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OPEN MEETING AGENDA

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1))
THIS MEETING IS BEING CONDUCTED BY ELECTRONIC MEANS
THIS MEETING IS BEING RECORDED

Date:	April 14, 2016
Time:	12:15–1:15 p.m.
Location:	Conference Call
Public Call-In Number	1-877-820-7831 and enter Listen Only Passcode: 4133250

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

II. PUBLIC COMMENT (CAL. RULES OF COURT, RULE 10.75(K)(2))

Public Comment
This meeting will be conducted by teleconference. As such, the public may only submit written comments for this meeting.

Written Comment
In accordance with California Rules of Court, rule 10.75(k)(1), written comments pertaining to any agenda item of a regularly noticed open meeting can be submitted up to one complete business day before the meeting. For this specific meeting, comments should be e-mailed to forum@jud.ca.gov or mailed or delivered to 455 Golden Gate Avenue, San Francisco, CA 94102, attention: Jennifer Walter. Only written comments received by 12:15 p.m. on April 13, 2016 will be provided to advisory body members.

III. Discussion and Possible Action Items (Items 1-10)

Item 1
Cochairs Report

- California Judicial Council Meeting: Honoring Judge Richard Blake and Presentation
- In Re Abbigail A., Case: S220187, oral argument before the Supreme Court of California, scheduled for Tuesday, May 3, 2016, at 1:30 p.m., in San Francisco
- Alaska v. Central Council of Tlingit and Haida Indian Tribes, Alaska Supreme Court No. S-14935
- Big Forum Meeting on June 2-3, 2016
- Forum In-Person Meeting on June 9, 2016
- Native American Indian Court Judges Association (NAICJA) Conference on October 19-21, 2016 at Morongo (Riverside County)

Item 2
Forum Collaboration with NAICJA and Casey Family Programs to convene two Indian Child Welfare Act Roundtables (the first one will be in conjunction with NAICJA Conference (October 18th or 21st and the second one will be in the north- location and date to be determined)

Presenters: A. Nikki Borchardt Campbell, Executive Director, National American Indian Court Judges Association (NAICJA)
Sheldon Spotted Elk, Director, Indian Child Welfare at Casey Family Programs

Item 3
Approval of Minutes for February 11, 2016

Item 4
Report on Meeting Convened by California Department of Justice, March 15, 2016

Presenters: Olin Jones
Judge Patricia Lenzi
Justice Dennis Perluss
Jenny Walter

Item 5
Report on Joint Jurisdictional Court

Presenters: Ms. Jackie Davenport
Judge Suzanne Kingsbury
Judge Christine Williams

Item 6
Report on Yurok Tribal Meth Summit February 27, 2016

Presenters: Judge Abinanti
Mr. Olin Jones

Item 7
Cross Court Educational Exchange on Domestic Violence and Child Welfare

Presenters: Judge David Nelson
Judge Joseph Wiseman

Materials can be accessed here:
https://ftp.jud.ca.gov/

Username: forum
Password: forum123

Item 8
Status Report on Forum/CJER Collaboration
Presenter: Judge Nelson

Item 9
Report on Responses to SB 406 Study
Presenters: Judge Marston
Judge Radoff
Jenny Walter

Item 10
Court Improvement Program- Collaborative Opportunity
Presenter: Jenny Walter

IV. ADJOURNMENT

Adjourn

Item 1
Cochairs Report

Notice: This opinion is subject to correction before publication in the PACIFIC REPORTER. *Readers are requested to bring errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, phone (907) 264-0608, fax (907) 264-0878, email corrections@akcourts.us.*

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA; PATRICK S. GALVIN, in his official capacity as Commissioner of the Alaska Department of Revenue; and JOHN MALLONEE, in his official capacity as Director of the Alaska Child Support Services Division, Appellants, v. CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, on its own behalf and as *parens patriae* on behalf of its members, Appellee.	Supreme Court No. S-14935 Superior Court No. 1JU-10-00376 CI <u>O P I N I O N</u> No. 7093 – March 25, 2016

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Philip M. Pallenberg, Judge.

Appearances: Mary Ann Lundquist, Senior Assistant Attorney General, Fairbanks, Stacy K. Steinberg, Chief Assistant Attorney General, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for Appellants. Jessie Archibald, CCTHITA Child Support Unit Attorney, Juneau, and Holly Handler and Sydney Tarzwell, Alaska Legal Services Corporation, Juneau, for Appellee. Erin C. Dougherty and Matthew N. Newman, Native American Rights Fund, Anchorage, for Amicus Curiae National

Association of Tribal Child Support Directors. Karen L. Loeffler, United States Attorney, and Richard L. Pomeroy, Assistant United States Attorney, Anchorage, and Ragu-Jara Gregg and Stacy Stoller, Department of Justice, Washington, D.C., for Amicus Curiae United States.

