

Lower Sioux Community in Minnesota

COURT OF APPEALS

Judges

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Robert Grey Eagle
Steven F. Olson
Andrew M. Small

Vanya Hogen-Kind, Clerk of Court

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January 31, 1994

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Re: Lower Sioux Community v. Susan Scott, Case No. 93-100

Dear Mr. Jacobson and Mr. Rasmussen:

Please find enclosed the Court's Opinion in the above-mentioned matter. If you have questions, please call.

Sincerely,



Vanya Hogen-Kind
Clerk of Court

IN THE LOWER SIOUX
COMMUNITY IN MINNESOTA
COURT OF APPEALS

Lower Sioux Community
vs.

Susan Scott.

No. 93-100

Argued and Submitted January 3, 1994

Filed January 31, 1994

*John Jacobson, Esq. and James
Schoessler, Esq. of Jacobson, Buffalo,
Schoessler & Magnuson, Minneapolis,
Minnesota, for Appellant.*

*Leif Rasmussen, Esq. of Moriarty &
Janzen, Minneapolis, Minnesota, for
Appellee.*

BEFORE Justices Olson, Grey Eagle
and Small, Chief Justice.

*Justice Olson delivered the opinion of
the Court.*

This appeal was taken from the order of the Trial Court for the Lower Sioux Community (the "Community") in the matter of *In Re the Petition of Susan Scott to Reacquire Membership Privileges*. The Trial Court found, after full opportunity for all interested parties to appear and present evidence, that Petitioner Scott met the burden of establishing residency in the Community as required by the Community Membership and Revenue Allocation Ordinance (the "Ordinance"). The Community appealed the decision of the trial court.

Ms. Scott filed her petition to reacquire membership privileges with the Trial Court on August 31, 1993, alleging that she resided within the Community Area from July 1991 until

the date she filed her petition. The Community filed a Memorandum in Opposition to Reacquisition of Membership Privileges on October 20, 1993, alleging that Ms. Scott did not meet the burden of establishing residency for two years by a clear preponderance of the evidence, because she did leave the Community Area in September of 1992 to attend high school in Phoenix, Arizona, and returned to the Community in October 1992. Ms. Scott also filed a Memorandum with the Trial Court, on October 19, 1992, in which she admitted that she left the Community Area on September 15, 1992 and returned on October 5, 1992.

At the hearing held by the Trial Court on Ms. Scott's petition on October 22, 1993, Ms. Scott testified that she left the Community for Arizona because "[a]fter the school year 91-92, they told me I didn't have enough credits to graduate. Since I'd already been to school in Phoenix, I knew the program and I knew I could get my high school diploma in Phoenix." (Transcript, 8, lines 17-20). When asked by her attorney "[w]as your intent to move back to the Community after receiving your high school [diploma]?", (Transcript, 8, lines 22-23), Ms. Scott answered "yes." (*Id.*, line 24).

Ms. Scott's mother also testified at the October 22, 1993 hearing. She admitted that her daughter left the Community Area to attend school in Phoenix, Arizona. (Transcript, 12). Ellen Scott added, however, that "[s]he was gonna come back sooner but that week before I already got her ticket to come back. It was because I couldn't afford, you know, I had to wait like a weekday night to send her that because it was a cheaper fare." (Transcript, 13, lines 12-16). The parties did not dispute

the fact that Ms. Scott left the Community Area for 35 days in 1992. They disputed the effect of that absence on Ms. Scott's ability to establish the requisite "continuous" residency in the Community Area for two years.

The Trial Court found that Ms. Scott met the burden of establishing continuous residency in the Community Area. "Although this Court declines to set a number of days during which it is permissible to absent oneself from the Community Area, the Court determines that attending school outside the Community Area for a short time does not disestablish one's residency." (Order of Chief Judge BlueDog, October 25, 1993, at 1).

Thereafter, the Community Council filed a Notice of Appeal with this Court. Both sides submitted legal memoranda to the Court, and oral argument was heard on January 3, 1994 at the Community Hall on the Lower Sioux Community Reservation.

I.

This case presents an issue of paramount importance to the Community. The question before this Court is whether Appellee's absence from the Community for a period of thirty-five days disqualifies her from eligibility for reacquisition of membership privileges pursuant to the terms of the Ordinance.

This Court must begin with the presumption that the Community, as a sovereign Indian Nation, can establish its own membership criteria through legitimate legislative action of its duly elected governing body the Tribal Council. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978); *Roff v. Burney*, 168 U.S. 218, 222 (1897).

