ST. REGIS MOHAWK TRIBAL COURT

Janet Herne, **Appellant** **By *Attorney Lorraine White*** **V.** **Mose Herne,** **Appellee** ***Pro Se***	)))))))))	**Case No: 11 – LND- 00007**

DECISION AND ORDER

PROCEDURAL HISTORY

Potter, J. This dispute comes before the Court from a Saint Regis Mohawk Tribe Land Dispute Tribunal (SRMT LDT or Tribunal) Decision and Order dated July 12, 2011. The dispute concerns acreage known as lot #471, located at 186 Cook Road, Akwesasne, which was purportedly[1] purchased by Earl Herne and Janet Herne from Charles Cook by a signed Indenture dated June 11, 1962. (Exhibit 1).

Appellant, Janet Herne, (Appellant or J Herne) filed a complaint "to determine the rightful ownership of Lot #471 . . . ." on October 27, 2010.[2] The SRMT LDT held a plenary hearing on June 1 and June 15, 2011, after which it found that "Earle Herne is the rightful owner of the entire estate identified as Lot #471, comprised of 48.7+/- acres, and to include any and all buildings on said parcel of land located at 186 Cook Road, Akwesasne," and it directed the St.

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[1] The word "purportedly" is used inasmuch as Appellee argues that Janet Herne was not a purchaser of the property. That issue will be discussed herein.

[2] The complaint appears to have been filed in response to a letter from M Herne to Appellant dated March 24, 2010, laying claim "as attorney-in-fact for Earl Herne" to sole ownership in the disputed property, and accusing J Herne of trespassing on said property, as well as other action taken by M Herne attempting to prohibit access to the disputed property by J Herne.

Regis Mohawk Tribal Clerk to provide a Right to Use and Occupancy Deed to Mose Herne (Appellee or M Herne) "as Power of Attorney for Earl Herne . . . ." (*See*, SMRT LDT Decision dated July 12, 2011).

Appellant filed a Notice of Appeal in the Tribal Court on August 12, 2011, seeking to "[correct] the egregious wrongs . . . in the rendering of [the SRMT LDT's] . . . decision." Appellee answered timely and moved the Court for an injunction to prevent "trespassing" upon the property by "all persons" and sought "restitution" from Appellant in the amount of $2,500.00 for items she allegedly removed from said disputed property.

The St. Regis Mohawk Tribe (SRMT) Court set a pre-conference date for November 1, 2011. Both parties were in attendance. With the permission of the Court, M Herne appeared via telecom. At this hearing Chief Judge Peter J. Herne let the parties know that since Janet Herne is his wife's Aunt, he must recuse himself from hearing this proceeding inasmuch as it constitutes a conflict of interest that cannot be waived. (*See, Herne v Herne*, (SRMT Ct., Case No. 11-LND-00007, November 2011)). The parties were also informed that another judge would be assigned to their case as soon as one was available.

On July 18, 2012, Judge Barbara Potter held a pre-conference hearing. Attorney White was present for and with J Herne, and M Herne appeared via telecom. A briefing calendar was set; and, subsequently, each party filed his/her brief in a timely manner. The Record on this appeal includes all evidence considered by the SRMT LDT. Oral arguments were set for September 26, 2012, with a notice that the parties must be physically present to give their oral arguments. Oral arguments were heard on behalf of each party on September 26, 2012; the Court reserved Decision.

DISCUSSION

First, the parties to this proceeding are Janet Herne and Mose Herne. Mose Herne is the son of Janet Herne and Earl Herne. M Herne was appointed

guardian of the person and property of Earl Herne under Article 81 of the New York State Mental Hygiene Law, by Decision & Order and Judgment of the Supreme Court of New York State, Hon. David Demarest, each dated July 2, 2009. Said Judgment was amended July 6, 2009, to remove provisions that did not affect the appointment of M Herne as guardian of his father. Earl Herne is afflicted with dementia. He was described by the Supreme Court in its July 2009 Decision as "a 76-year-old man suffering from hypertension, diabetes and advancing dementia due to Alzheimer's." He resides in a nursing home in Malone, NY.[3] [4]

The parties seem to argue that Mose Herne is named in this proceeding as a party in his capacity as guardian, or attorney-in-fact, of Earl Herne, making Earl Herne the person whom should have been named as the original "Respondent" in the complaint brought by J Herne October 27, 2010. Indeed, all of M Herne's arguments purport to be on behalf of his father. However, on or about August 19, 2009, just weeks after the Decision of the Supreme Court granting M Herne the powers of guardianship over Earl Herne's person and property, Earl Herne's interest in the disputed property, which is the subject of this proceeding, (lot # 471, 186 Cook Road, Akwesasne) was transferred to Mose Herne.[5] Earl Herne no longer has interest in that property, or this proceeding, except for the claim made by M Herne for $2500.00 restitution.

