2014 WL 3690438 (Alaska) (Appellate Brief)
Supreme Court of Alaska.

ASA'CARSARMIUT TRIBAL COUNCIL, Appellant.,
v.
John D. WHEELER, III, Appellee.

No. S-15318.
March 25, 2014.

Appeal from the Superior Court Third Judicial District at Anchorage
The Honorable Andrew Guidi
Trial Court No. 3AN-12-4581 CI

Appellant's Opening Brief

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United States Code:

25 U.S.C. § 1901. Congressional findings.

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power ***To regulate Commerce ***with Indian tribes1" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

1 So in original. Probably should be capitalized.

25 U.S.C. § 1902. Congressional declaration of policy.

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive ***xi** homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Alaska Statutes:

§ 25.30.300. Initial child custody jurisdiction.

(a) Except as otherwise provided in AS 25.30.330, a court of this state has jurisdiction to make an initial child custody determination only if

(1) this state is the home state of the child on the date of the commencement of the proceeding;

(2) this state was the home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(3) a court of another state does not have jurisdiction under provisions substantially similar to (1) or (2) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under provisions substantially similar to AS 25.30.360 or 25.30.370, and

(A) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(B) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(4) all courts having jurisdiction under the criteria specified in (1)--(3) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under provisions substantially similar to AS 25.30.360 or 25.370; or

(5) no court of another state would have jurisdiction under the criteria specified in (1)--(4) of this subsection.

(b) The provisions of (a) of this section are the exclusive jurisdictional bases for making a child custody determination by a court of this state.

***xii** (c) Physical presence of or personal jurisdiction over a party or a child is not necessary or sufficient to make a child custody determination.

§ 25.30.310. Exclusive, continuing jurisdiction.

(a) Except as otherwise provided in AS 25.30.330, a court of this state that has made a child custody determination consistent with AS 25.30.300 or 25.30.320 has exclusive, continuing jurisdiction over the determination until

(1) a court of this state determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(2) a court of this state or a court of another state determines that neither the child, nor a parent, nor a person acting as a parent presently resides in this state.

(b) A court of this state that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under AS 25.30.300.

§ 25.30.320. Jurisdiction to modify determination.

Except as otherwise provided in AS 25.30.330, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under AS 25.30.300(a)(1), (2), or (3) and

(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under provisions substantially similar to AS 25.30.310 or that a court of this state would be a more convenient forum under provisions substantially similar to AS 25.30.360; or

(2) a court of this state or a court of the other state determines that neither the child, nor a parent, nor a person acting as a parent presently resides in the other state.

***xiii** § 25.30.810. International application of chapter

(a) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying AS 25.30.400-25.30.590.

(b) Except as provided in (c) of this section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter shall be recognized and enforced under AS 25.30.400-25.30.590.

(c) A court of this state is not required to apply this chapter to a child custody determination made in a foreign country when the child custody law of the other country violates fundamental principles of human rights.

§ 25.30.901. Application and Construction.

In applying and construing this chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact laws substantially similar.

§ 25.30.909. Definitions.

In this chapter,

(1) “abandoned” means left without provision for reasonable and necessary care or supervision;

(2) “child” means an individual who has not attained 18 years of age;

(3) “child custody determination” means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child, including a permanent, temporary, initial, and modification order, except that the term does not include an order relating to child support or other monetary obligation of an individual;

(4) “child custody proceeding” means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue, including a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue may appear, except that the term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under AS 25.30.400-25.30.590 or provisions substantially similar to AS 25.30.400-25.30.590;

***xiv** (5) “commencement” means the filing of the first pleading in a proceeding;

(6) “court” means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination;

(7) “home state” means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months, including any temporary absences of the child or parent or person acting as a parent, immediately before the commencement of a child custody proceeding, except that, in the case of a child who is less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned, including any temporary absences;

(8) “initial determination” means the first child custody determination concerning a particular child;

(9) “issuing court” means the court that makes a child custody determination for which enforcement is sought under this chapter;

(10) “issuing state” means the state in which a child custody determination is made;

(11) “modification” means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination;

(12) “person” means a natural person, a corporation, a business trust, an estate, a trust, a partnership, a limited liability company, an association, a joint venture, a government or a governmental subdivision, an agency, an instrumentality, a public corporation, or any other legal or commercial entity;

(13) “person acting as a parent” means a person, other than a parent, who

(A) has physical custody of a child or has had physical custody for a period of six consecutive months, including temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(B) has been awarded legal custody by a court or claims a right to legal custody under the law of this state;

(14) “physical custody” means the physical care and supervision of a child;

***XV** (15) "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or a territory or insular possession subject to the jurisdiction of the United States;

(16) "warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

***1** JURISDICTIONAL STATEMENT

Judgment was entered in this case on May 2, 2013. [Exc. 44 .] After litigation regarding the finality of the judgment entered on May 2, 2013, the judgment is final and is dispositive of all claims by the parties. The Court has jurisdiction to hear this matter pursuant to AS 22.05.010(a). [1]

*2 STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether, in light of this Court's prior precedents, particularly *State v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011), a Superior Court may try a custody action in a matter involving an Alaska Native child without adhering to the requirements of Alaska's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), AS 25.30.300, et seq., when a tribal court has previously entered an initial determination regarding the child.

2. Whether the Superior Court erred in interpreting Alaska's UCCJEA, AS 25.30.300, *et. seq.*, as excluding tribal courts within the meaning of "court" in AS 25.30.909(6) and erred in failing to register the Asa'carsarmiut Tribal Court custody order, in light of the Court's prior precedents, particularly *State v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011).

3. Whether the Superior Court erred in concluding that it had "at least concurrent jurisdiction over the issue of Jacob's custody," and proceeded to enter an initial child custody determination without giving comity to or contacting the Asa'carsarmiut Tribal Court and requesting that the Asa'carsarmiut Tribal Court determine that it no longer had exclusive, continuing jurisdiction or, alternatively, establishing that the Superior Court "would be a more convenient forum."

4. Whether, if it is found that the Superior Court properly had jurisdiction to modify the Asa'carsarmiut Tribal Court order pursuant to AS 25.30.320, the Superior Court erred by failing to enter an Order Modifying Custody that stated its authority to modify the Asa'carsarmiut Tribal Court order as well as its findings regarding a ***3** substantial change of circumstances, pursuant to AS 25.20.110 rather than a Final Custody Decree and *Findings of Fact and Conclusions of Law*.

5. Whether, in light of the Court's prior precedent, particularly John v. Baker, 982 P.2d 738 (Alaska 1999), a Superior Court may try a custody action in a matter involving an Alaska Native child without engaging in a comity analysis when a tribal court had previously entered a custody order regarding the child.

*4 STATEMENT OF THE CASE

A Introduction

Beginning in 2007, the Asa'carsarmiut Tribal Court ("Tribal Court") adjudicated issues of custody, visitation and child support involving Jacob, a minor eligible for Tribal membership, between the child's mother, Jeanette Myre, also a Tribal member, and his father, non-member John D. Wheeler, III, a resident of Washington State. The parties appeared before the Tribal Court numerous times over a period of over four years, between 2007 and 2012. Mr. Wheeler submitted to the jurisdiction of the Tribal Court throughout that period of time.

In 2011, Mr. Wheeler exercised his visitation rights, and Jacob flew to Washington for Christmas vacation. Mr. Wheeler refused to return Jacob. Instead, he contacted the Tribal Court to inquire about procedures for modifying the order. Less than one week later, Mr. Wheeler filed a petition for custody, visitation and child support in the Superior Court for the Third Judicial District at Anchorage. Mr. Wheeler's state court pleadings failed to disclose the Tribal Court's initial determination or that Mr: Wheeler was in violation of the visitation order, even after the Tribal Court's initial custody determination was brought to the Superior Court's attention. The Superior Court proceeded to enter its own initial custody determination. That determination ignores the Tribal Court decree.

***5 B. Facts**

Jacob was born on XX/XX/2005. [Exc. 47] Jacob and his mother, Jeanette Myre, are members of the Asa'carsarmiut Tribe of Mountain Village [Exc. 42], a federally recognized Tribe.[2] Jacob's father, appellee John Wheeler, is not a member of the Tribe and lives in the State of Washington. [*Id.]*

1. Asa'carsarmiut Tribal Court Procedural History

Ms. Myre filed a custody petition with the Tribal Court in December 2007. [Exc. 2.] Mr. Wheeler submitted to the Tribal Court's jurisdiction. [Exc. 1.] The Tribal Court, relying upon the Asa'carsarmiut Children's Code [Exc. 62], entered an order following a hearing at which both Ms. Myre and Mr. Wheeler participated, on February 7, 2008. [Exc. 2.] The Tribal Court order specified that Ms. Myre was to have primary custody and that Mr. Wheeler would enjoy visitation. [Exc. 4.] The Court also held that "[t]he Tribal Court will retain jurisdiction over the custody of Jacob." [Id.]

The Tribal Court's involvement with the custody litigation was continuous over a period of over four years. Shortly after entry of the Tribal Court order in 2007, Mr. Wheeler requested further orders from the Tribal Court. [Exc. 7.] He sought assistance with respect to visitation rights on March 24, 2008. [Id.] He also sought a modification of the child support order. [Id.] He relied upon the Tribal Court with respect to visitation issues. [Exc. 12.] The Tribal Court addressed the parties' concerns. [Exc. 10.]

***6** In December 2011, and pursuant to the Tribal Court's initial determination, Mr. Wheeler arranged for the child to travel to Washington State for Christmas visitation. [Exc. 10.][3] Mr. Wheeler was required to return the child after the Christmas break. [Id.] He did not do so. [Exc. 21.]

