

Supreme Court No. 20210288  
District Court No. 40-2021-DM-00030

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**STATE OF NORTH DAKOTA**

In the Supreme Court

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Brock Baker,

Plaintiff/Appellee,

vs.

LuAnn Thiel f/k/a LuAnn Baker-Erickson,

Defendant/Appellant.

**On appeal from an Order Granting Motion to Vacate Order  
Recognizing Tribal Protection Order entered August 24, 2021,**

**in the District Court of**

**Rolette County in the Northeast Judicial District**

**The Honorable Anthony Swain Benson**

2nd AMENDED

**BRIEF OF APPELLANT**

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## STATEMENT OF ISSUES

- I. Whether the district court properly granted full faith and credit to the tribal court order.
  - a. Whether the tribal court restraining order is invalid on its face and not entitled to full faith and credit.
  - b. The tribal court exercised extrajudicial and extraterritorial jurisdiction invalidating the restraining order.
  
- II. Tribal court lacked personal and subject matter jurisdiction over the parties.

## STATEMENT OF THE CASE

[¶ 1] Petitioner, Brock Baker (hereinafter “Brock”) and Respondent were married on March 28, 2009 and remained husband and wife until they were divorced on June 23, 2016. (Doc. ID #33, page 1). The parties are the biological parents three (3) minor children, E.M.B., born in 2010; S.D.B., born in 2011; and C.J.B., born in 2014. Parentage of the minor children is not at issue. (Doc. ID #33, page 2). The parties were divorced, and child custody was entered via stipulated judgment in Cass County File No. 09-2016-DM-00700. (Doc. ID #9, page 1).

[¶ 2] Brock is an enrolled member of the Turtle Mountain Band of Chippewa Indians (hereinafter, “TMBCI”). (Doc. ID #33, page 4). LuAnn is not a member of the TMBCI. (Doc. ID #9). Based on information and belief, the minor children are also enrolled members. (Doc. ID #33, page 4).

[¶ 3] LuAnn has had primary custody of the children since the parties divorced in 2016. (Doc. ID #9, page 1).

[¶ 4] Brock made a motion to the district court on December 2, 2019, for primary residential responsibility of the minor children. (Doc. ID #9, page 2). Pursuant to a stipulation by the parties, a Second Amended Judgment dated June 4, 2020, was entered in district court, with LuAnn once again retaining primary residential responsibility for the minor children and Brock being granted parenting time. (Doc. ID #9, page 2).

[¶ 5] In April 2021, LuAnn suffered from an alcoholic relapse. LuAnn voluntarily entered alcohol treatment and requested assistance from Brock with regard to the minor children while she attended residential treatment. (Doc. ID #9, page 3).

[¶ 6] On April 12, 2021, Brock filed a temporary ex parte petition for a protection order in tribal court for the Turtle Mountain Band of Chippewa. (Doc. ID #31, page 1). No documentation has ever been filed in any court evidencing proper service of the temporary ex parte restraining order on LuAnn.

[¶ 7] Honorable Andrew Lavendure, Special Judge, reviewed the petition and granted a temporary ex parte restraining order on April 20, 2021. (Doc. ID #1, page 3). The restraining order included several overt and explicit provisions for custody of the minor children. (Doc. ID #1, page 3).

[¶ 8] On May 6, 2021, Judge Andrew Lavendure granted the restraining order on a permanent basis. (Doc. ID #1). On May 18, 2021, Brock filed the tribally issued permanent restraining order in district court for the county of Rolette as a foreign judgment. (Doc. ID #1). Judge Anthony Swain Benson presided over the proceedings. Brock's filing attempted to file the permanent restraining order as a foreign judgment in North Dakota district court. (Doc. ID #4). On May 21, 2021, Judge Anthony Swain Benson granted the registration of the foreign judgment and permanent restraining order pursuant to Rule 7.2 of the North Dakota Rules of Court. (Doc. ID #7).

[¶ 9] LuAnn timely filed a response to Brock's attempt to register the restraining order as a foreign judgment, including a motion to vacate pursuant to Rule 60(b), along with an affidavit and evidence she had never been properly served with either the temporary ex parte nor the permanent restraining order and asserting the tribal court did not have jurisdiction over herself or the minor children. (Docs. ID ##8-12).

[¶ 10] Brock filed a timely response to the motion to vacate. (Doc. ID #13). Although Brock filed several exhibits to his response – he did not file or serve any documentation

evidencing the fact that LuAnn had ever been served with the temporary ex parte or permanent restraining order. A hearing was held on July 7, 2021, both parties were represented by counsel. (Doc. ID #41).

[¶ 11] On August 24, 2021, Judge Anthony Swain Benson issued an order vacating the tribal court restraining order; however, in the memorandum of the order, Judge Benson inexplicably made several findings including findings explicitly stating tribal court had jurisdiction over the matter, that LuAnn was properly served, and that the substantive conclusion of the tribal court was enforceable. (Doc. ID #41).

[¶ 12] During the hearing on the motion to vacate on this issues in this case, counsel for LuAnn repeatedly questioned Brock as to why he did not reveal to tribal court the parties had an existing court order disposing of custody and that the children were residents of Bismarck, North Dakota, not the Turtle Mountain Indian Reservation. Under oath, Brock admitted he failed to include the information. (Tr. at 17, lines 8-12). Brock further admitted he knew LuAnn was located at a voluntary inpatient treatment program in Minnesota or North Dakota throughout the course of the proceedings and therefore knew she was not living in her home. (Tr. at 19, lines 13-19).