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[3] It is interesting to note that the original proceeding for appointment of a guardian of Earl Herne under Article 81 of NYS Mental Hygiene Law was brought by Lewis Herne, another son of Earl Herne and Janet Herne, on September 4, 2008; he sought appointment of himself as guardian for his father. Lewis Herne was appointed temporary guardian by Order dated September 26, 2008. A cross-petition was then filed by Mose Herne on December 1, 2008, seeking such appointment. Mose Herne was then appointed temporary guardian in March 2009. After a hearing, with the parties having adduced their proof on May 8, 2009, the Court rendered its Decision & Order and Judgment July 2, 2009.

[4] M Herne also had a valid appointment as Attorney-in-Fact for Earl Herne dated June 27, 2008.

[5] Such transfer was accomplished by M Herne, acting in his capacity as his father's Attorney-in-Fact, to transfer the property to himself.

However, in order to determine M Herne's interest in the property, we must determine what interest Earl Herne had to convey to M Herne in August of 2009. M Herne argues that the whole of lot #471 belongs solely to him as successor in interest to Earl Herne. J Herne argues that she is a joint owner of said disputed property.

There is no dispute that Earl Herne and Janet Herne were legally married prior to June 11, 1962.[6] Although legally separated by a Judgment of the Superior Court, Family Division, of the District of Beauharnois, Province of Quebec, Canada, dated June 18, 1987, they remain legally married.

On June 11, 1962, an "Indenture" was signed by Charles Cook, Earl R. Herne and Janet Herne whereby Charles Cook agreed to sell to Earl Herne and Janet Herne, Appellant herein, "the estate known as the David Cook estate located on the Cook road" for the sum of $6,000.00. Payment was to be made as follows: $1,000.00 down payment: $200.00 on June 11, 1962; then, $75.00 every two weeks or $150.00 a month until November 1, 1962. The balance was then to be paid at no less than $500.00 per year starting November 1, 1963.

There are notations of payments totaling $1,200.00 received from "Earl R Herne and Janet Herne" on the Indenture itself with dates of June 11, 1962, November 2, 1963, and November 3, 1964. The 1964 notation indicates a balance owed of $5,000.00. There is also a notation on the Indenture indicating that it is recorded in "Tribal Book" #5, page 33. There were also receipts received into evidence as follows: receipt dated July 7, 1962, made out to Earl Herne for $125.00 "toward down payment"; undated receipt acknowledging payment of $500.00 balance of down payment (no named payor); undated receipt made out to Earl Herne for $100.00; receipt dated September 21, 1965, made out to "Earl and Janet Herne" for $2,000.00; receipt dated

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[6] In his brief and during his argument before the Court, Appellee argued that there was no proof that Earl Herne and Appellant were ever married, but when questioned, he agreed that they were married. It was asserted they were married at St Regis Catholic Church on June 11, 1955, and that was not disputed.

November 6, 1966, made out to Earl Herne for $200.00; and receipt dated March 11, 1967, made out to Earl Herne for $300.00. The receipts presented indicate payments of $4,425.00.

J Herne argues that she paid for the property along with Earl Herne. M Herne argues that J Herne did not pay for the property, and therefore, J Herne and Earl Herne did not purchase the property jointly. He argues that he offered five receipts into evidence that show that Earl Herne alone paid for the property and should be the sole owner. He further claims that only one receipt had J Herne's name on it. That is not an accurate representation. Actually, four receipts are made out to Earl alone, and several contain the name of Janet Herne. However, there is no dispute that J Herne and Earl Herne were still residing together at the time those payments were made. In his oral argument, Appellee argued that J Herne had already abandoned the family when Earl Herne made the payments in 1964 and 1965. However, the 1965 receipt was made out to "Earl and Janet Herne." Even if he meant the payments made in 1966 and 1967 when the receipts were made out to Earl Herne alone, he has always maintained, and argued in his brief, that his mother left the family in 1980. (*See also infra* fn 8.) In his brief, M Herne stated the "last payment was made on the property around 1985." There was no proof before the Tribunal of that alleged fact, and the Court will not consider it at this time. Even if true, however, it would not affect the outcome of this proceeding.

