ST. REGIS MOHAWK TRIBAL COURT
ST. REGIS MOHAWK INDIAN RESERVATION

Ricky Joseph White,
Plaintiff

-against-

Geraldine McDonald/ White,
Defendant.

Decision on Divorce

Case No.: **12-CIV-00011**

Procedural History

On November 27th, 2012 Mr. Ricky Joseph White filed a complaint for divorce against Ms. Geraldine White (nee McDonald) in St. Regis Mohawk Tribal Court.

A twenty (20) day civil summons was issued by the Court on December 5th, 2012 to accompany the divorce complaint.

On December 6th, 2012 proof of service was provided to the Court that the divorce complaint and civil summons was served upon the Defendant, Ms. Geraldine McDonald-White. Method of service was certified mail/return receipt.

The Defendant's Answer was received by the Court on December 13th, 2012 in a timely manner, signed by the Defendant, Ms. Geraldine McDonald-White.

On July 17th, 2014 a status conference was held in St. Regis Mohawk Tribal Court with both parties present.

Today the Court is called upon to render a judgment of divorce in the above named action. This is a case of first impression for the Court since it's inception in 2008, and the Court would like to make clear that this action has been brought by the plaintiff with the consent of the defendant in the hopes of acquiring a divorce judgment from the SRMT Court. The Court has granted this request and we render this decision to accompany the divorce judgment.

Marriage as Contract

Stripped of its many social connotations, the law has for some time simply viewed Marriage as a form of 'civil contract' and as such, certain legal rights and remedies have become attached to this 'civil contract' over time. Under New York law marriage is defined as: "Marriage, so far as its validity in law is concerned, continues to be a civil contract, to which the consent of the parties capable in law of making a contract is essential."[1] [*our emphasis*] The attachment of rights to the civil contract has very often been fueled by religious beliefs, historical

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[1] *See* NY Domestic Relations Law (DRL) "§ 10 Marriage a Civil Contract".

custom, or legislative action. The attachment of such rights and remedies to 'marriage' has historically varied from person to person, community to community, and by nation to nation. In the United States it has only been through legislative action that many legal connotations have been attached to the marriage/ civil-contract.

Originally, in what became the United States, all laws effecting marriage and divorce were ratified in the Colonies. Following the ratification of the United States Constitution, marriage and divorce laws were passed by individual State governments. This became a necessity under the Constitution as such marriage and divorce authority was embedded in the 10th amendment, which reserves such authority to the States and not the Federal government. Since that time, all laws effecting marriage have been 'State' laws.

State marriage laws have many similar themes, such as: what is the appropriate age for a person to marry, waiting periods to be married, issuance of marriage licenses, or who can officiate a marriage. At the other end of the spectrum are laws with respect to when a marriage can be 'undone' (e.g. divorced). This includes what steps are necessary to 'undo' a marriage, and how should property, debts, and support be addressed when a marriage is undone. It is these State laws which bring what should be a private 'civil contract' dispute into the public realm. Interestingly enough, the current practice of persons entering into 'pre-nuptial' agreements is in large part an effort by individual citizens to take divorce out of the public realm and return it to the private sphere.

It is in this light that there is a simple but fundamental question: What is the justification for State government to legislate and become involved in these private civil contracts? The majority view upholding State government role in these matters is that of public policy. Whereby, if State government did not legislate and regulate these matters affected persons (e.g. ex-spouses or children) could very likely become a 'public charge' (e.g. welfare recipient).

It is within these confines that an early New York case had this to say about marriage:

> "... [is] not a commercial contract, therefore it has been regulated, controlled, and modified and rights growing out of the relationship may be modified or abolished by the legislature as long as such legislation does not violate the provisions of the federal or state constitution which prohibit a denial of equal protection, forbid the taking life, liberty, or property without due process of law." *See* Hanfgarn v. Mark, 274 NY 22.

Next, 'breaking' marital bonds legislatively is considerably older than what most persons may presume. In fact, New York passed its first divorce law in 1787. Most noteworthy about this law is that it provided a single ground for divorce: adultery. An even more interesting aspect is that adultery remained the only ground for divorce in New York up to 1966[2] when New York added other grounds for divorce! It was during this period, 1787-1966, that 'New Yorkers' resorted to numerous, if not humorous, legal means to acquire a divorce[3]. These included court

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[2] These 'new' grounds were cruel and inhumane treatment, abandonment, imprisonment, living separate and apart pursuant to a judgment or decree, or pursuant to a separation agreement. See NY DRL § 170 et. al.

[3] What can also be noted on this aspect is that many states also permitted 'Legislature Divorces'. Whereby a person or a couple would present their 'case' to a State legislator who would sponsor a bill in the State Legislature to pass a

shopping forays into other states and countries which offered more liberal divorce grounds, to paid 'correspondents' who posed as paramours so that New York's legislative mandated 'divorce ground' of adultery could be met.[4] Some people may be even more surprised to discover that New York did not pass their 'Equitable Distribution Law' until 1980![5] Prior to this, New York Courts were guided by 'Title Laws' and archaic common law 'Trust' rules developed by numerous court decisions to divide property and debts among divorcing couples.[6]

As we have noted, nearly all marital laws are State laws which is due to the 10th Amendment of the federal Constitution, reserving to the individual 50 States the authority to grant, modify, or abolish the rights which come with marriage. In this context New York was clearly the most conservative and resistant to change. Their expansion of divorce grounds in 1966 simply identified them as the last State to provide expanded grounds for divorce. Meaning more then just 'adultery' could be grounds for divorce. In 1970 California passed the United States' first 'no-fault' divorce law. This meant that a person no longer had to 'plead' and 'prove' the usual contentious divorce 'grounds'. Many States followed suit, and by 1985 there remained only one State which still required 'divorce' grounds to be plead and proven, New York. This did not change until 2011 when NY joined all other states by providing for 'no-fault divorces'[7]. It was this 'pleading' and 'proving' of contentious divorce grounds that led to many pro-tracted divorces.

Adding to many contentious divorces were State laws that tied the divorce 'grounds' to how marital assets and debts were going to be distributed. This was particularly true in New York. As adultery was the lone ground for divorce, if proven by the spouse alleging it, the penalty to be paid by the 'philandering spouse' was very heavy. This was the 'status quo' for many years until many State legislatures, often due to pressure from citizens who wanted a divorce and Courts forced to address those issues, secured passage of laws which 'broke the link' between 'divorce grounds' and 'distribution' of marital assets and debts. Again, New York being either reluctant to change or just being conservative, did not pass their Equitable Distribution Law (which broke this 'causal link' of divorce ground and distribution) until 1980![8]

The law, and therefore courts deciding cases, or vice-versa, is constantly evolving in these matters. Therefore it should come as no surprise that as the 'grounds for divorce' restrictions have been relaxed, other issues have become considerably more complex. For instance, in New York divorce has actually been viewed under the law as being in two (2) parts. The first part is to actually 'break' the marriage. This is very much like a 'contract' being formally and lawfully broken. Once done, the person is 'free' to enter into another contract (e.g. re-marry). Therefore, this first part simply breaks the 'legal-status' of the two persons as a

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law divorcing the person/couple!! In New York it appears their Legislature only granted one of these during this period, but other NY residents did try this mechanism.

