
ST. REGIS MOHAWK TRIBAL COURT

Desiree White,)	
Plaintiff)	
)	Case No.: 10-LND-00009
v.)	
)	
Allen White,)	
Defendant)	

DECISION AND ORDER

I. PROCEDURAL HISTORY

Plaintiff, Desiree White, filed an appeal in the St. Regis Mohawk Tribal Court, on April 18th, 2010, against Allen White, from a Tribal Council Land dispute decision. Plaintiff seeks to have the Court reverse the Tribal Council decision dated July 22, 2008 and go back to Council's First decision dated September 21, 2007. (*See*, Plaintiff's Brief) The Tribal Council's 2008 decision held that the November, 20th, 2000 deed between Reginald Whites (Parties father) and Allen White was the controlling document because it was entered into to settle the dispute between the parties; and, not the Plaintiff's 1987 deed, which was the controlling deed in the 2007 Council decision.

2010 Plaintiff attempted to deliver to the Defendant, by certified return receipt mail, the Complaint and 20-day summons, which was returned to sender September 7th, 2010. September 13th, 2010 Defendant was served by process server who filed a Proof of Service with the Court on the same day. Defendant filed a timely Answer on September 20th, 2010.

The first pre-trial conference was scheduled for October 14th, 2010. On March 9th, 2010, after the seventh pre-trial conference, the Plaintiff phoned the Court Clerk, Jennifer Brown, saying she felt the Judge has a conflict of interest because his wife is related to the Defendant's wife. Plaintiff did not send a formal notice to the Court; however, during the April 20th hearing Plaintiff stated in Court that she believed that the Judge has a conflict of interest. This decision and order is based upon whether a conflict of interest exists that requires the Judge at bar to reclude himself from hearing this dispute.

II. DISCUSSION

Pursuant to SRMT Civ. Pro Law the Plaintiff carries the burden of proof. § XX [Rule 17](A); "he who pleads must prove."¹ The burden moving forward is one of proving a cause of action

¹ *Actori incumbit onus probandi*. The burden of proof is upon on the Plaintiff.

upon which relief may be granted by this Court. In doing so, Plaintiff must prove that a conflict of interest exists that requires the Judge to recuse himself.

The SRMT TCR 2008-19 Tribal Civil Code (herein after SRMT Civ. Code) specifically lays out, in a hierarchal fashion, the choice of law to be applied by the SRMT Court, which gives precedence to those first appearing in the list. The Court must first determine by examining § V (A) (1)-(6), in sequence, which law is controlling in the case at bar. This code provides that the Court must first apply:

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) (*id.* §V(1))

New York State law is sixth on the list for determining preference of law; and, it may only be used:

If (but only if) consistent with principles of Tribal sovereignty, self-government, and self-determination, and if (but only if) consistent with principles of law identified earlier in this section, New York State laws on contracts and torts. *Id.* (A)(6)

In the case at bar, there is what appears to be a controlling federal law, 28 U.S.C. §455 (2010) [Disqualification of Justice, Judge, or Magistrate], which pertains to when a judge must recuse himself from presiding over a case concerning a conflict of interest.

First a judge shall disqualify himself in the following circumstances:

He or his spouse, or a person within the **third degree of relationship** to either of them, or the spouse of such a person:

- i. Is a party to the proceeding, or an officer, director, or trustee of a party;
- ii. Is acting as a lawyer in the proceeding;
- iii. Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- iv. Is to the judge's knowledge likely to be a material witness in the proceeding. [Emphasis Added] (*Id.* (B)(5)(i)(ii)(iii)(iv))

Under New York State law, the degree of relationship is more restrictive in that its standard is within the sixth degree of relationship. However, as previously mentioned federal law is given preference to New York State law for the choice of law provision in the SRMT Civ. Code which

would apply in the case at bar. Therefore, in this instance, the third degree of relationship standard applies in the SRMT Court, which brings forth the issue of how the degree of relationship is calculated.

Both statutes define the degree of relationship as calculated according to the 'civil law system' (*See*, § 455(d)(2); NYCRR Part 100.0(C)), which can be defined as:

The "degree of relationship" is calculated according to the civil law system. That is, where the judge and the party are in the same line of descent, degree is ascertained by ascending or descending from the judge to the party, counting a degree for each person, including the party but excluding the judge. Where the judge and the party are in different lines of descent, degree is ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the common ancestor and the party but excluding the judge. The following persons are relatives within the fourth degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, first cousin, child, grandchild, great-grandchild, nephew or niece. The sixth degree of relationship includes second cousins. (*See*, NYCRR Part 100.0 (C); *See also*, Office of the Attorney General Degrees of Relationship Chart).