Rather, Mr. Wheeler corresponded with the Tribal Court's lawyers, Fortier & Mikko, P.C., in late 2011 and early 2012. [Exc. 13.] He inquired about procedures for requesting modification of the custody order before the Tribal Court. [Exc. 12.] Mr. Wheeler was informed on January 3, 2012 as follows:

Dear Mr. Wheeler:

I have received your correspondence and your notes and I shall forward them to the Tribe. There is nothing before the Tribal Court at this moment. Jacob's travel arrangements were between you and Jeanette ("Myre"). The Tribal Court is not involved in changes of travel plans. If you wish to file a motion to alter custody orders, you are free to do so. I believe that you know the process; you will need to make your request in writing and support it with information you want the court to consider. Jeanette will have to receive a copy of your filings and be given an opportunity to respond. Also, you should be aware that you and

Jeanette have latitude to alter your arrangements. If the parties are in accord, unless there is some obvious harm to Jacob, the Tribal Court will not ordinarily get involved in voluntary changes to established visitation or custody schedules.

[Exc. 13.]

2. Alaska Superior Court Procedural History

But, instead of seeking modification before the Tribal Court, Mr. Wheeler hired an Anchorage lawyer, Carl Cook. Mr. Cook filed Mr. Wheeler's wholly new petition in the ***7** Anchorage Superior Court, seeking custody, visitation, and child support orders on January 11, 2012. [Exc. 17.] In his accompanying sworn Child Custody Affidavit, Mr. Wheeler denied that he had previously participated "as a party concerning the custody of any of the children ...." [Exc. 16.] Mr. Wheeler also refused to return the child. Instead of doing so, he filed a frivolous domestic violence petition. [Exc. 39.]

Ms. Myre, represented by the Alaska Native Justice Center, filed a motion for return of the child and for a Writ of Assistance on February 10, 2012. [R. 214-235.] She also petitioned the Superior Court to register the Tribal Court's order pursuant to the UCCJEA on February 10, 2012. [Exc. 19; R238-243.] The Superior Court denied the petition to register the Tribal Court Order on February 16, 2012, finding that the UCCJEA did not permit registration of tribal court orders. [Exc. 21.] [4]

Notwithstanding, the Superior Court, in a supplemental order, found the Tribal Court order was lawful and enforceable. In other words, the Superior Court found that the Tribal Court made the initial determination regarding custody and child support. [5] The Superior Court also found that Mr. Wheeler participated in the Tribal Court proceedings. [Exc. 26.] The Superior Court determined that the Tribal Court based its decision on the same criteria that Alaska courts considered in reaching custody decisions, i.e., the "best interests of the child factors listed in AS 25.20.150." [Exc. 21.]

***8** The trial court, after further briefing, entered supplemental findings on March 1, 2012 [Exc. 26.], granting Ms. Myre's petition for a long-term domestic violence order [Exc. 32], and denying Wheeler's petition for such relief. [Exc. 39.] The court held:

"Mr. Wheeler's retention of Jacob contravenes the *established, lawful tribal court custody order as Ms. Mvre is the lawful custodian.* Mr. Wheeler's only defense is "necessity," i.e., that he has only kept Jacob to protect him from abuse, neglect or imminent physical danger. Mr. Wheeler has retained custody for over two months now but the statute only permits him the lesser of 24 hours or the time necessary to report his concerns for Jacob to a peace officer or social service agency [footnote omitted.] Ms. Myre presented evidence that Mr. Wheeler reported his concerns to the Office of Childrens' Services ("OCS") in Anchorage and that OCS investigated the complaint, interviewed Ms. Myre and Mr. Johnson, and has dismissed the complaint as 'unsubstantiated.' Under the undisputed facts, the Court must conclude that Mr. Wheeler has not established a defense of necessity and has committed custodial interference. He has, therefore, committed domestic violence within the meaning of AS 18.66.990(3)(A).

(emphasis supplied) [Exc. 30.]

Although the Superior Court found that the Tribal Court's initial determination was an "established lawful" order, the Superior Court did not communicate with the Tribal Court. The Superior Court did not dismiss the action. Rather, the case proceeded before the Anchorage Superior Court, with no formal communication to the Tribal Court.

The Asa'carsarmiut Tribal Council (the "Council")[6] filed an expedited motion to intervene on April 2, 2013. [R. 595-599.] The Council requested that the Superior Court dismiss the proceedings and relinquish jurisdiction. [R. 582-591; 552-578.] The Superior Court granted expedited consideration. [Exc. 41.] On April 5, 2013, the ***9** Superior Court granted the Council permissive intervention solely to preserve its assertion that the Superior Court lacked jurisdiction to decide the custody dispute. [Exc. 60.] However, the Superior Court denied the Tribal Court's request to dismiss because it determined that the Superior Court had concurrent jurisdiction and therefore could modify the Tribal Court order. [*Id.*] The Council's request for reconsideration was denied following oral argument. [Tr. 1-2.]

The Superior Court blamed the Tribal Court for the late filing. The court stated that the Council "knew or should have known not only that the case existed, but that its 2007 custody order would not be registered." [Exc. 42.] The Superior Court also denied that its proceeding with the new petition would infringe on principles of comity. [Id.] The trial court denied that the proceedings before it were "designed to set aside or invalidate the 2007 Order." [Exc. 43] According to the Superior Court:

Instead, in accordance with Alaska law, plaintiff is seeking to modify the earlier custody decision in light of substantial changes in the circumstances of the parties that have occurred over the years since the Council's order [sic] was issued. The custody orders for every court in this state are subject to modification when circumstances change. And, as the Council recognizes, this court has at least concurrent jurisdiction over the issue of minor child's custody. [footnote omitted] No reason has been shown why this court is not an appropriate forum for the modification of the Council's 2007 order.

[Id.][7]

***10** The Superior Court held a custody trial on April 8 and 9, 2013. On May 2, 2013, the Superior Court entered a *Final Custody Decree* and *Findings of Fact and Conclusions of Law* ("Final Orders"). [Exc. 44, 46] The Superior Court found that it had "jurisdictionover the parties, Jacob, and the custody issues in this matter," without further explanation. [Exc. 47.] The Final Orders are silent on the Tribal Court's initial determination, its continuing jurisdiction and its custody proceedings for the previous five years. [Exc. 44, 46.] The Final Orders do not mention that Jacob is an Indian child or the Tribe's interest in fostering Jacob's cultural heritage and identity. [*Id.*]

Despite the Superior Court's Order allowing it to intervene, the Council was not served with Mr. Wheeler's proposed Final Orders, Ms. Myre's opposition and related pleadings, and Mr. Wheeler's responses or the Superior Court's Findings, Conclusions, Order and Decree. The Council filed an expedited Request for Opportunity to Be Heard and Motion for Stay on May 21, 2013. [R. 475-476.] The Superior Court granted the Council' request for an opportunity to be heard on June 19, 2013, but denied the motion for stay. [Exc. 60.] The Council responded that the Superior Court lacked modification jurisdiction, violated the UCCJEA, failed to recognize established principles of comity, and requested that the Superior Court permit the Council to submit amended findings. [R. 396-407.] Mr. Wheeler filed an opposition that argued an amended order was unneeded. [R 392-393.] Wheeler, adopting the Superior Court's rationale, asserted that the intervention motion came too late, and that the trial court should simply ignore the Tribal Court's initial custody determination. [Id.] The Council replied, arguing that, as a matter of public policy and judicial integrity, the Findings, Conclusions and Decree must ***11** reflect the basis of the court's exercise of jurisdiction and cannot ignore the Tribal Court's initial custody determinations. [R. 383-386.] To date the trial court has not ruled on the Council's request.

STANDARD OF REVIEW

This Court reviews de novo the scope of tribal court jurisdiction.[8] The Court reviews de novo the meaning of the federal statutes.[9] Interpretation of statutes presents questions of law involving the independent judgment of the Court.[10] Issues relating to "statutory...interpretations are also legal questions subject to de novo review."[11] In applying de novo review, the Court adopts "the rule of law that is most persuasive in light of precedent, reason and policy."[12] "The starting point for statutory construction is 'the language of the statute itself construed in light of the purposes for which it was enacted.'"[13]

***12** In custody cases, the Court reviews the trial court's determination for an abuse of discretion or clearly erroneous findings of fact.[14] "An abuse of discretion may be found where the trial court considered improper factors, failed to consider statutorily-mandated factors, or improperly weighed certain factors in making its determination."[15]

ARGUMENT

I. Summary of Argument

Because the Tribal Court first adjudicated custody and made the initial custody determination in this case and expressly retained jurisdiction over the parties, that court is entitled to exclusive control over the proceedings. Here, the Superior Court, in violation of that principle, re-adjudicated the custody of Jacob as an initial custody determination. The Superior Court lacked modification jurisdiction. Because the Superior Court lacked modification jurisdiction, this matter should be dismissed for lack of jurisdiction.

The Superior Court erred in failing to give comity to the Tribal Court's orders, as required under the UCCJEA and this Court's previous admnition to trial courts. Comity exists as a matter of law. The Superior Court had earlier specifically determined that the Tribal Court's initial custody determination was an "established lawful" order. Accordingly, this Court should remand this matter to the trial court with instructions to dismiss or, alternatively, to communicate with the Tribal Court.

***13** II. The Asa'carsarmiut Tribal Court Issued the Initial Determination

A. Tribal Court Proceedings 2007-2008

The Asa'carsarmiut Tribal Council is a federally recognized Tribe.[16] The Council has adopted a comprehensive Children's Code. [Exc. 62.] The Tribal Court received a petition to adjudicate custody of Jacob in December 2007 under the provisions of the Children's Code.