[4] *See* 'Breaking Up Is Hard to Do' Wall Street Journal, August 13, 2010

[5] *See* NY DRL § 236

[6] This should not be that surprising to the average person if one recalls that for many years the Common Law viewed a wife as the property of the husband, and the wife's property as his property.

[7] This 'new' ground for divorce is actually "irretrievable breakdown in relationship" for a period of at least 6 months. *See* NY DRL §170

[8] *See* O'Brien v. O'Brien 66 NY 2d 576 : marital fault is irrelevant for equitable distribution even though such fault may have been sufficient to establish a 'fault ground' for divorce purposes, see also NY DRL § 236.

'couple' and makes them two separate individuals [again]. Some may be surprised to learn that there are actual penal interests (e.g. adultery,) tied to this step.[9]

The second part of divorce under New York law is significantly more complex as it relates to issues *associated with* the breaking of the marital 'civil/contract'. Those issues are: custody, visitation, child support, equitable distribution of specific property from the marriage, maintenance (a/k/a alimony), pension benefits, use of a former last name, or exclusive use of the marital residence. In New York, these are often referred to as "ancillary relief" to the divorce action.[10] As one can imagine it is these issues which add to the complexities of divorce actions in New York.

Lastly, and perhaps most importantly for the case at bar, is a legal principle called "comity". As we have noted, each of the 50 States is permitted under the Constitution to pass its own laws with respect to marriage and divorce. As such, there are times when the laws of each State can come into conflict with one another with respect to marriage and divorce issues. In contemporary times the issue of 'same-sex' marriages is an example of this clash whereby some States not only permit such marriages, but they also recognize such marriages which were conducted in another State. Yet, prior to these 'current' same-sex marriage issues the law amongst the 50 States was fairly well settled by the use of "comity". The legal principle of "comity" is defined as being:

> "A practice among political entities (as nations, states, courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts."[11]

By way of example the reader may wish to consider or recall the person who may have 'gotten married' while in another state (e.g. Nevada with its minimal waiting period) or country (e,g, Mexico marriage and honeymoon), or even those who may have been married in a certain religious ceremony in a State other then their State of residence. It is through the principle of "comity" that each such marriage would be recognized in New York. This issue had been litigated enough times that with respect to "comity" and the issue of marriage the common law coined the phrase that a marriage is valid IF 'it is valid where celebrated'. Simply meaning, if the two persons met the legal criteria of wherever they were when they got married (e.g. Nevada), then the 'home' state (e.g New York) would recognize it as a valid marriage. If this were not the case, and as some 'new spouses' litigated, then the marriage was not valid and therefore void-able!

It is also important to note that States generally must recognize a 'judgment of divorce' rendered in another State due to the Full Faith and Credit Clause of the US Constitution.[12] It is

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[9] New York is still one of the few states in which Adultery is a criminal offense, *See* NY Penal Law § 255.17, and Polygamy is an offense as well. *See* NY Penal Law § 255.15

[10] *See* NY: 'Introduction to Uncontested Divorce Instructions (Rev. 4/27/14)', prepared and made available on the New York State Unified Court System website.

[11] *See* Black's Law Dictionary 8th, Bryan A. Garner Ed., *citing* Hilton v. Guyot, 159 US 113 (1895): " 'Comity' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."

here though that 'ancillary issues', as called in New York, cause the greatest problems. For instance, child support issues are not actual 'judgments' but are very often Court orders.[13] For many years there were questions whether a foreign (meaning non-resident state) divorce with an ancillary order (e.g. child support) remained in the jurisdiction of the foreign (other state) court that issued it.[14] We will discuss these ancillary issues later in this decision.

TRIBAL NATION MARRIAGE AND DIVORCE

In the case at bar the pertinent question is what happens in the context of Tribal Nation members who desire to be married or divorced through a Tribal Nation Court.

In this decision we see no reason to add to the abundant amount of legal scholarship with respect to the field of 'Indian Law'. What is important for current discussion is that it has been long recognized that Tribal Nations are free to pass their own 'laws'[15] to regulate the internal affairs of their territories and members.[16] This has been recognized as not only flowing from a Tribal Nations inherent authority, but also to the extent that such matters are in the recognized exclusive jurisdiction of the Tribal Nation.[17] Among such authorities is that of regulating domestic relationships such as marriage and divorce.

One could easily pen a legal treatise on the interplay of a Tribal Nation's laws, including Tribal Nation Court decisions, with State or Federal laws and Court decisions. For the current case we will remain focused upon the issue of marriage and divorce.

With respect to Tribal Nation marriage[s], there have been cases to reach the United States Supreme Court and some of the highest Courts of the individual States where the issue has been at least noted or discussed.[18] Common among these decisions is some type of recognition

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[12] It is in fact this mandate which made many New York residents desirous of a divorce to 'go out of state' and acquire 'quickie' divorces.

[13] Unpaid child support in New York actually has to be made into a judgment in order for it to be fully subject to all civil enforcement mechanisms under New York Law. *See* NY FCA § 448, and New York Civil Procedure Law, Article 52, for enforcement mechanisms.

[14] It is now required to be recognized by each state which receives federal monies to operate child support units. *Infra.* The SRMT now has a Child Support unit within federal programming so their orders must likewise be given full faith and credit.

[15] Although we use the term "laws" here, we can also mention "custom" as some jurisdictions (except New York) have recognized marriages performed by Tribal Nations through "custom" and not limited to those performed pursuant to a Tribal Nation's formal written legislative act. *See* Kobogum et. al v. Jackson Iron Co. 43 N.W. 602, Ortley v. Ross 110 N.W. 982

[16] *See generally* United States v. Mazurie 419 U.S. 544 (1975), Montana v. United States 450 US 544 (1981)United States v. Wheeler 435 U.S. 313, Williams v. Lee 358 U.S. 217, Morton v. Mancari 417 US 535 (1974)

[17] *Id.*

[18] *See* In re Kansas Indians 72 U.S. 737 (1866); Jones v. Meehan 175 U.S. 1 (1899); Untied States v. Quiver 241 U.S. 602 (1916); Hallowell v. Commons 210 F. 793 (8th. Circ. 1914); United States v. Shanks 15 Minn. 369 (1870), Ortley (FN 7); Scott v. Epperson 284 P. 19 (Okla. 1930); Blake v. Sessions 220 P. 876 (Okla. 1923); Cyr v. Walker 116 P. 931 (Okla. 1911); Pompey v. King 225 P. 175 (Okla 1923); Earl v. Godley 44 N.W. 254 (Minn. 1890); LaFramboise v. Day 161 N.W. 529 (Minn. 1917); Rogers v. Cordingley 4 N.W. 2d 627 (Minn 1942); Boyer v. Dively 58 Mo. 510 (1875); In re Goldings Estate 89 P. 2d. 1049 (Nev. 1939); Henry v. Taylor 93 N.W. 641 (S.D. 1903); Compo v. Jackson Iron Co. 16. N.W. 295 (Mich. 1883); Wall v. Williams 11 Ala. 826 (1847); State v. Pass 121 P. 882 (Ariz. 1942); In re Paquet's Estate 200 P. 911 (Or. 1921)

that Tribal Nations have the authority to regulate their own internal affairs inclusive of marriage, that only Congress can divest Tribal Nations of such authority, and Tribal Nation marriages must be recognized under "comity" principles. This was summed up by one Court as:

> "The decisions in Alabama, Tennessee, Missouri, and Texas all sustain the right of Indians to regulate their own marriages, and their is no respectable body of authority against it; on the contrary, it is a principle of universal law that marriages valid by the law governing both parties when made must be treated valid anywhere" *see* Kobogum et. al v. Jackson Iron Co. 43 N.W. 602 at 605 [our emphasis].