Indian tribes are "distinct independent political communities, retaining their original natural rights" in matters of local self-governance. *Worcester v. Georgia*, 31 U.S. (6 Pet) 515, 559 (1832); see, *United States v. Mazurie*, 419 U.S. 544, 557 (1975). The powers of Indian tribes are, in general, "inherent powers of a limited sovereignty which has never been extinguished," Felix S. Cohen, *Handbook of Federal Indian Law*, 122 (1945) (emphasis in original). These powers derive from the fact that Indian tribes were self-governing sovereign political communities before the coming of the Europeans. See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 (1973). In this critically important membership context, the Tribe's powers of self-government are preeminent.

The Lower Sioux Community has fully retained its power to regulate its internal and social relations. See *United States v. Kagama*, 118 U.S. 375, 381-382 (1886). The Community makes its own substantive law pertaining to membership. See *Roff v. Burney*, 168 U.S. 218 (1897). The determination of membership in this "political community" is *sine qua non* for the exercise of the powers of self-government. See *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

II.

The Community has established membership criteria through the adoption of the Community's Constitution. (Constitution and Bylaws of the Lower Sioux Indian Community in Minnesota, Article III). It is important to note that the membership qualifications of the Community as defined in the Community's

Constitution are not at issue here. This Court is not called upon to address, and does not presume to address, the Constitutional requirements of the Community for membership.

Membership in the Community entitles the individual to certain rights and privileges. (See, e.g., Membership Privileges and Gaming Revenue Allocation Ordinance, Section 200). Among the rights that the to which an individual member is entitled are the right to vote and the right to benefit from Community programs. Among the privileges to which a member is entitled is the privilege to receive per capita payments from the revenues of the Community's gaming enterprise. (*Id.*)

The Community has determined that involvement in the affairs of the Community is necessary for the retention of these rights and privileges. The Community has further determined that if a member who is recognized to have the aforementioned rights and privileges ceases to reside within the Community for a period of two consecutive years, this absence shall permit the Community Council to declare that individual to have lost membership rights and privileges, "including the privileges of voting, participating in Community programs, and receiving per capita distributions from Community gaming enterprises" (Membership Privileges and Gaming Revenue Allocation Ordinance, Section 201).

The Community has also determined the standards by which those individuals who have absented themselves from the Community for a period in excess of two years may reacquire specific membership

privileges. The Community established this court to, among other purposes, resolve questions of residency relative to membership petitions. This Court restricts the scope of its inquiry to the narrow question before the Court: the interpretation of the Community's law governing reacquisition of membership privileges. Specifically, the Court must determine whether a member has "established[ed] by a clear preponderance of evidence in a proceeding brought before the Court . . . that he or she has in fact been a bona fide resident of the Community Area for the entire two year period in question," (MP & GRAO, Section 203 as amended), and the application of that determination to the facts of the case before this Court.

III.

Appellee argues in her brief that the Trial Court was granted discretion by § 203 of the Ordinance, and implies that there is no issue of law before this Court. Appellee further asserts that this Court must review the Order of the Trial Court "most favorably to sustain order involving exercise of discretionary authority by the trial court." (Appellee's Memorandum, 3 (citations omitted)).¹

¹ This Court rejects Appellee's reliance on cases from the law of the state of Minnesota as the first choice of law to apply where the Court has not previously addressed an issue. This Court's stated order of preference for the application of case law from other jurisdictions is: (1) Tribal law; (2) federal law; and (3) if and only if no Tribal or federal law addresses the issue, this Court will apply the rationale of laws from the state of Minnesota, without adoption of those laws.

First, this Court rejects Appellee's declaration that there is no question of law before this Court.² It is disingenuous to suggest that only an exercise of discretion by the Trial Court is at issue. By suggesting that a grant of roving discretion exists, Appellee creates a question of law.³

² Contrary to Appellee's position stated in her brief, Appellee's counsel fully acknowledged the legal issue before the Court at oral argument.

³ The Ordinance requires the Court to consider only unambiguous evidence. Appellee's counsel's attempt to construe this Section as providing the Trial Court with discretion of the sort which would require application of the standard of review suggested by counsel is without basis.