The Tribal Court initially found that Ms. Myre, the Petitioner, was an enrolled member of the Tribe. As a result, her child, Jacob, the subject of the proceedings, was a lineal descendent and was "therefore a member of the Asa'carsarmiut Tribe." [Exc. 1.] The Tribal Court accordingly assumed jurisdiction to decide custody on December 3, 2007. [*Id.*] The Tribal Court directed its Clerk to contact both Ms. Myre and Mr. Wheeler "to arrange a mutually acceptable... date (for the child custody proceeding)." *[Id.]*

A custody hearing was held on December 19, 2007, in Mountain Village before Tribal Court Judges Ephrim Thompson, Lucy Peterson and Maria Koutchak. [Exc. 2.] Both Mr. Wheeler and Ms. Myre participated, and all persons who appeared before the Tribal Court were duly noted in the subsequently issued written initial custody determination. [Id.] Mr. Wheeler did not contest the Tribal Court's jurisdiction to hear and determine the case. [Id.] The Tribal Court, after applying the Tribe's codified child

***14** custody factors, awrded physical and legal custody to Ms. Myre, with extensive visitation rights granted to Mr. Wheeler by written order dated February 8, 2008. [Exc. 4.] [17]

B. Asa'carsarmiut Tribal Court Exercised Continuing Jurisdiction

About six weeks after entry of the initial determination, Mr. Wheeler filed two requests before the Tribal Court. He requested assistance in enforcing his visitation rights and he also sought modification of the child support order. [Exc. 7, 9.] As directed by the initial determination, Wheeler specified the dates he intended to exercise his physical visitation rights, from June 25, 2008 through July 9, 2008, and requested the court's assistance in this regard as well. [Exc. 7.]

The Tribal Court responded to Mr. Wheeler's request by a written order dated May 30, 2008, and signed by Judge Ephrim Thompson as the presiding judge. [Exc. 10.] Based upon the written communications, Judge Thompson directed that visitation for 2008 would be for two weeks, which would permit Jacob to visit with Mr. Wheeler in Washington State. *[Id.]* In addition, the Tribal Court, in responding to Mr. Wheeler's concern that Ms. Myre was undermining his efforts to maintain a parental relationship, repeated its initial determination:

***15** Ms. Myre shall allow Jacob to have monitored telephone conversations, send pictures, drawings, letters or other documents to his father. Ms. Myre should ensure that Jacob knows that he has a father who lives outside of Alaska and help Jacob to learn to trust Mr. Wheeler.

The Judges wish for the best intentions from both parents to consider Jacob's well being, and that they not dispute with one another over a child as it is part of the traditional beliefs of our people. The Tribal Court will retain jurisdiction over the custody of Jacob.

[Exc. 11.] The Tribal Court also invited Ms. Myre, if she wished, to address Mr. Wheeler's concerns within ten days. *[Id.]*

Again, in June 2009, Mr. Wheeler requested more extensive visitation. [Exc. 12.] Subsequently, in 2011, Mr. Wheeler arranged for Jacob to visit over Christmas. Jacob was to travel with his relative to Washington State on December 16, 2011, and to return on December 30, 2011. [R. 209-213.] On or about January 3, 2012, Mr. Wheeler contacted Fortier & Mikko, the Council's lawyers. Mr. Wheeler inquired as to a modification of the Tribal Court Order. He was referred to the Tribal Court and informed that he should present his petition in writing. [Exc. 13.]

A week following, Mr. Wheeler, rather than petitioning the Tribal Court, filed a custody complaint in the Superior Court. [Exc. 17.] The Superior Court found that Mr. Wheeler's failure to return Jacob in January 2012 contravened an “established lawful” Tribal Court custody order. [Exc. 30.] The Superior Court also found that Ms. Myre was the “lawful custodian.” *[Id.]* But, contrary to the law and policy of Alaska, the Superior Court did not dismiss the action. We demonstrate below that the Superior Court's custody determination violates this Court's comity rules, established rules of concurrent jurisdiction and the UCCJEA.

***16 III. This Court's Decisions Establish that Asa‘carsarmiut Tribal Court's Initial Determination Is Entitled to Comity.**

This Court has admonished its lower courts to give deference to duly constituted and properly functioning tribal courts. [18] It is undisputed that the Tribal Court is a duly constituted and properly functioning tribal court. Its initial determination in this matter is an “established, lawful order.” [Exc. 30.]

Without question, the Tribal Court's initial determination was entitled to comity before the Superior Court. In fact, here the Superior Court initially granted comity, but then, determined to go on its own and ignore the prior Tribal Court proceedings. But, the lower court, in the first instance, should have referred this matter back to the Tribal Court. [19]

In *Starr v. George*, [20] an ICWA [21] proceeding, this Court reiterated its holding in John v. Baker, and John v. Baker, II: Courts must respect tribal court orders that comply with due process. [22] The Starr Court held that the dual goals of ICWA, to "protect the best interests of Indian children and to promote the stability and security of Indian Tribes and families," [23] are not invoked in disputes between unmarried parents, because reg of the outcome, "the child would continue to be raised in the home of a Native parent and in a Native Village; thus, ICWA's exclusive jurisdiction and procedural ***17** guidelines are unnecessary to protect the family's or the Tribe's interest in those situations." [24] Here, that is not the case. The Superior Court completely ignored the Tribal Court's initial determination, a determination that found Mr. Wheeler would discourage the minor's contact with the Tribe. As a result, the Superior Court virtually severed the child's ties to his Tribe in contradiction of the Tribal Court's initial determination. This is so because the Superior Court gave Wheeler sole legal and physical custody of Jacob. [Exc. 44.]

A. Under Common Law Principles, the First Court to Decide an Issue Has Exclusive Control Over the Case

Although the Tribal Court and the Superior Court have concurrent jurisdiction, [25] "Tribal jurisdiction over child custody cases involving member children will further the goal under both federal and state law at best serving the needs of Native American children." [26] Thus, the importance of concurrent jurisdiction with respect to child custody enhances "the opportunity for Native Villages and the state to cooperate in the child custody arena by sharing resources." [27]

Alaska courts do have concurrent jurisdiction with tribal courts with respect to child custody issues. But, that cannot mean that state courts have jurisdiction to trump tribal court orders. Rather, the well-accepted rule is that a court of competent jurisdiction ***18** that first assumes control of an action that could be heard in separate courts of concurrent jurisdiction retains exclusive control of the action. [28]

It is likely that Mr. Wheeler will argue, as he did below, that requiring him to continue to litigate in the Tribal Court is a violation of his due process rights. But, Mr. Wheeler did litigate for over four years in Tribal Court. At no time did he assert a deprivation of rights, nor did he bring forward evidence in the state court of any deprivation. Certainly, the Tribal Court, which has concurrent jurisdiction with the Alaska courts with respect to Jacob, is the appropriate court. This is so because without question, tribal courts have jurisdiction to try child custody matters as a matter of law. [29]

B. The Alaska Supreme Court's Tribal Court Comity Jurisprudence

The Superior Court, within a few weeks after the filing of the Complaint, determined that "the Tribal Court based its decision on the same criteria that Alaska courts consider in reaching custody decisions, *i.e.*, "the best interests of the child factors listed in AS 25.24.150." The Superior Court also found that Mr. Wheeler's failure to return Jacob in January 2012 "contravenes the established, lawful Tribal Court custody order as Ms. Myre is lawful custodian." [Exc. 30.] But, the "lawful Tribal Court custody order" before the court, and enforceable by the court on March 1, 2012, was subsequently ignored, as was the lower court's duty to give comity to the Tribal Court's orders.

***19** The Tribal Court's initial custody determination reflects the Tribe's concern that its children not be lost so that the culture of the Asacarsarmiut Tribe will be preserved through its children. This Court in John v. Baker, while recognizing that the

fundamental purpose of ICWA is to protect Indian families, nonetheless held that ICWA did not apply to custody disputes between parents. [30] Notwithstanding, the Congressional policy announced in ICWA is a matter of national concern. Similarly, the Asa'carsarmiut Tribe's Children's Code [Exc. 62] focuses on the Tribe's retained inherent sovereign process" in domestic affairs involving tribal membership. [31]

This case thus exemplifies that concern. [32] The Tribal Court expressly found that, based upon the evidence before it, Mr. Wheeler had no intention or desire to involve Jacob in the culture and heritage of his Tribe. [Exc. 2.] By contrast, the Superior Court, in reaching its contradictory conclusions, placed no concern on tribal jurisdiction, the minor's future ties to his Tribe, nor in the tribal interests in maintaining those ties as in the best interest of the child.

Mr. Wheeler denied that the Tribal Court had any jurisdiction. Indeed, he labelled the Council's efforts to retain jurisdiction as a "clear attempt by the Tribal Council to strong arm this Court." [R. 522.] He argued that the Tribal Court asserted "non-existent ***20** jurisdiction." [R. 522.] [33] What appears from Mr. Wheeler's opposition is a wish that the Tribal Court simply never ruled, and he thus urged the Superior Court to ignore the Tribal rulings. But, the Tribal Court's rulings recognize the minor's cultural heritage and identity and a requirement under Tribal law to "view Jacob as a whole and all of his needs." [R. 532.]

In any case, since the Tribal Court does have jurisdiction, the denial of the existence of such jurisdiction was frivolous, and fails in the face of *John v. Baker*, and *John v. Baker II*. Wheeler's argument and the trial court's disposition are therefore directly contrary to this Court's direction to the state's trial courts: "As a general rule, our courts should respect tribal court decisions under the comity doctrine." [34]

C. The Trial Court Should Have Abstained.

Without question, Tribes occupy a unique status under federal law. [35] Consequently, federal law provides significant protection for the political rights of Indian Tribes. [36] Tribes retain the inherent powers of self-governing political communities. [37] ***21** State law must comply with federal policy to support Tribal self-government and self-determination. [38] In *Farmers Union Ins. Companies*, the Supreme Court adopted a tribal court abstention policy. [39] In doing so, the Court directed federal district courts to determine whether to dismiss an action or hold the same in abeyance pending a full development in the Tribal Court. [40]

Iowa Mut. Ins. Co. v. LaPlante also involved a non-Native defendant and the Court again required the non-Native to exhaust remedies in Tribal Court. [41] The Iowa Mut. Ins. Co. Court based its holding on the federal government's long-standing policy of encouraging Tribal self-government. [42] The Court held that such a policy reflected the fact that Tribes retain "attributes of sovereignty over both their members and their... territory to the extent that sovereignty has not been withdrawn by federal statute or treaty." [43] To the argument that a tribal court cannot be relied upon and the non-Native thus needs protection against local bias and incompetence, the Supreme Court stated that:

The alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in ***22** *National Farmers Ins. Cos.*, 471 U.S. at 856, n.21, 105 S.Ct. at 2454, n.21, and would be contrary to the Congressional policy promoting the development of tribal courts. Moreover, the Indian Civil Rights Act, 25 U.S.C. Section 1302, provides non-Indians with various protections against unfair treatment in Tribal Courts. [44]

Consequently, it is clear that the policy reasons supporting concurrent jurisdiction in Alaska as an incident of sovereignty [45] must reasonably be in alignment with the federal policy. Moreover, this case does not present a "race to the courthouse issue." [46] Rather, both parties fully engaged the Tribal Court for over four years before Mr. Wheeler himself raced to the Anchorage Courthouse and failed to disclose the prior litigation.