It can be noted that decisions in these matters has included recognition of a Tribal Nation 'common law' marriage, recognition of polygamous Tribal Nation marriage[s] via custom, and recognition of Tribal Nation divorce via 'custom'.[19]

The next obvious issue is the treatment of 'marriage and divorce' by and between Tribal Nations and New York. It is here that the historical legal narrative becomes very tumultuous as from all appearance New York has been in the minority of jurisdictions, in that New York is very averse to recognizing any Tribal Nation authority with respect to marriage and divorce. It is from this history that one can very quickly discern there have been multiple NY legislative actions, NY judicial decisions, and executive forays into these matters to the detriment of the recognition of Tribal Nation marriages and divorce.

As early as 1888 a NYS Joint Legislative report known as the Whipple Report[20] was highly critical of marriage and divorce patterns it allegedly observed on the various Indian reservation within the State. Legislation soon followed, and New York upon their own initiative, made New York's marriage and divorce mandates applicable to Tribal Nation members and Territories.[21] Matters reached a fervor pitch at New York's 1915 Constitutional Convention, when among the many proposals from this convention, was an amendment to the State Constitution "abolishing' all Tribal Nation 'authority' with respect to marriage and divorce. It was with this backdrop that Courts in the State entered the foray. It is not necessary to reiterate the numerous decisions which come from this period. We say this because the 'break-water' mark came in the 1942 case of *US v. Forness* 125 F.2d. 928 (2d Circ.1942).

Up to the *Forness* decision, along with established Court precedent to this time, Courts should have clearly found in favor of recognizing Tribal Nation marriages and divorces via the use of 'comity'.[22] Which many State Courts in fact did find. Here again though, New York remained very adverse to follow the use of 'comity' for Tribal Nation marriage and divorces. In *Forness* though, it was determined that ALL New York laws were of no force or effect on the Indian Reservations.[23] This clearly would have included New York's attempt to legislate in the realm of marriage and divorce within Tribal Nation territories. As a result of this decision New

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[19] *Id.*

[20] *See* 'Report of Special Committee to investigate the Indian Problem of the State of New York', Appointed by the NY Assembly 1888, Assembly Document No. 51, 1889.

[21] *See* NY Indian Law § 3 (Chap. 31, Laws of 1909)

[22] *See* FN 18, above

[23] Until Congress gives its consent, *see Forness*.

York began a protracted lobbying effort to acquire both civil and criminal jurisdiction. These efforts were realized in 1947 (criminal) and 1950 (civil).[24] Yet, even in light of New York acquiring this jurisdiction the current trend among Tribal Nations is to pursue sovereign actions to free themselves from State jurisdiction.[25]

For current discussions it is important to stress that many marriage and divorce issues do not affect an entire Tribal Nation. Rather, these issues are most often felt directly by individual Tribal Nation members. For this reason a Tribal Nation entity tends not to worry about recognition of marriages or divorces. For a new Tribal Nation couple though, there are many significant issues which 'flow' from the marital status: name change, insurance coverage, pension rights, survivorship benefits, credit applications, ownership titles, so on and so forth.[26] For the 'new' couple who may be Tribal Nation members these are significant factors. For them, when the government which is the 'gatekeeper' to some of these matters chooses not to recognize Tribal Nation marriages (e.g. New York), the non-recognition of Tribal Nation marriage has a very real and substantial effect on their lives. Of course this can be felt with respect to divorce as well.

It is in this regard that the Seneca Nation of Indians (SNI) provides an example of the legal clashes involved with these issues. For whatever reason[s][27] the SNI is actually included in New York's Indian Law and most important for current discussions is that the New York law is 'supposed' to recognize the authority of the SNI Peacemaker Courts to divorce couples.[28] This does NOT mean that all has gone smoothly for the SNI when exercising this jurisdiction. Even in light of this 'recognized' authority to divorce couples there has been litigation in New York and US Federal Courts resulting in reported decisions.[29] Therefore, even in light of having in place all of the concomitant 'legislative' pieces to 'render' a divorce judgment, there still appears to be abundant grounds available to parties upon which to challenge such actions in and out of Tribal Court.

It is in light of the foregoing that we now address the case at bar, and in particular the civil complaint filed and served by Ricky Joseph White to obtain a judgment of divorce from

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[24] *See* 25 USC § 232 for the Criminal Jurisdiction and 25 USC § 233 for the civil/choice of forum statute. For additional reading: "The Jurisdictional Relationship between the Iroquois and New York State: An Analysis of 25 USC §§ 232, 233" , Robert Porter, 27 Harv. J. on Legis. 497 (1990)

[25] *E.g.* The Oneida Indian Nation has ratified many of their own laws inclusive of criminal matters affecting their members; St. Regis Mohawk Tribe has started doing the same via a Court system, vehicle and traffic law, land disputes, child support, and general civil jurisdiction. *See* SRMT Civil Code, and the Seneca Nation of Indians for some time has maintained their Peacemaker Courts which has 'divorce' jurisdiction.

[26] As contemporary times show, these issues have been intertwined with the same-sex marriage controversy.

[27] There is much academic scholarship with respect to how this came about which is beyond our inquiry.

[28] In light of what has been discussed herein, clearly the SNI already has this inherent authority and this therefore could not be a grant of such authority by the State. For the law see New York Indian Law § 3, and New York Laws of 1900, Chap. 252.

[29] *See* Parry v. Haendiges 458 F. Supp 2d. 90 (WDNY); Van Aernam v. Nenno 2006 Dist. LEXIS 38402 (WDNY); Wooden v. Seeley 141 Misc. 207 (Chtq. Cty. 1931); People v. John 181 Misc. 2d. 921 (Ere. Cty 1943); for a marriage related issue see Hatch v. Luckman 155 A.D. 765 (NY App. Div. 4th 1913) and Patterson v. Council of Seneca Nation 245 N.Y. 433 (1927); for a decision touching upon these matter involving the St. Regis Indian Reservation *See* Application of Fischer 283 A.D. 518 (1954 App. 3rd)

Geraldine McDonald/White. Furthermore, it is clear from the answer received from Ms. Geraldine McDonald/White that she also desires a divorce from the plaintiff.

JURISDICTION

Under the SRMT Civil Code the SRMT Court has jurisdiction for any "Disputes arising in, connected with, or substantially effecting Mohawk Indian Country." *See,* Civil Code Section II Jurisdiction (A.). Mohawk Indian Country is defined as "the Saint Regis Mohawk Reservation". *Id* at Section III Definitions (A.). As the parties have entered into what is considered under New York Law a 'civil contract', it is clear that an action under this 'civil contract' can be heard here in SRMT Court.

Plaintiff, Mr. Ricky Joseph White is a resident of the St. Regis Mohawk Indian Reservation, initiated this action by filing a complaint in SRMT Court, *See,* SRMT Civil Procedure Sec. IX [Rule 6], and he caused the same to be served on the defendant Ms. Geraldine McDonald/White. *See,* SRMT Civ. Pro. Sec. IV. Defendant provided an answer to plaintiff's complaint, *See,* SRMT Civ. Pro Sect. XI, did not make any jurisdictional objections but did make a counterclaim consisting of her request to resume using her maiden name. *Id.* at (B.)

