally indicates the parties' communications broke down, leading the Appellee to file a petition in the Tribal Court seeking visitation rights on September 9, 2015. Appellant's mother accepted service on Appellant's behalf of the summons and complaint on September 18. The Appellant filed a response on October 14, asserting that the court lacked personal jurisdiction over her because she and her child are nonmembers who live outside the Tribe's reservation boundaries, as well as procedural defects related to the service of process and failure to include a notice of hearing. In arguing that the LTBB Court could not exercise personal jurisdiction over her without violating the LTBB Constitution, we presume that Appellant impliedly moved to dismiss under Rule XV(b) of the Little Traverse Bay Bands of Odawa Indians Rule of Civil Procedure (LTBBRCP).

The court held a hearing to consider parenting time on November 19. The Appellant made a limited appearance to contest the Tribal Court's exercise of jurisdiction over her. Presiding at the hearing, Associate Judge John J. Lemire determined the Tribal Court had personal jurisdiction over the parties "based on an activity that I find to be the parenthood and all the attributes that go with parenthood, and that is the connection between the mother and father as responsibilities that they have to each other." Tr. at 32-3. Following the hearing, on November 23, the court issued the Order of Parenting Time, holding that "parenthood with a Tribal Member, who resides on the reservation, and all the 'activity' that parenthood entails," satisfies the minimum contacts to establish personal jurisdiction as a constitutional matter. Order at 2. Finally, the Court deemed the Paternity and Custody Statute, WOS 2015-010, "controlling." *Id.*

The Appellant timely filed this appeal to challenge the court order on November 30. Initially, she challenged the court's order for denying her procedural due process by (1) finding that it had personal jurisdiction over her; (2) failing to hold a pretrial meeting as required by

LTBBRCP XV(4); depriving her of the right to cross-examination as required by LTBBRCP XVIII(1)(a); and (4) denying the right to cross-examine, call witnesses, present evidence, and making opening and closing arguments in violation of LTBBRCP XX(2). During briefing, the Appellant elected to focus the appeal solely on the issue of personal jurisdiction. In her brief filed February 25, 2016, she supplemented the insufficient minimum contacts analysis with a second reason the Tribal Court lacked jurisdiction: by operation of federal common law. The Appellant thus argues that the Tribal Court lacks jurisdiction (1) under the LTBB Constitution, and (2) as a matter of federal common law. On May 2, Bryan Klawuhn entered an appearance on behalf of Appellee, who previously represented himself in pro per. The Appellate Court heard oral arguments May 13, 2016.

II. ANALYSIS

In her appeal, the Appellant argues that because she and her child are non-tribal members who live outside the Reservation boundaries, the LTBB Constitution and federal common law principles deprive the Tribal Court of jurisdiction. We first examine whether the LTBB Constitution authorizes the court's exercise of personal jurisdiction over the Appellant. Second, we consider whether the operation of federal common law restrictions on tribal civil jurisdiction deprive the Tribal Court of subject matter jurisdiction.

A. Standard of Review

The Tribal Court's determination that it had personal jurisdiction is a conclusion of law, which the Appellate Court reviews *de novo*. LTBBRAP 7.501(E); see *In re A.N.M. and A.M.M.*, A-016-0611, *4 (LTBB App. Ct. 2012). In applying the *de novo* standard, this Court "refers to the Tribal Court's record to determine the facts, but it does not defer to the Tribal Court's legal conclusions." *Kiogima & DeLeon v. Little Traverse Bay Bands of Odawa Indians Election Bd.*,

A-025-1214, *5 (LTBB App. Ct. 2015). In addition, by issuing an Order of Parenting Time, the Tribal Court impliedly determined that it held subject matter jurisdiction over the case. This determination is also a conclusion of law that the Appellate Court reviews *de novo*.

B. Personal Jurisdiction

Personal jurisdiction and subject matter jurisdiction are both necessary for the Tribal Court to enter a judgment *in personam*, i.e., against a party rather than in relation to title to property. Whereas subject matter jurisdiction is the power of a court to hear particular types of cases, personal jurisdiction is the power of a court over the parties in a case. The personal jurisdiction of the Tribal Court over parties in matters involving child custody and visitation disputes is governed by two sources of tribal law. One source is the LTBB Paternity and Custody Statute, codified in the Tribal Code at WOS 6.6103. This provision states the following regarding the Tribal Court's jurisdiction:

The Court shall have jurisdiction over determination of paternity and/or child custody, child support, and visitation where at least one (1) parent to the proceedings is a Tribal Citizen of the Little Traverse Bay Bands of Odawa Indians and has been a bona fide resident of the Tribal Jurisdiction for a period of at least one hundred eighty (180) days prior to the filing of the action.