In *Iowa Mut. Ins. Co. v. LaPlante,* [47] the Supreme Court refused "to foreclose tribal court jurisdiction over a civil dispute involving a non-Indian." [48] *The Iowa Mut. Ins. Co.* Court held that the Congressional policy of promoting "tribal self-government and self-determination" required the federal court to step aside. [49] That same policy is applicable in this case. The trial court should have abstained upon Ms. Myre's presentation of the Tribal Court order in February 2012. [50]

A bright line rule is necessary when the Tribal Court has asserted jurisdiction and enters orders determining child custody, visitation and support. The Superior Court ***23** should not engage in either initial determination jurisdiction or modification jurisdiction without first requiring the parties to exhaust Tribal Court remedies. [51] Where, as here, this action began in the Tribal Court, Wheeler should be required to exhaust his Tribal Court remedies before a state court may exercise jurisdiction. [52] As the Wisconsin Supreme Court stated in *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians:* [53]

Comity is based on respect for the proceedings of another system of government and the spirit of cooperation. Comity endorses the principal of mutual respect between legal systems, recognizing the sovereignty and sovereign interests of each governmental system and the unique features of each legal system. It is the doctrine that recognizes, accepts, and respects differences in process. The doctrine of comity is neither a matter of absolute obligation nor of mere courtesy and good will, but is recognition which one state allows within its territory to legislative, executive or judicial acts of another, having due regard to duty and convenience and to rights of its own citizens.
In the context of state-tribal relations, principles of comity must be applied with an understanding that the federal government is, and the state government should be, fostering tribal self-government and tribal self-determination. Through principles of comity, federal and state governments can develop an increased understanding of tribal sovereignty, ***24** encourage deference to and support for tribal courts, and advance cooperation, communication, respect and understanding in interacting with tribal courts. Central to tribal sovereignty is the capacity of self-government through tribal justice mechanisms. Tribal justice systems are essential to the maintenance of the culture and identify of Indian tribes.

Although this Court has declined to adopt a "strict exhaustion requirement for tribal adjudications of child custody cases," [54] the Court has nonetheless noted that, "[a] party's failure to seek tribal appellate review may seriously undermine any claims that the tribal court denied [him] due process." [55] By contrast, federal courts have adopted a strict exhaust on requirement. [56] Under federal law, the exhaustion requirement is intended to enable the "orderly administration of justice... by allowing a full record to be developed in the tribal court before either the merits or any questions concerning appropriate relief is addressed." [57] In fact, in John v. Baker, II, this Court appears to have echoed the Crow Tribe exhaustion requirement, noting that the tribal court was provided no opportunity to "pursue internal remedies" for the loss of a trial record because "Mr. Baker never sought appellate review in tribal court." [58] Thus, this Court has recognized that principles of sovereignty do in fact require exhaustion of tribal court remedies. The lower court's refusal to require Mr. Wheeler to exhaust his tribal court remedies, and permitting Mr. Wheeler to abandon the Tribal Court proceedings thus violates this Court's comity and tribal court exhaustion doctrines.

***25 IV. The UCCJEA Compels The Conclusion That The Tribal Court Had Exclusive Jurisdiction.**

Although the lower court found that the Tribal Court order was an "established lawful" order early in the state court proceedings, it nonetheless proceeded to retry the custody case as if the trial court was trying the initial determination. The trial court was aware of the Tribal Court orders by February 10, 2012, a few weeks after the filing of this case. [Exc. 39] Subsequently, upon the Council's application for intervention and its request that the court abstain or defer to the Tribal Court, the Superior Court, while permitting "permissive intervention," denied the Council's request for deference or abstention, claiming that as a court of the State of Alaska, the trial court had concurrent jurisdiction to modify the Tribal Court decree. [Exc. 42.] The court was in error in ruling that it had jurisdiction to modify the Tribal Court judgment. The Tribal court possessed jurisdiction exclusive of the Superior Court to consider modifying the Tribal Court order. Public policy required the trial court to respect, not ignore, the Tribal Court's initial determination. Below, the Tribal Council demonstrates that the UCCJEA, properly applied, also prohibits the Superior Court from modifying or otherwise exercising jurisdiction in this matter.

***26 A. The UCCJEA and the Alaska Legislature**

1. The Model Act's Purpose

The UCCJEA is intended to provide uniformity with respect to initial custody determinations, modifications of custody orders and enforcement of custody orders.[59] Thus, the scope of the enforcing court's inquiry is limited to the issue of whether the decreeing court had jurisdiction and complied with due process in rendering the original custody decree. Here, the trial court determined that the Tribal Court's Order was lawful and enforceable. No further inquiry was necessary: the UCCJEA does not allow an enforcing court to modify a custody determination.[60]

Section 101 of the Model Act further sets forth how the Act should be interpreted, including:
1. Avoiding the jurisdictional competition and conflict with courts of other states;

2. Promoting cooperation with the courts of other states;

3. Defer abductions of children;

4. Avoiding re-litigation of custody issue decisions of other states in this state; and

***27** 5. Facilitating the enforcement of custody decrees.[61]

2. The Alaska Legislature Believed it Was Enacting a Uniform Act

Alaska's version of the UCCJEA was introduced as House Bill No. 335 on January 20, 1998.[62] House Bill 335 was referred to the Health, Education and Social Services (HESS) and Judiciary Committee. As introduced, the proposed legislation did not include the Commissioners' suggestion definition for "Tribe."[63] Nor was the Alaska Legislature given an opportunity to consider the Model Act's treatment of Tribal Courts[64].

The HESS Committee simply never was advised of nor considered the application of the UCCJEA to Alaska Native Village Tribal Courts, as H.B. 335 was debated. When Patty Swenson, the Legislative Assistant to HESS Chair Bundee, presented H.B. 335, she stated the proposed legislation as presented to the House Committee "soon...would be adopted by all 50 states. When it is, parents will not be able to use their children as ***28** pawns in their disputes."[65] In explaining the Bill, Ms. Swenson also

told the Committee that the legislation would provide uniformity, thereby addressing the "lack of uniformity between various state laws...." [66]

Deborah Behr, an Assistant Attorney General with the Legislation and Regulation Section of the Department of Law and a Uniform Law Commissioner representing Alaska, also discussed the Bill with the HESS Committee. She explained that "she was one of the nine attorneys nationwide selected to be on the Committee to draft the UCCJEA." [67] Ms. Behr discussed "the importance of all states having the same terms," which would "ensure uniformity of the rules among the states." [68] Ms. Behr, in responding to a question from Representative Joe Green, explained that an "enforcing court has an obligation to respect the order, not modify the order, and to enforce it." [69] The minutes also reflect that Chairman Bundee "summarized the intent of H.B. 335... to reduce the opportunity or incentive for noncustodial kidnapping, where children are used in the battle of the ongoing, unsettled problems between the parents." [70] But, nowhere did Ms. Behr inform the HESS Committee that H.B. 335 was missing §§ 102(6) and 104 of the Model Act.

***29** A week later, on February 5, 1998, the HESS Committee again discussed the H.B. 335. Again, there was no discussion as to whether or not the UCCJEA's provisions for Tribes would be included. However, there was discussion regarding international court systems. [71] One representative stated that he did not support "Alaska giving jurisdiction to a foreign power over child custody cases." [72] Chairman Bundee pointed out that the purpose of the UCCJEA was to inform other states "not to revise [a] custody order that was entered into by the State of Alaska." [73] Ms. Behr advised the HESS Committee that the concern over fleeing with children and attempting modification in a foreign forum was precisely what the Act was intended to prevent. [74]

The House Judiciary Committee again considered H.B. 335 on February 23, 1998. [75] Although H.B. 335, unlike the Model Act, did not contain a §§ 102(16) or 104, the Judiciary Committee was also informed that H.B. 335 provided "uniformity throughout all 50 states." [76] The Committee was told that the proposed legislation would reduce "the opportunity to go into another jurisdiction and have a different custody order written, which will result in fighting where children are used by parents to attack each other. Furthermore, it encourages better enforcement of child custody and visitation orders, and it provides uniformity throughout the nation." [77]

***30** Ms. Behr also appeared before the House Judiciary Committee. Ms. Behr, in responding to Committee questions, explained that the home state making the initial determination would retain jurisdiction "to do the modification, until a point that everyone's left or the original state relinquishes jurisdiction." [78] Ms. Behr also explained that H.B. 335 simply deals with "jurisdiction for the initial child custody proceeding and for modifications of it and for how to enforce child custody." [79] In colloquy with Ms. Behr, Representative Croft stated that the uniform law provides a uniform rule that "works well and we will adopt it oluntarily with the same protocols and all that. This is in fact the instance of the federal government just saying 'everybody abide by these rules' this is all of us doing it voluntarily" [80]