Earl Herne and Appellant are the parents of at least three children, among them M Herne. At some time Appellant left the marital abode. She testified she left between 1983 and 1985; Appellee testified she left in August 1980. The exact date is insignificant except as it has affected the parties to this proceeding. Appellee has on numerous occasions alluded to the fact that his mother abandoned his father and her children. There is so much animosity in this family that it has pitted child against parent and sibling against sibling. There have been criminal complaints filed, and a family offense petition was filed in Franklin

County Family Court on May 10, 2010, by M Herne, on behalf of Earl Herne, against Appellant, which resulted in a temporary Order of Protection. The petition was subsequently dismissed and the temporary order of protection vacated. M Herne, in his oral argument, used the word "infidelity" numerous times, and in his letters to the Tribal Council, which were received into evidence by the SRMT LDT, he discusses his mother, J Herne's, pelvic inflammatory disease, stating with certainty that it was caused by her infidelity and adultery. He also alludes to the fact that he believes that his mother's alleged behaviors with numerous sexual partners contributed to his father's Alzheimer's disease.

Sometime prior to November 27, 1986, J Herne filed an action in the above-mentioned Superior Court of Quebec for "separation from bed and board" against Earl Herne. On November 5, 1986, J Herne and Earl Herne signed a "Consent" agreement, and by Judgment of the Superior Court of Quebec dated November 27, 1986, the parties were ordered to comply with the terms of the "Consent". Subsequently, on June 18, 1987, upon the default of Earl Herne, and upon a finding that "the action is well founded," the Superior Court entered a Judgment in favor of Janet Herne, against Earl Herne, declaring the parties "separated from bed and board."

The terms of the "Consent" agreement are as follows:

1) Both parties agree and consent as follows:

    a) The care and custody of the minor child is to stay with Respondent; [Earl Herne]

    b) As to visiting rights, this issue is to be settled between them on a friendly basis;

    c) Petitioner is to stay in her own domicile located in St. Regis Island

    d) Petitioner reserves her right to claim alimony

2) Without costs.

Those are the sole terms of the "Consent", and therefore, the Judgment of the Superior Court of Quebec. (*See,* Judgment of the Superior Court of Quebec dated November 27, 1986, on file with the Court).

Appellant argues that the term "domicile" in the Consent agreement has its ordinary meaning of a place of residence. She argues that she agreed to reside elsewhere other than with Earl Herne on the property which is the subject of this proceeding. She asserts that she complied with that agreement.

Appellee argues that the term "domicile" in the Consent agreement is synonymous with ownership. He argues that, despite the fact that there is no mention of the Cook Road property in the Consent agreement, it provides that J Herne would "own" the St Regis Island property and that, by extrapolation, Earl Herne would "own" the Cook Road property. Appellee also argues that J Herne did not reserve her right to claim any interest in the Cook Road property, thereby waiving that right.

Appellee argues that his father transferred three smaller parcels of land from the property in question[7]. He further argues that because those deeds were signed by the Tribal Clerks at the time and recorded in the Tribal Books, it proves that Earl Herne was recognized by the St. Regis Mohawk Tribe as the sole owner of lot #471. He asserted the various Tribal Clerks were aware that Earl Herne and Appellant were separated, and by their signatures on the various deeds, the transfers were "ratified" by the Tribal Clerks. Appellee argues that Appellant did not oppose the deeds or their recordation, which indicates that she did not object to the transfers because she believed/acknowledged that Earl Herne owned the property. J Herne claims that she did not acquiesce in the transfers by Earl Herne; she was unaware of the transfers at the time they were made, but even if

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[7] June 29, 1993, to Louis Douglas Jacobs, one-half acre; June 15, 1998, to Lewis E. Herne, approximately 1.25 acres; and July 11, 2005, to June Herne-Oskineegish, 3.916 acres.

she had been aware of them, there was no process at the time by which she could object to, or appeal, their being filed.

With respect to the property on St Regis Island which was cited as J Herne's "domicile" in the Consent agreement of November 5, 1986, Appellee claims that it, too, was marital property, and Appellant disposed of it without Earl Herne's consent. Appellee claims that again is an indication that J Herne acknowledged that she would own the St. Regis Island property, and Earl Herne would own the Cook Road property. J Herne argues that she inherited that property from her family. Therefore, she claims it would not be marital property under any circumstances.

Appellee further argued in his brief and his oral argument that the SRMT Lands and Estates Office,[8] Geographic Information Systems Department (G.I.S. Dept.), is responsible for "tracking ownership" of lands on the Reservation, and it had Earl Herne listed as the sole owner of lot #471, thereby proving his sole ownership. Appellant argues that the G.I.S. Dept. is merely responsible for mapping the property within the Reservation and providing 911 addresses. It is not its responsibility to determine ownership.