(Source: WOS 2015-010, June 17, 2015, Section II)

Read in isolation, this provision grants broad authority to the Tribal Court to exercise personal jurisdiction over a nonresident custodial parent in any case involving a determination of child custody or visitation where at least one parent is an LTBB member who resides within the exterior boundaries of the LTBB Reservation for the requisite 180 days before filing an action.

Second, where a statute grants jurisdiction over a party, the statutorily-authorized exercise of jurisdiction must comport with the LTBB Constitution, whose limits may not be

superseded. With respect to territory and jurisdiction, Article IV of the LTBB Constitution states:

A. Territory

The Territory of the Little Traverse Bay Bands of Odawa Indians shall encompass all lands and waters within the Reservation as defined in Article III (H)¹ and any other lands which are now and hereafter owned or acquired by the Little Traverse Bay Bands of Odawa Indians or held in trust for the Tribe by the United States.

B. Jurisdiction

The jurisdiction of the Little Traverse Bay Bands of Odawa Indians shall extend to all territory set forth in Section (A) of this Article and to any and all persons or activities therein based upon the inherent sovereign authority of the Little Traverse Bay Bands of Odawa Indians and Federal law.

LTBB Constitution, Art. IV, Sections (A) and (B).

Relevant here, these provisions authorize the Tribe's exercise of jurisdiction over all Reservation territory, "and to any and all persons or activities therein..." However, this scope of tribal jurisdiction is also limited by the due process language within the LTBB Constitution. Article II, Section 8 of the LTBB Constitution states that, "[t]he Little Traverse Bay Bands of Odawa Indians, in exercising powers of self-governance, shall NOT . . . deprive any person of liberty or property without due process of law." (Emphasis in original). By guaranteeing substantive due process, the LTBB Constitution protects individuals against the exercise of personal jurisdiction by the Tribal Court where that exercise would be fundamentally unfair. The test for when the exercise of personal jurisdiction would be fundamentally unfair has never been addressed by the

¹ Article III (H) defines "Reservation": Unless otherwise specified in this Constitution "Reservation" means all lands within the boundaries of the reservations for the Little Traverse Bay Bands of Odawa Indians as set out in Article I, paragraphs third and fourth of the Treaty of 1855, 11 Stat. 621, plus any lands set out in Articles Second and Third of the Treaty of March 28, 1836, 7 Stat. 491, in the event that the 1836 reservation is determined to include lands which are not included within the 1855 reservation, plus any lands outside of those boundaries which are now or in the future declared to be Little Traverse Bay Bands of Odawa Indians reservation by the U.S. Department of the Interior.

It is undisputed that the parties' previously shared residence is situated within the Reservation boundaries.

Appellate Court's case law. Given the similarity between the due process clause in Article II, Section 8 to those in the Fifth and Fourteenth Amendments to the U.S. Constitution, we find that federal jurisprudence on this issue is persuasive. Although not binding on the Court, the law and judicial decisions of foreign jurisdictions "may be instructive to the extent that they offer persuasive reasoning . . ." *Little Traverse Bay Bands of Odawa Indians Tribal Council Members v. Harrington & McNamara*, No. A-022-1212 *5 (LTBB Ct. App. March 5, 2015); *see also McFall v. Victories Casino*, No. A-002-1102 *5 (Little Traverse Bay Bands of Odawa Indians Ct. App. June 9, 2003).