Ms. Behr clarified for the Judiciary Committee that the goal of the Act "is to set up one court to make the decision so the people will not litigate over which court makes the decision but rather over what is in the best interest of the children." [81] Ms. Behr stated, "If you have two courts that, arguably, both have jurisdiction it is possible for a person to be subject to two orders, and then they do not know exactly what they are supposed to do. So, that is what it is designed to address." [82] Ms. Behr also told the Judiciary Committee that the process for drafting the UCCJEA involved representatives from 52 states and territories, the Bill was two years in the drafting and that it is ***31** advantageous to both custodial and non-custodial parents. [83] There was also discussion, based upon Representative Berkowitz's inquiry regarding the international application of the chapter. [84] Ms. Behr

explained that the international application is an important provision, which permits recognition of the judgment of foreign courts.[85] Ms. Behr explained that the purpose of the foreign courts provision is one of comity, in that " court of this state is not required to apply this chapter to a child custody determination made in a foreign country when the child custody law of the other country violates fundamental principles of human rights."[86]

The Senate Health Education and Social Services Committee took up discussions regarding H.B. 335 on March 25, 1998.[87] The Senate Judiciary Committee reviewed the Bill on April 27, 1998. Again, the purpose was explained as uniformity in order to integrate Alaska law and practice with the Uniform Custody Jurisdiction Enforcement Act.[88] Ms. Behr was also present for discussions. She explained that H.B. 335 was a result of cooperation between the states and deals with "routine divorce custody orders that have some need for enforcement actions." The Bill was submitted to the governor on ***32** June 5, 1998 with only three manifest errors that had been corrected, none of which are applicable to this case.

Thus, the Alaska Legislature, informed that H.B. 335 was uniform in all 50 states, was misinformed. Nonetheless, as enacted § 25.30.901 provides that: "in applying and construing this chapter, consideration shall be given to the need to promote uniformity of the law with respect to the subject matter amongst states that enact laws substantially similar."[89]

3. Alaska's Omission of Tribal Courts is an Anomaly

Ms. Behr was correct that all 50 states and the Virgin Islands adopted the UCCJEA. Moreover, all but six states adopted the UCCJEA's § 102(16) definition of a Tribe as including Alaskan Native Villages, and the corresponding § 104 of the UCCJEA.[90] Alaska is one of only six jurisdictions not adopting statutes similar to ***33** §102(16) and §104 of the Model Act.[91] Only Alabama expressly excludes the definition of Indian Tribes.[92] The District of Columbia does not have provision for Tribal Courts but its UCCJEA, similar to Alaska's UCCJEA, directs that "in applying and construing the UCCJEA, "consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enacted."[93]

B. The Alaska Legislature Never Considered Nor Debated UCCJEA Provisions Pertaining to Alaska Native Tribal Court Initial Determinations.

1. The Legislature Was Mistaken in its Assumption that AS 25.30.300, et seq. Mirrored the UCCJEA as Adopted By 49 Other States

The Alaska Legislature did not, as Alabama did, intentionally omit provisions regarding Tribal Court Orders from its uniform coverage under the UCCJEA. Rather, it appears that the Legislature was never advised of the UCCJEA formulation of tribal court orders. Nor was the Alaska Legislature advised that H.B. 335 contained an omission that is now an anomaly that renders Alaska's version not uniform. Notwithstanding, the Legislature directed as a matter of law that courts are to give consideration "to the need to promote uniformity of the law with respect to the subject matter among states that enact ***35** laws substantially similar."[94] Clearly, where a vast majority of states has adopted the UCCJEA to include the judgments of Alaska Native Villages, it follows that uniformity, and the national policy of tribal self-determination, is a compelling policy basis for Alaska to recognize the validity of tribal court judgments of Alaska Tribes under the UCCJEA. Here, in contrast, the Superior Court refused to register the Tribal Court's judgment because there was no provision under Alaska's UCCJEA for the recording of Alaska Native Village Tribal Court judgments. But, there is no prohibition to doing so, either.

Even if the trial court's refusal to register the Tribal Court's initial determination was not in error, its decision to exercise "concurrent jurisdiction," and to "modify" the Tribal Court order constitutes error. For, in doing so, the Court ignored this

Court's admonishment in *John v. Baker, II,* [95] that "[a]s a general rule, our courts should respect tribal decisions under the comity doctrine." [96]

2. The Absence of Provisions in AS 25.30.300, et seq.Regardig Tribal Court Orders Not a Basis to Ignore Asa'carsarmiut Tribal Court's Initial Determination

The omission of tribal courts under the statute is not grounds for ignoring the policy of both the UCCJEA and this Court's jurisprudence regarding tribal courts. Indeed, the Legislative history of AS 25.30.300, et seq. demonstrates that the Alaska Legislature believed that its adoption of the UCCJEA was uniform with all 50 states. That uniformity is demonstrated by the fact that 44 states and the Virgin Islands ***36** recognize Alaska Native Village tribal courts. Jurisdictions from Washington and Hawaii to the Virgin Islands recognize the validity of child custody determinations of Alaska Native Villages, but Alaska does not. Such an anomaly cannot be the policy of this state. Certainly, if the Alaska Legislature intended courts to ignore the child custody decisions of Alaska Native Villages, it would have said so. That is what Alabama did. [97]

Moreover, the legislative history demonstrates that the Alaska Legislature's intent was to avoid modifications of existing child custody determinations. Yet, the trial court, below, did exactly that. In doing so, the lower court ignored the policy behind the UCCJEA, as well as the Legislature's instructions on the application and construction of AS 25.30.901:

> In applying and construing this chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter amongst states that enact laws substantially similar.

Moreover, the fact that the Legislature did not include a definition for Alaska Native Village tribal courts, nor direct the state courts to treat tribes as if they were states of the United States for the purpose of applying the UCCJEA [98] simply cannot mean that the Legislature intended the result obtained in this case. In short, it is at least reasonable to infer that the Legislature intended to include tribal courts as it is to infer the opposite proposition. The Alaska statute was derived directly from the Model Act, and the ***37** Legislature was informed that it was adopting the Model Act. [99] Although the legislative history is silent on the comity to be given to Alaska Native Village tribal court custody determinations, it cannot be said that the Alaska enactment of the UCCJEA goes "beyond the scope" of the Model UCCJEA. [100] This Court has held that where the state's statutes do not go beyond the scope of a federal prototype, Alaska courts consider the federal cases persuasive in interpreting that statute. [101] Similarly, by analogy, this Court should consider its own case law and case law from other states as persuasive in interpreting the application of the UCCJEA to tribal court custody determinations. [102]

C. Application of the UCCJEA Demonstrates the Superior Court Erred In Exercising "Concurrent Jurisdiction"

1. Wheeler's Wrongful Conduct Did Not Divest the Asa'carsarmiut Tribal Court of Exclusive Continuing Jurisdiction

Mr. Wheeler's conduct was wrongful. Under AS 25.30.370:
(a) Except as otherwise provided in AS 25.30.330, if a court of this state has jurisdiction under this chapter because a person invoking the jurisdiction has engaged in wrongful conduct, the court shall decline to exercise its jurisdiction...

(c) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction under (a) of this section, that court shall assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses...

***38** The trial court found Mr. Wheeler's conduct was wrongful. [Exc. 26.] In addition to violating a lawful, enforceable order, Mr. Wheeler also violated AS 25.30.380(a) by failing to disclose his participation as a party in the Tribal Court proceedings commencing in 2007. [103] He also failed to disclose his knowledge of a proceeding, to wit: the Tribal Court proceedings that could affect the new proceeding he filed. [104] The trial court had the authority and the duty to dismiss the proceedings. [105] Wheeler never corrected his statement and his complaint "is therefore deemed to have admitted that there was no other proceeding dealing with the children apart from" the case now before this Court. [106]

The UCCJEA was:

> promulgated in an effort to encourage courts considering child custody matters to cooperate in order to arrive at a fully informed judgment transcending state lines and considering all claimants, residents and non-residents, on an equal basis and from the standpoint of the welfare of the child. [107]

The trial court failed to cooperate. In addition, a central purpose of the UCCJEA is to eliminate forum shopping. Mr. Wheeler engaged in forum shopping.

***39 2. Asa'carsarmiut Tribal Court Initial Determination was First in Time**

Because there is no question that the Tribal Court proceedings preceded and were first in time, by many years, there is no doubt that the Tribal Court clearly has exclusive, continuing jurisdiction. [108] The Tribal Court did not lose jurisdiction, nor was there any finding by the trial court that it did. "AS 25.30.310(a)(1)...is a list of requirements that must be fulfilled to lose jurisdiction." [109] The trial court made no findings that any of the requirements under AS 25.30.310(a) were fulfilled.

In similar cases from sister states, the rule has been applied with equal force. In *C.L. v. Z.M.F.H.,* [110] in facts remarkably similar to those before this Court, the mother agreed that the couple's children could visit their father in 2006. The father, however, did not return the children. In December 2006, the mother filed a complaint for divorce with the Oglala Sioux Tribal Court. A temporary custody order was issued in January 2007, and a hearing occurred in March 2007, after providing notice to the father. In March 2007, the father filed for custody in the Pennsylvania Superior Court and failed to disclose the Oglala Tribal Court proceedings. [111] The Pennsylvania Court awarded physical and legal custody of the children to the father. [112]

In 2010, the mother filed a petition in Pennsylvania for enforcement of the Oglala Tribal Court order. [113] The Pennsylvania Court held that the trial court, upon hearing of ***40** the tribal court order, was the 'modifying court,' and that the father's Pennsylvania custody petition should be dismissed. [114] The Pennsylvania court also held that the first in time rule was applicable, which rule requires communications between the courts "when it is determined that a proceeding has been commenced in another state." [115] The Court therefore dismissed the Pennsylvania action.