The SRMT LDT determined, among other things, that there was no valid evidence of a land purchase for lot #471. It found that the only Tribal document on file with regard to lot #471 is the map prepared by the G.I.S. Department identifying lot #471 with the name of Earl Herne as sole owner. It further concluded that the "Indenture" between Charles Cook, Earl Herne and Janet Herne, together with the receipts received into evidence, presented no clear identification of the land purchased or for what the payments were made. It also based its decision, in part, on the fact that there was no proof that the terms of

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[8] There is no *per se* SRMT Lands and Estates Office. The Tribal Clerk's office is responsible for this function. The G.I.S. technician works in that office.

the contract had been fully satisfied, and that there had been no recorded Deed transferring the property. (*See* SRMT LDT Decision dated July 12, 2011.)

Instead, the SRMT LDT concluded that its decision would be based upon "the validity and weight of other documents to establish ownership." To do so, they considered: the Consent terms included in the Judgment of Separation; the 2008 Durable General Power of Attorney granted to M Herne by Earl Herne; a letter to the St. Regis Mohawk Tribal Council from Earl Herne dated October 4, 2008, in which it found he "articulated his understanding" of the Consent agreement and his "final wishes to preclude" J Herne from receiving any property;[9] the fact that Earl Herne was diagnosed with Alzheimer's disease in November 2008; the appointment by the New York State Supreme Court of M Herne as guardian of Earl Herne; M Herne's maintaining an "articulate and consistent record of actions and court proceedings for over three years."

Appellee, M Herne, argues that, for all of the reasons set out by the SRMT LDT in its Decision, supported by his written brief and oral argument,[10] the Decision must be affirmed.

Appellant, J Herne, argues that the Decision of the SRMT LDT is based upon obvious and compelling error and disregards the proper evidence before it. She argues that it erroneously disregarded the recorded purchase agreement [Indenture] between Charles Cook and the Hernes; that it ignored what is customary in the community;[11] and that it ignored the St. Regis Mohawk Tribe

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[9] That letter indicates that J Herne "abandoned" the family in 1980.

[10] Appellee argues that the "Indenture" is a land contract and should be recognized as such. He argues, however, that Earl Herne is the one who paid for the property, and that fact, along with all arguments regarding the separation consent agreement of Earl Herne and Appellant, coupled with her "infidelity" and "abandonment" of her family, must result in a finding that Earl Herne was the sole owner of the property in question.

[11] In fact, Appellant argues, handshakes and oral understandings are often what is customary within the Tribal community, and the fact that there is the signed agreement to purchase the land, recorded in the Tribal office, together with written receipts, is "amazing."

Land Dispute Resolution Ordinance (SRMT LDRO) which requires that in absence of a recorded deed, a bill of sale will be a binding document.

ANALYSIS

This Court is cognizant of the Decision and Order in the matter of *White v. White,* Case No. 10-LND-00009, (SRMT Ct. July 26, 2012) wherein Judge Peter Herne rendered a lengthy Decision and discussion of the Land Holding Origins, New York State Legislation as it respects St. Regis Land Holdings, the principles of the Constitution of the United States and federal law as they apply to Mohawk Indian Country, the SRMT LDRO, and other SRMT laws relevant to land issues. To the extent they apply in the instant case, this Court has considered them and will discuss their applicability here. As Judge Herne stated in *White*, the Court's responsibility is to do what is "'just' over what is 'expedient'."

From at least the 19th century, the St. Regis Mohawk Tribe had developed a custom of providing written documents with respect to land holdings, and those records were held in the SRMT Clerk's Office. (*White, supra,* p. 7). Despite attempts throughout history by the New York State Legislature and other political entities to interfere with the established customs and practices of the Tribe with respect to land holding, and despite the transfer to New York State of civil jurisdiction over other matters, those customs and practices with respect to land holdings survive to this day, many of them codified into Tribal law.

Judge Herne in *White, supra,* states:

> As indicated herein, there has been a multitude of New York State Legislation with respect to land holding on the St. Regis Indian reservation. By the time the Federal transference of jurisdiction was completed (1947-1952) though, the basic parameters of the SRMT system still remained intact. This can be summarily described as such: SRMT members for some time now occupy certain land parcels which they are free to devise of in whatever manner they see fit, over time they are issued 'use and occupancy' deeds which are endorsed by the Chiefs of the SRMT, and the use and occupancy deeds also have affixed to them the SRMT Clerk's signature, and these use and occupancy deeds are

> recorded at the SRMT Clerks office. Disputes between SRMT members and residents were decided by the Chiefs of the SRMT. Where all of this originated from is unclear, but it is certain that aspects of it originate in the history and customs of the St. Regis Indians. Nonetheless, there has been sufficient criticism of that system that change was called for, ...This change has resulted in the implementation of a SRMT Court, creation of a Land Dispute Tribunal, and the passage of a SRMT Land Dispute Ordinance.