In the federal courts, due process requires a civil defendant who does not consent to a court's jurisdiction to have what are called "minimum contacts" within the jurisdiction. The concept of "minimum contacts" was first developed in *International Shoe v. Washington*, 326 U.S. 310 (1945). In that case, the U.S. Supreme Court observed that "due process requires only that, in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463). Later, in *Kerry Steel v. Paragon*, 106 F.3d 147 (6th Cir. 1997), the Sixth Circuit Court of Appeals identified a three-factor test for determining whether a court might rightfully assert personal jurisdiction over a non-resident person. In addition, in *Moore v. McFarland*, 466 N.W.2d 309 (1990) (*McFarland*), the Michigan Court of Appeals examined whether constitutional minimum contacts were satisfied in a paternity action filed in the State of Michigan against a putative father who had never lived in the state. Noting that the minimum contacts factors applied in *McFarland* were substantively identical to those

applied in *Kerry Steel*, we review the minimum contacts test and consider whether it is satisfied by the facts of this case.

In *Kerry Steel v. Paragon*, 106 F.3d 147 (6th Cir. 1997), a Michigan steel company offered to sell its product to Paragon, an Oklahoma company. The companies reached a deal, but Paragon rejected the steel shipment as substandard. Kerry Steel filed suit in Michigan and Paragon moved to dismiss for lack of personal jurisdiction. On appeal, the Sixth Circuit Court of Appeals used the three-factor test the Appellant proposes. First, “the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state.” Second, “the cause of action must arise from the defendant’s activities there.” And third, “the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.” *Id.* at 150 (quoting *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968)). The court deemed determinative that “Paragon, in response to an unsolicited sales call, ordered products from a Michigan seller and negotiated with the seller via fax and telephone to finalize the transaction. This does not constitute a purposeful availing of the privilege of transacting business in Michigan, so as to invoke the benefits and protections of Michigan law.” Thus, a nonresident company conducting a remote transaction at the behest of a Michigan company lacked minimum contacts with the State of Michigan to establish personal jurisdiction.

Turning to the facts in the instant case, the first factor concerns whether the Appellant purposefully availed herself of “the privilege of acting in ... or causing a consequence,” in the Tribe’s jurisdiction. In *Kerry Steel*, the defendant had no physical presence in Michigan, and its activities consisted only of negotiations by phone and facsimile. The Appellant, conversely,

appears to have previously lived with the Appellee in Harbor Springs, within LTBB's Article III(H) territory. In response to a question from the Court during oral argument, the Appellate Court heard statements that the Appellant had accepted the proceeds of tribal programs, including a stipend, prenatal care, and a child safety seat. It is unclear, however, to what extent Appellant directly and purposefully availed herself of these benefits. Unlike the non-resident defendant in *Kerry Steel*, the Appellant may have satisfied the first factor by residing within the jurisdiction and by purposefully availed herself of the Tribe's benefits.

Consistent with the second factor, which requires the cause of action to arise from the defendant's activities in the forum state, the activities giving rise to this matter purportedly occurred while the Appellee and the Appellant cohabitated within the reservation boundaries. According to the hearing transcript, the parties conceived, and then temporarily reared, their child in their shared apartment within the Reservation. If these statements are confirmed, then it is plausible "[t]he obligation which is here sued upon arose out of those very activities." 326 U.S. at 320. In *International Shoe*, the obligation was to pay a tax for its salesmen operating in the State of Washington. Here, the obligation would be to abide the Court's visitation order. The second factor may be satisfied.

The third factor concerns the acts or consequences of defendant's acts having "a substantial enough connection" with the Tribe to make the Tribe's jurisdiction reasonable. In the context of child custody proceedings, this factor is similar to the "significant connections" and "substantial evidence" prerequisites for personal jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA) before it was replaced with the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA) in the late 1990s. The UCCJA's "significant connections" standard was flexible, and courts in some states deemed the requirement was

satisfied if multiple relatives lived in the state asserting personal jurisdiction, and in others, if the parents were raised or even vacationed in the state.² For states applying the UCCJA, “substantial evidence” supporting personal jurisdiction required that the state asserting jurisdiction have evidence readily available that pertained to the child’s care, protection, training, and personal relationships.³