Before: Fabe, Chief Justice, Winfree, Stowers, Maassen, and Bolger, Justices.

FABE, Chief Justice.
WINFREE, Justice, with whom STOWERS, Justice, joins, concurring in part.

I. INTRODUCTION

A federally recognized Alaska Native tribe has adopted a process for adjudicating the child support obligations of parents whose children are members of the tribe or are eligible for membership, and it operates a federally funded child support enforcement agency. The Tribe sued the State and won a declaratory judgment that its tribal court system has subject matter jurisdiction over child support matters and an injunction requiring the State's child support enforcement agency to recognize the tribal courts' child support orders in the same way it recognizes such orders from other states. Because we agree that tribal courts have inherent subject matter jurisdiction to decide the child support obligations owed to children who are tribal members or are eligible for membership, and that state law thus requires the State's child support enforcement agency to recognize and enforce a tribal court's child support orders, we affirm.

II. FACTS AND PROCEEDINGS

A. The Uniform Interstate Family Support Act

The Uniform Interstate Family Support Act (UIFSA)[1] governs Alaska's enforcement of child support orders issued by tribunals other than Alaska's state courts. Federal child support enforcement funds are conditioned on a state's passage of UIFSA,[2] and as a result every state in the country has enacted identical legislation.[3]

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[1] AS 25.25.101 *et seq.*

[2] 42 U.S.C. § 666(f) (2012) (to qualify for reimbursement, "each State must have in effect the Uniform Interstate Family Support Act").

[3] *See* ALA. CODE § 30-3A-101 *et seq.* (2014); ARIZ. REV. STAT. ANN. § 25-1201 *et seq.* (2014); ARK. CODE ANN. § 9-17-101 *et seq.* (2014); CAL. FAM. CODE § 4900 *et seq.* (West 2014); COLO. REV. STAT. § 14-5-101 *et seq.* (2014); CONN. GEN. STAT. § 46b-212 *et seq.* (2014); DEL. CODE ANN. tit. 13, § 6-101 *et seq.* (2014); D.C. CODE § 46-301.01 *et seq.* (2014); FLA. STAT. § 88.0011 *et seq.* (2014); GA. CODE ANN. § 19-11-100 *et seq.* (2014); HAW. REV. STAT. § 576b-101 *et seq.* (2014); IDAHO CODE ANN. § 7-1001 *et seq.* (2014); 750 ILL. COMP. STAT. 22/101 *et seq.* (2014); IND. CODE § 31-18-1-1 *et seq.* (2014); IOWA CODE § 252k.101 *et seq.* (2014); KAN. STAT. ANN. § 23-36,101 *et seq.* (2014); KY. REV. STAT. ANN. § 407.5101 *et seq.* (West 2014); LA. CHILD. CODE ANN. art 1301.1 *et seq.* (2014); ME. REV. STAT. tit. 19-A, § 2801 *et seq.* (2014); MD. CODE ANN., FAM. LAW § 10-301 *et seq.* (2014); MASS. GEN. LAWS ch. 209D, § 1-101 *et seq.* (2014); MICH. COMP. LAWS § 552.1101 *et seq.* (2014); MINN. STAT. § 518C.101 *et seq.* (2014); MISS. CODE ANN. § 93-25-1 *et seq.* (2014); MO. REV. STAT. § 454.1500 *et seq.* (2014); MONT. CODE ANN. § 40-5-101 *et seq.* (2014); NEB. REV. STAT. § 42-701 *et seq.* (2014); NEV. REV. STAT. § 130.0902 *et seq.* (2014); N.H. REV. STAT. ANN. § 546-B:1 *et seq.* (2014); N.J. STAT. ANN. § 2a:4-30.65 *et seq.* (West 2014); N.M. STAT. ANN. § 40-6a-100 *et seq.* (2014); N.Y. FAM. CT. ACT § 580-101 *et seq.* (McKinney 2014); N.C. GEN. STAT. § 52c-1-100 *et seq.* (2014); N.D. CENT. CODE § 14-12.2-01 *et seq.* (2013); OHIO REV. CODE ANN. § 3115.01 *et seq.* (2014); OKLA. STAT. tit. 43, § 601-100 *et seq.* (2014); OR. REV. STAT. § 110.303 *et seq.* (2014); 23 PA. CONS. STAT. § 7101 *et seq.* (2014); R.I. GEN. LAWS § 15-23.1-100 *et seq.* (2014); S.C. CODE ANN. § 63-17-2900 *et seq.* (2014); S.D. CODIFIED LAWS § 25-9B-101 *et seq.* (2014); TENN. CODE ANN. § 36-5-2001 *et seq.* (2014); TEX. FAM. CODE ANN.
(continued...)