Under SRMT Laws the judicial prerequisites of this matter have been met.

ANCILLARY RELIEF:

As we have indicated issues associated with these matters can add significantly to divorce proceedings. The Court will now note that there is already existing legislation which recognizes SRMT Court authority with respect to many of these matters

Child Support:

This ancillary issue can be of profound importance in a divorce proceedings as child support issues involving 'children of the marriage' can be of a much longer duration then any divorce judgment proceeding. For instance, if there is a child of the marriage who is one year of age at the time of the divorce judgment, the support obligations of the child for both parents continues until the child exceeds the age of majority in many jurisdictions.[30] This would be long after any final divorce judgment. Furthermore, the failure to pay child support is most often a violation of a Court order that must be 'converted' into a Court judgment so those monies owing can be collected.

It can be noted that with respect to child support many States offer 'child support services' and these services are offered at very low or no cost to the parent/ child. In New York this is offered at the County level through Child Support Enforcement Units (CSEU) which are attached to the County Department of Social Services. Spouses who are seeking child support as

[30] These are up to 21 in New York when the child is attending school, 24 for medical support when insurance is available, or up to 19, if the child does not 'emancipate' themselves earlier. Under the SRMT Family Support Act the age is 21. *See* SRMT FSA Sec. III (17)(F)(G).

a result of a divorce judgment can solicit these services, and those persons who receive nearly any form of social assistance are required to permit the County (CSEU) to seek child support. The County CSEU services are financially supported by the Federal Government through reimbursement arrangements, and they require States who desire to receive Federal reimbursements to implement the Uniform Interstate Family Support Act (UIFSA). New York did so and those changes can be found in the New York Family Court Act.[31] It was not until 1996 that direct federal reimbursement for child support services was made available to Tribal Nations by the federal government.[32]

Along with the legislative changes permitting direct federal funding to Tribal Nations to provide child support services, were changes to the Federal "Full Faith and Credit for Child Support Orders Act" (FFCCSA).[33] With Tribal Nations now receiving direct funding to operate Child Support Enforcement Units (CSEU), amendments to the FFCCSA included recognition and enforcement of Tribal Nation child support orders. In New York, this resulted in amendments to the Family Court Act which requires NY Courts to recognize Tribal Nations as a "State", making their child support orders subject to the FFCCSA, and therefore recognition and enforcement via a County CSEU. *See* NY FCA § 580-101 (19).

By an SRMT Tribal Council resolution, the SRMT Court in 2010-2011 began the process of applying for money from the US Dept. of Health and Human Services to establish an SRMT Child Support Enforcement Unit. Along with this effort, the SRMT passed a Family Support Act in April 2014. *See* SRMT Family Support Act. As indicated, since both New York and the SRMT are receiving federal reimbursement to operate CSEU's, the orders from SRMT Court are subject to the FFCSA. In layman terms, child support orders issued by the SRMT Court are to receive full faith and credit in other jurisdictions. Including New York.

In the case at bar, we can note that there is NO children of the marriage between Mr. Ricky Joseph White and Ms. Geraldine McDonald/White. Therefore there is no need to make a child support determination or order in conjunction with this divorce judgment.

Child Custody & Visitation

This ancillary issue can, like support, be of significant importance as it is entirely possible that this aspect of a Courts jurisdiction can remain active for a significant period of time following a judgment of divorce and can have a profound effect on a child. In fact, this issue can have a significant impact on the calculation of child support. *See* SRMT Family Support Act at Sec. III (9)(A.)(vi). It is therefore not uncommon for this issue to be considered as being 'hand-in-hand' with child support. Adding the issue of visitation, which are often included in Custody orders, can only add to this complexity.

The unique nature of "custody" involves how Courts make that determination between divorcing parents. Although there is a multitude of New York laws on where to file, or how to

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[31] *See* NY Family Court Act Article 5B §501-101 *et. al.*

[32] *See* Personal Responsibility and Work Opportunity Reconciliation (PRWORA) Act of 1996, amending § 455(f) of the Social Security Act permitting direct funding of Tribal Nation Child Support Enforcement Units (CSEU).

[33] *See* 28 USC § 1738B

file a custody issue, the criteria to determine which parent should have custody is relatively simple and straightforward: A New York Court must examine the totality of the circumstance to determine custody that is in the best interests of the child.[34]

It is only through reported decisions that one can see New York Courts weighing various factors to make a custody determination that are 'in the best interest of a child'.[35] These factors include: age of the parents, alcohol & drug use, availability of parents, disability and physical health, domestic violence, existing informal custody agreement, existing written custody agreement, finances of parents, findings of neglect and/or abuse, psychological evaluations, home environment, mental and emotional stability, preferences of the child, primary caretaker, religion, siblings, and willingness to foster the child's relationship with the other parent.[36]

Clearly everyone can agree that each of these factors is important and should be weighed by any Court when making a custody determination which will be in the 'best interest of a child'. What is absent from these factors though, and also absent from any reported New York Court decision, is consideration when the child is a Native American.[37] Thus, in custody actions heard in a Tribal Nation Court the child's status as a Tribal Nation member must be weighed as a factor in making a custody determination. It is clear that certain rights and privileges may flow from the political status of being a Tribal Nation member for the child. Therefore, this also should be considered when making a custody determination that is in the 'best interest of a child'.

Next, all too often one can observe a 'custody' issue being litigated on multiple fronts. This occurs when one parent moves to another Country, State, or jurisdiction and initiates a new custody proceeding. This results in a custody case involving the same child[ren] occurring in multiple Courts. Associated with these actions have been instances when a parent takes the child, sometimes in contravention of an existing custody and visitation Court order, and moves to another jurisdiction. Regretfully, these actions occur with some frequency. When events like this occur, whereby a custody proceeding/order is in a Tribal Nation Court and similar proceedings are initiated in a 'neighboring' State court, there is some legislative relief to be found.

It was actions like these that led both State and Federal governments to legislate with respect to custody proceedings.[38] Early legislation ratified by nearly all State(s) was called the 'Uniform Child Custody Jurisdiction Act'. As we noted though, there are instances when a parent has 'left' a jurisdiction with a child in contravention of an existing child custody order.

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[34] New York laws in regard to a custody determination 'standard' are very sparse. *See* NY DRL § 70, DRL § 240, and FCA Article 6 §611 et.al. Otherwise it is a 'best interest of a child' standard. *See* Eschbach v. Eschbach 56 N.Y. 2d. 167 (NY Ct. of Appls. 1982); and Friderwitzer v. Friderwitzer 55 N.Y. 2d. 89 (1982)

[35] The start of this appears to be Eschbach and the progeny of cases following it.

[36] *Id.*

[37] *See* "Best Interest of an Indian Child", NYS Bar Association Journal, March/April 2014, Vol. 86/No. 3.