[¶ 13] In addition to admissions during the hearing that he could have brought a restraining order in district court, where he knew jurisdiction to be correct, Brock also admitted he allowed LuAnn to assume the arrangement between the parties was temporary qualifying his response that he never agreed it was temporary. (Tr. at 21, lines 12-24).

[¶ 14] Due to inappropriate findings by the district court on the motion to vacate, Thiel now brings this appeal in order to prohibit the application of those inappropriate findings to subsequent district court cases under the doctrine of collateral estoppel.



## STATEMENT OF THE FACTS

[¶ 15] LuAnn has had primary custody of the children since the parties divorced in 2016. (Doc. ID #9). Brock accessed the tribal court for adjudication of the protection order, while fully aware the issue of custody was under the jurisdiction of the North Dakota district courts. (Tr. at 22, lines 1-25).

[¶ 16] In April 2021, LuAnn suffered an alcoholic relapse for which she immediately sought treatment at the nation's top facility, Hazelden, located in Minnesota. (Doc. ID #9). Recognizing the urgency of the situation given her previous history of alcoholism, on April 17, 2021, LuAnn checked herself into Hazelden Betty Ford Center in Center City, MN (hereinafter "Hazelden"). (Doc. ID #9). She successfully completed the program on May 21, 2021, and has remained clean and sober since her discharge. (Doc. ID #9). LuAnn has also followed through on all recommended treatment and continues individual therapy in order to remain sober for the sake of her children. (Doc. ID #9).

[¶ 17] On an informal basis, LuAnn asked Baker to temporarily parent the children while she was in residential treatment located in Minnesota. (Doc. ID #11). Baker agreed to parent the children while LuAnn was in residential treatment in Minnesota, and LuAnn believed the minor children would temporarily reside with Baker while remotely attending their Bismarck School. (Doc. ID #9). The arrangement allowed for the minor children to continue their studies online with Bismarck Public Schools. (Doc. ID #11). LuAnn's brothers, Joe and Tom, were to exercise responsibility for the children on the weekends in lieu of LuAnn's parenting time. Baker made no objections or contrary statements to LuAnn. (Doc. ID #11).

[¶ 18] Baker removed them from the Bismarck Public School system, despite less than four (4) weeks remaining in their regular school years, and enrolled the children at St. John's school near his parents' home on the reservation. (Tr. at 31, lines 20-25; Tr. at 32, lines 15-24 ).

[¶ 19] Brock then applied for an ex parte temporary restraining order against LuAnn in this Court that prevents LuAnn from having any contact with the children and grants Brock "full custody" with "no visitation" to LuAnn. (Doc. ID #1). The petition for the restraining order contains volumes of hearsay, inflammatory rhetoric, and patent untruths. (Docs. ID ##15-25). Most importantly, Thiel was never properly served with the petition for the restraining order, temporary restraining order, or notice of hearing. Thiel was not served with any documents until the permanent, final restraining order was in place and Baker started the process of registering the restraining order in district court. (Rolette County District Court File No. 40-2021-DM-00030).

[¶ 20] Thiel remains unable to retrieve the children from the reservation while the Tribal Order is in effect, despite having a valid and enforceable district court custody order and parenting plan. Baker's attempted registration of the tribal court restraining order in Rolette County district court (Rolette County File No. 40-2021-DM-00030) demonstrates his knowledge appropriateness and applicability of North Dakota district court as the proper jurisdiction for actions, including restraining orders, for the minor children.

[¶ 21] Thiel testified at the hearing that she had not seen nor had any contact with her minor children for three (3) months, despite having a valid and enforceable district court order for primary residential responsibility, also referred to as "primary custody."

(Tr. at 62, lines 20-23). The tribal court protection order remains in full effect and prevents ANY contact. (Doc. ID #1).

[¶ 22] Brock has abused the tribal court system to alienate the children from Thiel and to circumvent the federal and state court laws designed to prevent one parent from kidnapping children and removing them to tribal lands and keeping them there in perpetuity against any other court's order.

[¶ 23] The tribal court order was improperly recognized and subsequently is now utilized by Brock as both a sword and shield to keep LuAnn from having any contact with the minor children and depriving her of her constitutional right to parent her children and due process under the law.

## **STATEMENT OF JURISDICTION**

[¶ 24] The district court had jurisdiction to decide the incidents of the parties' marriage, and the primary issue in this case involves the district court's subject matter jurisdiction to decide child custody under N.D.C.C. § 14-14.1-12.

[¶ 25] LuAnn Thiel's appeal is timely under N.D.R.App.P. 4(a). This Court has jurisdiction under N.D. Const. art. VI, §§ 2, 6, and N.D.C.C. § 28-27-01.

## **LAW AND ARGUMENT**

[¶ 26] This case involves the intersection of federal law, tribal law, and state law. This Court must reverse and remand the district court's decision making several findings of fact in granting full faith and credit to tribal court that is invalid on its face and incongruent with both federal and state law. LuAnn Thiel appeals from an order granting her motion to vacate a temporary ex parte and then permanent restraining order brought by Brock Baker in which the district court granted her motion to vacate the restraining order against LuAnn with regard to the parties' minor children. Troublingly, the tribal court order is invalid on its face, exercises extraterritorial jurisdiction, and was never properly served on LuAnn affording her the opportunity and notice to litigate the petition.

[¶ 27] The tribal court restraining order (Doc. ID #1) granted "custody" [sic] of the parties' minor children to Brock and prohibited LuAnn from having any contact with the parties' minor children. Further, the restraining order provided LuAnn would have "no visitation." (Doc. ID #1, page 3).