UIFSA allows parents to register and enforce child support orders issued by the tribunal of another state[4] in the same manner as orders issued by Alaska's courts.[5] It also allows parties to send the documents required to register another state's support order directly to the Alaska Child Support Services Division (CSSD), the arm of state government charged with enforcing child support orders.[6] CSSD enforces these orders through administrative procedures "without initially seeking to register the order."[7] UIFSA also includes procedures for direct enforcement of orders from other tribunals. Income withholding orders can be sent directly to obligors' employers in Alaska without first registering the orders with the state courts or CSSD.[8] When an employer receives a facially regular order from another state, the employer must comply and withhold the income as directed, just as if the order had come from an Alaska court.[9]

Whether the out-of-state child support order is registered with Alaska's courts, enforced by CSSD without court involvement, or sent directly to an employer,

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[3](...continued)
§ 159.001 *et seq.* (West 2014); UTAH CODE ANN. § 78b-14-101 *et seq.* (LexisNexis 2014); VT. STAT. ANN. tit. 15B, § 101 *et seq.* (2014); VA. CODE ANN. § 20-88.32 *et seq.* (2014); WASH. REV. CODE § 26.21a.005 *et seq.* (2014); W. VA. CODE § 48-16-101 *et seq.* (2014); WIS. STAT. § 769.101 *et seq.* (2014); WYO. STAT. ANN. § 20-4-139 *et seq.* (2014).

[4] AS 25.25.601-.602.

[5] AS 25.25.603(b).

[6] *See* AS 25.27.080.

[7] AS 25.25.507(b).

[8] *See* AS 25.25.501.

[9] *See* AS 25.25.502(b).

an obligor can contest its validity or enforcement.[10] The party contesting an order has the burden of proving one of several available defenses, including that "the issuing tribunal lacked personal jurisdiction over the contesting party," and that "there is a defense under the law of this state to the remedy sought."[11]

UIFSA applies to support orders "issued in another state."[12] As originally enacted in 1995, Alaska's version of UIFSA differed from the model version by not including Indian tribes within its definition of "state."[13] In 2008 the State twice requested that the federal Department of Health and Human Services exempt it from the requirement that states enact UIFSA exactly as the model legislation was written. Both requests were denied. In 2009 the State legislature amended AS 25.25.101 to include Indian tribes in its definition of "state."[14] As Alaska's version of UIFSA now reads, "the term 'state' includes an Indian nation or tribe."[15]

The law amending the statute included the legislature's view that "UIFSA does not determine the authority of an Indian tribe to enter, modify, or enforce a child

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[10] AS 25.25.506 (allowing an obligor to contest directly enforced orders); AS 25.25.606 (procedure to contest registered orders).

[11] AS 25.25.607(a)(1), (5).

[12] *See* AS 25.25.507, .601; *see also* AS 25.25.101(14) (" '[I]ssuing tribunal' means the tribunal of a state or foreign country that issues a support order or a judgment determining parentage of a child.").

[13] *See* ch. 57, § 4, SLA 1995 (omitting Indian tribes).

[14] Ch. 45, § 3, SLA 2009.

[15] AS 25.25.101(26).

support order."[16] It went on to state that

> the legislative intent is
>
> (1) to remain neutral on the issue of the underlying child support jurisdiction, if any, for the entities listed in the amended definition of "state";
>
> (2) not to expand or restrict the child support jurisdiction, if any, of the listed "state" entities in the amended definition; and
>
> (3) not to assume or express any opinion about whether those entities have child support jurisdiction in fact or in law.[17]

B. The Central Council Of Tlingit And Haida Indian Tribes Of Alaska's Tribal Child Support Unit

The Central Council of Tlingit and Haida Indian Tribes of Alaska ("Central Council" or "the Tribe") is a federally recognized Indian tribe based in Southeast Alaska.[18] Central Council has established a tribal court system asserting jurisdiction over civil, criminal, probate, and juvenile law matters.[19] Central Council also has a child support enforcement program known as the Tribal Child Support Unit. The Unit was first initiated in 2004, and it received full federal funding as Alaska's first Tribal IV-D program in 2007.

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[16] Ch. 45, § 1, SLA 2009.

[17] *Id.*

[18] Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 79 Fed. Reg. 4748-02, 4752 (Jan. 29, 2014).

[19] Central Council of Tlingit & Haida Indian Tribes of Alaska Tribal Code, § 06.01.020.