Subsequently, and after much work and consensus, including referenda on which members of the Tribe voted, on December 3, 2009, the Tribal Council enacted SRMT TCR 2009-69, Land Dispute Ordinance, amended in 2011, (SRMT TCR 2011-20). The authority to resolve land disputes is granted to the Land Dispute Tribunal and the Tribal Court. Decisions of the Tribunal may be appealed to the SRMT Tribal Court, which must review the Tribunal Decision "based upon the record developed before the Tribunal."[12] The Court must consider not only the SRMT LDRO, but all other laws relevant to land issues. The SRMT Civil Code[13] sets out the sequence in which those laws must be considered:

> [1.] Such portions of the Constitution of the United States and federal law are clearly applicable in Mohawk Indian Country (with great weight given at all times to principles of the United States Constitution and federal Indian law which recognize Indian sovereignty, self-determination, and self-government, which render many federal and state laws inapplicable to federal Indian Country, which provide for a federal trust responsibility to Indian tribes, and which provide rules of legal interpretation favorable to Indian tribes);
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> [2.] Written Mohawk laws adopted by the recognized governmental system of the Mohawk Tribe;
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> [3.] Unwritten Mohawk laws, and (written and unwritten Mohawk customs), traditions and practices; [emphasis added]

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12 SRMT LDRO §XV(B)(2).

13 SRMT Civ. Code §V(A)(1-6)

> [4.] Generally recognized principles of the law of contracts as reflected by the most recent Restatement of Contracts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine;
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> [5.] Generally recognized principles of the law of torts, as reflected by the most recent Restatement of Torts or in such expert treatises as the Court may choose to recognize or as the Court may otherwise determine;
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> [6.] New York State law (but only if) consistent with principles of Tribal sovereignty, self-government, and self-determination and it is consistent with the aforementioned. (*See*, SRMT Civ. Code at § V (A) (1)-(6)).

In the instant case, the Court is constrained to consider written Mohawk laws adopted by the SRMT, unwritten Mohawk laws, and written and unwritten Mohawk customs, traditions and practices, as well as other laws applicable. No party before the Court has sought to apply a U. S. Constitutional provision, a Federal law or a NYS law. While a pertinent issue, and one argued extensively by the parties, involves a Canadian Judgment of Separation, neither party has sought to invoke Quebec law or requested the Court to do so. While Appellee argued that Quebec law requires "fidelity" [within marriage and regardless of legal separation], he presented no law to back up that argument.

As Judge Herne stated in *White:*

> [I]t is clear that our custom and 'unwritten laws' recognize that . . . '*When an Indian is in possession of a piece of land he holds it as proprietor; no other Indian can take it from him. He may by custom transfer it to his heirs, or sell it to any number of the Tribe, . . .* and our custom although contrary to 'outside law' is our custom.'" (*White*, *supra,* p. 36).

In fact what is transferred upon the grant of a Deed is the right to "use and occupancy" of the land in question. A Use and Occupancy Deed is defined by the SRMT LDRO §V(F) as "an official Tribal document granting the holder the right to use and occupy land . . . ."

Since there has been no argument to the contrary, and the SRMT LDT did not question it, the Court will assume that Charles Cook had the right to use and occupancy of lot #471 and had the right to transfer that right.

On June 11, 1962, Charles Cook entered into an agreement, designated an "Indenture", whereby he agreed to sell to Earl R. Herne and Janet Herne "the estate known as the David Cook estate located on the Cook Road. . .." for good and valuable consideration. Proof of payment by the parties has been received into evidence. The SRMT LDT, in its Decision, noted correctly that there was no Use and Occupancy Deed to the property. It found that the purchase agreement dated June 11, 1962, provided no clear identification of the land purchased, and further found there was no evidence that the terms of the land contract were fully satisfied. While the Indenture submitted into evidence contains a notation on it as "Lot #471," it is not clear that was a part of the original Indenture, and in fact, it appears to have been added at some later date and will not be considered. Further, the receipts received into evidence do not total $6,000.00. The Tribunal's final Decision that Earl Herne is the sole owner of the property; however, belies its decision that the purchase agreement should not be considered. It found that J Herne left the "home" sometime between 1980 and 1985. All of the testimony and arguments before the Tribunal and the Court indicate that the "home" was lot #471, Cook Road, where Earl Herne remained domiciled after J Herne left the "home." Therefore, Earl Herne and Appellant resided in the "home" on Cook Road together for a number of years. And, whether the total sum of $6,000.00 was paid by the Hernes to Cook should not be a determining factor in the instant case. If they did not pay the full amount, that would be the subject of another proceeding by Cook, or his heirs or successors, against the Hernes. It is irrelevant to this proceeding.