[38] Initial State legislation followed what was known as 'Uniform Child Custody Jurisdiction Act'. This was drafted by the Uniform Law Commission which is a non-profit organization established in 1892 to offer to States non-partisan, well-conceived and well drafted legislation. It is a very prominent group in this regards as many states follow their lead and many law students have touched some of their other works (e.g. Model Penal Code, UCC, etc.). *See* www.uniformlaws.org

This action in some jurisdictions would rise to the level of 'kidnapping'.[39] It was in this context that the Federal Government legislated in this area with passage of the Parental Kidnapping Prevention Act (PKPA) and the Violence Against Women Act (VAWA).[40] This action though, rendered many provisions of the 'Uniform Child Custody Jurisdiction Act' inconsistent with the Federal legislation. In response to this, by 1997, there was proposed a new 'Uniform Child Custody Jurisdiction and Enforcement Act' (UCCJEA). It is this act that 49 states have ratified, including New York. *See* NY DRL Article 5A § 75 et. al.

We raise this issue because a unique factor in the UCCJEA is the use and reliance of the legal principle of 'home state'. In layman's terms, it is the 'home-state' of the child which is to guide the Courts as to which Court should be exercising jurisdiction.[41] For current discussions: What if the 'home-state' of the child is NOT a state, but is instead a Tribal Nation?

It is here that the UCCJEA is very unique as it requires Tribal Nations to be regarded as 'home states' for custody determinations.[42] This provision has been included in nearly all the State legislation which has ratified the UCCJEA, including New York.[43] Therefore, it is clear that if the SRMT Court had to make a custody determination, under the UCCJEA provisions the SRMT custody order should get 'recognition' and 'enforcement'. In fact this could very well occur under existing SRMT law.[44]

In the case at bar, as there is no children of the marriage between Mr. Ricky Joseph White and Ms. Geraldine McDonald White, there is no need to make a custody determination, custody order, or visitation order in conjunction with this judgment of divorce.

Order[s] of Protection

In the preceding section we referenced the federal Violence Against Women Act (VAWA). *See* 18 USC § 2265, § 2266. This act was in response to not only domestic violence but also an attempt to get better uniformity in the recognition and enforcement of protection orders across jurisdictions.[45] For current discussion, VAWA also affirmed and expanded Tribal Nation jurisdiction in the context of domestic violence. A center piece of which was to afford Tribal Nation 'Protection Orders' full faith and credit. To ensure better compliance with

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[39] It can be noted that such actions raise many other issues very often sounding in domestic violence.
[40] *See* 28 USC § 1738 and 18 USC §§ 2265 and 2266
[41] This 'home-state' principle is that which is contained in the PKPA.
[42] Like all marital and divorce laws, the Federal Constitution considers these to be state powers under the 10th amendment, which would include custody issues.
[43] *See* NY DRL § 75-a Definitions "(16) 'Tribe' means an Indian tribe or band, or Alaska Native village, which is recognized by federal law or formally acknowledged by a state.", and § 75-c (2.) "A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying this title [General provisions] and title two [enforcement] of this article." [our notes].
[44] *See* SRMT Family Support Act at Sec. II (9) (vi), Sec. III (14)(A.)
[45] In this regard the changes made by VAWA was tied to some federal financial assistance given to states for law enforcement purposes.

VAWA, federal funding was tied to its implementation.[46] In New York these requirements have been legislated into various provisions of State law.[47]

Through these processes it is clear that if a Tribal Nation Court had to issue an Order of Protection, the persons subject to such order could not violate the Tribal Nation Court order and then abscond to a neighboring jurisdiction. This would include orders of protection issued by the SRMT Court in a matter pending before it. For instance, if during the pendencey of a child support, child custody, or marriage/ civil contract divorce proceeding, the SRMT Court finds grounds to issue an order of protection, that order should be afforded full faith and credit in New York Courts.

In the case at bar there has been no allegation of violence nor has there been any request by either party for an order of protection. In a pretrial conference held by the SRMT Court the petitioner was present as was the respondent by telephone. It appears that both parties are cordial to one another, and both have a desire to obtain a divorce. Wherefore, the SRMT Court finds that there is no need to issue an order of protection in regards to this action.

Divorce & Lands on SRMIR

Perhaps the most difficult 'ancillary' decision of a divorce involving SRMT members involves land. As we have noted, following the *Forness* decision New York began a protracted lobbying effort to acquire civil and criminal jurisdiction on Indian Reservations. By 1950 they had acquired both. As divorce issues are civil in nature, the pertinent law for discussion is 25 USC § 232.

Although often described as 'granting' civil jurisdiction to the State of New York, we have recently recognized it as being more akin to a 'choice of forum' statute. *See* Jacobs v. Ransom 10-LND 00002[48]. Our recognition in this regard is buttressed by the very language used in the statute: "The courts of the State of New York under the laws of such state shall have jurisdiction in civil actions ..." *See* 25 USC § 232[49]. With respect to the issue of lands on the St. Regis Mohawk Indian Reservation (SRMIR) we noted in *Jacobs* that 25 USC § 232 provides: "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians any lands within any Indian reservation in the State of New York,..." *Id.* It is this provision that we noted in *Jacobs* to hold that an 'internal' land dispute on

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[46] This was for STOP funding which assists states in law enforcement efforts.

[47] *See* NY Domestic Relations Law § 240 (3-b) Custody and Child Support: Orders of protection- affording full faith and credit to orders of protection; NY DRL § 252 (2) according Full Faith and Credit to orders of protection from a 'tribal jurisdiction'; NY Family Court Act § 154-e; New York Family Court Act, Part 4, § 846-a discussing contempt powers of New York Family Court when a 'tribal jurisdiction' protection order is NOT obeyed; NY Criminal Procedure Law § 530.11 (5)

[48] *See also* FN 24 Porter

[49] It is in this context we see NO granting of civil regulatory jurisdiction to the New York executive branch.

the SRMIR cannot be in the jurisdiction of an 'external' court. *See also* AG Organic Inc. v. John 892 F. Supp. 466 (WDNY 1995)[50].

We bring these matters to the fore in an effort to address two issues. First, it is to distinguish two (2) cases which originated in the Federal District Court of Western NY, and secondly, to show that land matters lie in the exclusive jurisdiction of the SRMT.

In 2006 two cases were heard in the Western District of New York federal court. These were Parry v. Haendiges and Van Aernam v. Nenno[51] each of which were State Court divorce actions which involved Seneca Nation of Indian member[s]. In each of these cases the District Court recognized and applied what is known as *Teague*[52] factors to make a determination whether State Court or SNI Court had jurisdiction over the divorce proceedings. For current discussions the important *Teague* factor is: 'Whether the location of material events giving rise to the litigation is on tribal or state land.' *See* Nenno and Perry, citing *Teague*. It is here that we must distinguish the current case, as well as all potential future cases in the SRMT Court, from Perry and Nenno.

In 2009 the SRMT, following a referendum vote, ratified a Land Dispute Resolution Ordinance (LDRO). Since passage of the LDRO we have had to address numerous cases under the LDRO and in these cases we have recognized and held that land matters occurring on the St. Regis Mohawk Indian Reservation are in the exclusive jurisdiction of the SRMT. In fact, in one such case we described the SRMT's interest in land matters as "compelling".[53] *See* Ransom v. Jacobs 10-LND 00002. Likewise, in another case we recognized that even in land dispute cases decided by SRMT Court, the issuance of SRMT Use and Occupancy deeds is still controlled exclusively by the SRMT under the SRMT Land Dispute Resolution Ordinance. *See* Hathaway v. Thomas 12-LND-00007[54]. We can also note that these 'land dispute' cases under the LDRO very often involve interpretations of wills, interpretation of sales agreements, intestate inheritance, or competing purchases. It is in this light, and upon review of the SRMT LDRO, that we see nothing exempting 'land disputes' which may be part of a divorce proceeding from the application of the SRMT LDRO.

