

University of Nebraska - Lincoln

DigitalCommons@University of Nebraska - Lincoln

Court Review: The Journal of the American Judges
Association

American Judges Association

1-1-2009

Beyond Minimum Standards: Federal Requirements and State Interpretations of the Indian Child Welfare Act

Kathryn E. Fort

Michigan State University College of Law

Follow this and additional works at: <http://digitalcommons.unl.edu/ajacourtreview>

Fort, Kathryn E., "Beyond Minimum Standards: Federal Requirements and State Interpretations of the Indian Child Welfare Act" (2009). *Court Review: The Journal of the American Judges Association*. Paper 281.
<http://digitalcommons.unl.edu/ajacourtreview/281>

This Article is brought to you for free and open access by the American Judges Association at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Court Review: The Journal of the American Judges Association by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

Beyond Minimum Standards:

Federal Requirements and State Interpretations of the Indian Child Welfare Act

Kathryn E. Fort

A woman comes to state court with a tribal custody order, seeking to modify its provisions. The state removes a child from her home and her mother is a tribal citizen. A couple seeks a divorce in state court but both are tribal citizens. When these cases appear in state courts, practitioners need to know how and where family law and Indian law intersect, and how that intersection shifts the cases out of the majority of family law cases in state courts. Because family law is such a large portion of the civil docket, it is easy for certain procedures to become routine. However, some cases involving tribal citizens require the application of different laws and different standards which are hardly routine. The intersection of family law and Indian law may account for a small number of cases, but particularly in states with high Native populations it is necessary for all state court practitioners to have a basic understanding of the issues involved.

The appearance of a tribal citizen or tribal court order in state court may cause confusion for state court judges and practitioners. Judges and lawyers may try to handle the case under the state family laws with which they are already familiar. However, there are specific federal and state laws which govern many of these situations. On the federal level, the most important is the Indian Child Welfare Act (ICWA).¹ ICWA requires certain minimum federal standards be met when an Indian child is in state court. However, courts are also grappling with the Violence Against Women Act (VAWA),² and the Adoption and Safe Families Act (ASFA).³ In addition, state laws can provide more than the federal minimum standards provided by ICWA and also affect cases when ICWA does not apply. Specifically, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)⁴ as adopted by the state, and various full faith and credit rules and interpretations, address tribal courts and tribal court orders when in state court.

THE INDIAN CHILD WELFARE ACT

Of the federal laws which come into play in state courts, by

far the most important is the Indian Child Welfare Act (ICWA). ICWA is the law governing cases involving the removal of Indian children from their homes and tribes. Passed in 1978, ICWA governs the removal of an "Indian child" from the home, the termination of parental rights, and pre-adoption and adoption placement procedures.⁵ The goal of ICWA is to preserve Indian families and keep children connected to their tribe against an onslaught of state agency attempts to break up these families and place the children with non-Indian families. For example, from 1971 to 1972, Indian children were adopted at eight times the rate of non-Indian children, and virtually all of these children were placed in non-Indian homes.⁶ Because the very existence of a tribe is in its children, this taking of children strikes at the heart of tribes and their existence.⁷ Understanding ICWA's dual goals – to protect both the child and the tribe – is the first step in understanding the various provisions of the law.

ICWA changes the rules of traditional family law practice by requiring different, and higher, standards based on a child's tribal status. Though ICWA singles out a specific group for different treatment, such as higher standards of proof for terminating parental rights, or requiring more effort by the state in maintaining family ties, this federal law is not unconstitutional. The group ICWA seeks to protect are tribal citizens and their nations. ICWA is based on the government-to-government relationship between the federal government and Indian nations, and the political status of tribal citizens as citizens of their nations.⁸ The federal government has long recognized a "trust relationship" with tribes, based on treaties, statutes and court cases. Some also trace the relationship to the Commerce Clause and Treaty Clause of the Constitution. As stated in the *Handbook of Federal Indian Law*, "[t]he commerce clause has become the linchpin in the more general power over Indian affairs recognized by Congress and the courts."⁹ The Commerce Clause, therefore, "anticipat[es] and affirm[s] federal law singl[ing] out Indian nations and their members for separate

Authors' Note: Portions of this article were previously published as *When the Rules Shift: A Review of the Indian Child Welfare Act*, M.C.R. 2.615 and *Tribal Court Jurisdiction in Michigan Family Law Cases* in 10 MICHIGAN CHILD WELFARE LAW JOURNAL 11 (Spring 2007).