[¶ 28] The district court properly dismissed the foreign judgment; however, in doing so, the district court improperly made findings on the memorandum and order that may

now be weaponized by Brock and his counsel in the primary custody case. LuAnn found herself in the awkward legal position of having to appeal a favorable district court decision based on the court’s improper analysis under the motion to vacate. Rule 60(b)(4), N.D.R.Civ.P., provides, “[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: the judgment is void.” The standard of review for a motion to vacate a judgment as void is plenary. Roe v. Doe, 2002 ND 136, ¶ 6, 649 N.W.2d 566. When analyzing a motion challenging a judgment as void under Rule 60(b)(4), “the court’s sole task is to determine the validity of the judgment.” Roe, 2002 ND 136, ¶ 6, 649 N.W.2d 566.

**I. Whether the district court properly granted full faith and credit to the tribal court order.**

[¶ 29] North Dakota state courts may give full faith and credit to a foreign state or tribal protection order pursuant to 18 U.S.C. § 2265. North Dakota statutory provisions pertaining to the enforcement of protection orders are preempted by provisions of 18 U.S.C. § 2265 to the extent that they are inconsistent with federal law.

[¶ 30] Article 4, Section 1 of the United States Constitution provides, “[fu]ll faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. The full faith and credit clause requires states honor a judicial decree the force and effect to which it was intended in the state or tribal jurisdiction in which it was rendered. If an order is an enforceable order in the state or tribal jurisdiction in which it was rendered,

the full faith and credit clause imposes a duty to give effect to the order even when procedures to enforce the order differ. Sistare v. Sistare, 218 U.S. 1 (1910).

[¶ 31] North Dakota has adopted the Uniform Enforcement of Foreign Judgments Act (UEFJA) (codified at N.D.C.C. § 28-20.1-01 through 28-20.1-08). Under the Act, a foreign judgment is “any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.” N.D.C.C. § 28-20.1-01. In Brossart v. Janke, 2020 ND 98, ¶ 28, 942 N.W.2d 856, the North Dakota Supreme Court explained when a foreign judgment, including tribal judgments and restraining orders, is entitled to full faith and credit under UEFJA:

[C]onstitutional full faith and credit is afforded to foreign judgments even though a similar judgment could not be obtained in the forum state as a matter of law, or through the judgment could not be obtained in the forum state as a matter of strong public policy. However, we have recognized foreign judgments are not entitled to full faith and credit under certain circumstances such as when they are rendered in violation of due process in the rendering state, when the rendering court lacks jurisdiction, or when the judgment is procured through fraud in the rendering state[.]

(citations and quotation marks omitted).

[¶ 32] In order for a foreign judgment, such as the one at issue in this case, there must be subject matter jurisdiction and personal jurisdiction over the parties. City of Harwood v. City of Reiles Acres, 2015 ND 33, ¶ 10, 859 N.W.2d 13. Subject matter jurisdiction is the court's power to hear and determine the subject involved in the action, and personal jurisdiction is power over the parties. Id. This Court has previously held, “[a] judgment is void if the tribunal lacks jurisdiction.” Oden v. Minot Builders Supply, 2021 ND 30, ¶ 13, 955 N.W.2d 102, (citing City of Harwood, 2015 ND 33, ¶ 10, 859 N.W.2d 13).

- a. The tribal court order is invalid on its face and is not entitled to full faith and credit.

[¶ 33] 18 U.S.C. § 2265 specifically sets forth the requirement that states and tribes grant full faith and credit to a protection order issued by another state or tribe. 18 U.S.C. § 2265 provides:

Sec. 2265. Full faith and credit given to protection orders

Full faith and credit.--Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or tribe.

Protection order.--A protection order issued by a State or tribal court is consistent with this subsection if—such court has jurisdiction over the parties and matter under the law of such State or Indian tribe; and (2) reasonable notice and opportunity to be heard is given to the person against whom the order is sought sufficient to protect that person's right to due process. In the case of ex parte orders, notice and opportunity to be heard must be provided within the time required by State or tribal law, and in any event within a reasonable time after the order is issued, sufficient to protect the respondent's due process rights.

Cross or counter petition.--A protection order issued by a State or tribal court against one who has petitioned, filed a complaint, or otherwise filed a written pleading for protection against abuse by a spouse or intimate partner is not entitled to full faith and credit if-- (1) no cross or counter petition, complaint, or other written pleading was filed seeking such a protection order; or (2) a cross or counter petition has been filed and the court did not make specific findings that each party was entitled to such an order.

[¶ 34] The term “protection order” is defined in 18 U.S.C. § 2266 as: “protection order” includes any injunction or other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil and

criminal courts (other than support or child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition or motion filed by or on behalf of a person seeking protection.”

[¶ 35] 18 U.S.C. § 2265(a) requires that the state or tribe enforce the protection order of another state or tribe issued consistent with 18 U.S.C. § 2265(b) as if it were the order of the enforcing state or tribe. Article 4, Section 1 of the United States Constitution authorizes Congress to adopt laws to implement the full faith and credit clause. 18 U.S.C. § 2265 is an act implementing the full faith and credit clause establishing the manner in which the judicial proceedings shall be proved and the effect of such proof.

[¶ 36] Under Article IV, Section 1 of the United States Constitution, full faith and credit must be given in each state to the public acts, records, and judgments of every other state. Article VI, Section 1, the Full Faith and Credit Clause, has been applied to Indian tribes. In re Adoption of Buehl, 87 Wash.2d 649, 663, 555 P.2d 1334 (1976).