Therefore, unlike the Courts in *Nenno* and *Perry* we cannot find that 'land' issues are simply a factor to be weighed in making a jurisdiction determination. Under SRMT law, and the decisions of this Court, we find that if any matter touches upon the lands of the St. Regis Mohawk Indian Reservation, then the matter is within the exclusive jurisdiction of the SRMT. Furthermore, passage of the SRMT LDRO has left no room for any other sovereign to litigate or legislate in this area as the SRMT has not ceded any such jurisdiction. Finally, and as we found

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[50] Recognizing that civil jurisdiction over non-natives on reservation land is presumptively in Tribal Court.
[51] *See* 458 F. Supp 2d. 90 and 2006 U.S. Dist. LEXIS 38402/ 206 WL 1644691 respectively.
[52] This is in reference to Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians 2003 WI 118. This case involved Court actions which were commenced in both State (Wisc.) Court and Tribal Court. The Court in *Teague* developed a judicial 'standard' to determine which Court should exercise jurisdiction over the case. This 'standard' later became a protocol entered into between Tribal Nations and Wisconsin Courts, and the Wisconsin Court System subsequently promulgated a rule for its use.
[53] In *Ransom* we also recognized that it is only Congress which can alter the boundaries of an Indian Reservation.
[54] Under the SRMT LDRO neither the SRMT Court or SRMT Land Dispute Tribunal have authority to issue SRMT Use and Occupancy Deeds. That function is still held exclusively by the SRMT.

in *Jacobs*, our reading in this regard is supported by the very statute that purportedly permits divorce actions in NY Courts: "That nothing herein contained shall be construed as authorizing the alienation from any Indian nation, tribe, or band of Indians any lands within any Indian reservation in the State of New York,..." *See* 25 USC § 232. Therefore, there can be no diminishment of SRMIR lands by divorce judgment or decree.

In the case at bar, both plaintiff and defendant are members of the SRMT. *See* SRMT LDRO. Here though, there is no land dispute issue associated with this divorce action which must be addressed by the Court. In fact both have stipulated and agreed that neither lays claim to any such property and that each assumes any debts and assets that they have accrued during their five (5) plus year separation from one another.

Economic Issues associated with Divorce:

Other matters which are deemed to be ancillary to divorces in New York center upon economic issues. These include separation and allocation of marital debts and assets, alimony issues (called 'maintenance' in New York), and economic rights to such matters as business valuation, professional licenses value, and other similar issues. Here, although it appears the SRMT has no laws regarding these issues, it is clear that a party to a 'civil contract' divorce proceeding in SRMT Court is not without recourse.

In other cases decided in SRMT Court we have directed the Court's, as well as litigants, attention to other laws of the SRMT. Specifically, the SRMT Civil Code (SRMT TCR 2008-19). It is within the SRMT Civil Code that the SRMT has ratified "Section V Applicable Law" which provides that:

> "Civil disputes over which the Tribal Court has jurisdiction shall be decided by the Court in accordance with and by applying the following principles of law in the priority and precedence in which the principles of law are first identified below..." *Id* at (A.) [our emphasis]

The SRMT Civil Code then lists the laws which can be applied.[55] For current discussions we bring this to light as it is the very next paragraph of the SRMT Civil Code, Applicable Law provision that can best address the foregoing ancillary divorce issues:

> "Principles of New York State law for resolving private civil disputes are not automatically applied in Mohawk Courts. Principles of New York State law for resolving private civil disputes may be applied in Mohawk Courts for the purpose of resolving a private civil dispute over which the Mohawk Court has jurisdiction if (but only if) the Mohawk Court finds: (i) there is no other controlling principle of Mohawk law; (ii) application of the New York State law is consistent with principles of Tribal sovereignty,

[55] 1.) U.S. Constitution and Federal law which is applicable to "Mohawk Indian Country", 2) Written Mohawk Laws, 3.) Mohawk Custom and Tradition, 4.) Restatement of Contracts, 5) Restatement of Torts, 6) New York law on contracts and torts if "...consistent with principles of Tribal sovereignty, self-government, and self-determination,..." *See* SRMT Civil Code, Section V (A.), (1.)-(6.)

self-government, and self-determination; and (iii) application of the New York State law is in the overall interest of justice and fairness to the parties." *Id* at (B.) [our empahsis]

In applying these principles to the current proceeding we can begin by identifying that the SRMT Court does have jurisdiction over the current matter as it involves a private 'civil contract' dispute between two SRMT members, both of whom have agreed to the SRMT Court exercising jurisdiction over the matter.[56]

Next, in going through the laws in which to apply there is no laws which meet the criteria provided in SRMT Civil Code, Section V Applicable Law (A).[57] In particular, it is pretty clear that the SRMT has not ratified an equitable distribution law applicable to divorce proceedings which are initiated in SRMT Court. In lieu of that, we turn to SRMT Civil Code Section V Applicable Law **(B)**.

We can begin by noting that par. B. provides that we do NOT "automatically" apply New York laws to "private civil disputes" which are in SRMT Court.[58] This clearly would include New York's equitable distribution law which addresses ancillary economic issues associated with a divorce like the allocation of marital debts and assets, as well as maintenance (alimony) issues.[59] Although we do not "automatically" apply New York law, it clearly can still be done as provided in the SRMT Civil Code (New York law "may be applied in Mohawk Court").

To do so, we must first find that the case at bar is a "private civil dispute". Clearly the case at bar meets this definition as it is a private civil action between Mr. Ricky White and Ms. Geraldine White/ McDonald to dissolve their marriage civil contract. There is no public entity which is a party to the case, nor is the cause of action stemming from application of law or policy of the SRMT. Therefore we find that this is a "private civil dispute" within the SRMT Civil Code, SRMT Civ. Pro.

The next step of the inquiry for the Court is to find that: "(i) there is no other controlling principle of Mohawk law; (ii) application of the New York State law is consistent with principles of Tribal sovereignty, self-government, and self-determination; and (iii) application of the New York State law is in the overall interest of justice and fairness to the parties." *See* SRMT Civ. Code V (B).

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[56] We bring this to light to also note that there are many commercial contracts whereby the parties to it may choose the forum (which state Court), the style of forum (arbitration, mediation, ADR); and which law is to apply (which state law). Therefore, it is entirely possible that a contract entered into by two (2) SRMT could be negotiated and entered into on the SRMIR, choose the SRMT Court as the forum, and then identify the Law of Arizona to apply!! In the marriage context, this also is entirely possible. For a couple could get married in New York (site of the Civil Contract), move to another state and divorce, and still have New York law being used to divide any property that may still be in New York. For an example of this *see* O'Connell v. Corcoran 1 N.Y.2d. 179 (NY Ct. Appls. 2003). Therefore, the current case is not as unique as some may wish it to be.

[57] As we indicated, marriage and divorce is a 10th Amdt. State powers issue so there is no federal Constitution or federal law to apply, there is no SRMT laws on the subject matter, neither the Restatement of Contracts or Torts applies, and New York law of Contracts or Torts also does not apply.

[58] See NY DRL § 236.