Footnotes

1. 25 U.S.C. §§1901-1963.
2. Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).
3. PL 105-89; 111 Stat 2115.
4. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997), available at <http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.htm> (versions of the UCCJEA have been passed by 40

states, <http://www.nccusl.org/Update/docs/UCCJEAadoptions.pdf>).

5. See B.J. JONES, MARK TILDEN & KELLY GAINES-STONER, *THE INDIAN CHILD WELFARE ACT HANDBOOK* (2nd ed. 2008).
6. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).
7. See Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of the Legislative History* (Michigan State University Indigenous Law & Policy Center Occasional Paper Series, 2009-04 (April 10, 2009)). available at <http://www.law.msu.edu/indigenous/papers/2009-04.pdf>.
8. 25 U.S.C. §1901.
9. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §5.01[4] (Nell Jessup Newton et al. eds. 2005).

treatment.”¹⁰ The Supreme Court also provides a basis for the trust relationship in various decisions as early as 1831.¹¹

The trust relationship now covers a broad range of federal legislation designed to provide services and benefits to tribes and tribal citizens, and is often cited by Congress when passing legislation designed for tribes or tribal citizens. In ICWA, Congress started the findings section by “recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people....”¹² Because of this special relationship, the Supreme Court has held that Congress has the power to “legislate on behalf of federally recognized Indian tribes.”¹³ This singling out is also based on tribal citizens’ own political relationship as citizens of their tribes.¹⁴ As citizens, or potential citizens, of a tribe, a child is due both the benefits and responsibilities as a tribal citizen and the benefits of the federal trust relationship. In removing a child from a tribe, not only does a tribe lose one of its citizens, the child loses her tribe.

For these reasons, ICWA is a particularly important statute. However, while ICWA itself is not long or complex, state interpretations of it are wide ranging. Most importantly, ICWA slows down the usual practices regarding the removal and placement of Indian children outside of their homes and their tribes. This is because of the abuse, or complete lack, of due process procedures when children were systematically removed from parents by the state.¹⁵ Indeed, even with the implementation of ICWA, certain due process procedures required by the statute are still systematically not followed.¹⁶

While the only Supreme Court case interpreting the statute, *Mississippi Band of Choctaw Indians v. Holyfield*¹⁷ strongly encouraged uniform state application of the law, stating “a statute under which different rules apply from time to time to the same child, simply as a result of his or her transport from one State to another, cannot be what Congress had in mind,”¹⁸ interpretations of the provisions of ICWA do vary widely from state to state. In addition, ICWA provides for the “minimum federal standards” for protection of Indian children in state court. Some states have passed laws with higher standards for Indian children in their state courts. Regardless, the federal provisions of ICWA require state courts to follow certain procedures in ICWA cases.

ICWA applies to specific “child custody proceedings.” These proceedings are usually non-voluntary, such as foster care or guardianship placement where the child “cannot be returned upon demand” of the parent, or permanent, such as termination of parental rights, pre-adoption and adoption placement procedures.¹⁹ For example, while deciding to allow

a child to be adopted may be a voluntary act by the parent, it is a permanent severance of the child from the parent, and likely the tribe, and therefore falls under the ICWA. ICWA does not apply in custody disputes stemming from divorce cases. However, as discussed below, laws other than ICWA or state divorce laws may govern in those cases.

For ICWA to apply in these situations, the child must be considered an “Indian child.” The state agency bringing the action falling under ICWA has the affirmative duty to determine whether the child might be a tribal member or eligible for tribal citizenship and a biological child of a tribal citizen. Since only the tribe has the ability to determine whether the child would be considered an Indian child under the act, the tribe must be contacted by the state in these proceedings. While the court does not have the ability to determine the child’s status as an Indian child, it does have a role in determining whether the *tribe* qualifies under ICWA, specifically, whether the tribe is federally recognized.

