

**A Grand Adventure:
Exploring FFCSOA, Tribal
Sovereignty, and
Tribal/State Cooperation on
the Trail to Delivering Child
Support Services**





Why Is This Area of Law Unique?

- States already work with interstate and international cases.
- Tribes are sovereign entities; described in one decision as “domestic dependent nations.” *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).
- State subject matter jurisdiction is not present if it will “infringe on the right of reservation Indians to make their own laws and be ruled by them.” *Williams v. Lee*, 358 U.S. 217, 220 (1959).



Why Bother?

Don't Let Cases with Tribal Children Fall Off the Table

- Tribal kids are state kids, too.
- Dual citizenship should be a benefit for Tribal children, not a detriment.
- Be Practical – Make Decisions Based on Common Cents (¢¢¢¢) for Children
- Good outcomes can be obtained by partnering with Tribal programs or appearing in Tribal court.



Caveats

- Every jurisdiction is different.
- Predictions from existing case law are not guarantees.
- Since not every tribe has a IV-D program, but each child in the IV-D caseload deserves services and support, some advocacy is presented in favor of state jurisdiction
- Administrative states may be different from judicial states.
- Does NOT apply to Alaska!



Context

- ND establishes and modifies obligations judicially, often through stipulations or uncontested proceedings with no hearing.
- ND is home to four reservations plus a small portion of a fifth.
 - Two Tribes have a IV-D program and two have tribal courts in which ND IV-D sends an attorney to handle cases.
 - In 2009, nearly 10% of the ND IV-D caseload was in LJ (lack of jurisdiction) status; today, it is a quarter that amount (2.88%).
- ND has no jurisdiction over tribes under Public Law 280.



Major Takeaways

- Focus on areas of agreement
- Concurrent jurisdiction will exist in a lot of cases – think practically
- Don't be intimidated – a handful of case facts will lead to a sound jurisdiction decision in nearly every case
- If jurisdiction in one place is clear, and jurisdiction in another place is uncertain, go with the sure thing



Major Takeaways

- If establishing paternity will make the child eligible for membership in a tribe, jurisdiction will almost always be with tribal court
- Tribal sovereignty can only be raised by tribal members
 - Not by Non-Indians
 - Not by Non-member Indians



A Good Place to Begin

For an extensive monograph on this subject sponsored by the Federal Office of Child Support Enforcement, see Tribal and State Jurisdiction to Establish and Enforce Child Support, Attachment to OCSE IM-07-03.

http://www.acf.hhs.gov/sites/default/files/ocse/im_07_03a.doc



Foundation of Cooperation

- Distinguish between who maintains an open IV-D case and which jurisdiction has control over the support order
 - A IV-D program can have an open case with no court jurisdiction to establish or modify
- The depths of jurisdiction are the depths of despair – focus first, second, and third on areas where you agree
 - Do you talk about religion and politics with your in-laws?
- Don't just toss aside an order as lacking jurisdiction



Case Referral versus Case Transfer

- IV-D regulations make it easy to open a case in several jurisdictions
- As a general rule, a parent can insist on having multiple jurisdictions work the same case
- IV-D regulations make closing duplicate cases much harder
- Since 2016, states can transfer cases to Tribes; Tribes cannot transfer to states



Concurrent Jurisdiction

- Concurrent does not mean you can have dueling orders – remember FFCCSOA.
- The first court to issue a judgment for paternity or child support gets to handle the case.
- What if jurisdiction is “reserved”?



Subject Matter Jurisdiction versus Personal Jurisdiction

- Service of process on the reservation can be challenging.
- A Tribal member's domicile on the Tribe's reservation is not sufficient for minimum contacts in the State.
- Personal jurisdiction can be waived; subject matter usually cannot.



First Step – Some General Rules

- State courts must be open to lawsuits brought by Tribal members against non-Indians. Three Affiliated Tribes v. Wold Eng'g (Wold I), 467 U.S. 138, 148-49 (1984).
- A non-Indian cannot invoke Tribal sovereignty. State v. Zaman, 946 P.2d 459 (Ariz. 1997). See also Roe v. Doe, 2002 ND 136, 649 N.W.2d 566.
- Tribal members going outside reservation boundaries are generally subject to state jurisdiction over off-reservation activities, including contracts. Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).



First Step – Some General Rules

- If the parents are members of different Tribes, the interests of each Tribe must be analyzed separately under the infringement test. Roe v. Doe, 2002 ND 136, 649 N.W.2d 566.
 - A member of a different Tribe stands “on the same footing as non-Indians.” Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 161 (1980).
- Tribes generally lack civil authority over the conduct of nonmembers unless “necessary to protect Tribal self-government or to control internal relations.” Nevada v. Hicks, 553 U.S. 353, 376-77 (2001). See also Strate v. A-1 Contractors, 520 U.S. 438 (1997); Montana v. United States, 450 U.S. 544 (1981).



The Next Step – What Kind of Case

- Establishment of Paternity
- Establishment of an obligation (paternity not an issue)
- Review and adjustment of an obligation
- Enforcement of an obligation



Establishment of Paternity

- In most jurisdictions, the location of conception is a key question, along with residence and Tribal membership.
- Some jurisdictions look to the location of an application for public assistance as where the cause of action arises.
- The determination of parentage of a child of Tribal members “is intimately connected with the right of reservation Indians to make their own laws and be ruled by them.” McKenzie County Social Service Bd. V. C.G., 2001 ND 151, 633 N.W.2d 157.



Establishment of Paternity

What Facts Do You Consider?