Implicit in the three-factor test set out above is also a reasonableness requirement. Reasonableness can be assessed distinct from the prior factors, as it was in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). There a man injured in a motorcycle accident sued the Taiwanese manufacturer of the motorcycle tires’ inner tubes in a California state court. *Id.* at 105-06. The manufacturer filed a cross-complaint against Asahi, the Japanese manufacturer of the tube’s inner valve assembly. *Id.* All claims were resolved, except for an indemnity action between the companies in a California state court. *Id.* The California Supreme Court determined that personal jurisdiction was satisfied. *Id.* at 108. The US Supreme Court reversed, introducing five factors to govern courts’ evaluation of the reasonableness of personal jurisdiction: “A court must consider [1] the burden on the defendant, [2] the interests of the forum State, and [3] the plaintiff’s interest in obtaining relief. It must also weigh in its determination [4] ‘the interstate judicial system’s interest in obtaining the most efficient resolution of controversies; and [5] the shared interest of the several States in furthering fundamental substantive social policies.’” *Id.* at 113 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980) (numbering

² *Kean v. Kean*, 577 S.E.2d 1152 (La. Ct. App. 1991)(both parents raised in Louisiana along with presence of relatives gives significant connections); *Gray v. Gray*, 572 So.2d 341 (La. Ct. App. 1990)(presence of relatives and prior vacations in the state are sufficient, especially with a one year old child); *contra, Holman v. Holman*, 396 N.E.2d 331 (1979)(relatives living in the state does not constitute significant connection).

³ See Comparison of the UCCJA and UCCJEA, prepared by the American Bar Association and available at http://www.americanbar.org/content/dam/aba/migrated/family/hurricane/UCCJA_UCCJEA_COMPARISON.authcheckdam.PDF. (Last accessed on February 10, 2017).

supplied; internal citations omitted). In total, the factors “reveal[ed] the unreasonableness of the assertion of jurisdiction” over *Asahi*. *Id.* at 114.

As the preceding paragraphs make clear, there is some indication in the record that the Appellant has minimum contacts with the jurisdiction. However, the statements referenced in relation to the relevant factors were solicited by the Judge at the hearing or by the Appellate Court during oral arguments. Thus, although many of the statements were made under oath, they were made without the benefit of discovery or an opportunity for the parties to examine and cross-examine witnesses. It is therefore premature to make a determination because the Tribal Court did not recognize the need to satisfy the factors we cite, and consequently, the record is not sufficient for judicial review on appeal. Before the Appellate Court can evaluate whether the *Kerry* and *Asahi* factors are satisfied, there must be a hearing following discovery, after which the Tribal Court makes clear findings of fact that address each of the relevant factors. Only then can the Tribal Court answer the legal question of whether it may assert personal jurisdiction over the Appellant consistent with the due process requirements of fairness and justice.

C. Subject Matter Jurisdiction

In addition to personal jurisdiction, the Tribal Court must also possess subject matter jurisdiction, consisting of regulatory and adjudicatory jurisdiction over a case.⁴ To evaluate whether the Tribal Court has subject matter jurisdiction, it must first determine whether such jurisdiction constitutes a lawful assertion of the tribe’s inherent sovereign authority. In cases involving a nonmember, the Tribal Court must then consider whether the assertion of regulatory and adjudicatory jurisdiction is consistent with limitations imposed by federal law.

⁴ Although Moore first raised the issue of federal common law in her brief, we address the argument in recognition of the Supreme Court’s assertion in dicta that “*Strate*’s limitation on jurisdiction over nonmembers pertains to subject matter, rather than merely personal, jurisdiction, since it turns upon whether the actions at issue in the litigation are regulable by the tribe.” 533 U.S. 353, 367 n.8 (2001). A federal court reviewing this court’s decision consistent with the *Hicks* proviso would consider the timing of the common law arguments immaterial.

Neither the U.S. Constitution nor any act of Congress prohibits application of the LTBB Paternity and Custody Statute to the Appellant. The critical issue is whether the exercise of jurisdiction over the Appellant is consistent with the rule set forth in *Montana v. United States*, 450 U.S. 544 (1981). In *Montana*, the United States Supreme Court held that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.” *Id.* *Montana* then recognized that “[t]o be sure, Indian tribes retain inherent sovereign power to exercise some forms of jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.” First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.” Second, “[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” *Id.* at 565-66 (internal citations and footnotes omitted).

Furthermore, *Montana*’s restriction on tribes’ regulatory jurisdiction extends to tribes’ judicial powers. *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In *Strate*, the Supreme Court extended the *Montana* restriction on tribes’ regulatory jurisdiction to tribes’ judicial powers, holding that “[a]s to nonmembers ... a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.” *Id.* at 453.