In *Ex parte Rich,* [116] following a separation between husband and wife, the husband filed a complaint in the Shelby Circuit Court of Alabama in December of 2004, and in July 2005, the wife filed a domestic relations action against the husband in the Coushatta Tribal Court. [117] By the time the wife had filed the domestic relations action in tribal court, however, the husband had obtained temporary custody determination orders. [118] The Alabama court declined to give comity to the tribal court in large part because it had earlier entered the custody order and secondly because the tribal court had not acquired -jurisdiction over the husband. [119]

In *Duwyenie v. Moran,* [120] a father took the couple's child to South Dakota and filed a custody action before the Rosebud Sioux Tribal Court. Following, mother's tribe, the San Carlos Apache Tribe, filed a petition for an inter-tribal judicial conference with ***41** the Rosebud Sioux Tribal Court. The tribal courts conferred and the Rosebud court dismissed the proceeding before it, citing the father's initial failure to disclose that "the parties... resided in Gila County, Arizona, where the child was born." [121]

Subsequently, the Rosebud Sioux Tribal Council adopted a resolution asserting that tribe's exclusive jurisdiction over cases involving its tribal members. Upon father's motion, a new tribal court judge accepted jurisdiction under the revised Rosebud Sioux Tribal Court jurisdictional resolution and reinstated the case. Mother later visited the child and returned to Arizona with the child in violation of the Rosebud Sioux Tribal Court's temporary custody order. In Arizona, she filed an action for custody in the Gila County Superior Court. [122] The Superior Court conferred with the Rosebud Tribal Court, which declined to relinquish its Claim of juridiction. The Arizona trial court, following a hearing, determined that Arizona was properly the home state and accepted jurisdiction. The Arizona Supreme Court found that Arizona was indeed the home state, and had not lost that status on account of the father's "unauthorized - and arguably criminal - conduct in removing C.J. from the state. To find otherwise would defeat one of the core purposes of UCCJEA, the deterrence of child abductions" [123] The Arizona Court resolved the home ***42** state jurisdiction by noting that the Rosebud Sioux tribe did not have jurisdiction "substantially in conformity with the UCCJEA." [124]

Here, the Anchorage Superior Court did not have jurisdiction to modify the Tribal Court's initial determination under AS 25.30.300 *et seq.*

D. Asa'carsarmiut Tribal Court Initial Determination is Analogous to a Foreign Country Determination

This Court has previously analogized challenging judgments of tribal courts to that of challenging the validity of foreign judgments. [125] Under the UCCJEA,

(a) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying AS 25.30.400 through 590.
(b) Except as provided in (c) of this section, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter shall be recognized and enforced under AS 25.30.400 through 25.30.590. [126]

The trial court violated the express provisions of the UCCJEA in its order, ignoring the Tribal Court's existing judgment and order. The trial court ultimately failed ***43** to enforce that order, although it had a duty to do so under AS 25.30.410. [127] Instead of complying with this Court's comity decisions and the express language of AS 25.30.440 and 410, the trial court claimed it had jurisdiction to modify the existing order. This claim was in error. The UCCJEA modification provisions and the policy supporting those provisions prohibit a court of this state from modifying an order when:

[m]ade by a court of another state unless this court has jurisdiction to make an initial determination under AS 25.30.300(a)(1), (2), or (3) and
(1) The court of the other state determines it no longer has exclusive, continuing jurisdiction under provisions substantially similar to AS 25.30.310 or that a court of this state would be a more convenient forum under provisions substantially similar to AS 25.30.360; or

(2) A court of this state or a court of the other state determines that neither the child nor a parent, nor a person acting as the parent presently resides in the other state. [128]

This Court, like its sister courts throughout the nation, has strictly applied the UCCJEA to modifications. [129] Where an initial determination, as here, was already made, the trial court lacks jurisdiction, because the Tribal Court did not decline jurisdiction, nor did the trial court determine that it provided a more convenient forum. [130]

***44 V. Even If the Superior Court Had Jurisdiction, the Superior Court Erred by Failing to Make the Findings Required for Modification.**

Even if the UCCJEA did not apply, and even if the Superior Court was not required to conduct a comity analysis, the Superior Court abused its discretion and committed error because it failed to make the proper findings for modifying a custody decision.

A parent seeking a modification of a custody determination must make a *prima facie* showing of substantially changed circumstances that justify a modification hearing. [131] Once the parent has shown substantially changed circumstances, the superior court must hold a hearing to determine what custody arrangement is in the best interests of the child. [132] At the hearing, the court does not revisit the entirety of the parties' parental history. The court only considers the change in circumstances as "demonstrated relative to the facts and circumstances that existed at the time of the prior custody order that the party seeks to modify." [133] If a parent opposes a modification of custody or visitation, the superior court must enter its reasons for modification on the record. [134] Here, the Court conducted an entire trial and revisited the entirety of the parties' parental history with no discussion of the Tribal Court proceedings, as its findings demonstrates. [Exc. 46.]

***45** If the judge fails to enter its reasons for modification on the record, the judge commits reversible error. For example, in *Howlett v. Howlett*, a judge entered an order modifying a decree of divorce. [135] The *Howlett* order modifying the decree did not state the court's findings regarding a change of circumstances or the best interests of the child. [136] This Court held, "It is reversible error for a judge to modify custody without making findings regarding the change in circumstances and the best interests of the child." [137]

Here, the Superior Court initially stated on the record that it was exercising concurrent jurisdiction to modify the Tribal Court order. [Exc. 42.] The Superior Court stated:

> The custody orders of every court in this state are subject to modification when circumstances change. And, as the Council recognizes, this court has at least concurrent jurisdiction over the issue of the minor child's custody. No reason has been shown why this court is not an appropriate forum for the modification of the Council's 2007 order.

[Exc. 43.]

But, in the Final Orders, the Superior Court failed to consider the litigation that had occurred and was ongoing in the Tribal Court. [Exc. 44, 46.] The Tribal Court expressed concerns that maintaining the child's ties to the Native Village of Mountain

Village, his relatives, his large extended Native family in Mountain Village, and the ***46** importance of the Native child to be raised in a Native culture were in the child's best interest.

The Superior Court did not mention these concerns at all in its Final Orders. [Exc. 44, 46] Furthermore, in the absence of the Tribal Court record of the child custody determination, the Superior Court could not "modify" an existing custody order. It had no existing circumstances against which to measure a substantial change of circumstances. Moreover, Ms. Myre opposed modification of custody [R. 226-236.]. The Superior Court was required to enter its reasons for modification on the record. [138] In its Final Orders, as well as orally on the record, the Superior Court failed to specify either the Tribal Court order or circumstances constituted a substantial and material change of circumstances. [Exc. 44, 46.] Therefore, the Superior Court committed reversible error by failing to enter findings regarding the change in circumstances. [139]

CONCLUSION

The trial court lacked jurisdiction to hear this case. The Tribal Court has exclusive continuing jurisdiction. This Court should therefore order that the case be dismissed for lack of matter jurisdiction. Alternatively, the Court should remand this case with instructions to the Superior Court to communicate on the record with the Tribal Court, and thereafter to determine whether it may exercise jurisdiction. Alternatively, the Court should vacate the Superior Court's Final Orders and remand this matter to the Superior Court to state its jurisdictional basis to modify the Tribal Court orders.

Footnotes

1 The parties appearing in the case include John Wheeler, Petitioner, Jeanette Myre, Respondent, and Asa'carsarimiut Tribal Council (hereafter the "Council" or "ATC")Intervenor.

2 *See* Indian Entities Recognized, 78 F.R. 26,389-02, 26,388.

3 *See* also Affidavit of Jeanette Myre [R. 200-208], (paragraph 22 - Mr. Wheeler to return minor on December 30, 2011); [R. 209-213]. See also [R. 209-211] (flight information).

4 The UCCJEA is adopted by Alaska and codified at AS 25.30.300, et seq.

5 *See* AS 25.30.909(8) : "initial determination" means the first child custody determination concerning a particular child.

6 The Council is the recognized governing body of the Asa'carsarmiut Tribe of Mountain Village. The Tribal Court is the judicial arm of the Tribe.

7 The trial court clearly misapprehended the fact that the orders the Council sought to vindicate were not its orders, but rather the lawful orders of the Tribal Court.

8 *State v. Native Village of Tanana*, 249 P.3d 734, 737 (Alaska 2011).

9 *John v. Baker*, 982 P. 2d 738, 744 (Alaska 1999).

10 *Bradshaw v. State, Dep't of Admin., Div. of Motor Vehicles*, 224 P.3d 118, 122 (Alaska 2010); *Tesoro Petroleum Corp. v. State*, 42 P,3d 531, 535 (Alaska 2002); *Curran v. Progressive Northwestern Ins. Co.*, 298 P.3d 829, 830 (Alaska 2001).

11 *C.J. v. State Dep't of Corrections* 151 P.3d 373 375 (Alaska 2006).

12 *Id. (citing Guin v. Ha*, 591 P.2d 1281, 1284, n. 6 (Alaska 1979)).

13 *Curran*, 829 P.3d at 830 (quoting *Progressive Ins. Co. v. Simmons*, 953 P.2d 510, 512 (Alaska 1998)).

14 *Howlett v. Howlett*, 890 P.2d 1125, 1126 (Alaska 1995) (citing *Holl v. Holl*, 815 P.2d 379, 380 (Alaska 1991)).

15 *Id.* (quoting *Julsen v. Julsen*, 741 P.2d 642, 649 (Alaska 1987)) (internal quotation marks omitted).

16 *See* Indian Entities Recognized, 78 F.R. 26,389-02, 26, 388 (May 6, 2013); *see also* 58 Fed. Reg. at 54, 365-366 (Villages possess same governmental powers as federally acknowledged Indian Tribes); *see also John v. Baker*, 982 P.2d 750 ("Tribal List Act [25 U.S.C. § 479(a) *et seq.*] establishes recognition of Villages as sovereign entities").