- Where did the cause of action arise?
- Is the custodial parent a member of the Tribe?
- Does the custodial parent reside on the Tribe's reservation?
- Is the alleged father/noncustodial parent a member of the Tribe?
- Does the alleged father/noncustodial parent reside on the Tribe's reservation?



	Conception Where?	Is CP a member of the tribe?	Does CP reside on the tribe's reservation?	Is NCP a member of the tribe?	Does NCP reside on the tribe's reservation?	Court(s) with jurisdiction
1	On	Y	Y	Y	Y	Tribal
2	On	Y	Y	Y	N	Tribal
3	On	Y	Y	N	Y	Concurrent – T
4	On	Y	Y	N	N	Concurrent – S
5	On	Y	N	Y	Y	Tribal
6	On	Y	N	Y	N	Tribal
7	On	Y	N	N	Y	Concurrent – S
8	On	Y	N	N	N	Concurrent – S
9	On	N	Y	Y	Y	Tribal
10	On	N	Y	Y	N	Concurrent?
11	On	N	Y	N	Y	Concurrent – S
12	On	N	Y	N	N	Concurrent – S
13	On	N	N	Y	Y	Tribal
14	On	N	N	Y	N	Concurrent?
15	On	N	N	N	Y	Concurrent – S
16	On	N	N	N	N	State



	Conception Where?	Is CP a member of the tribe?	Does CP reside on the tribe's reservation?	Is NCP a member of the tribe?	Does NCP reside on the tribe's reservation?	Court(s) with jurisdiction
17	Off	Y	Y	Y	Y	Tribal
18	Off	Y	Y	Y	N	Concurrent – S
19	Off	Y	Y	N	Y	Concurrent – T
20	Off	Y	Y	N	N	State
21	Off	Y	N	Y	Y	Concurrent – T
22	Off	Y	N	Y	N	Concurrent – S
23	Off	Y	N	N	Y	Concurrent – T
24	Off	Y	N	N	N	State
25	Off	N	Y	Y	Y	Concurrent – T
26	Off	N	Y	Y	N	Concurrent – S
27	Off	N	Y	N	Y	State
28	Off	N	Y	N	N	State
29	Off	N	N	Y	Y	State
30	Off	N	N	Y	N	State
31	Off	N	N	N	Y	State
32	Off	N	N	N	N	State



Establishment of an Obligation

- Sovereignty interests are different and less implicated when paternity is not an issue and the outcome of the proceeding will not determine eligibility for membership.
- When is paternity not an issue?
 - Marriage
 - Voluntary paternity acknowledgment (VPA)
 - Other state or tribal laws
- Which law governs whether paternity is an issue?



Establishment of an Obligation

The grid below assumes that paternity is not an issue in the case because:

1. Child was born during a marriage
2. A valid voluntary paternity acknowledgment has been signed
3. The obligor is the child's mother

The grid below further assumes that at least one of the parties resides in your state or on a reservation in your state, or else neither jurisdiction would have an interest in the case beyond asking another state or Tribal IV-D program for assistance.



	Existing Order?	Does A Party Still Reside in the Jurisdiction that Issued the Last Order?	Does the Opposing Party Reside on the Reservation ?	Is the Opposing Party a Tribal Member?	Were There Significant Incidents of Relationship in Jurisdiction of the Moving Party?	Court(s) with jurisdiction
1	No		Y	Y	N	Tribal
2	No		Y	Y	Y	Concurrent
3	No		Y	N		Concurrent
4	No		N	Y		Concurrent
5	No		N	N	Y	Concurrent
6	No		N	N	N	State



Review and Adjustment

- “State” means “a State of the United States ... and Indian country (as defined in section 1151 of title 18). FFCCSOA – 28 United States Code § 1738B.
- A child support order must be given full faith and credit under FFCCSOA if “(1) a court that makes the order, pursuant to the laws of the State in which the court is located ... (A) has subject matter jurisdiction to hear the matter and enter such an order; and (B) has personal jurisdiction over the contestants ; and (2) reasonable notice and opportunity to be heard is given to the contestants.”



	Existing Order?	Does A Party Still Reside in the Jurisdiction that Issued the Last Order?	Does the Opposing Party Reside on the Reservation ?	Is the Opposing Party a Tribal Member?	Were There Significant Incidents of Relationship in Jurisdiction of the Moving Party?	Court(s) with jurisdiction
7	Tribal	Y				Tribal
8	Tribal	N				State
9	ND	Y	N			State
10	ND	Y	Y			State
11	Other	Y				Other
12	Other	N	Y	Y		Tribal
13	Other	N	Y	N		Concurrent
14	Other	N	N	Y		Concurrent
15	Other	N	N	N		State



Enforcement of an Obligation

- Does an enforcement tool require jurisdiction over the obligor, or jurisdiction over the obligor's property?
- Certain tools are available notwithstanding Tribal membership, unless there is a judicial protest:
 - Intercepting Federal Tax Refunds
 - Passport denial
 - Credit reporting



Enforcement of an Obligation

- Enforcement specific to the State:
 - State-issued licenses
 - State tax refund offsets
 - State unemployment insurance benefits. First v. Montana, 808 P.2d 467 (Mont. 1991).
- Enforcement specific to the Tribe:
 - Per capita
 - Tribal casinos



Enforcement of an Obligation

Federal Offset – Tribal Offset Partnership (TOP)



Tribal Offset Partnership

Taking it to the **TOP** for Tribal Children



Enforcement of an Obligation

- Income withholding – who is the employer and where are the wages earned?
 - Wages earned on reservation – Begay v. Roberts, 807 P.2d 1111 (Ariz. Ct. App. 1990).
- Bank Accounts – state or tribal chartered bank? Location of branch?



Need More Information?

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Thank You!



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