Tribal IV-D programs are federally funded child support enforcement programs.[20] The federal government reimburses Tribal IV-D programs that comply with federal statutory and regulatory requirements for much of the cost of enforcing child support orders, just as it does for states' child support enforcement programs. One of these requirements is that any potential Tribal IV-D program describe "the population subject to the jurisdiction of the Tribal court or administrative agency for child support enforcement purposes."[21] Another is that each Tribal IV-D program "[e]stablish one set of child support guidelines by law or action of the tribunal for setting and modifying child support obligation amounts."[22]

Central Council's Tribal IV-D plan for the Tribal Child Support Unit grounds the jurisdiction of the tribal court in the Central Council Constitution and bylaws. Those bylaws first include the following statement of jurisdiction: "The jurisdiction of the Tribal Court shall include all territory described in Article 1 of the [Central Council] Constitution and it shall be over all persons therein, and any enrolled Tribal member citizen and their descendants wherever they are located."[23] The bylaws

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[20] *See* Tribal Child Support Enforcement Programs, 69 Fed. Reg. 16,638-82 (Mar. 30, 2004) (codified at 45 C.F.R. pts. 286, 302, 309, and 310). The designation "IV-D" is a reference to Title IV-D of the Social Security Act, codified at 42 U.S.C. §§ 651-669b (2012), the federal law that governs the federal government's reimbursement of child support enforcement costs.

[21] 45 C.F.R. § 309.70 (2015).

[22] 45 C.F.R. § 309.105(a)(1).

[23] Central Council of Tlingit & Haida Indian Tribes of Alaska Tribal Code, § 06.01.020(A). The territory described in Article I of the tribal constitution includes lands within the Tribe's dependent communities and tribal trust lands. CONST. OF THE CENTRAL COUNCIL OF TLINGIT & HAIDA INDIAN TRIBES OF ALASKA art. I, § 1.

further include a list of actions subjecting individuals to tribal jurisdiction.[24] It is under this provision, rather than the provision for territorial jurisdiction, that Central Council asserts jurisdiction here. In its Tribal IV-D plan, Central Council explains that "[t]here are a number of criteria that the Court can rely on to exert its jurisdiction, which include sexual conduct which results in the paternity of a [Central Council] child and the corresponding obligation to provide for the child."

Central Council's Tribal IV-D plan for the Tribal Child Support Unit also describes the guidelines the tribal court uses to set child support obligations. The guidelines enact a percentage-based formula that establishes the amount of an obligor's child support obligation based on adjusted income and number of children. The guidelines also foresee certain deviations for low-income obligors, for in-kind support, and for other causes.

Since the Tribal Child Support Unit began its operations in 2007, Central Council's tribal courts have heard and decided more than 100 child support cases. In each case the child was a member of the Tribe, eligible for membership, or part of a family that had received Temporary Assistance to Needy Families benefits from Central Council, resulting in assignment of the right to child support to the Tribe. Central Council's courts have enforced child support obligations over the jurisdictional objections of obligor parents who are neither members of the Tribe nor eligible for membership.

The Tribal Child Support Unit has worked with its state counterpart, CSSD, since 2007. CSSD has referred more than 700 existing child support cases to the Unit for enforcement. CSSD has also enforced cases that the Unit referred to it, so long as the original child support order was issued by a state court rather than an Alaska tribal court.

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[24] *Id.* at § 06.01.030.

CSSD has not enforced any child support orders that Central Council's tribal courts originally issued. Only a state can garnish IRS tax refunds of obligor parents, and the Unit has coordinated with the State of Washington to do so. But certain other enforcement mechanisms, including garnishing an obligor parent's Alaska unemployment insurance benefits or Permanent Fund Dividend, require CSSD's cooperation and thus have been unavailable for enforcement of any child support orders issued by Central Council's tribal courts.

C. Proceedings Below

In January 2010 Central Council filed a complaint against the State seeking a declaration that it possesses inherent jurisdiction to decide child support cases for member and member-eligible children and an injunction directing the State to enforce child support orders issued by its tribal courts. Both parties moved for summary judgment.

The superior court granted summary judgment for the Tribe. The superior court determined that "the issues of child custody and child support are closely intertwined." It grounded this connection between custody and support in two sources of Alaska law: first, *McCaffery v. Green*, a 1997 case in which we held that an Alaska trial court with jurisdiction to modify an out-of-state custody order also had jurisdiction to modify support obligations;[25] and second, the provisions of Alaska Civil Rule 90.3, which the superior court interpreted to "require [a trial] court to consider child support any time it makes a custody decision." The superior court also noted that rejecting Central Council's assertion of jurisdiction to set child support orders "would provide a substantial deterrent for parents to bring custody disputes to tribal courts, since tribal courts could not decide all of the issues in the case."

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[25] *See* 931 P.2d 407, 414 (Alaska 1997).

In light of the connection between child custody and child support, and relying on our holding in *John v. Baker (John I*) that Alaska tribes have inherent sovereign jurisdiction to adjudicate child custody matters,[26] the superior court ruled that Central Council's jurisdiction extended to child support adjudication as well:

> The determination and enforcement of the duty of parents to support a child who happens to be a tribal member is no less a part of the tribe's internal domestic relations than the decision as to which parent the child will live with, which school the child will attend, or any of the other important decisions that custody courts make every day. Ensuring that tribal children are supported by their noncustodial parents may be the same thing as ensuring that those children are fed, clothed, and sheltered. The future of a tribe — like that of any society — requires no less.