While the court must determine if the child is potentially an “Indian child,” it is not, nor is it ever, the state court’s role to determine if the child is *eligible* for tribal membership. That is a decision of the tribe, and implicates a key area of tribal sovereignty. The Supreme Court, in *Santa Clara Pueblo v. Martinez*, stated “a tribe’s right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community.”²⁰ Most states around the country have upheld this fundamental provision of tribal sovereignty.²¹

In conjunction with determining if ICWA applies to the case, the state also must comply with the notice provision. The state is required to notify the tribe, the parent, the “Indian custodian” and the regional BIA office of the proceedings as soon as the state has any knowledge the case might fall under ICWA. The agency making the petition has the duty to make the notification and make it properly. Lack of notice at the start of a case can be an incurable flaw later in the case. For example, the Michigan Appeals Court has held that “failure to comply with the requirements of the ICWA may render invalid a proceeding terminating a parent’s rights.”²² California routinely remands

...ICWA is a particularly important statute. However, while ICWA itself is not long or complex, state interpretations of it are wide ranging.

10. *Id.*, §14.03[2][b][i].

11. *Id.*, §5.04[4][a].

12. 25 U.S.C. §1901.

13. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

14. *Id.* at 554.

15. Fletcher, *supra* note 7, at 4.

16. See, Kathryn Fort, *The Cherokee Conundrum: California Courts and the Indian Child Welfare Act* (MSU Legal Studies Research Paper No. 07-07 (April 20, 2009)), available at SSRN http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392293.

17. 490 U.S. 30 (1989).

18. *Id.* at 46.

19. 25 U.S.C. §1903(1).

20. 436 U.S. 49, 72 n.32 (1978).

21. See *In re N.E.G.P.*, 626 N.W.2d 921, 924 (Mich. App. 2001); NATIVE AMERICAN RIGHTS FUND, A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT 5 (2007), available at <http://narf.org/icwa/print/application.pdf>.

22. *In re N.E.G.P.*, 626 N.W.2d at 923.

Improper notice means ICWA cannot be applied to the rest of the proceeding, since the tribe may have no way of knowing the case even exists.

ICWA cases for noncompliance with the notice provisions of the statute.²³ Without notice, the tribe is unable to exercise its right of intervention and petition for transfer. Improper notice means ICWA cannot be applied to the rest of the proceeding, since the tribe may have no way of knowing the case even exists. This notice is of particular importance given the jurisdictional aspects of

ICWA. Finally, notifying and communicating with the tribe is one way a state court may determine whether the child is considered an Indian child by the tribe.

Initially ICWA shifts jurisdiction slightly from the usual civil tribal jurisdiction interpretation. In an ICWA case, if the Indian child resides off of the reservation, the state and tribe have *concurrent* jurisdiction. If the child resides on the reservation the tribe has *exclusive* jurisdiction. These cases are not evaluated under principles of civil tribal jurisdiction; ICWA clearly provides for the jurisdictional boundaries in these cases. If the state is exercising its concurrent jurisdiction, the tribe, or Indian custodian, has the right to intervene in the case. The tribe also has the right to petition for transfer of the case to tribal court. Absent “good cause to the contrary” the state court “shall” transfer the case to the tribal court.²⁴

ICWA is a highly litigated statute, and both the intervention and transfer provisions have been the subject of cases in state court. “Good cause” is a difficult standard to quantify, and each state has determined for itself what “good cause” may be. One area of guidance is the Bureau of Indian Affairs *Guidelines for State Courts; Indian Child Custody Proceedings*.²⁵ The Guidelines are not binding on state courts, though many states find them persuasive. While the Guidelines provide different factors involved to determine “good cause,” including the timeliness of the petition for transfer, the best interests of the child standard is not to be considered by the court. Because the best interest standard is used by most family law courts, there have been some cases where courts have incorrectly applied the best interests standard to this jurisdictional standard. In South Dakota, the supreme court overturned a decision by the trial court to deny a transfer to tribal court based on an evaluation of the best interests of the child. The court held “that a substitute parent might provide a child with good care or even better care than its natural parent is not an appropriate standard for determining the best interests of the child in the context of a ICWA transfer decision.”²⁶ As an appellate court in Illinois pointed out, the best interests test was “relevant not to determine juris-

diction but to ascertain placement.”²⁷

If the tribe does not seek to transfer the case to tribal court, or if the state fails to transfer the case because of good cause, the state is still bound by ICWA and required to follow its provisions. Among others, these include the placement provisions and active efforts provision. When a child is removed from her family and placed in foster care or with an adoptive family, the court must place the child in accordance with the ICWA’s placement preferences. Importantly, the court first must determine if the tribe has passed a law regarding placement preferences, as these are to be the primary guidance for a state court to follow. Otherwise, children in foster care must be placed in the “least restrictive setting” in “reasonable proximity to his or her home” and placed with either a member of the child’s extended family, a foster home approved or licensed by the tribe, an Indian foster home licensed by the state, or an institution run by an Indian organization or approved by the tribe. Children being adopted must be placed with a member of the child’s family, members of the child’s tribe, or another Indian family.²⁸