The issue before this Court unquestionably is the proper interpretation of the Ordinance with respect to the question of residency, and the application of that interpretation to the facts of this case. The appropriate interpretation of a statute is always a question of law, and will be reviewed by this Court *de novo*. See *Pierce v. Underwood*, 487 U.S. 552, 557 (1988).⁴ To the extent this Court must address fact issues in its determinations, the standard which this Court shall apply is clear error. *Id.* It is only in matters where the Trial Court clearly is accorded discretion pursuant to the provisions of an Ordinance or other law that this Court will review the trial court's finding applying an abuse of discretion standard.⁵

⁴ Citation to foreign authority is for illustrative purposes only. The Court's duty is to interpret the law and create the standard by which that interpretation is most fully and effectively accomplished. The legal conclusions reached by this Court are not bound by or dependent upon foreign jurisdictions' declarations or uses of those same concepts.

⁵ Appellee, in her brief, addresses the issue of a "going to school exception to the two year residency requirement for the reacquisition of membership privileges," and argues that if such an exception exists for members qualified to receive per capita payments, that it will somehow violate the Indian Civil Rights Act to not permit the same exception to apply for members who are in the process of reacquiring membership privileges. While this Court questions the validity of this argument, and Appellee's understanding of the Indian Civil Rights Act, the Court need not reach the issue at this time, for Appellee, at oral argument, conceded that receipt of per capita payments is a *privilege and not a right*. Because the receipt of per capita payments is a privilege and not a right, and because the privilege does not vest until such time as the conditions for reacquisition of membership privileges have been met, there exists no protectable interest to which the Indian Civil Rights Act could be held to apply.

IV.

The Membership Privileges and Gaming Revenue Allocation Ordinance provides that to reacquire membership privileges, a member must "return and establish *residency* in the Community for a period of two consecutive years." (Resolution 41-93, amending Section 203 of the Ordinance). The Ordinance goes on to say that the individual can only reacquire membership privileges on a showing that "he or she has in fact been a bona fide resident of the Community Area for the entire two year period in question." *Id.* This Court agrees with Appellant that residency must be for the

entire two year period for the reacquisition of membership privileges. However, "residency" is nowhere defined explicitly in the Ordinance.

Because this critical term is undefined, this Court must look to canons of statutory construction to determine the meaning of the term in a manner which will provide for substantial justice and simultaneously "give effect to the intent of [the legislature]. The language of the statute, if it plainly reveals legislative intent, governs." *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Bethlehem Mines, Corp.*, 669 F.2d 187, 194 (4th Cir. 1982). See also, *TVA v. Hill*, 437 U.S. 153, 184 n.29 (1978).

The first step is to examine the plain meaning of the term "residence."

Webster's defines residence as "(1)(a) the act or fact of dwelling in a place for some time (b) the act or fact of living or regularly staying at or in some place for the discharge of a duty or the enjoyment of a benefit; (2)(a)(1) the place where one actually lives as distinguished from [her] domicile or a place of temporary sojourn" *Webster's New Collegiate Dictionary*, 1980. It may be argued that Susan Scott's residence was at the Lower Sioux Community, as distinguished from Arizona, which was a "place of temporary sojourn."

While the dictionary definition might prove instructive, it is the legal definition of the words "resident" or "residency" which this Court shall consider controlling. Unfortunately, "[t]he words 'resident' and 'residence' have no precise legal meaning although they are favorite words of legislators.

Sometimes they mean domicile plus physical presence; sometimes they mean domicile; sometimes they mean something less than domicile." *Willenbrock v. Rogers*, 255 F.2d 236 (1958), citing *McGrath v. Kristensen*, 340 U.S. 162 (1950).

Domicile is not generally considered synonymous with residency. "For diversity purposes, citizenship means domicile; mere residency in the state is not sufficient." *Mas v. Perry*, 489 F.2d 1396 (5th Cir.), cert. denied, 419 U.S. 842 (1974). "A person's domicile is the place of [her] true, fixed, and permanent home and principal establishment, and to which [she] has the intention of returning whenever [she] is absent therefrom." *Id.*, quoting *Stine v. Moore*, 213 F.2d 446, 448 (5th Cir. 1954).

To acquire a domicile of choice, the law requires the physical presence of a person at the place of the domicile claimed, coupled with the intention of making it her present home. When these two facts concur, the change in domicile is instantaneous. Intention to live permanently at the claimed domicile is not required. If a person capable of making her choice honestly regards a place as her present home, the motive prompting her is immaterial. See *Holmes v. Sopuch*, 639 F.2d 431 (8th Cir. 1981); *Ellis v. Southeast Construction Co.*, 260 F.2d 280 (8th Cir. 1958).

V.

Because the plain meaning of "residence" is not completely clear, the next step in interpreting the Ordinance is to look elsewhere in the Ordinance for the Community Council's intent regarding the definition of residency.