[¶ 37] Full faith and credit is also extended specifically to tribal protection orders in 18 U.S.C. § 2265. This provision is part of the Violence Against Women Act which provides for nationwide enforcement of protection orders in state and tribal courts. Accordingly, 18 U.S.C. § 2265 states that: “Any protection order issued that is consistent with subsection (b) of this section by the court of one State or Indian tribe (the issuing State or Indian tribe) shall be accorded full faith and credit by the court of another State or Indian tribe (the enforcing State or Indian tribe) and enforced as if it were the order of the enforcing State or Indian tribe.”



[¶ 38] To be consistent with subsection (b), a protection order must be issued by a court that has jurisdiction over the parties and the matter under the law of the State or Indian tribe. 18 U.S.C. § 2265(b)(1). Also, the person against whom the order is sought must have been given reasonable notice and opportunity to be heard sufficient to protect due process rights. 18 U.S.C. § 2265(b)(2).

[¶ 39] In this case, none of the primary elements establishing full faith and credit for recognition of the tribal court order were met. The district court failed to read the restraining order in conjunction with the applicable law, instead choosing to accept the legal fiction advanced by Brock and his counsel that LuAnn had been properly served prior to the hearing, she had not. Tribal Code requires service to be done at the abode of the subject by personal service or by certified mail return receipt requested. There exists damaging knowledge by Brock and his counsel that they knew where LuAnn was during the duration of the proceedings and chose not to have her personally served or served by mail at her actual location. During the hearing on the motion to vacate, Brock admitted to knowing LuAnn was not present in her home during his procurement of the tribal restraining order and that Brock knew where LuAnn was located during the entirety of the proceedings. (Tr. at 19, lines 13-19). Brock knew if something was served at LuAnn's house she would not receive it. He further knew exactly where she was and could have easily and lawfully effectuated personal service or certified service upon her, but chose not to do so in direct contradiction to tribal, state, and federal law.

[¶ 40] In this case, the district court erred in accepting the restraining order on its face when even a cursory review of the evidence and of the tribal court's own findings established the tribal court lacked both personal and subject matter jurisdiction.

[¶ 41] The restraining order issued by the tribal court is not consistent with 18 U.S.C. § 2265(b). LuAnn has consistently and repeatedly challenged the jurisdiction of the tribal court both in terms of personal and subject matter jurisdiction. The face of the order indicates the tribal court did not meet the basic criteria for enforcement of the restraining order when the order was issued nor in its aftermath. Consequently, the tribal order restraining order cannot be accorded full faith and credit pursuant to 18 U.S.C. § 2265.

b. The tribal court exercised extrajudicial and extraterritorial jurisdiction invalidating the restraining order.

[¶ 42] In this case, the district court improperly applied tribal law, made findings without proper analysis or application of the law much to the detriment of the subject of the restraining order, LuAnn Thiel. LuAnn Thiel is a non-Indian. Brock Baker and the parties' minor children are enrolled members of the Turtle Mountain Band of Chippewa. (Doc. ID #33, page 4).

[¶ 43] In Kelly v. Kelly, 2009 ND 20, ¶¶ 10-11, 759 N.W.2d 721, this Court recognized personal jurisdiction and subject matter jurisdiction are interrelated with tribal court jurisdiction and considerations of tribal sovereignty and autonomy. This Court previously held state court erred as a matter of law in concluding the tribal court had exclusive jurisdiction of matters involving matters of child custody and marital matters. Id. at ¶ 18. State court had concurrent jurisdiction with the tribal court over the incidents of the marriage did not end the inquiry, because there were separate statutory jurisdictional requirements involving "home state" status in the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), N.D.C.C. ch. 14-14.1, for a court of this State to exercise jurisdiction over child custody determinations. Kelly, at ¶ 19.

[¶ 44] In Kelly, this Court held the UCCJEA treats the tribe as a state, and explained the statutory requirements in N.D.C.C. § 14-14.1-12. Kelly, at ¶¶ 19-23. In Kelly, this Court held:

[¶ 45] The UCCJEA essentially prioritizes home state status, and if this state is the child's home state the district court has jurisdiction. If this state is not the child's home state, the court must determine whether another state is the home state and, if so, may only acquire jurisdiction if a court of the home state has declined jurisdiction. Thus, on remand, the parties should be given an opportunity to present evidence relevant to the jurisdictional facts, and the district court must determine whether this state, the reservation, or neither is the child's home state.

[¶ 46] Analogous to this case, the Kelly case involved a restraining order against a non-Indian on matters involving the parties' marriage and children. The UCCJEA governs the jurisdiction of the determination of child custody, it does not control jurisdiction over other tangential marital issues. Kelly, at ¶¶ 21-22 (citations omitted).

[¶ 47] In this case, issues of child custody, primary residential responsibility and parenting time are vested with the North Dakota district courts. The district court erred in this case, although achieving the legally correct result, it issued improper findings that collaterally impact the future of the case as well as the present status of the custody of the minor children.

[¶ 48] In a decision issued August 24, 2021 order and decision, the state court acknowledged the Turtle Mountain Tribal court decision and explained Brock Baker represented he had properly filed and served LuAnn with tribal court restraining order documents; however, the district court failed to apply this fact and the available

evidence to the actual tribal court statute on service of process. LuAnn properly and with sufficient evidence demonstrated she has never been served with any of the tribal court documents – and in fact, she could not have been served because she was in residential treatment at a location known and easily ascertained by Brock and his counsel. (Doc. ID #11, page 1). Brock and his counsel chose to intentionally ignore LuAnn’s actual location and purported to have her “served by mail” which is not the standard for service pursuant to tribal code.