There is, however, a “good cause,” exception to the ICWA placement preferences as well, and some state courts have inserted the best interests test into this determination as well. For a court to deviate from the placement preferences, it must provide “good cause to the contrary.”²⁹ Again, the BIA Guidelines provide some guidance as to what “good cause” might consist of, but specifically does not list a best interests standard as good cause. ICWA assumes the best interests of the Indian child are served by following the placement preferences. Using the best interests standard of the state court to undermine the placement preferences ignores Congressional intent and fails to acknowledge the reasons ICWA had to be passed in the first place. The best interests test is amorphous, and allows the court to insert the very standards and values ICWA tries to counter.

Another vital provision in the act is the active efforts section. The phrase “active efforts” refers to the portion of the law which requires that in the event of foster care placement or termination of parental rights, the party seeking to remove the child must demonstrate that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”³⁰ Unfortunately, the statute does not define what these active efforts need to be, and are often the subject of litigation. The BIA Guidelines do provide some instruction, stating that the efforts should “take into account the prevailing social and cultural conditions and way of life of the Indian child’s tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers.”³¹ At the very least, active efforts require more than pas-

23. Fort, *supra* note 16, at 18.

24. 25 U.S.C §1911.

25. Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 FEDERAL REGISTER 67584 (Nov. 26, 1979) (“BIA Guidelines”).

26. In re J.C.D., 686 N.W.2d 647, 650 (S.D. 2004).

27. Interest of Armell, 550 N.E.2d 1060, 1065 (Ill. 1990) (cited in

Michael J. Dale, *State Court Jurisdiction under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 390 (1992)).

28. 25 U.S.C. §1915.

29. *Id.*

30. *Id.* at §1912(d).

31. BIA Guidelines, D.2, 44 Fed Reg 67584, 67592.

sive efforts, and also must include tribal services and culturally appropriate services.³²

Because of the relatively amorphous definition, there are not many cases listing what satisfies the active efforts requirement. Rather, the courts tend to focus on the facts of each individual case to determine whether active efforts occurred. A majority of state courts have found active efforts require more than the normal services offered to non-Indian parents.³³ In South Dakota, the Supreme Court followed the Holyfield directive for the statute to be applied uniformly across the country and determined that active efforts did require more than the regular services offered by the state.³⁴

More recently, courts have been struggling with the interplay between ICWA and AFSA. However, AFSA and ICWA have contradictory goals, and ought not to be read together. Generally the biggest conflict comes under ICWA's requirement of active efforts to rehabilitate and reunite the Indian family separated by the court. Under AFSA, in certain circumstances, reasonable efforts are not required by the court before terminating parental rights. Indeed, the goals of AFSA, to hurry up adoption proceedings and streamline the process, are the opposite of ICWA, which is to slow down the parental termination process and make sure proper procedures are followed before the permanent removal of Indian children from their families. Where ICWA applies, AFSA should not.³⁵

Even after the application of active efforts, there are different standards of proof in non-ICWA and ICWA cases. Under ICWA, removal of an Indian child from the home requires clear and convincing evidence, and testimony by qualified experts, that leaving the child in the home will lead to "serious emotional or physical damage to the child." Under ICWA, termination of parental rights requires evidence beyond a reasonable doubt, and testimony by qualified experts, that the child will suffer "serious emotional or physical damage."³⁶ Different states have applied these standards in various ways. For example, in Michigan, both the federal and state levels of evidence must be met. Therefore, to terminate the parental rights of a parent to an Indian child, the court must prove the ICWA standard, and also "find clear and convincing evidence that one or more enumerated statutory grounds for termination exist."³⁷

ICWA also provides rules for the enforcement of any tribal court orders a state court might encounter in an ICWA case. Under ICWA, tribal court judgments are to be enforced by the state court without any question into the nature of the tribal court or previous tribal court proceedings. In other words, in ICWA cases, tribal court orders, tribal laws and judicial proceedings are granted full faith and credit by the state courts.³⁸

Finally, some courts have used the judicially created existing Indian family exception to avoid applying ICWA at all. Courts created the existing Indian family exception for children and families the court determines should have no contact with the tribe. In other words, the court puts itself in the position of determining the "Indian-ness" of a child, and ignores the federal requirements of ICWA's Indian child definition. Many states have rejected this exception, and – notably – it was also recently rejected in Kansas, the state to first introduce the exception.³⁹ States which have also rejected the existing Indian family exception include Michigan, New York, Illinois and Alaska, among many others.⁴⁰

Some states have adopted ICWA as either a state law or court rule.