The superior court entered an order "declaring that the Tribe's inherent rights of self-governance include subject matter jurisdiction to adjudicate child support for children who are members of the Tribe or eligible for Tribal membership." The order also required the State to treat Central Council's tribal courts and the Tribal Child Support Unit as it would any other state's courts and child support enforcement agency under UIFSA and the regulations connected to Title IV-D.

The superior court's order on summary judgment noted that Central Council's action for a declaratory judgment and injunctive relief did "not require the [superior] court to decide the issue of personal jurisdiction, which must be decided on a case by case basis." In some cases, the superior court speculated, "the exercise of jurisdiction by the tribal court may well violate due process." Ultimately, both parties

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[26] *See* 982 P.2d 738, 748-49 (Alaska 1999).

agreed "that the [superior] court should leave questions of personal jurisdiction for decision in future cases."

The State appeals.

III. STANDARD OF REVIEW

We review the scope of tribal jurisdiction de novo.[27] We also "review a grant of summary judgment de novo, applying our independent judgment."[28] "Under de novo review, we apply 'the rule of law that is most persuasive in light of precedent, reason, and policy.' "[29]

IV. DISCUSSION

UIFSA requires that Alaska courts register and CSSD enforce child support orders issued by the tribunal of "an Indian nation or tribe."[30] Central Council does not argue that either Title IV-D of the Social Security Act or UIFSA is the source of its tribunals' authority to decide child support matters. Instead, the legal question presented in this appeal is whether Central Council's tribal courts have inherent sovereign authority to exercise subject matter jurisdiction over child support matters and thus are "authorized tribunals" for purposes of UIFSA.

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[27] *See State v. Native Village of Tanana*, 249 P.3d 734, 737 (Alaska 2011).

[28] *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 385 (Alaska 2013).

[29] *Native Village of Tanana*, 249 P.3d at 737 (quoting *Glamann v. Kirk*, 29 P.3d 255, 259 (Alaska 2001)).

[30] AS 25.25.101(14), (26).

A. Subject Matter Jurisdiction Derived From Inherent, Non-Territorial Sovereignty Has Two Dimensions.

The jurisdictional reach of tribal courts is a question of federal law.[31] As the United States Supreme Court has long recognized, "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."[32] In most states there is a "traditional reservation-based structure of tribal life,"[33] and many tribes consequently look to both tribal membership and tribal land as their sources of sovereignty and tribal court jurisdiction.[34] But a 1971 federal law known as the Alaska Native Claims Settlement Act (ANCSA) extinguished all Native claims to land in Alaska and revoked all but one Indian reservation in the state.[35] The United States Supreme Court has held that the former reservation lands ANCSA transferred to

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[31] *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

[32] *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

[33] *John I*, 982 P.2d 738, 754 (Alaska 1999).

[34] *See, e.g.*, CONST. OF THE BLUE LAKE RANCHERIA art. II, § 1 ("Territory and Jurisdiction. The jurisdiction of the tribe, . . . and its tribal courts shall extend to the following: (a) All lands, water and other resources within the exterior boundaries of the Blue Lake Rancheria, . . . (e) All tribal members, wherever located, to the fullest extent permitted by applicable Federal law."); CONST. OF THE LITTLE RIVER BAND OF OTTAWA art. I, § 2 ("Jurisdiction Distinguished From Territory. The Tribe's jurisdiction over its members and territory shall be exercised to the fullest extent consistent with this Constitution, the sovereign powers of the Tribe, and federal law."); CONST. OF THE SIPAYIK MEMBERS OF THE PASSAMAQUODDY TRIBE art. II, § 1 ("Scope. The authority of the government established by this Constitution shall extend over all Sipayik members of the Passamaquoddy Tribe and all persons, subjects, territory and property now or hereafter included within the jurisdiction of the Pleasant Point Reservation of the Passamaquoddy Tribe . . . .").

[35] *See* 43 U.S.C. §§ 1603, 1618(a) (2012).

Native-owned, state-chartered regional and village corporations in exchange for extinguishing those claims are not "Indian country" under the federal statute that defines the term.[36] As a result of this history, we have had to examine the inherent, non-territorial sovereignty of Indian tribes, a question of federal law that other "courts have not had occasion to tease apart."[37]

Our decisions analyzing the inherent, non-territorial subject matter jurisdiction of Alaska tribal courts have implicitly recognized two separate dimensions of this jurisdiction. Both dimensions reflect our understanding that inherent, non-territorial subject matter jurisdiction derives from "a tribe's ability to retain fundamental powers of self-governance."[38] The first dimension of this jurisdiction relates to the character of the legal question that the tribal court seeks to decide, while the second relates to the categories of individuals and families who might properly be brought before the tribal court.