[59] *See* New York DRL Article 13, in particular § 236 for proceedings involving maintenance and equitable distribution.

As we have indicated, we find that there is NO SRMT law with respect to the issue of equitable distribution or maintenance (alimony). Therefore, we find that there is "no other controlling principle of Mohawk law."

With respect to section [(ii)] we can begin by recognizing that a 'private civil dispute' such as a divorce may have associated with it an issue of land being located on the St. Regis Mohawk Indian Reservation (SRMIR). The seriousness of this 'land' issue can be magnified when it includes a marital residence.[60] As those matters are in the exclusive jurisdiction of the SRMT, only the SRMT can ultimately issue a deed in this regard.[61] Likewise, when a 'private civil dispute' involves distribution of personal property, marital property, or other assets which are located on the SRMIR, then the SRMT Court under SRMT law is the most appropriate, if not required, forum to decide such issues. Furthermore, in the absence of exercising jurisdiction in these matters parties could very well seek divorce judgments in State court, which would then be deciding SRMIR land matters even though they were not included the jurisdiction of those Courts. *See* 25 USC § 232, *and* Application of Fischer 283 A.D. 518 (1954 App. 3rd). This could then result in further litigation in SRMT Court.

Finally, with respect to section (iii) it is clear that applying a New York State law (like NY DRL § 236) can be done in SRMT Court IF it is in the: "interest of justice and fairness to the parties". Here we can note that applying a law that is fully disclosed and provided to the parties is far better then leaving any party to guess or speculate as what is going to occur. Furthermore, it is clear that either party to such an action can request that a certain law be, or not be, applied. Being in a position to make such a request, or knowing that a certain law is going to apply, best serves the goal of fairness.[62] In addition, the Court is cognizant of the fact that in the absence of exercising jurisdiction over this case the parties in all likelihood could have resorted to a New York Court to seek the divorce that they wish to obtain. And that court, although lacking jurisdiction over lands on the SRMIR, would apply New York's equitable distribution law which could potentially lead to further litigation and uncertainty. *See* NY DRL § 236 [63]

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[60] This can be even further magnified when one of the parties to a divorce action is a non-member of a Tribal Nation. See SRMT Land Dispute Resolution Ordinance providing that only enrolled members may possess a SRMT Use and Occupancy Deed., and Application of Fischer 283 A.D. 518 (App. 3rd 1958)

[61] Meaning issuance of an SRMT Use and Occupancy Deed as provided for in the SRMT Land Dispute Resolution Ordinance.

[62] Like what can be done in commercial contracts.

[63] It can be further noted that DRL § 236 contains the following provisions which touch upon 'equitable distribution' and which could easily touch upon SRMIR lands: DRL § 236, Part B (5) (b.) Separate property shall remain such; (5) (d): (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action; (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects; (7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditure and contribution service as a spouse, parent, wage earner, and homemaker, and to the career or career potential of the other party;(8) the liquid or non-liquid character of all marital property;(10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party; (5) (f) In addition to the disposition of property set forth above, the court may make such order regarding the use and occupancy of the marital home and its household effects as provided in section two hundred thirty four of this chapter, without regard to the form of ownership of such property. [our emphasis]

Finally, if there is an instance when applying the NY equitable distribution law a determination is made by the SRMT Court that one spouse should be ordered to provide maintenance/support to the other spouse, such an order can get assistance in its enforcement via New York Family Court Act, Article 5B Uniform Interstate Family Support Act, § 580-101.[64]

In the case at bar, the parties have been separated for more then five (5) years and each has acquired their own personal assets and both wish to forego any claim to the others property. Therefore, there is no equitable distribution determination that needs to be made, no request for maintenance (e.g. alimony) has been made by either party, and there is no SRMIR land question that needs determination by the Court or the SRMT land Dispute Tribunal.

PENSIONS:

Under New York divorce jurisprudence pensions are considered part of the 'marital property' which can be claimed by both parties to be distributed under New York's equitable distribution law. *See* NY DRL § 236 *and* Majauskas v. Majauskas 61 NY 2d. 481. Furthermore, monies received by a party from a pension can be subject to lien/garnishment, whereby someone other than the payee may receive a payment from the pension plan. Most commonly, this would be child support or maintenance payments to a former spouse.

It is in this context that a unique feature of pensions must be noted. Pensions are actually governed by federal statute, *see* Employee Retirement Income Security Act (ERISA) 29 USC § 1001 et. al., and pensions are under the regulatory authority of the US Department of Labor. Due to this unique factor, a divorce judgment is NOT enough to compel the division and direction of payment under a pension plan.[65] It is here that a 'Domestic Relations Order' or a 'Qualified Domestic Relations Order' (QDRO) is required. In many instances a 'domestic relations order' needs to become 'qualified' to become a QDRO. In this qualification step/process a pension plan administrator reviews the DRO for certain information to 'approve' it, thereby permitting payment to a new or different payee (e.g. child/ former spouse).[66] In fact, in New York divorce proceedings it is the responsibility of the party who is seeking a QDRO to submit the potential QDRO to the Court and notify the other party. *See generally* Demaro v. Demaro, 84 AD 3d 1148. It is for this reason that some courts in New York have developed forms for making such a request.[67]

Pension issues for Tribal Nation court proceedings are muddled by the fact that the U.S. Dept. of Labor in a 2011 advisory opinion held that domestic relations orders issued by the

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[64] This provision is very similar to child support and child custody discussed supra. Noteworthy is that it additionally covers: "Duty to support' means an obligation imposed or imposable by law to provide support for a child, spouse, or former spouse, including an unsatisfied obligation to provide support" at (3). For current discussion, "an Indian tribe" is treated as a state under this law, whereby orders from Tribal Court are recognized and can be enforced.

[65] It is also the position of the US Dept. of Labor that pension plans cannot be made parties to divorce proceedings.

[66] *See* "FAQ's about Qualified Domestic Relations Orders" U.S. Department of Labor, Employee benefits Security Administration. This is rooted in the fact that the pension administrator has a fiduciary duty imposed by law to ALL pension holders and not simply the pension holder who is going through the divorce proceeding.

[67] *See* "Bronx County Supreme Court QDRO Checklist", available on NYS OCA website, as well as NYC Police Pension Fund Sample DRO

Navajo Nation could not be a QDRO in their reading of ERISA.[68] However, the Dept. of Labor did not entirely close the door to all Tribal Nation Court orders, for as they recognized a State could have in place laws to recognize Tribal Nation support orders.[69] It is here that we recognize that with respect to child support, and maintenance support, there already is legislative recognition in New York for such Tribal Nation orders and or judgments.[70]

Finally, in many reported divorce cases in New York a spouse may 'fore-go' their rights to 'pension/payments' in favor of a lump-sum payment. In this context, the lump sum payment can be recognized as a monetary judgment. It is here that if a 'foreign court' rendered such 'lump-sum' judgment, the person whose benefit such judgment is rendered can seek to enforce that judgment in New York Courts as a money judgment.[71] This may negate the necessity of the DRO/QDRO.[72] This option appears to include Tribal Nation Courts, an outcome that seems permissible to the New York Unified Court System.[73]

In the case at bar, the parties have been separated for more then five (5) years and each has acquired their own personal assets and both wish to forego any claim to the others property including any pension rights. Therefore, there is no pension distribution determination that needs to be made.[74]

Defendant's Cross Claim for Name Change

In the case at bar the defendant (Ms. Geraldine McDonald/White) has made only one cross claim with respect to the civil complaint served upon her. *See* SRMT Civ. Pro., *and* Cook v. Cook 13-CIV-00006. Here the defendant has requested to change her name and resume utilizing the surname McDonald. Plaintiff, Mr. Ricky Joseph White has no opposition to this request for relief.