The Tribunal also relied on the map prepared by the G.I.S. Dept. identifying Earl Herne as the sole owner of lot #471. If, in fact, there were no description in the land contract/Indenture sufficient to identify the property that

Mr. Cook had the right to use and occupy, and over which to transfer that right, there is no evidence from which the G.I.S. Dept. could map the property.

The SRMT LDRO defines a "Land Contract" as "an agreement between a buyer and seller for the purchase of a right to use and occupy a parcel of land where the buyer makes installment payments to the seller for the property. These agreements may be informal . . . ." (*See*, SRMT LDRO §V(G)(emphasis added)). Clearly the Tribunal, absent a formal contract, could rely on the custom(s) of the community, such as a handshake or other such informal customs. The agreement/Indenture here is not informal. It is a formal, written, signed (by all three parties to it: Charles Cook, Earl R. Herne and Janet Herne) agreement that was recorded in the records of the SRMT, Tribal Book #5, page 33.

The SRMT LDRO defines a "Bill of Sale" as "a record of a transaction between individuals for the exchange of their right to use and occupy a particular parcel of land." (*See,* SRMT LDRO §V(H)). The Ordinance requires that a Bill of Sale "must be signed, witnessed or notarized and then recorded with the Tribal Clerk in order to be valid." (*See*, SRMT LDRO §V(H)(1)). In the instant case, the record of the transaction between Charles Cook and Earl Herne and Janet Herne, was not witnessed or notarized. However, let us not overlook the fact that the Indenture was prepared in 1962. The SRMT LDRO was adopted December 3, 2009. Pursuant to SRMT LDRO §V(H)(2), "In the event that a land dispute arises in a case where there are no recorded deeds with the Tribal Clerk, the Bill of Sale will be considered a binding document."

Indeed, each party to this proceeding argues for the validity of the original Indenture. While they differ in their arguments as to what other factors should be considered by the Court in determining ownership, each of them relies on the validity of the June 11, 1962, Indenture in his/her quest to be determined to be the rightful owner of lot #471.

The Court finds that the Tribunal erred in not considering the June 11, 1962, Indenture, as well as the various receipts received into evidence, as valid evidence of the land purchase.

That determination alone, however, is merely dispositive of the final determination in this case. It is not the sole factor to be considered.

Several years subsequent to Earl Herne and Appellant's original possession of the property in question, Appellant left the home and took up residence elsewhere. She started an action for legal separation from Earl Herne in Quebec, Canada, in 1986. On November 5, 1986, Earl Herne and Appellant signed a Consent agreement with respect to certain matters: custody of the minor child; visitation;[14] and, Appellant J Herne's domicile. Those were the only matters settled. J Herne's right to claim alimony was reserved. Appellee argues that from the matters that were settled and set out in the Consent agreement, one can determine other issues that were not set out, specifically that, because J Herne agreed to be domiciled in a place other than the Cook Road property, Earl Herne was granted sole ownership of the Cook Road property. In fact, when questioned, M Herne consistently argued that the right in Earl Herne to sole use and occupancy, which he termed ownership, of the Cook Road property was specifically set out in the Judgment of the Quebec Court. The Court disagrees. The Court cannot guess about what is NOT contained in the Consent agreement.

The Tribunal found, and Appellee argues, that the true intent of the Consent agreement can be determined by the actions of the parties to the agreement after its inception. The Tribunal held that "[t]he terms and general understanding of the separation agreement are demonstrated by the consistent record of conduct of each party in the following thirty years. . . ." There is a legal term known as "accord and satisfaction" which loosely defined means that the

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[14] Visitation was not truly settled, but the parties agreed they would settle it between themselves on a "friendly" basis.

parties to a contract, by their actions and agreement, vary the terms of the original agreement, in effect creating a new agreement. The accord is the agreement on the terms of the new contract, and the satisfaction is the performance of the agreement. The Court is not proffering legal theories, but that seems to be the argument of the Appellee, adopted by the Tribunal. However, even if the Court were to consider that theory, it fails. There is no proof before the Tribunal that Appellant had knowledge of the actions of Earl Herne in transferring, without her signature, portions of lot #471. There is no proof of any agreement to that effect. And if she had known, prior to the inception of the SRMT LDRO in December 2009, she had no recourse in any event. There is no custom for challenging such transfers. The SRMT LDRO provides that "[t]he issuance of deeds is not challengeable unless the deeds are found to have been issued due to, but not limited to the following: fraud, deceit, coercion, or duress." (*See,* SRMT LDRO §V(F)(2)). The SRMT LDRO was adopted more than four years after the last conveyance of a portion of lot #471 by Earl Herne. It is the defining "law" by which a Tribal member may bring such a challenge, called a "land dispute claim." The procedure for filing such a claim is set out at Section VIII of the SRMT LDRO. Appellant has followed that procedure in bringing this claim.