The American Bar Association's, Code of Judiciary Conduct,² further clarifies third degree of relationship:

"Third degree of relationship" means the following persons are relatives within the third degree of relationship: great grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great grandchild, nephew or niece. (21-400(3))

In the case at bar, the Judge's spouse is a cousin to the Defendant's wife, which makes the relationship within the fourth degree and according to federal law 28 U.S.C. §455 does not constitute in itself a conflict of interest for which a Judge must disqualify himself from hearing the case at bar.³

² In 1980, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act (28 U.S.C.A. §§ 331, 332, 372, 604 [1982]). This act authorized each of the thirteen federal circuits to establish a judicial council to review complaints against federal judges. The judicial council, comprising judges, was also authorized to order sanctions for violations of the Code of Judicial Conduct.

³ While under New York State law, a judge would have to disqualify himself from hearing the case at bar, the SRMT Court must abide by the controlling law pursuant to SRMT CIV. Code § V (A) (1)-(6).

Next, under federal law a judge shall, “disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” (28 U.S.C. §455(A)).

On April 20th, 2011 in Court the Plaintiff motioned that she believed that the Judge has a conflict of interest and should be disqualified from hearing the case. The Plaintiff has offered nothing further indicating why or how the impartiality of the Court is effected.

Federal Courts have held that although there is no express requirement in §455 that a motion to disqualify be timely; it is settled in, the S.D. New York that a timely requirement is implicit in the statute §455, *see*, 43. B.R. 765; citing *in re International Business Machines Corp.*, 618 F.2d 923, 932 (2d Cir. 1980); *United State v. Daely*, 564 F.2d 645, 651 (2d Cir. 1977), *cert denied* 435 U.S. 933, 98 S.Ct. 1508, 55 L.Ed.2d 530 (1978). A timely component is necessary to prevents parties from filing such a motion late just because they feel that they may not be winning their case. In the case at bar, Plaintiff filed this Land Dispute appeal of a Tribal Council decision on August 18, 2010. It has been 8 (eight) months since the case was filed before Plaintiff raised a motion of conflict of interest.

Next, it is not enough for the motion to be filed timely, it must also be factually and legally sufficient. (*United States Corr*, 434 F,Supp. 408, 412-413 (S.D.N.Y. 1977)) With respect to this, the Honorable Edward Weinfeld stated:

The test under that provision is not the subjective belief of the defendant or that of the Judge, but whether facts have been presented that, assuming their truth, would lead a reasonable person to infer that bias or prejudice existed, thereby foreclosing impartiality of judgment. The claim must be supported by facts which would raise a reasonable inference of lack of impartiality on the part of the judge in the context of the issues presented for his consideration. *Id.*

Therefore, the party moving to disqualify the presiding Judge must establish clear and convincingly that disqualification is warranted (See, *United States v International Business machines Corp.*, *supra* 618 F.2d at 931). Thus, a motion to disqualify a judge must be timely and the party must show with “clear and convincing” evidence that disqualification is warranted. It is not enough to state that the Judge or a spouse related to a Judge is within the third degree of blood. The motioning party here, Ms. Desiree White, must prove that the person is known by the judge to have an interest that could be *substantially* affected by the outcome of the proceeding.

I. Conclusion

In Conclusion, it is clear that pursuant to SRMT Laws currently in place there is no automatic disqualification based upon a perceived conflict of interest. There is in fact two applicable 'tests.' First, is the sitting Judge within 3 degrees of relationship to any of the parties. In the case at bar this is not the case. Here the closest relationship is the Judge's wife who is within a fourth degree of relationship with the defendant's wife.⁴

Second, the next test would be to determine if the Judges impartiality might reasonably be questioned. Although it is questionable if Plaintiff's motion was timely, the Court will permit the motion to go forward. None the less, it is still the Plaintiff's burden to show by Clear and convincing evidence that the Court has a conflict of interest that may be reasonably cause to question the impartiality of the Court. Wherefore, pursuant to this decision and order the Court will set another pre-trial hearing to allow the Plaintiff an opportunity to offer any and all evidence with respect to the conflict of interest issue in the case at bar.