The relief requested by the defendant in this regard is not uncommon, and in many cases similar to the one at bar, it is the sole reason in which a person seeks a divorce judgment. It is here that the acquisition of a divorce judgment from a Court can assist the party making such a request. It is in this context that we can note that some agencies, like the U.S. Social Security Administration, simply require a "Divorce Decree" original, or certified copies of the same..[75] It does not appear that such a judgment must be rendered by a State court. Another 'popular' document involved in a divorce name change is a Department of Motor Vehicles identification card (e.g. drivers license). For those persons who have changed their driver's license to a

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[68] *see* Department of Labor, Advisory Opinion 2011-03A

[69] *Id.* citing Oregon Revised Statutes 24.115(4).

[70] *See* NY FCA Uniform Interstate Family Support Act, Article 5B, § 508-101 et. al.

[71] *See* New York Civil Practice Law and Rules (CPLR), Article 53, § 5301

[72] Here, although the monies making up the lump sum payment can come from the pension funds, it is not necessary that they come from that source. The obligation on the debtor/spouse remains until paid.

[73] *See* July 15, 2014 Proposed Rule (22 NYCRR § 202.71) of NY Unified Court System recognizing that: "Moreover, tribal money judgments may receive recognition pursuant to Article 53 of the CPLR, which is derived from the Uniform Foreign Money-Judgments Recognition Act."

[74] In addition to this statutory right under New York law, a party is free to seek from a new York court "for a declaration of the validity or nullity of a foreign judgment of divorce" *See* NY DRL § 236 Part B (2)(a.).

[75] See www.socialsecurity.gov; "Corrected Card for a U.S. Born Adult"

'married name', it is very common for them to want to 'change it back' following a divorce judgment. As the SRMT has no Department of Motor Vehicles currently, many SRMT residents and members must rely upon the New York State DMV. In a cursory review of the NY DMV requirements to change a name, it requires a "US Divorce decree (with official signature)".[76] It is here that it also does not appear that the divorce judgment needs to be rendered by a State Court. Furthermore, in reviewing the NYS DMV acceptable proofs of identity a St. Regis Mohawk Tribal Photo Identification is accepted.[77]

Finally, under New York law divorce judgments are required to contain a provision "...that each party may resume the use of his or her premarriage surname or any other former surname." *See* NY DRL §240-a.

In the case at bar the only real issue presented is the 'cross-claim' request by the defendant for her to change her name and "resume the use of...her premarriage surname". The Court having jurisdiction over the matter, both parties have received proper notice and having appeared, and neither party having made any opposition to the request, this Court finds that the defendant be permitted to resume the use of her premarriage surname, and that this finding be included in the judgment of divorce.

CONCLUSION:

The dissolution of any marriage is never an easy experience and in this decision we have discussed the many legal issues that accompany a divorce. For many SRMT members and residents they are forced to seek divorces in a New York State Supreme Court. Although this is due in large part to 25 USC § 233, it is also traceable to New York's aversion to divorces, and in more particular, their apparent aversion to recognizing Tribal Nation divorces.

For many SRMT members the first step in the divorce process is the payment of court filing fees which in New York currently exceed $300.[78] It must be noted that this amount can go up if there are issues which need to be litigated.[79] Next, although the New York State Court system has clearly attempted to simplify this process, the current 'uncontested' divorce packet is some 40 pages with multiple legal documents which need to be completed.[80] It is this packet, upon payment of the fee, which is submitted to the Court in the hopes of obtaining a divorce decree/judgment. Again though, if there is any opposition then the costs and complexity go up.

Next, for many of the issues we have discussed it is clear that these do not require to be litigated in Court, with the Court rendering a 'final decision'. For instance, New York law provides "An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action is such agreement is in writing, subscribed by the parties,

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[76] See www.dmv.org/ny-new-york/changing-your-name.php

[77] See www.dmv.org/ny-new-york Therefore, if the SRMT ID has the parties maiden name, then apparently DMV can accept that as well as the divorce decree.

[78] *See* NY OCA website "Fees". In Kings County Supreme Court it is $210 to obtain a filing fee, $125 for a note of issue, and if matters are contested Request for Judicial Intervention is $95, Note of Issue $30, and motions or cross-motions are $45.

[79] *Id.*

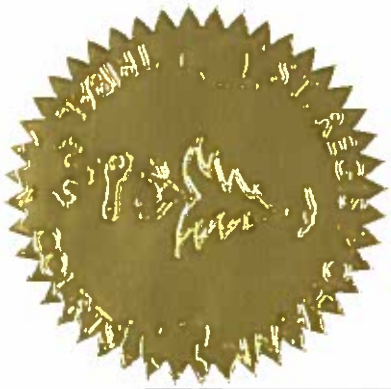
[80] New York has even attempted to do an electronic application for this process, *see* NY OCA website

and acknowledged or proven in the manner required to entitle a deed to be recorded." *See* NY DRL §236 Part B (3.) With respect to child support, New York law provides "A validly executed agreement or stipulation voluntarily entered into between the parties..." *See* NY DRL § 240 (1-b)(h), is what the Court must follow. Similarly, with respect to the many economic issues (like equitable distribution) a New York Court must make a decision "Except where the parties provided in an agreement for the disposition of their property..." *See* NY DRL § 236 Part B (5.)(a.) This also holds true for both temporary and permanent maintenance (alimony): "Except where the parties have entered into an agreement ..." *See* NY DRL § 236 Part B (5-a.)(a.) & (6)(a.). Therefore, if the parties are in agreement, or have reached an agreement, the Courts role is generally to simply provide a judgment reflecting that agreement.[81] The legal recognition of agreements reached by parties is not limited to New York law provisions, as the SRMT Family Support Act provides: "If an agreement was reached by the parties, the Agreement shall be filed in the Tribal Court and the Clerk shall be notified to take the matter off the docket." Sec. III(5.)(C.)[82]

In the case at bar, it is patently clear that the parties have reached their own agreement[s] and desire to obtain a divorce judgment. The lone request for any relief has been made by the defendant, and it is for her to resume using her maiden name. For the reasons provided in this decision, we provide the divorce judgment and grant the relief requested by the defendant.

Wherefore, the SRMT Court, with both parties having appeared and both having consented to the Court exercising jurisdiction in this matter, grants the judgment of divorce requested by the plaintiff, Mr. Ricky Joseph White, inclusive of the grant of relief to the defendant, Ms. Geraldine McDonald White, to resume the use of her maiden name.

Entered by my hand this the 15th day of October, 2014.



Chief Judge Peter J. Herne
SRMT Court.

[81] The only thing unique is that any such order and judgment must include some statutory language, or the use of statutorily prescribed formulas (e.g. child support, maintenance).

[82] *See also* "If the parties were unable to reach an agreement with respect to child support and other conditions in the Mandatory Meeting, ..." Sec. III(14)(A.), it appears these 'other conditions' could mean "custody, visitation and placement of the child.' *See* Sec. II(9)(A.)(vi)