As the Community Council pointed out in its "Memorandum in Support of Reversal of Trial Court," the Council explicitly provided for an "education exception" to residency requirements for Qualified Members pursuant to Section 201 of the Ordinance. (Memorandum, 4). Conversely, the Council did not include such an exception for members who are attempting to re-establish membership privileges by demonstrating continuous residency in the Community.

It may be argued that the maxim of "expressio unius," which means "inclusion of one thing indicates exclusion of the other," see, e.g., *Tate v. Ogg*, 195 S.E. 496 (Va. 1938), applies here. If the Tribal Council purposely left out such an exception for non-Qualified members, no such exception exists, according to the maxim. However, this Court rejects such an interpretation as "stand[ing] on the faulty premise that all possible alternatives or supplemental provisions were necessarily considered and rejected by the [legislature]." *National Petroleum Refiners Assn v. FTC*, 482 F.2d 672, 676 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). This conclusion is necessary in light of the discussion of legislative intent, *infra*.

Where a statute is admittedly ambiguous, courts traditionally look to the statute's legislative history to determine the intent of legislators when enacting it. See, e.g. *Chisom v. Roemer*, ___ U.S. ___, 115 L.Ed.2d 348 (1991); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979); and *TVA v. Hill*, *supra*. Here, though, the Court is provided no solace by this tool of

statutory interpretation because the record is silent concerning the legislative history of this enactment.

While this Court could remand to require the Trial Court to take additional testimony regarding legislative intent, this Court must be wary about "post-enactment legislative history." As the United States Supreme Court found in *Southeastern Community College v. Davis*, 442 U.S. 397, 411-12, n.11 (1979), "isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment."

"Although statements of legislative intent made subsequent to enactment are not nearly as authoritative as statements contemporaneous to enactment, they are entitled to some weight as secondary expressions of expert opinion." *Bethlehem Mines, Corp.*, 669 F.2d at 196. However, because justice requires timeliness to ensure due process of law is provided all parties to the proceeding, and because substantial delays would result from remand, this Court declines to remand for additional testimony concerning legislative intent.

Given that no legislative history exists, the Court must determine how best to proceed without legislative history. The Supreme Court's view is that "the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language [the legislative body] adopted in the light of the evident legislative purpose in enacting the law in question." *United*

States v. Bornstein, 423 U.S. 303, 310 (1976).

It is the task of this Court to examine the Community Council's purpose in enacting the Ordinance, and the residency requirement in particular. The purpose for the residency requirement is stated in the Ordinance. "Policy for Distribution of Per Capita Payments From Community Gaming Enterprises," includes the following language:

The Community recognizes that increased personal daily contributions of Community enrolled members to the advancement of the Community's society, economy, and culture will have the long term effect of enhancing the Community's ability to survive as a viable and effective political community. Therefore, the Community encourages enrolled members who have lost membership privileges through their absence from the Community Area and who truly are committed to contributing to the Community, *to return to live and to participate socially, economically, and culturally.* However, the Community also recognizes that its resources are limited, and that a fragile balance would be upset if persons were permitted to assume or reassume the privileges of membership without having first demonstrated a commitment to the Community by a *sustained period of satisfactory residence* within the Community Area.

p. 6, MP & GRAO (emphasis added).

The Community Council's apparent intent was to provide membership privileges only to those exhibiting a commitment to the Community. A member's commitment is demonstrated by contributions to "the Community's social, economic, and cultural development." (Section 300). However, the Community's only stated *measure* of commitment to the Community is *residency*. (Section 203, as amended).

Although the United States Supreme Court found that "domicile" and "residence" are not always synonymous, *McGrath, supra*, the Community's interpretation of "residence" suggests a definition very similar (if not identical) to that usually given for "domicile"—including an intent and a physical presence requirement.

At oral argument, Appellant Community suggested a two-pronged definition of residency. The first prong of the test was the intent of the person regarding her residency, i.e. what place does she "call home." The second prong of the test as articulated was physical presence. Appellee, at oral argument, agreed with this test, and this Court adopts the test for residency as articulated. The Court further determines that the definition of "residency" shall be synonymous with the definition of "domicile" as that term is used in relevant case law.

VI.

The Community suggested that certain factors could modify the application of this test. One factor suggested by Appellant Community was the length of time spent at a particular location. However, Community's counsel also suggested that intent was

the most important of the two requirements, indicating that if a person intended to make a place her home, it would become her place of residence if she had been there only one day.

We agree that certain factors should modify the test for residency. This Court determines that, in the context of the facts before the Court, the age of the individual seeking to reacquire membership is also one of the factors this Court will consider when examining issues of residency. Domicile of minors *should* be treated differently than domicile for adults.