Although our earlier decisions have not always clarified that inherent, non-territorial subject matter jurisdiction has the two dimensions we now expressly recognize, they have addressed both the character of the legal questions that tribal courts have adjudicative authority to decide and the populations subject to that authority. In doing so, our decisions have aligned with the definition of subject matter jurisdiction

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[36] *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 532-34 (1998) (interpreting 18 U.S.C. § 1151).

[37] *John I*, 982 P.2d at 754; *cf. Kaltag Tribal Council v. Jackson*, 344 F. App'x 324, 325 (9th Cir. 2009) ("Reservation status is not a requirement of jurisdiction because '[a] Tribe's authority over its reservation or Indian country is incidental to its authority over its members.' " (quoting *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 559 n.12 (9th Cir. 1991))).

[38] *John I*, 982 P.2d at 758.

advanced by a leading treatise on Indian law: "the ability of a court to hear a particular kind of case, either because it involves a particular subject matter or because it is brought by a particular type of plaintiff or against a particular type of defendant."[39]

Our foundational decision for the analysis of tribal courts' exercise of subject matter jurisdiction on the basis of inherent, non-territorial sovereignty is *John I.*[40] That case arose when a father who was a member of Northway Village filed a custody petition in the Northway tribal court and then, after the tribal court issued its custody order, filed an identical suit in state superior court.[41] Although the children's mother was not a member of Northway Village she "consented to Northway's jurisdiction" during the first suit and then moved to dismiss the superior court suit on the basis of the tribal court's order.[42]

In *John I* we examined the first dimension of tribal courts' inherent, non-territorial subject matter jurisdiction: the character of the legal question at issue. We surveyed federal decisions and recognized that "in determining whether tribes retain their sovereign powers, the United States Supreme Court looks to the character of the power that the tribe seeks to exercise, not merely the location of events."[43] We focused our analysis on whether adjudicating child custody matters — the power that the Northway Village tribal court sought to exercise in *John I* — was the type of legal question that falls within tribal courts' membership-based subject matter jurisdiction. We

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[39] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.01, at 597 (Nell Jessup Newton ed., 2012).

[40] 982 P.2d 738.

[41] *Id.* at 743.

[42] *Id.*

[43] *Id.* at 752.

characterized child custody as an "internal domestic matter[]"[44] that "lies at the core of sovereignty."[45] Based on our analysis of the rights at issue, we held "that the type of dispute before us today — an action for determination of custody of the children of a member of Northway Village — falls squarely within Northway's sovereign power to regulate the internal affairs of its members."[46]

We next turned to the second dimension of inherent, non-territorial subject matter jurisdiction: the categories of litigants whose disputes the tribal courts have authority to decide. We noted that "[b]ecause the tribe only has subject matter jurisdiction over the internal disputes of tribal members, it has the authority to determine custody only of children who are members or eligible for membership."[47] We explicitly recognized that the mother in *John I* was "not a member of Northway Village," but our remand order only directed the superior court to determine the *children's* eligibility for tribal membership.[48]

A later case more distinctly separated the two dimensions of inherent, non-territorial sovereignty by deciding only one of the dimensions and explicitly declining to reach the other. In *State v. Native Village of Tanana* a tribe sought declaratory and injunctive relief related to its sovereign authority to initiate child custody

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[44] *Id.* at 754.

[45] *Id.* at 758.

[46] *Id.* at 759.

[47] *Id.*

[48] *Id.* While the mother had consented to tribal jurisdiction, *id.* at 743, we emphasized that the key inquiry was the *children's* membership or membership-eligible status, *id.* at 759.

proceedings as the Indian Child Welfare Act (ICWA)[49] defines the term.[50] After analyzing our own cases, precedent from federal courts, and congressional actions, we concluded that tribes do have inherent sovereign jurisdiction and authority to initiate ICWA-defined child custody proceedings.[51]

Although we recognized this jurisdiction, we concluded that the record developed at trial did not contain "sufficient facts to make determinations about specific limitations on inherent tribal jurisdiction over ICWA-defined child custody proceedings."[52] The reach of the jurisdiction would depend on, among other things, "the proper exercise of *subject matter* and personal jurisdiction."[53] Among the "many issues" left explicitly undecided were "the extent of tribal jurisdiction over non-member parents of Indian children" and "the extent of tribal jurisdiction over Indian children or member parents who have limited or no contact with the tribe."[54]

Thus, our decision in *Tanana* analyzed the first dimension of the subject matter inquiry but not the second. By acknowledging that questions of subject matter jurisdiction remained unanswered even after holding that "tribes are not necessarily precluded from exercising inherent sovereign jurisdiction to initiate 'child custody

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[49] 25 U.S.C. § 1901 *et seq.* (2012).