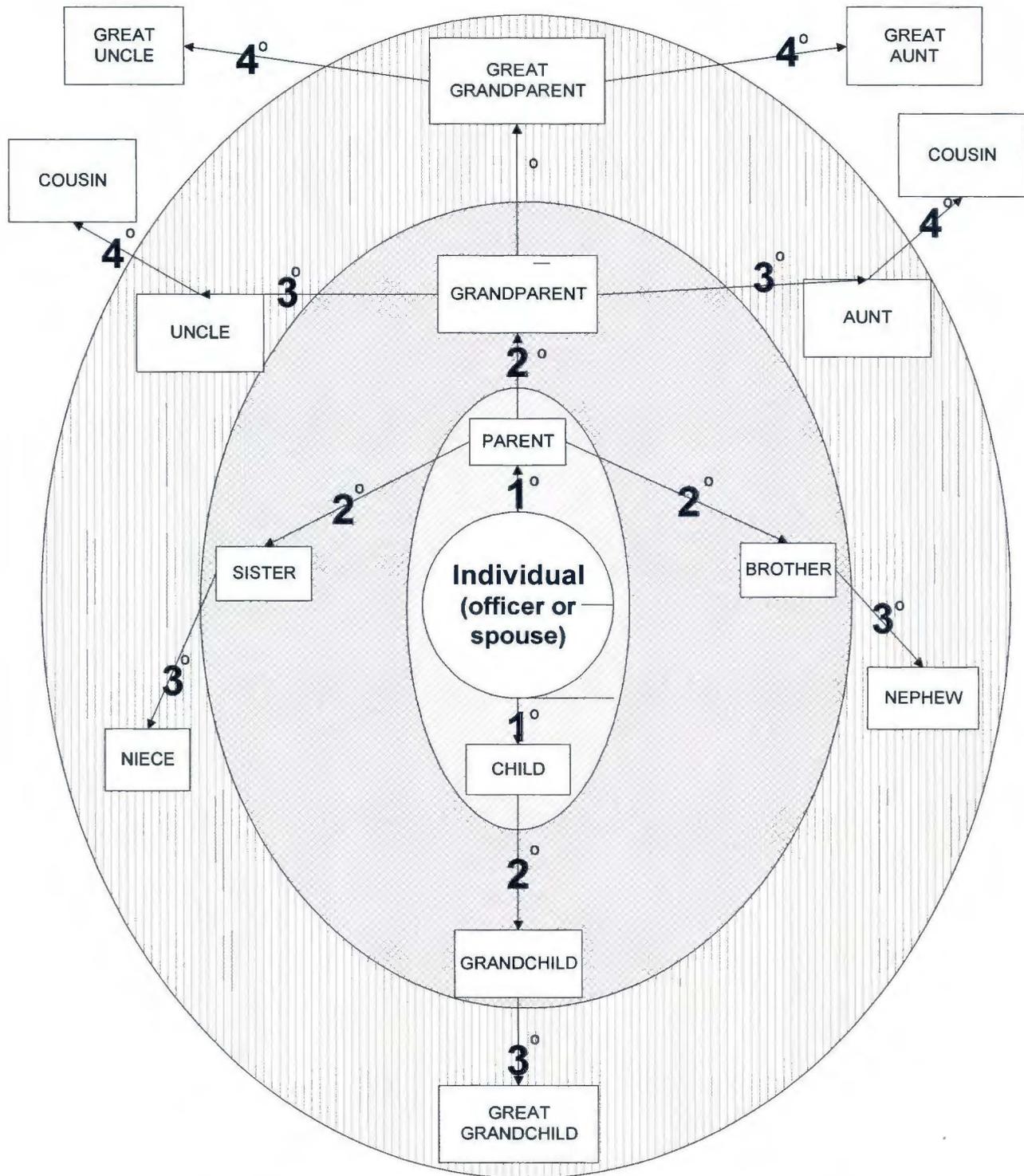
Based upon the aforementioned reasons, the Court will set a hearing to determine whether there is showing by clear and convincing evidence that the impartiality of the Court can be reasonably questioned.

Entered by my hand on this the 18th day of May 2010


Peter I. Herne, Chief Judge
Saint Regis Mohawk Tribal Court

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⁴ It can be noted that Defendant's wife is not a named party in the case at bar.



Degrees of Relationship Chart

When determining the degree of relationship by consanguinity, the individual in the center is the officer. For relationships by affinity, the officer's spouse is the individual in the center.