[¶ 49] Notwithstanding the fact that tribal court should have declined to exercise jurisdiction as a result of Baker’s unjustifiable conduct in seeking custody and child support for the minor children within the four corners of the petition for the tribal court restraining order, the district court, in this case, should have never made a finding of the protection order’s merits, which it did.

[¶ 50] The district court’s arguably dangerous position on this issue has placed LuAnn in a legal juggernaut. The district court’s findings on the matters of the validity of the personal jurisdiction of the restraining order and the failure of the subject matter jurisdiction of the restraining order have conveniently weaponized a simple order on a motion to vacate. Brock now has the potential ability to claim the district court’s order prohibits her from collaterally attacking the restraining order in the primary, underlying case in Cass County as res judicata.

## **II. Tribal court lacked personal and subject matter jurisdiction.**

[¶ 51] The Tribal court lacked subject matter jurisdiction over the claims raised in the Petition for the temporary ex parte restraining order. Given the parties’ mutual filing of a civil divorce action in district court, as well as the Tribal court’s tenuous basis for

exercising jurisdiction over this matter, Thiel has moved to vacate the restraining order in tribal court. During oral argument on the motion to vacate, counsel for Thiel laid out the legal basis for the tribal court's lack of subject matter and personal jurisdiction and took substantial testimony on the issue. (Tr. at 7, lines 19-22).

[¶ 52] Tribal court does not and did not have jurisdiction over Thiel or the minor children pursuant to the Uniform Child Custody Jurisdiction Enforcement Act. Although brought into this Court as, "Restraining Order," let us please call the tribal restraining order what it really is: a permanent parenting and custody order. During the hearing on the matter and in his subsequent filings, Brock has engaged in what can only be considered a "scorched earth" campaign against LuAnn. (Tr. at 14, lines 13-17).

[¶ 53] Further, Baker absconded the jurisdiction of state authority under which the parties had a parenting and custody arrangement. Baker then sought a restraining order under tribal jurisdiction using the children as tools to deny Thiel her due process rights under the constitution and according to Tribal Code.

[¶ 54] Pursuant to the portion of the Restraining Order statute in tribal code, "[s]ervice shall be pursuant to the procedure set forth in the Turtle Mountain Tribal Code." Turtle Mountain Tribal Code §37.0504. In this case, service was not properly effectuated on LuAnn Thiel at any time. The first that Thiel learned of the permanent protection order was when she attempted to pick up her children after completing her rehabilitative treatment— far too late for her to address the issue. (Tr. at 68, lines 9-21). It is incumbent upon all courts to ensure petitions, motions, and orders be properly served. In this case, the record does not reflect LuAnn was property served.

[¶ 55] According to Tribal Code section 2.0405, in order for service to be complete tribal court must first have jurisdiction over the individual, which in this case, it does not, according to section 2.0406. Further, the applicable portions of the service statute require the following:

A copy of the summons, together with a copy of the complaint as required under Section 2.0402 may be served by certified mail, return receipt requested, or may be served personally upon an individual defendant.

Service may be made by leaving a copy of the summons and complaint at the defendant's usual abode with a resident of the household above the age of fourteen (14) years, if the defendant cannot be conveniently found.

...  
Turtle Mountain Tribal Code section 2.0406(1)-(2).

[¶ 56] In this case, the record reflects the clerk mailed the permanent restraining order to LuAnn via regular mail with no certification, return receipt, or restricted delivery. Further, no copy was ever left or served personally on LuAnn at her regular abode. Given the arguably low threshold necessary in tribal court to achieve service, that leaves room for speculation as to why service was never achieved except to railroad LuAnn and obfuscate the judicial process in order to achieve a nefarious end.

[¶ 57] In the Tribal court case, Jenna Azure, clerk of court, drafted and sent an email to Brock and his counsel specifically stating the documents were not sent certified mail. (Doc. Id. #38). Brock and his counsel knew LuAnn had never been properly served yet continued to abide by and actively enforce the illegally obtained protection order in an effort to continue Brock's illicit and insidious pattern of alienation of the minor children against LuAnn. Alienation is most successful when a parent can excommunicate the other parent from the children's lives. Brock has continued to misuse his tribal status in order to wage war against LuAnn using the minor children as his primary weapon.

[¶ 58] Both North Dakota state court and Turtle Mountain tribal court require respondents to a restraining order to be given adequate notice of petitions, orders, and violations of restraining provisions against them. LuAnn was never afforded any such courtesies in this case.

[¶ 59] Here, the tribal order states that LuAnn was served via mail after the initial temporary ex parte order was filed and subsequently granted. On May 6, 2021, LuAnn only discovered the restraining order by email, not by proper service of process in either jurisdiction. Brock and his attorney both knew LuAnn did not have sufficient time or opportunity to appear at the hearing. (Doc. ID #11). Brock and his attorney included the email from LuAnn stating she would be unavailable and out of the state in the evidence for the tribal court protection hearing. (Doc. ID #25); (Tr. at 49, lines 1-11). In the email attachment sent to Jessica Azure, the tribal court civil clerk of court, from attorney Bruce, a pdf is shown labeled “Letter from LuAnn treatment Recd 5-15-21”. (Doc. ID #25). In the Rollete county district court testimony Brock stated that he did not believe LuAnn’s email regarding treatment, however, the inclusion of the email as evidence for tribal court contradicts that statement. (Tr. at 19, lines 1-19). The district court’s finding that LuAnn had sufficient notice and opportunity to be heard is confounding.