[50] 249 P.3d 734, 736 (Alaska 2011).

[51] *See id.* at 751.

[52] *Id.*

[53] *Id.* at 752 (emphasis added).

[54] *Id.*

proceedings' as ICWA defines that term,"[55] we recognized that there are more facets of subject matter jurisdiction than just the character of the legal question at issue. The categorical analysis of "the extent of tribal court jurisdiction over non-member parents of Indian children" was not necessarily reserved for a case-by-case determination, but it could not be decided on the record on appeal in that case.[56] A complete description of the inherent, non-territorial subject matter jurisdiction of tribal courts consists of both the types of legal questions those courts can properly hear and the categories of parties whose legal disputes those courts can properly resolve.

B. Adjudicating Child Support Is Within Tribal Courts' Inherent, Non-Territorial Subject Matter Jurisdiction.

The superior court concluded that "[t]he determination and enforcement of the duty of parents to support a child" is an integral "part of the tribe's internal domestic relations," and is thus within Central Council's courts' inherent, non-territorial subject matter jurisdiction.[57] We agree, and we hold that the adjudication of child support

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[55] *Id.* at 736.

[56] *Id.* at 752.

[57] The superior court's order on summary judgment also examined the extent to which "the issues of child custody and child support are closely intertwined" and the potential for "procedural manipulation" if tribal courts have jurisdiction over one but not the other. This method of analyzing Central Council's inherent, non-territorial subject matter jurisdiction is inconsistent with the United States Supreme Court's statement that the sovereign authority of Indian tribes "does not vary depending on the desirability of a particular regulation." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 340 (2008). Tribal court jurisdiction over child support matters must be analyzed on its own merits rather than as an extension of the recognized jurisdiction over child custody matters. *See also John v. Baker* (*John III*), 125 P.3d 323, 326-27 (Alaska 2005) ("Given the plain language of *John I* and *John II*, it is clear that we believed that the custody and support matters were separate and that the transfer of the former to the
(continued...)

obligations is a component of a tribe's inherent power "to regulate domestic relations among members."[58]

We have held that tribes' powers of internal self-governance include the power to determine the custody of children of divorcing parents,[59] the power to accept transfer jurisdiction of ICWA-defined custody cases from state courts,[60] and the power to initiate child protection cases.[61] In each of the cases in which we have recognized these powers, we discussed a federal statute — ICWA[62] — which is not directly applicable to the question of child support now before us. Even in *John I*, an inter-parental custody dispute to which ICWA did not strictly apply,[63] we examined the statute as relevant evidence of Congress's intent.[64]

The United States Supreme Court has described ICWA as a reaction to "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually

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[57](...continued)
tribal court did not entail the transfer of the latter." (first citing *John I*, 982 P.2d 738 (Alaska 1999); then citing *John v. Baker* (*John II*), 30 P.3d 68 (Alaska 2001))).

[58] *John I*, 982 P.2d at 758 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)).

[59] *See id.* at 759.

[60] *See In re C.R.H.*, 29 P.3d 849, 852 (Alaska 2001).

[61] *See Native Village of Tanana*, 249 P.3d at 736, 750-51.

[62] 25 U.S.C. § 1901 *et seq.* (2012).

[63] *See John I*, 982 P.2d at 746-47.

[64] *See id.* at 754 ("Although the custody dispute at the center of this case falls outside ICWA's scope, Congress's purpose in enacting ICWA reveals its intent that Alaska Native villages retain their power to adjudicate child custody disputes.").

in non-Indian homes."[65] Congress elected to address these practices by limiting state court jurisdiction and recognizing tribal court jurisdiction over ICWA-defined child custody matters.[66] Although the statute has provisions that establish the substantive law state courts are to apply — for example, a preference order for adoptive placements[67] — its primary means to enforce its provisions is an allocation of jurisdiction in ICWA-defined custody cases.

Congress has not suggested that similar practices exist or need to be addressed in the realm of child support. Although Congress gave the Secretary of the Department of Health and Human Services the authority to reimburse tribes for child support enforcement costs in 1996,[68] Title IV-D of the Social Security Act is a funding statute that does not purport to expand or otherwise alter its recipients' jurisdiction. Central Council's briefing before the superior court asserted that its jurisdiction to adjudicate child support is not tied to Title IV-D or to any other act of Congress.

Although ICWA was relevant to our earlier decisions on the subject matter jurisdiction of tribal courts, we have never suggested that it was the sole or even primary basis of that jurisdiction. Doing so would be inconsistent with the United States Supreme Court's pre-ICWA recognition of tribal court jurisdiction over custody

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[65] *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

[66] *See* 25 U.S.C. § 1911; *see also Native Village of Tanana*, 249 P.3d at 751 ("ICWA creates limitations on states' jurisdiction over ICWA-defined child custody proceedings, not limitations on tribes' jurisdiction over those proceedings."); *John I*, 982 P.2d at 753 ("ICWA's goal was to increase tribal control over custody decisions involving tribal children.").