17 The Council will use the definitions contained within AS 25.30.300, et seq. (the UCCJEA) as applicable. Accordingly, pursuant to AS 25.30.909, The Tribal Court's February 8, 2008 order is: A "child custody determination" within the meaning of AS 25.30.909(3). The

initial custody trial and subsequent disputes between the parties before the Tribal Court constitute "child custody proceedings" within the meaning of AS 25.30.909(4). The Tribal Court's February 8, 2008 Order is therefore an "initial determination" within the meaning of AS 25.30.909(8). The Tribal Court was the issuing court making the child custody determination, pursuant to AS 25.30.909(9).

18 *John v. Baker*, 982 P.2d at 763.

19 *See John v. Baker*, 30 P.3d 68 (Alaska 2001) ("*John v. Baker, II*") (this Court ordering the tribal court to refer custody matter to the Northway Tribal Court to conduct further child custody proceedings).

20 175 P.3d 50 (Alaska 2008).

21 Indian Child Welfare Act of 1978, 25 U.S.C. § 1901, et seq. (2006).

22 *See Starr*, 175 P.3d at 53-54.

23 *Id.* at 54.

24 *Id.*

25 *John v. Baker*, 982 P.2d at 759-760.

26 *Id.*

27 *ld.* at 760.

28 *See Theodore v. State*, 407 P.2d 182, 184 (Alaska 1965).

29 *John v. Baker*, 982 P.2d at 763; *John v Baker, II*, 30 P.3d at 79; *Starr*, 175 P.3d at 75; *see also In re Marriage of Skillet*, 956 P.2d 1, 18 (Mont. 1998), overruled on other grounds, by In re Estate of Big Spring, 255 P.3d 121 (Mont. 2011); *see also Harris v. Young*, 473 N.W. 2d 141, 146-147 (S.D. 1991) (concurrent jurisdiction between tribal court and state court but "whatever court system first obtained personal jurisdiction over the parties" enjoys exclusive jurisdiction).

30 *John v. Baker*, 982 P.2d at 747; *see also Starr*, 175 P.3d at 54 (finding ICWA unnecessary to protect tribe's interest because "the child would continue to be raised in the home of a Native parent and in a Native Village.")

31 *See John v. Baker*, 982 P.2d 751, citing *United States v. Wheeler*, 435 US 313, 326, 98 S.Ct 1079, 55 L.Ed. 303 (1978); *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981).

32 *See* 25 U.S.C. § 1901(3), "[T]here is no resource that is more vital to the continued existence and integrity of Indian Tribes than their children."

33 Mr. Wheeler also asserted that the proceedings that he filed in Superior Court had nothing to do with the Tribal Court's initial determination, but rather "which of those parties should be awarded custody in the best interest of the child." [R. 000523.] But, because the Tribal Court did have jurisdiction as a matter of law and because the proceedings before the Superior Court had everything to do with Wheeler's actions in the Tribal Court, Wheeler's statements quoted in this footnote and the accompanying text appear to violate Alaska R. Prof. Conduct 3.3(a)(1) (prohibiting false statement of fact or law to the tribunal) and Alaska R. Prof. Conduct 3.3(a)(3) (duty to correct false material evidence).

34 *John v. Baker*, 982 P.2d at 763.

35 *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851, 105 S.Ct. 2447, 85 L.Ed. 2d 818 (1985).

36 *Id.*

37 *See id.*

38 *See id.* (*citing New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 n.5, 102 S.Ct. 894, 71 L.E.2d 21 (1982); *White Mountain Apache Tribe v. Bracket*, 448 U.S. 136, 144 n.10, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *Williams v. Lee*, 358 U.S. 217, 223, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

39 *Nat'l Farmers Union Cos.*, 471 U.S. at 857.

40 *Id.*

41 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

42 *Id.* at 14.

43 *Id.* (*citing United States v. Mazurie*, 419 U.S. 544, 557 (1975)) (additional citations omitted).

44 *Id.*

45 *John v. Baker*, 982 P.2d at 765.

46 *See e.g. John v. Baker*, 982 P.2d at 76 n.185 (noting that the son's concerns "about the race to the courthouse appear to be overstated and speculative").

47 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987).

48 *Id.* at 15 (*citing Nat'l Farmers Union,* 471 U.S. at 855).

49 *Id.*

50 Ms. Myre presented the Tribal Court order in her request to the trial court for registration. [R 226-236.] The court declined the registration because UCCJEA was silent on registering Tribal Court orders [Exc. 21.]

51 *See also Miodowski v. Miodowski,* ___ F.Supp.2d ___, 2006 W.L. 3454797 (D. Neb. Nov. 29, 2006) (tribes possess jurisdiction over divorce actions where one party is a member of the tribe) (citing *Sanders v. Robinson,* 864 F.2d 630, 633 (9th Cir. 1988); *Nevada v. Hicks,* 196 F.3d 1020, 1032 (9th Cir. 1999) (state required to exhaust claim in tribal court as a matter of comity) *overruled on other grounds by Nevada v. Hicks,* 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001); *Oglala Sioux Tribe v. C&W Enterprises, Inc.* 516 F.Supp.2d 1039, 1043 (D. S.D. 2007) (requiring contract to exhaust tribal court remedies); Aernam v. Nenno,___ F.Supp.2d ___, 2006 W.L. 1644691 (W.D. NY 2006); *Tohono O'odham Nation v. Schwartz,* 837 F.Supp. 1024 (D. Ariz. 1993) (applying Indian Abstention Doctrine to enjoin state court from hearing contract case); *In Re Estate of Big Spring,* 255 P.3d 121 (Mont. 2011) (abstention applicable where the exercise of jurisdiction by a state court would infringe on Tribal self-government); *c.f. Weston v. Jones,* 603 N.W. 2d 706, 709 (S.D. 1999) (concurrent jurisdiction; state properly exercised jurisdiction where case first filed in state court).

52 *See Miodowski* 2006 W.L. 3454797 at *4.

53 665 N.W.2d 899, 917 (Wis. 2003).

54 *John v. Baker, II,* 30 P.3d at 74 n. 31.

55 *Id.*

56 *Nat'l Farmers Union Ins. Cos. v. Crow Tribe,* 474 U.S. 857.

57 *Id.*

58 *John v. Baker, II,* 30 P.3d at 74.

59 National Conference of Commissioners on *Uniform State Laws, Uniform Child Custody Jurisdiction Enforcement Act,* at 3 (1997) (available at htt:// www.famillaw.or/uccia.htm) (last visited 1/25/2014).

60 *Id.* at p. 6.

61 *Id.*

62 *See* House Journal Journal text Jan. 20 1998 at p. 2090.

63 *See id.*, H.B. 335, 20th Leg. (Alaska 1998); compare National Conference of Commissioners on Uniform State Laws, Uniform Child Custody Jurisdiction, and Enforcement Act at Section 102(16) (defining "Tribe" to mean "an Indian Tribe or Band or *Alaska Native Village,* which is recognized by federal law or formally acknowledged by a state.") (emphasis added)

64 Section 104(b) provides, in pertinent part:

a.

b. The courts of this state shall treat a Tribe as if it were a state of the United States for the purposes of applying Articles 1 and 2.

c. A child custody determination made by a Tribe under factual circumstances and substantial conformity with the jurisdictional standards of this Act must be recognized and enforced under Article III.

65 *Comm. Minutes of House Comm. on Health Education and Social Services,* 20th Leg., No. 0252 (Alaska June 29, 1998) (statement of Patty Swenson, Leg. Assistant).

66 *Id.*

67 *Id.* at No. 0420.

68 *Id.* at No. 0548 (statement of Deborah Behr, Assistant Attorney General). Ms. Behr discussed hypothetical cases in which a marriage occurred in Alaska, the couple divorces, and a custodial parent moves outside. There was no mention of Tribal Courts.

69 *Id.* at No. 0655.

70 *Id.* at 1380 (statement of Comm. Bundee, HESS Chairman)

71 *Comm. Minutes of House Comm. on Health Education and Social Services,* 20th Leg., No. 0078 (Alaska Feb. 5, 1998).

72 *Id.*

73 *Id.* at 0150.

74 *Id.* at 0361.

75 *See Comm. Minutes of House Judiciary on H.B.* 335, 20th Leg. (Alaska Feb. 23, 1998).

76 *Id.*

77 *Id.* at No. 1515.

78 *Id* . at No. 1637.

79 *Id.* at No. 1801.

80 *Id.* at No. 1924,

81 *Id.* at No. 1994.

82 *Id.*

83 *Id.* at No. 2072.

84 *Id.*

85 *Id.* at No. 2263-2303.

86 *Id.*

87 *Comm. Minutes of Sen. Health Education and Social Services*, 20th Leg. (Alaska Mar. 25, 1998). Again, the Legislature was not advised regarding the provisions for tribal courts. However, the Legislature was advised that the purpose of the Act was "to give swift, share enforcement of court ordered custody and visitation inexpensively in most cases without a lawyer."

88 *Comm. Minutes of Sen. Judiciary on H.B.* 335, 20th Leg. (April 27, 1998).

89 *See also* SLA 1998, Chapter 133, § 29.