The Tribunal considered: the June 27, 2008, Durable Power of Attorney executed by Earl Herne appointing M. Herne his attorney-in-fact; a letter from Earl Herne to the St. Regis Mohawk Tribe, Tribal Council, dated October 4, 2008, wherein it found that Earl Herne "articulated his understanding of the Agreement and his final wishes to preclude Janet Herne from receiving any property"; and that Earl Herne was diagnosed with Alzheimer's Disease "on or about November 2008." The fact that Earl Herne appointed M Herne as his attorney-in-fact by the execution of a Durable Power of Attorney on June 27, 2008, is irrelevant to this proceeding. Earl was residing with M Herne at that time. It does, however, shed some light on the validity of, and weight that should be accorded, other documents and facts on which the Tribunal relied in rendering its Decision.

It is clear from evidence before the Tribunal, submitted by M Herne, including a letter written by M Herne to Hon. David Demarest, Supreme Court Justice, on May 18, 2009, that Earl Herne's physical and mental condition had seriously deteriorated prior to M Herne's involvement with his care and his moving his father to live with him in early 2008, prior to the execution of the Power of Attorney. M Herne wrote the following: "When I became aware of our father's situation early in 2008, I moved my family from Boston MA back to New York. . . I was able to convince my father to move in with me in short time . . . ." Earl Herne's condition had so deteriorated by September 2008, that Lewis Herne had sought, and was temporarily granted, guardianship, under Article 81 of the New York Mental Hygiene Law, of Earl's person and property. While the Tribunal considered the "fact" that Earl Herne was diagnosed with Alzheimer's disease in November 2008, it is clear that his mental capacity was substantially demented prior to that. In fact, Lewis Herne had temporary guardianship of Earl Herne during October and November 2008, prior to M Herne's filing a cross-petition in NYS Supreme Court seeking guardianship himself. M Herne proffered in his May 18, 2009, letter in evidence before the Tribunal, that while Lewis Herne had guardianship of Earl in October and November 2008, Lewis did attempt to care for Earl, but failed. According to Appellee M Herne, Lewis left Earl at the "Iakisontha Nursing Home"[15] in Quebec, Canada, "with no medications or visitations from other family members." And yet, the Tribunal gave apparent significant weight to a very succinct, type-written, well-written letter dated October 4, 2008, purportedly from Earl Herne, c/o Mose Herne, 21 Second Street, Malone, NY 12953, to the St. Regis Mohawk Tribe, Tribal Council, which the Tribunal found "articulated [Earl Herne's] understanding of the [Consent] Agreement and his final wishes to preclude Janet Herne from receiving any property." Even if Earl Herne wrote that letter, his mere "wish" that J Herne be precluded from her interest in the real property would be insufficient to extinguish a valid property right if it exists.

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[15] The correct name is Iakhihsohtha Lodge or Iakhihsohtha Home for the Elderly.

There is so much bitterness among these family members, that as the Court noted hereinabove, children have turned against their parents, siblings have turned against siblings. There is no question in this Court's mind that Appellee, M Herne, is an intelligent man. He is well-educated, particularly in the area of mental health. He is able to write succinctly. In addition, he has provided appropriate care and guardianship over his father's person and has taken care of his father's financial circumstances, all of which was given great weight by the Tribunal.[16] All of that has occurred since 2008; all of that is irrelevant to the issue of ownership of lot #471. Unfortunately, Appellant is also consumed by what he terms his mother's "abandonment" of his father and her children and her "infidelity."

Finally, the Tribunal addressed the issue of the August 19, 2009, letter from the St. Regis Mohawk Tribal Clerk, Corleen Jacco, which contained a conclusory statement that "Mose Herne does not have a full interest in the property known as Lot #471, as Earl acquired the property along with his wife Janet Herne." (*See,* Tribal Clerk statement on file with the Court dated August 19, 2009). The Tribunal held that "[n]o tribal documents were provided to the Tribunal that support the decisions contained in the letter . . ." and that such statement is "contrary to the NY State Superior Court Judgment dated July 6, 2009 providing Mose Herne with Power of Attorney." (*See*, SRMT LDT Decision dated July 12, 2011). This Court does not understand what is meant by the latter portion of that statement. However, the Supreme Court Judgment dated July 6, 2009, appointing M Herne guardian of his father is, as the Court indicated, irrelevant to this proceeding and carries no consequence to the ownership in lot #471. As to the statement by the Clerk regarding ownership of the property in question, that is not a decision to be made by the Clerk, but by the Tribunal, and now by this Court.