In a case examining the meaning of "domicile" in the Indian Child Welfare Act, the United States Supreme Court noted that "[d]omicile' is not necessarily synonymous with 'residence' (citation omitted), and one can reside in one place but be domiciled in another." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989), citing *District of Columbia v. Murphy*, 314 U.S. 441 (1941). The United States Supreme Court went on to state that "[f]or adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Id.* (citation omitted). "Since most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Id.* (citation omitted).

Because Susan Scott was 17 when she left for Arizona, and turned 18 the day before returning to LSC, the fact that she was a minor will be considered by this Court to be controlling up to the time when she reached the age of majority, and the place of residence of

her mother shall be the place of residence of Susan Scott as a minor.

Susan Scott's mother has resided within the Community since 1991 and was granted the reacquisition of membership privileges in the Community in October, 1993. The record is unclear where Susan's father was domiciled, but she lived with her mother before leaving for Arizona. Because this Court interprets the Community's use of the term "residency" in the Membership Privileges and Gaming Revenue Allocation Ordinance as "domicile," Ms. Scott's residency was with her mother on the Reservation up to the day she turned 18.

In this jurisdiction, the residency of a student shall be determined by a method similar to that of the federal jurisdictions. Generally, in the federal system, the "domicile" ("residence" for our purposes here) of a student is determined by the student's intention to make a place her permanent home. See *Mas v. Perry, supra*.

Mas v. Perry involved a graduate student attending Louisiana State University who lived in Mississippi before her marriage, and whose parents were domiciled in Mississippi. The question in the case was whether diversity jurisdiction existed as the defendant was a citizen of Louisiana. The court found that Mrs. Mas' domicile was in Mississippi: "Though she testified that after her marriage she had no intention of returning to her parents' home in Mississippi, Mrs. Mas did not effect a change of domicile since she and Mr. Mas were in Louisiana only as students and lacked the requisite intention to remain there." 489 F.2d at

1400. The court went on to note that "[u]ntil she acquires a new domicile, [plaintiff] remains a domiciliary, and thus a citizen, of Mississippi." *Id.*, citing *Mitchell v. United States*, 88 U.S. 350, 352 (1875).

The residence of Susan Scott, after she reached the age of majority, was determined by physical presence coupled with the requisite intent. In this case, because Ms. Scott was a resident of the Community up until the day before she departed from Arizona, and because she lacked the requisite intent to establish Arizona as her residence after reaching the age of majority, she was at all times during the period at issue a resident of the Community. The judgment of the Trial Court is therefore, *Affirmed*.⁶

⁶ An issue which was not before the Court but will inevitably arise is whether Ms. Scott is entitled to membership privileges, specifically per capita payments, during the pendency of the Community's appeal. Section 302 (E) of the Membership Privileges and Gaming Revenue Allocation Ordinance, as it was when the Trial Court issued its decision, provided that:

Any person becoming eligible after the date of this Ordinance to receive per capita payments shall not be entitled to any back payments of per capita proceeds. Per capita payments shall commence on the date the Community Council issues a confirmation of qualified status and shall not be retroactive. The first per capita payment to a new Qualified member shall be on the first date of a regularly scheduled payment after her or his qualified status is confirmed.

(Ordinance, 15).

The Court is aware that the Community Council passed Resolution 41-93 on July 29,

1993, amending Section 302(E) to provide that the first payment to a newly qualified member should be "the first regularly scheduled payment occurring after the passage of 30 days from the date the Community Council issues a confirmation of qualified status under th[e] Ordinance." However, the Resolution did not receive the requisite Secretarial approval until January 13, 1994. As such, the Court of Appeals holds that the former language controls Ms. Scott's membership status.

On October 27, 1993, Ms. Scott's attorney sent a letter to the Court regarding the effect of the Community's appeal, suggesting Ms. Scott may lose a substantial sum of money from per capita payments during the course of the appeal process.

This Court is sensitive to Ms. Scott's concern. The plain language of the Ordinance suggests that by force of the calendar, the confirmation of a member may be delayed by at least seventy days (the absolute minimum time in which an appeal may be accomplished under Rule 39 of the LSCRCP, assuming no oral argument is heard, and that a decision is issued the date the reply brief is filed). The Court would suggest that such a result is unavoidably unfair. Thus, consideration should be given on receipt of this affirmance, that confirmation be given effect as of the date of the Trial Court's decision. The Court expects a decision grounded in fairness and foresight and would be disappointed to find this case before it again for consideration of this matter.

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