STATE LAWS, COURT RULES, AND ICWA

Some states have adopted ICWA as either a state law or court rule. These laws or rules may be different than the federal statute. As Congress wrote, ICWA is considered the "federal minimum standards" governing cases involving Indian children. Some states have chosen to go beyond those minimum standards, while some adopt the law with no changes. Under ICWA, when a state or federal law provides a "higher standard of protection" for the parents or Indian custodian of an Indian child, the state or federal law applies.⁴¹ However, state courts react to these laws and rules in different ways. One issue with state law adaption of ICWA is the state court's ability to review, and determine the state constitutionality of, these laws.

In Iowa, the state legislature adopted ICWA as state law, with some changes to various parts of the federal statute. The Iowa ICWA statute extended the definition of Indian child to include children recognized as members of the tribal community.⁴² Recently the Iowa Supreme Court found that portion of the ICWA statute unconstitutional. Citing the U.S. Supreme Court's holding in *Morton v. Mancari*, the Iowa Court determined that the state definition impermissibly included "racially" Indian children, not just children who are tribal citizens or eligible for tribal citizenship.⁴³

After a series of cases in the California appellate courts, the California legislature passed a law banning the courts from using the existing Indian family doctrine to prevent the application of ICWA.⁴⁴ At least one appellate court found that statute to be unconstitutional and applied the existing Indian family doctrine.⁴⁵ However, the legislature passed the law again, now as Welfare and Institutions Code §224, and a 2007

32. See *In re Children of SW*, 727 NW2d 144, 149 (Minn. App. 2007).

33. See, e.g., *In re JS*, 177 P3d 590, 593-4 (Okla. Civ. App. 2008); Fletcher, *supra* note 7, at 9.

34. *In re JS*, 177 P3d at 593.

35. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed Reg 4020-01, 4029-30 (January 25, 2000) (While AFSA is silent on ICWA, the Federal Regulations interpreting AFSA conclude that "nothing in this regulation supersedes ICWA requirements.").

36. 25 U.S.C. §1912(e),(f).

37. *In re Dougherty*, 599 N.W.2d 722, 776 (Mich. Ct. App. 1999).

38. 25 U.S.C. §1911

39. *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982), *overruled by* *In re A.J.S.*, 204 P.3d 543 (Kan. 2009).

40. NATIVE AMERICAN RIGHTS FUND, *supra* note 21 at 2-3.

41. 25 USC §1921.

42. IOWA CODE §232B.3 (2003).

43. *In re A.W.*, 741 N.W.2d 793 (Iowa 2007).

44. CAL. WELF. & INST. § 360.6 (1999).

45. *In re Santos Y.*, 92 Cal. App. 4th 1274 (Cal. App. 2 Dist., 2001).

Generally, the treatment of tribal court orders in family law cases is governed by both state and federal law

appellate court case upheld the law as constitutional.⁴⁶ There is still a split, however, in the California appellate courts regarding the application of the existing Indian family exception.

In Michigan, the Department of Human Services of course must follow the notice requirements of

ICWA.⁴⁷ The Michigan Appeals Court agreed with a Vermont Supreme Court case that “it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child.”⁴⁸ However, Michigan also provides for more extensive notice proceedings than the ICWA notice provisions. Michigan’s court rule on ICWA requires a court to inquire about the child or parent’s status as a tribal citizen. The appellate court cited to ICWA and stated that “Michigan imposes a more stringent standard than that found in §1912(a) of the ICWA to ensure that inquiry and notification are performed.”⁴⁹

In another case, though, the Michigan appeals court maintained ICWA’s narrow definition of an Indian child, holding that ICWA does not apply when the “minor child is claimed to be an Indian child from an Indian tribe that is not recognized as eligible for services provided to Indians by the Secretary of the Interior,”⁵⁰ contrary to the state’s own *Children’s Foster Care Manual*, which encouraged the courts to extend ICWA to state-recognized or Canadian tribes. The tribe in question in the case was neither a non-federally recognized tribe located in Michigan nor a Canadian First Nation. Whether the Michigan court would consider those under Michigan ICWA standards is questionable.