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[16] The Tribunal stated in its findings: "Complainant has failed to provide the Tribunal with evidence of any possessory interest in tribal lands. The Respondent however, has maintained an articulate and consistent record of actions and court proceedings for over three years."

No evidence was provided to the Tribunal or to this Court with regard to the claim filed by Appellee for $2,500.00 restitution for "items illegally taken from the property in question."

FINDINGS OF FACT

1. On June 11, 1962, Appellant, for good and valuable consideration, entered into an agreement, designated an "Indenture," with her husband, Earl R. Herne, and Charles Cook for the purchase of the right to use and occupancy of certain lands located within the St. Regis Mohawk Tribe Reservation designated as "the David Cook estate located on the Cook road." Said property has become to be known as lot #471.

2. Said agreement was memorialized in a formal written contract and was recorded in the St. Regis Mohawk Tribal Land Record Books at Tribal Book #5, page 33. It constitutes both a land contract and a bill of sale under the SRMT LDRO. As such, the law requires that "where there are no recorded deeds with the Tribal Clerk, the Bill of Sale will be considered a binding document." (SRMT LDRO §V(H)(2)).

3. At the time of the purchase agreement/land contract, J Herne and Earl Herne were legally married, and they remain legally married today.

4. Pursuant to the terms of the written contract/Indenture certain payments were made to Charles Cook, or his successor. Receipts received into evidence indicate payments made between 1962 and 1967. Several of the receipts for those payments were made out to Janet Herne and Earl Herne; several of the receipts were made out to Earl Herne alone; and at least one receipt was blank as to the payor(s)' name(s). All payments for which evidence was presented were made during the time J Herne and Earl Herne resided together.

5. Appellant J Herne left the marital residence on Cook Road during the 1980's.

6. At some time prior to November 27, 1986, J Herne filed an action in the Superior Court of Quebec, Canada, seeking a "separation from bed and board" against Earl Herne.

7. On November 5, 1986, J Herne and Earl Herne signed a "Consent" agreement, and by Judgment of the Superior Court of Quebec dated November 27, 1986, the parties were ordered to comply with the terms of the "Consent". Subsequently, on June 18, 1987, upon the default of Earl Herne, and a finding that "the action is well founded," the Superior Court entered a Judgment in favor of Janet Herne against Earl Herne declaring the parties "separated from bed and board."

8. The Consent agreement adopted by the Superior Court of Quebec, Canada, contained no provisions related to the property on Cook Road, now designated as lot #471. Indeed, if it had, it would be unenforceable inasmuch as the Quebec Court did not then, nor does it now, have jurisdiction to determine disputes involving St. Regis Mohawk Tribal lands.

9. Earl Herne's unilateral action in transferring the right to use and occupancy of portions of lot #471 is not dispositive of the issue before this Court. Likewise, any action by J Herne in transferring her interest in the property on St. Regis Island is not dispositive of the issue here.

10. Any interest of Earl Herne in the disputed land has been transferred to M Herne by deed on or about August 19, 2009. Said document was executed by M Herne as attorney-in-fact for Earl Herne, pursuant to the Durable Power of Attorney executed by Earl Herne on June 27, 2008.

11. Appellee M Herne has failed to carry his burden of proof with respect to the counter-claim interposed by him on behalf of Earl Herne for restitution for "items illegally taken" by J Herne.

CONCLUSIONS OF LAW

The St. Regis Mohawk Tribe Land Dispute Tribunal erred in its Decision of July 12, 2011. Such Decision is contrary to established Mohawk law and customs and must be vacated.

It is the Decision of this Court that the subject property of this dispute, lot #471, located at 186 Cook Road, Akwesasne, is owned jointly, in equal shares, by Appellant Janet Herne and Appellee Mose Herne, successor in interest to Earl R. Herne.

Accordingly, the St. Regis Mohawk Tribal Clerk shall provide a St. Regis Mohawk Tribal Right to Use and Occupancy Deed for lot #471 to Janet Herne and Mose Herne, in equal shares, within 45 days of this Decision.

The counter-claim filed by Mose Herne on behalf of Earl Herne seeking $2,500.00 restitution for "items illegally taken" by Janet Herne is hereby dismissed

SO ORDERED.

Entered by my hand this 28th day of November, 2012.

Barbara R Potter

Barbara R. Potter, Judge