[¶ 60] In its order the district court stated, “while the emails a day or three before the hearing are very close in time and not necessarily property service the Tribal Court Order for hearing was sent to the Defendant’s mailing address in Burleigh County by the Clerk of Tribal Court sixteen (16) days before the hearing was scheduled to be heard.” (Doc. ID #41). This is clear error and a misapplication of the law. The standard

for service in tribal court is not email. And the tribal court's clerk's mailing was improper because LuAnn was never served first. In order for a clerk's service to be vested, a litigant must first be properly served at their abode personally or by certified mail, return receipt and restricted delivery.

[¶ 61] The full faith and credit act was promulgated in conjunction with the Violence Against Women Act. 18 U.S.C. § 2265. Further, these acts were intended to prevent and work in conjunction with the Uniform Child Custody Jurisdiction Enforcement Act.

[¶ 62] In this case, Judge Benson granted the tribal court order the presumption of validity despite the face of the order proving its invalidity. LuAnn has challenged tribal court jurisdiction both personally and in its subject matter jurisdiction, yet, the district court judge in this case simply disregards that analysis and testimony.

[¶ 63] Under tribal court jurisdiction, order for protection are granted only on limited jurisdictional grounds. Jurisdiction for civil protection orders are governed by Tribal Code section 37.500, which provides as follows:

1. The Turtle Mountain Tribal Court shall have jurisdiction:
  - a. When the petitioner or respondent is domiciled or found on the Turtle Mountain Indian Reservation;
  - b. When any act of domestic violence occurs within the exterior boundaries of the Turtle Mountain Indian Reservation;
  - c. When the Court is being asked to recognize and enforce a valid Protection Order of another court of competent jurisdiction; and
  - d. Over any petition for Protection Orders under this Domestic Violence Code.



2. The Court shall construe this Section liberally to exercise maximum jurisdiction.
3. This Section is not exclusive of the situations in which the Court may exercise jurisdiction.

[¶ 64] The language of the applicable provision uses the word “and” in conjunction with its subparts. Use of the word “and” means that a potential application of the statute requires a petitioner to meet the four prongs listed in the statute. Use of the conjunctive “and” in a list means that all of the listed requirements must be satisfied. See United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979); De Sylva v. Ballentine, 351 U.S. 570, 573 (1956)(explaining both “and” and “or” are context-dependent and when used conjunctively, must be applied consistently through the subject statute). The tribal code’s use of the word “and” as a conjunctive between the third and fourth prongs of the jurisdiction analysis imparts the drafter’s intent for a petitioner to meet the prongs inclusively and in concert, not exclusively or independently. Zorich v. Long Beach Fire and Ambulance Serv., 118 F.3d 682, 684 (9th Cir. 1997); United States v. O’Driscoll, 761 F.2d 589, 597-98 (10th Cir. 1985). A comprehensive search of Turtle Mountain appeals cases do not reveal any relevant case history to assist in interpretation rules, which necessitates the application of the general rules of statutory interpretation for federal and state statute.

[¶ 65] In this case, none of the prongs are met. Further, case law and statute provide that when a petitioner absconds to a jurisdiction, the act of flight cannot be used and should not be applied to the circumstances as residing or being “found” on the reservation or foreign jurisdiction. Indeed, the three minor children do not attend school or otherwise

“reside” on the reservation. The children attend St. John school and based on information and belief, live outside the exterior boundaries of the reservation proper.

[¶ 66] Pursuant to the Uniform Child Custody Jurisdiction Act, children removed from their home jurisdiction and secreted away to a foreign jurisdiction, which includes tribal jurisdiction, are not considered to “reside” or be “found” within the foreign jurisdiction. Section 208 of the UCCJEA requires a court to decline jurisdiction if such jurisdiction was created by the unjustifiable conduct of the party bringing the action. Furthermore, the Act requires the court to assess the wrongdoer necessary and reasonable expenses. Although the statute does not define “unjustifiable conduct,” examples cited in the accompanying comment to section 208 include wrongful removal, retention, or concealment of a child. TMCBCI is one of the three tribal jurisdictions in North Dakota recognizing the UCCJEA and adopting its application. As a matter of law, the children are not considered subject to tribal jurisdiction. Brock had an appropriate avenue and remedy to get a restraining order, if necessary, in district court. Indeed, the proper place would have been in district court; however, Brock did not even try to get a restraining order in district court. Instead, he chose a route that he knew would instantly result in extreme prejudice against LuAnn.

[¶ 67] In this case, the restraining order that has the practical impact of a custodial change between, Brock, a TMCBCI member, and LuAnn, a non-TMCBCI member and nonresident of the Turtle Mountain Indian Reservation, is not within the subject matter jurisdiction of the Turtle Mountain Tribal court. At best, the Tribal court might have concurrent jurisdiction with the district court over such matters; however, the Tribal court failed to address the existing state court order or ascertain whether she had been

properly served. In light of the particular facts of this case, Tribal court should decline to exercise jurisdiction over the parties' divorce and the related matters of child custody.

[¶ 68] In addition to issues regarding Brock's failure to address the restraining order in the court of proper jurisdiction, Brock failed to allege that domestic violence had ever taken place within the interior boundaries of the reservation. The statute clearly states this is a necessary requirement for tribal court to have jurisdiction. Failure to plead it necessitates a dismissal.