90 For states adopting statutes similar to UCCJEA §§ 102(16) and 104, see Ark. Code Ann., § 9-19-102(16) (recognizing Alaska Native Villages as Tribes) and Ark. Code Ann.§ 9-19-104 (recognition of tribal custody orders); Ariz. Rev. Stat. § 25-102(16) ("Tribe means... Alaska Native Village recognized by federal law") and Ariz. Rev. Stat. § 25-1004 (recognition of tribal custody orders); Cal. Fam. Code, § 3402(b) (tribe includes Alaska Native Villages) and Cal. Fam. Code, §3404 (enforceability of tribal court order); Del. Code Ann., tit.13 § 1902(16) (tribe includes Alaska Native Villages); Fla. Stat. Ann. § 61.503(16) (tribe includes Alaska Native Villages); Ga. Code Ann. § 19-9-41 (tribe includes Alaska Native Villages); Haw. Rev. Stat., §5838-102(16) (tribe includes Alaska Native Villages); Idaho Code § 32-11-102 (tribe includes Alaska Native Villages); 750 Ill. Commp. Stat. Ann., 36/102(16) (tribe includes Alaska Native Villages); Indiana Code § 31-21-2-20; § 31-21-1-2; Iowa Code § 598B.102(16) (tribe includes Alaska Native Villages); West's Ann. Kan. Stat. Ann. § 23-37,102(17) (tribe includes Alaska Native Villages); Ky. Rev. Stat. Ann. § 403.800 (tribe includes Alaska Native Villages); La. Rev. Stat. Ann. § 13:1802(16) (tribe includes Alaska Native Villages); Me. Rev. Stat. Ann. tit., §1732(16) (tribe includes Alaska Native Villages); Md. Fam. Law Code Ann. § 9.5-101(16) (tribe includes Alaska Native Villages); Mich. Comp. Laws Ann. § 722.1102(q) (UCCJEA definition of tribe as including Alaska Native Village); Minn. Stat. Ann. § 518D.102(q) (UCCJEA definition of tribe as including Alaska Native Village); Miss. Code Ann. § 93-27-102(r) (UCCJEA definition of tribe as including Alaska Native Village); Mo. Rev. Stat. § 452.715 (directing courts to treat tribes as states of the United States for purposes of UCCJEA); Mont. Code Ann. § definition of tribe as including Alaska Native Village); Mont. Code Ann. § 40-7-135 (recognition of tribal custody orders); Nev. Rev. Stat. § 125A.165 (UCCJEA definition of tribe as including Alaska Native Village); Nev. Rev. Stat. § 125A.215 (recognition of tribal custody orders); N.C. Gen. Stat. Ann. § 50A-102(16) (UCCJEA definition of tribe as including Alaska Native Village); see id. at § 50A-104 (applying full faith and credit to child custody determinations made by a tribe); N.D. Cent. Code § 14-14.1-01(102) (UCCJEA definition of tribe as including Alaska Native Village); Neb. Rev. Stat. Ann. § 43-1227(16) (UCCJEA definition of tribe as including Alaska Native Village); N.H. Rev. Stat. Ann. § 458-A: (XVI (UCCJEA definition of tribe as including Alaska Native Village); N.J. Stat. Ann. § 2A34-54 (UCCJEA definition of tribe as including Alaska Native Village); N.M. Stat. Ann. § 40-10A-102(16) (UCCJEA definition of tribe as including Alaska Native Village); NRS § 125 A.165 and NRS § 125 A.215 (West's Nev. Rev. Stat. Anno. 2043); N.Y. Dom. Rel. Law § 75-A(16) (UCCJEA definition of tribe as including Alaska Native Village); Ohio Rev. Code Ann. § 3127.01(16) (tribe includes Alaska Native Villages); Okla. Stat, tit. 43, § 551-102(16) (UCCJEA definition of tribe as including Alaska Native Village); Or. Rev. Stat. Ann. § 109.704(16) (UCCJEA definition of tribe as including Alaska Native Village); Pa. Stat. Ann., tit. 23, § 5042 (UCCJEA definition of tribe as including Alaska Native Village); R.I. Gen. Laws, § 15-14.1-2(16) (UCCJEA definition of tribe as including Alaska Native Village); S.C. Code Ann. § 63-15-302(16) (UCCJEA definition of tribe as including Alaska Native Village); S.D. Codified Law § 26-5b-102(6) (UCCJEA definition of tribe as including Alaska Native Village); Tenn. Code Ann. § 36 (UCCJEA definition of tribe as including Alaska Native Village); Tex. Fam. Code Ann. § 152.102(15) (UCCJEA definition of tribe as including Alaska Native Village); Utah Code Ann. § 78b-13-102(16) (UCCJEA definition of tribe as including Alaska Native Village); Va Code Ann. § 10-146.1(16) (UCCJEA definition of tribe as including Alaska Native Village); W. Va. Code § 48-20-102(p) (tribe includes Alaska Native Villages); Wash. Rev. Code Ann. § 26.27.021(16) (UCCJEA definition of tribe as including Alaska Native Village); Wis. Stat. Ann. § 822.02(16) (UCCJEA definition of tribe as including Alaska Native Village); Wyo. Stat. Ann. § 20-5-202(xvi) (UCCJEA definition of tribe as including Alaska Native Village); C.f. Vt. Stat. Ann. tit. 15, § 1063 (excepting ICWA proceedings only).

91 States not adopting statutes similar to UCCJEA § 102(16) and § 104 are: Alabama (see Ala. Code § 30-3b-102, cmt to subsection 16); Colorado (*see* Colo. Rev. Stat. § 14-13-102; but *see* Colo. Rev. Stat. § 14-13-110 (cmt requiring communications with tribal court); Connecticut (see Conn. Gen. Stat. Ann. § 16-b-11 5(a); Massachusetts (see Mass. Gen. Laws Ann. ch. 209B, § 1).

92 Ala. Code § 30-3B-102 cmt. to subsection 16 ("this section, defining Indian Tribes, has been omitted since Alabama has chosen not to apply this Act to Tribal adjudications.").

93 D.C. Code Ann. § 16-4605.01; contrast V.I. Code Ann. tit. 5 § 116 (16) (recognizing Alaska Native villages).

94 AS 25.20.901.

95 982 P.2d at 763.

96 *Id.*

97 Ala. Code § 30-3B-102, cmt. to sub-section

98 *See* Model Act at Section 104(b).

99 *See Cumberland Farms Northern Inc. v. Maine Milk Comm* 'n, 428 A.2d 869 (Me. 1981);c.f. Cesar v. Alaska Workmen's Compensation Bd., 383 P.2d 805, (Alaska 1963)(Alaska's Comparable Provisions to the Federal Longshoreman's and Harbors Compensation Act, super imposed limitation and therefore federal act was not persuasive) overruled on other grounds, Board of Trade, Inc. v. State Dep't of Labor, 968 P.2d 86 (Alaska 1988).

100 *See Ratliff v. Alaska Workers' Comp. Bd.*, 721 P.2d 1138, 1141 n. 4 (Alaska 1986).

101 *Id.*

102 *See id.* (discussing federal prototype).

103 AS 25.30.380(a)(1) requires an affidavit which "must state whether the party (1) has participated, as a party... in another proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number, and the date of the child custody determination...."

104 *See* AS 25.30.380(a)(2) (requiring such disclosure).

105 *See* AS 25.30.380(c).

106 *See Starr*, 175 P.3d at 56 [citing Alaska R. Civ. P. 8(d)].

107 *Id.; Ronny M. v. Nanette H.*, 303 P.3d 392, 400 (Alaska 2013) (*quoting Atkins v. Vigil*, 59 P.3d 255, 257 (Alaska 2002) (*citing Rogers v. Rogers*, 907 P.2d 469, 471 (Alaska 1995)).

108 *See* AS 25.30.310(a)(1).

109 *Steven D. v. Nicole J.*, 308 P.3d 875, 881 (Alaska 2013).

110 18 A.3d 1175 (Pa. 2011).

111 *Id.* at 1176

112 *Id.*

113 *Id.*

114 *Id.* at 1180. The Court also held that the trial court had properly determined that the Oglala Sioux Court had some significant connections to the children.

115 *Id.*

116 953 So. 2d 409 (Ala. 2006).

117 *Id.* at 410.

118 *Id.*

119 *Id.* at 412. The Alabama Court also stated that "Alabama has chosen not to apply this Act [i.e., the UCCJEA] to Tribal adjudications" (citing Ala. Code § 30-3B-102 cmt. to subsection 16 (1975)).

120 207 P.3d 754 (Ariz. 2009).

121 *Id.* at 755.

122 *Id.*

123 *Id.* at 756 (*citing* Uniform Child Custody Jurisdiction Enforcement Act, cmt. to § 101, 9 ULA 657 (1999)).

124 *Id.* at 759-60; *see also In Re E.E.B.W.*, 733 S.E. 2d 369, 372 (Ga. 2012) (finding the court that makes an initial child custody determination has exclusive continuing jurisdiction to modify its initial determination); In re T.L.B., 272 P.3d 1148, 1153 (Colo. 2012) (where father obtained Canadian court order in substantial conformance with UCCJEA, Colorado courts did not have jurisdiction over parental responsibilities orders); Bellew v. Larese, 706 S.E.2d 78 (Ga. 2011)(Italian court did not base its decision for custody

jurisdiction on any standard recognizable under the UCCJEA, thereby violating a specific purpose of the UCCJEA, to combat forum shopping); *cf. Nasr v. El-Harke,* 2011 WL 2175870 (Minn. App. 2011) (after mother took the child to the United States, father obtained Lebanese court order requiring return of the minor child and subsequently petitioned for enforcement; court held Lebanon had properly applied the jurisdictional law and had exclusive jurisdiction).

125 *John v Baker, II,* 30 P.3d at 72.

126 AS 25.30.810.

127 AS 25.30.410 provides:

A court of this state shall recognize and enforce a child custody determination of the court of another state if the court of the other state exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter.

128 AS 25.30.320.

129 *See Robertson v. Riplett,* 194 P.3d 382, 385 (Alaska 2008).

130 *See also, id.* at 386 (finding Alaska courts lack subject matter jurisdiction to modify Ohio custody determination).

131 *Id.*

132 AS 25.20.110.

133 *Heather W. v. Rudy R.,* 274 P.3d 478, 481-82 (Alaska 2012).

134 AS 25.110.

135 *Howlett v. Howlett,* 890 P.2d 1127.

136 *Id.*

137 *Id.* at 1127 (citing *Lee v. Cox,* 790 P.2d 1359, 1362 (Alaska 1990)).

138 AS 25.20.110.

139 *Howlett,* 890 P.2d at 1127.

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