Finally, Wisconsin has also found that when trying to “harmonize” its children’s code and ICWA, the state law may be invoked when it provides higher standards of protection. Specifically, the court stated when the state law “provides a higher standard of protection than is mandated by the ICWA, we find it appropriate that where the children’s code provides additional safeguards beyond what is mandated by ICWA, those additional safeguards should be followed.”⁵¹

At this time at least two states, Michigan and North Carolina, are contemplating incorporating ICWA into state statutes to both clarify and potentially extend ICWA’s federal minimum protections.⁵²

FULL FAITH AND CREDIT IN NON-ICWA FAMILY LAW CASES

There are family law cases where ICWA does not apply, but other state and federal laws may. Generally, the treatment of tribal court orders in family law cases is governed by both state and federal law. Part of the issue comes down to distinguishing between full faith and credit, comity and various state court rules regarding comity or full faith and credit.

Full faith and credit is guaranteed in Art. IV of the United States Constitution, to ensure the sister states give full force to the judicial proceedings in other states. When faced with an order from another state, the implementation and enforcement of it ought to be automatic. There are no discussions of due process standards or reading behind the order itself. A federal statute, 28 USC §1738, expanded the full faith and credit clause to territories and possessions of the United States. The statute does not explicitly include tribes. However, two states – Idaho and New Mexico – interpret the statute to include tribes.⁵³ These states conclude the tribes are equivalent territories, and therefore grant full faith and credit to tribal court judgments. The vast majority of states do not interpret that statute or the Constitution to ensure full faith and credit for Indian tribes. However, other federal statutes such as the Violence Against Women Act and the Child Support Order Act include full faith and credit for tribal court order provisions. When these statutes apply, the state court does not invoke a state statute, rule or comity when enforcing the judgment. Enforcement of the judgment is automatic under these federal statutes.

When faced with a foreign court order, a state or federal court will invoke principles of “comity.” Comity is a far more amorphous concept, based on the respect of another sovereign. The Supreme Court, in *Hilton v. Guyot*,⁵⁴ stated that comity was “neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation,” which it has cited approvingly in later cases.⁵⁵ Enforcing a foreign court order is not guaranteed or required. Comity requires a discussion of a number of factors, including due process concerns and public policy issues. Indeed, it has been noted that the use of comity may even bring up concerns of separation of powers and political question issues, as only Congress and the Executive Branch have the power to deal with foreign nations. The granting, or not granting, of comity to a foreign court may have the potential to cause larger foreign policy problems.⁵⁶

A majority of states, when enforcing tribal court judgments not governed by federally mandated full faith and credit laws still use principles of comity to determine the enforcement of

46. In re Vincent M., 150 Cal. App. 4th 1247 (Cal. App. 6 Dist., 2007).

47. In re IEM, 592 N.W.2d 751, 756 (Mich. App. 1999).

48. *Id.* at 757 (quoting *In re M.C.P.*, 571 A.2d 627 (Vt. 1989)).

49. In re Elliot, 554 N.W.2d 32, 38 (Mich. App. 1996).

50. In re Fried, 702 N.W.2d 192 (Mich. App. 2005).

51. In re D.S.P., 480 N.W.2d 234, 238 (Wis. 1992).

52. Interview with Allie Maldonado, General Counsel for the Little

Traverse Bay Bands of Odawa Indians, in Lansing, MI (May 11, 2009).

53. *Jim v. City Financial Services Corp.*, 533 P.2d 751 (N.M. 1975); *Sheppard v. Sheppard*, 655 P.2d 895 (Idaho 1982).

54. 159 U.S. 113, 164 (1895).

55. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408 (1964).

56. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Intern.*, 493 U.S. 400 (1990).

the judgment. Some states, however, have passed a statute or court rule to provide guidance for state courts when enforcing a tribal court judgment. In Michigan, a unique court rule governs the enforcement of tribal court judgments when there is no other state or federal law dictating otherwise. M.C.R. 2.615 is not quite full faith and credit, but is a higher standard than comity, and is a reciprocal rule. In order for a tribe to have its orders enforced in a Michigan state court, it must pass a law or rule ensuring its tribal courts enforce state court judgments. The tribe must notify the State Court Administrative Office (SCAO) of their rule. The SCAO maintains a list of which tribes qualify under M.C.R. 2.615. In addition, M.C.R. 2.615 does not limit reciprocity to tribes located in Michigan. Any federally recognized tribe can file with the SCAO, provided the tribe has passed the rule regarding the enforcement of Michigan state court judgments in their court.