[¶ 69] According to Tribal Code chapter 9.09, Tribal court may exercise jurisdiction in a child custody proceeding when the reservation is the home reservation of the child or children or if the child is physically present; however, case law is clear that mere physical presence of a child on the reservation is not sufficient to confer tribal court jurisdiction. In this case, the children's presence is the only factor presented by the moving party, Brock. Based on information and belief, the children are enrolled members. (Doc. ID # 33, page 2). Further, the children never lived on the reservation until Brock moved them there in direct violation and contempt of the existing parenting order in place.

[¶ 70] Subject matter jurisdiction of tribal courts is governed by what is known as the "infringement test," as articulated in Williams v. Lee, 358 U.S. 217, 79 S. Ct. 263 (1959). Under the infringement test, tribal courts retain exclusive subject matter jurisdiction where state court jurisdiction, "would undermine the authority of the tribal courts over reservation affairs and thereby infringe on the right of the Indians to govern themselves." McKenzie County Social Services Bd. v. V.G., 392 N.W.2d 399, 402

(N.D. 1986). Two main categories of claims where tribal courts have exclusive jurisdiction have been identified under the infringement test. The first is claims in which a non-Indian asserts a cause of action against an Indian for actions taking place on that Indian's reservation. See Roe v. Doe, 2002 ND 136, ¶ 8, 649 N.W.2d 566, 569 (2002). The second is claims in which all parties are members of the same Indian tribe and the cause of action arose from conduct which took place on that tribe's reservation. See id. It has further been recognized that a tribal court maintains exclusive jurisdiction over "wholly internal tribal subject matter, such as membership disputes, divorce actions between members domiciled on the reservation, and certain probate actions," and over cases arising under the Indian Child Welfare Act (ICWA) concerning children residing within the reservation. Id.

[¶ 71] The North Dakota courts have interpreted these principles in several leading cases involving divorce, paternity, and child custody disputes between members of Indian tribes and non-members, as is the case here. For example, in Byzewski v. Byzewski, 429 N.W.2d 394 (N.D. 1988), the North Dakota Supreme Court held that the district court's exercise of jurisdiction over child custody and support in a divorce action between a tribal member and her non-Indian husband was an infringement on the right of Indians, "to make their own laws and be ruled by them," and where, "all incidents giving rise to the custody and support issues...occurred on the reservation" and the tribal court had already issued various temporary orders in the case. Byzewski, 429 N.W.2d at 399-400. But in a similarly-situated case, Roe v. Doe, 2002 ND 136, 649 N.W.2d 566, the court limited the holding of Byzewski to its specific circumstances, noting especially that the children of the marriage in Byzewski were domiciled on the

reservation and the tribal court had already issued temporary custody and support orders before the state court case was filed. In Roe, by contrast, these circumstances were not present. The parties, who were members of different tribes, lived together and their child was born off the reservation, in Grand Forks, and a state court order of paternity and child support had previously been issued. See Roe, 2002 ND 136 at ¶ 29.

[¶ 72] Further, in Kelly v. Kelly, 2009 ND 20, 749 N.W.2d 721, the North Dakota Supreme Court recognized the distinguishing factors from Roe and applied them to find that the district court’s exercise of jurisdiction had been proper. In Kelly, as in Roe, many “critical incidents of the marriage occurred off of the reservation,” including the place of the parties’ marriage, the conception of the parties’ child, the place of birth of the child, and the residence of the non-Indian spouse off the reservation during the year-plus period that the parties were separated. Kelly, 2009 ND 20 at ¶ 16. Moreover, the state court action had been ongoing for over a year when the Indian spouse attempted to invoke the jurisdiction of the tribal court. See id. The Court further noted that “resolution of the parties’ claims will have ‘significant off-reservation impact.’” Id. at ¶ 18 (quoting Roe, 2002 ND 136, at ¶ 30).

[¶ 73] In this case, examination of the circumstances of the marriage, its breakdown, and the subsequent child custody action in 2018-2019, reflects that the limited holding of Byzewski will not bring this case into the fold of exclusive tribal court jurisdiction. This case involves a tribal member and non-tribal member who were married off the reservation, in Detroit Lakes, Minnesota, whose children were born during the marriage and a non-tribal spouse who has been divorced from the tribal spouse since June 21, 2016, and has established a separate domicile off the reservation, in Bismarck, North

Dakota. (Doc. ID # 33). Moreover, and perhaps most importantly, the minor children of the parties have been domiciled with the non-tribal parent in North Dakota since the parties divorced. (Doc. ID # 9). Prior to April 21, 2021, the children were living with LuAnn and attending school in Bismarck, North Dakota. Since at least 2016, when the parties divorced, the children have been availing themselves of State resources and amenities, and therefore the State has “a significant interest” in all matters pertaining to the children. See Kelly, 2009 ND 20 at ¶ 17. Also as in Kelly, the non-Indian spouse, LuAnn, has spent a significant period of time living off the reservation.

[¶ 74] In this case, LuAnn and the children had not resided on or near the reservation prior to Brock’s unilateral movement of the children to the reservation. Further, LuAnn was never properly served with the tribal court documents. Any claim by Brock for the safety or best interests of the children is disingenuous.

[¶ 75] In another important consideration, it must be noted that under the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”), N.D.C.C. ch. 14-14.1, which governs jurisdiction over child custody determinations, a tribal entity must be considered as “a state” when considering the proper jurisdiction to make an initial custody determination or modification thereof. Under the UCCJEA, the “home state” of a child has jurisdictional priority in an initial custody determination. See Kelly, 2009 ND 20 at ¶ 21. A child’s “home state” is the state in which a child has lived with a parent for at least six (6) consecutive months immediately before the commencement of a child custody proceeding.