In *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) the Court also held that a nonmember’s consensual arrangement with a tribe or tribal member does not subject the nonmember to general regulatory authority. Instead, where tribal civil jurisdiction arises under

the consensual relationship exception to Montana's general rule, the exercise of jurisdiction must have a sufficient nexus with the parties' consensual relationship.

As we determined with respect to personal jurisdiction, the Tribal Court Order does not engage the *Montana* exceptions, and it offers no factual findings regarding whether either of the exceptions apply in this case. The Appellate Court declines to rely on an underdeveloped record to hazard an opinion as to whether there are sufficient facts to support jurisdiction under *Montana*. Instead, the Tribal Court must make factual findings relevant to this legal analysis after giving the parties the opportunity to engage in discovery and participate in a hearing complete with direct and cross-examination of witness testimony.

D. The Alternative Approach of the UCCJEA

Although not adopted as law by LTBB, every state except Massachusetts has adopted the Uniform Law Commission's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), which establishes a uniform rule governing personal jurisdiction in child dependency cases involving custody and visitation disputes.

Under the UCCJEA, exclusive and continuing jurisdiction to make an initial child custody determination is prioritized for the "home state" of the child, provided that the child, a parent, or a person acting as a parent remains in the "home state." A child custody determination is defined under the statute as including "a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child." UCCJEA, Sec. 102(3). The "home state" is the state in which a child has lived with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of the child custody proceeding. If a child is less than six months old, then the "home state" is the state in which a child has lived with a parent since birth.

The UCCJEA prioritizes jurisdiction over child custody proceedings in the “home state” to serve several purposes. First, the rule is clear and easy to apply, allowing parties to avoid delay and disputes over which court may properly exercise jurisdiction over a child custody proceeding. Second, the rule includes provisions that make it consistent with the federal Parental Kidnapping Prevention Act, which requires states to give full faith and credit to custody orders granted by “home states” in order to prevent the ability of one parent to abduct a child and immediately obtain a custody order in another state. In addition, the UCCJEA includes protections for Indian tribes. Section 104(a) of the UCCJEA states that Indian Child Welfare Act proceedings are not subject to the UCCJEA, ensuring that the “home state” rule does not supplant ICWA’s procedural protections and tribal jurisdictional rules in cases involving an “Indian child” as defined under ICWA. For states such as Michigan that enacted them, subsections 104(b) and (c) further promotes tribal interests. Subsection 104(b) designates tribes as states for purposes of the UCCJEA, enabling tribes to assert “home state” status when a child and parent reside on the reservation. And Section 104(c) imposes on states enacting it a duty to enforce a child custody determination made by a tribe with “home state” status.

The LTBB Parent and Custody Statute sets forth a statutory scheme that is distinct from the UCCJEA scheme. This may be due to the Tribal Council’s conscious rejection of the UCCJEA’s “home state” rule in favor of authorizing personal jurisdiction to the broadest extent permissible under the LTBB Constitution. In this matter, for example, if the UCCJEA had been adopted by LTBB, then the Appellant’s and her child’s residence in Grayling outside the LTBB reservation would result in Michigan receiving “home state” status, and the LTBB Tribal Court would then decline jurisdiction in favor of the exercise of jurisdiction by a court of the State of Michigan. It may be true, however, that Tribal Council has never contemplated enacting the

UCCJEA. Either way, the Appellate Court recognizes the Council's exclusive prerogative under the Constitution to make legislative decisions, and includes this brief discussion merely to highlight a coordinated effort among states, U.S. territories, and at least one Indian tribe⁵, to minimize personal jurisdiction disputes in child custody cases.

CONCLUSION

For the reasons stated above, the Appellate Court DENIES the Appellant's appeal and REMANDS the case to the Tribal Court for discovery and a hearing sufficient to support the factual findings necessary to analyze whether the Tribal court has personal jurisdiction and subject matter jurisdiction over the parties and this case. In its analysis, the Tribal Court is instructed to apply the factors and tests described in this opinion that are relevant to the personal jurisdiction analysis and the *Montana* analysis. This case is REMANDED for further proceedings.

SO ORDERED.

Dated 02/15/2017

Wenona T. Singel, Chief Appellate Justice

⁵ The Ely Shoshone Tribe codified the UCCJEA at Chapter 125A of its tribal code.