Under M.C.R. 2.615, a tribal court judgment is presumed valid. The party challenging the order must prove otherwise. This is a distinct difference from comity, where the burden of proof is on the party seeking to enforce the foreign order. Therefore, a tribal court judgment is presumed valid by the court unless challenged, and when challenged, that party must demonstrate one of five factors applies to the order. Four of the factors are types of evaluations the state courts do in other comity cases, including whether the order was obtained through fraud or duress, without notice or hearing, "repugnant" to public policy, or not final. The fifth factor, however, is a lack of personal or subject matter jurisdiction, a determination which requires an understanding of civil tribal jurisdiction.

Regardless of state court rules, in all cases, a court must determine whether the tribe had jurisdiction over the case under which the order arises. Civil tribal jurisdiction requires a complex analysis and complete understanding of the parties' tribal citizenship and residence.⁵⁷ As a sovereign entity, a tribe has inherent jurisdiction over its own citizens residing on the reservation. If the tribal citizens are not domiciled on the reservation, the state and tribe may have concurrent jurisdiction, depending on the tribe's code. In some instances, the tribe has jurisdiction over non-Indians as well. If a dispute occurs between a tribal citizen and a non-Indian on the reservation, the tribe may have jurisdiction, but if the same dispute arises off the reservation, the state has jurisdiction. Of course, a non-Indian can consent to tribal jurisdiction, and in some cases the tribal code extends jurisdiction to non-Indians living on the reservation.

One additional issue regarding full faith and credit implicates the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA).⁵⁸ Many states have adopted this model statute as state law. In the draft published by the National Conference of Commissioners on Uniform State Laws, tribes were included in section 102 and 104. Specifically, the draft law stated that if ICWA applies to a case, the UCCJEA does not. However, the draft law also requires states to treat tribes as if they are sister states for the purposes of applying the

law, and also states that tribal determination of child custody must be "recognized and enforced."⁵⁹ If the tribal court had proper jurisdiction over the custody proceeding, then the state cannot later exercise jurisdiction other than to enforce the custody order. While some states may not have chosen to add the additional language when they codified the UCCJEA as state law, some have. Since the UCCJEA is used every day by family court practitioners, treating tribes as states does not require a difficult analysis. The same rules apply to a tribal court order as to a state court order.

CONCLUSION

The interplay of these laws can be confusing, particularly if the practitioner is not familiar with their language or application. Family law cases are already emotionally difficult, with multiple parties trying to achieve what they believe will be the best conclusion for a child. When the family court routine shifts with the introduction of different laws, confusion and miscommunication is not uncommon. An understanding of these laws and why they apply makes it easier for all involved parties. However, ignoring ICWA or misapplying ICWA early on only leads to extended litigation. The court's adherence to the federal law can ensure the relatively quick resolution of difficult cases.

Many tribes now have fully functioning tribal courts at both the trial and appellate level. Both highly educated tribal citizens and traditional tribal elders sit as judges and justices on these courts. Acknowledging and respecting the work these tribal courts do on a daily basis is a first step for any state court judge when faced with a tribal court order or a motion to transfer a case to tribal court. Cooperation and communication between tribal and state courts make difficult cases easier and lead to better resolutions for those involved.



Kathryn E. Fort is the Staff Attorney and Adjunct Professor for the Indigenous Law and Policy Center at Michigan State University College of Law. In her role with the Center, she teaches both clinical and doctrinal classes, researches and writes on behalf of Center clients and manages administrative aspects of the Center. She was recently published in the

George Mason Law Review and the American Indian Law Review and works on laches and land claims, the Indian Child Welfare Act, and legal history as applied in federal Indian law. Ms. Fort received her J.D. magna cum laude from Michigan State University College of Law with the Certificate in Indigenous Law, and is licensed to practice law in Michigan. She received her B.A. magna cum laude in History (with honors) from Hollins University in Roanoke, Virginia.

57. For a more detailed discussion of tribal civil jurisdiction, see COHEN'S HANDBOOK, *supra* note 9, at 7.

58. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, *available*

at <http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997.act.pdf>

59. *Id.* at §104.