[¶ 76] In this case, North Dakota, not the Turtle Mountain Reservation, is the “home state” of the minor children under the UCCJEA given their continuous domicile in Bismarck,

North Dakota, until April 21, 2021, when Brock removed them from their home state and brought them to the reservation. This circumstance is yet another factor weighing against the exercise of tribal court jurisdiction over child custody.

[¶ 77] This Court should further consider the parties' affirmative step to avail themselves of district court jurisdiction in this matter by filing their action for marital termination, primary residential responsibility, child support, and equitable division in the District Court of Cass County. LuAnn is entitled to invoke the jurisdiction of Cass or Burleigh County, North Dakota, the jurisdiction in which the children were domiciled at the time of dissolution, and where she intends to make her home in the coming months. Further, North Dakota – not the Turtle Mountain Reservation – is the “home state” of the children under the UCCJEA.

[¶ 78] As a former law enforcement officer, Brock is much more sophisticated than the average litigant in due process or manipulating the system in order to achieve his ultimate goal, which is to excommunicate the children from their mother and primary caretaker. In this case, Brock had a proper and legitimate remedy – that remedy was to seek an ex parte change of custody in district court under the parties' properly filed divorce and custody case. Instead, Brock consciously and conspicuously chose to AVOID the jurisdiction he consented to for years and the only system which has jurisdiction over LuAnn and the children.

[¶ 79] Tribal court is an important tenant of tribal sovereignty. Using and abusing the tribal court system to alienate children from their biological mother and the only caregiver they have known is unconscionable and should not be rewarded.

[¶ 80] The rules of the UCCJEA are clear: before Tribal court can assume jurisdiction of a child custody case, it must meet and confer with the district court to take over jurisdiction from the district court.

[¶ 81] Section 37.0507 provides for the circumstances of an ex parte domestic violence restraining order. The applicable portion of tribal code provides:

Temporary emergency ex parte protection orders.

During the hours that the Court is closed, the Court shall provide for the availability of a Judge or other authorized personnel who shall authorize the issuance of Temporary Emergency Ex Parte Protection Orders by any appropriate and effective method. The following conditions apply:

Temporary Emergency Ex Parte Orders will be issued upon a good cause showing that it is necessary to protect the applicant or others from domestic violence;

Immediate and present danger of domestic violence to the applicant or others constitutes good cause for purposes of this section;

Any Order issued under this section expires seventy-two hours after its issuance unless it is continued by the judge or authorized personnel in the event of continuing unavailability of the Court. At that time, the applicant may seek a Temporary Ex Parte Protection Order from the Court; and

Any Order issued under this section and any documentation in support of the Order must be immediately certified to the Court.

If an officer cannot make an arrest, but there is probable cause to believe a person is in immediate and present danger of domestic violence, the Judge or other person authorized to issue Temporary Emergency Ex Parte Protection Orders may issue a Temporary Emergency Ex Parte Protection Order.

[¶ 82] Brock Baker has perpetrated a fraud upon tribal court, district court, and now this Court. Brock failed to establish or even plead that domestic violence took place against the minor children within the interior boundaries of the TMIR. Further, Brock knew LuAnn was not a present danger to the children, as she had voluntarily checked herself



into rehabilitative care in Minnesota and was not any where near TMBCI or the minor children. Brock's constant and flagrant misuse of the tribal code and his status as an enrolled member is nothing short of corruption and a denial of due process to the aggrieved parent. A seasoned and sophisticated law enforcement such as Brock would know he was misusing the system for his own gain.

**CONCLUSION**

[¶ 83] LuAnn asks this Court to reverse the district court's order and remand for findings that LuAnn was not properly served, the tribal court restraining order is not entitled to full faith and credit and is not enforceable in state court.

Dated this the 18<sup>th</sup> day of February 2022.

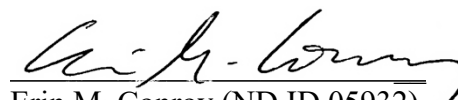
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**CERTIFICATION**

[¶ 84] The undersigned, as the attorney representing Appellant, and the author of the Brief of Appellant, hereby certifies that said brief complies with Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure, in that the brief was prepared with proportional typeface and that the total number of pages does not exceed thirty-eight (38) pages.

Dated this the 18<sup>th</sup> day of February 2022.

  
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**IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA**

Brock Baker,  Appellee/Plaintiff,  vs.  LuAnn Baker-Thiel,  Appellant/Defendant	Civil No. 40-2021-DM-00030 Supreme Court No. 20210288 <b>AFFIDAVIT OF SERVICE</b>
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STATE OF NORTH DAKOTA                    )  
  )ss.   **AFFIDAVIT OF SERVICE**  
COUNTY OF BOTTINEAU                    )   **BY ELECTRONIC FILING**  
  )   **AND ELECTRONIC SERVICE**

Nikole Soli, being first duly sworn, deposes and states that she is of legal age and that on the 18<sup>th</sup> day of February 2022, she electronically filed with North Dakota Supreme Court and served the following:

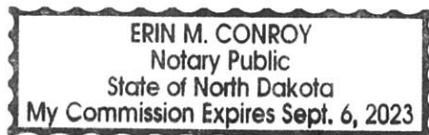
**1. Appellant’s Brief.**

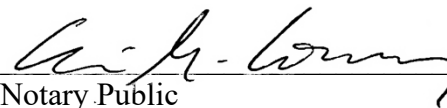
  
\_\_\_\_\_  
Nikole Soli

By sending a true and correct copy through electronic service to:

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Subscribed and sworn to before me this the 18<sup>th</sup> day of February 2022.



  
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Notary Public