[67] *See* 25 U.S.C. § 1915(a).

[68] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 375, 110 Stat. 2105 (1996).

matters.[69] Instead, in *John I*, our examination of ICWA was in service of the point that an earlier statute, ANCSA, was not intended to "eradicate tribal court jurisdiction over family law matters."[70] We "follow federal law by beginning from the premise that tribal sovereignty with respect to issues of tribal self-governance exists unless divested."[71]

At issue in both *John I* and this case is the *inherent* power of tribes "to conduct internal self-governance functions."[72] Although child support is not governed by ICWA, as some child custody matters are, it is equally "a family law matter integral to tribal self-governance,"[73] and as such is part of the set of core sovereign powers that tribes retain.[74] Moreover, "Congress's express finding in ICWA that 'there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children' "[75] is relevant to both child support and custody.

Child support orders are a pillar of domestic relations and are directly related to the well-being of the next generation. As the superior court explained, "[e]nsuring that tribal children are supported by their noncustodial parents may be the

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[69] *See Fisher v. Dist. Ct. of the 16th Jud. Dist. of Mont.*, 424 U.S. 382, 389 (1976).

[70] 982 P.2d at 753.

[71] *Id.* at 752; *see also id.* at 752-53 ("[W]e will not lightly find that Congress intended to eliminate the sovereign powers of Alaska tribes.").

[72] *Id.* at 758.

[73] *Id.*

[74] *See Hepler v. Perkins*, 13 INDIAN L. REP. 6011, 6015 (Sitka Cmty. Ass'n Tribal Court, Apr. 7, 1986) ("Tribal jurisdiction to care for tribal children is simply not related to nor dependent on the legal status of any given parcel of land.").

[75] *Simmonds v. Parks*, 329 P.3d 995, 1007 (Alaska 2014) (quoting 25 U.S.C. § 1901(3)).

same thing as ensuring that those children are fed, clothed, and sheltered. The future of a tribe — like that of any society — requires no less." "[A] tribe has a strong interest in 'preserving and protecting the Indian family as the wellspring of its own future,' "[76] and determining what resources a child will enjoy from her parents is a crucial aspect of promoting that interest. As the United States Court of Appeals for the Ninth Circuit has recognized, parental financial neglect of children "is a matter of vital importance to the community."[77]

Recognizing tribal courts' inherent, non-territorial subject matter jurisdiction over child support matters is consistent with our description of tribal power. Although our cases recognizing specific instances of that power have largely related to child custody, they are situated within the larger context of family affairs. In *John I* we recognized "the fundamental powers of tribes to adjudicate internal family law affairs like child custody disputes."[78] In *Tanana* we described *John I* as "foundational Alaska authority regarding Alaska Native tribal jurisdiction over the welfare of Indian children."[79] And in *Simmonds v. Parks* we reiterated that *John I* recognized "tribal sovereignty to decide cases involving the best interests of tribal children."[80] When child

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[76] *John I*, 982 P.2d at 752 (quoting H.R. REP. No. 95-1386, at 19 (1978)).

[77] *United States v. Ballek*, 170 F.3d 871, 874 (9th Cir. 1999) (discussing the importance of child support obligations in concluding that child support awards may be enforced through imprisonment).

[78] 982 P.2d at 759.

[79] *State v. Native Village of Tanana*, 249 P.3d 734, 750 (Alaska 2011).

[80] 329 P.3d at 1008.

support is ordered it is fundamental to its recipients' welfare and best interests and thus is "of vital and fundamental importance to tribal self-governance."[81]

The subsequent history of the *John v. Baker* litigation also weighs in favor of Central Council's assertion of subject matter jurisdiction over child support orders. In *John III* we considered the argument that our decision in *John I* implicitly recognized tribal court subject matter jurisdiction over not just child custody matters but also child support matters.[82] The posture of the case made it unnecessary for us to decide whether the tribal court in fact had the necessary jurisdiction to issue child support orders.[83] But we did discuss what qualities a tribal child support order would require to be "a recognizable child support order to which the [superior] court could extend comity."[84] Had the tribal court lacked subject matter jurisdiction to issue a child support order, this discussion of the proper contours of comity would have conflicted with our statement in *John I*'s comity analysis that "our courts should refrain from enforcing tribal court judgments if the tribal court lacked personal or subject matter jurisdiction."[85]

The actions of the federal executive branch also suggest that Central Council's tribal courts have inherent, non-territorial subject matter jurisdiction over child

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[81] *Id.*

[82] *See John III*, 125 P.3d 323, 326 (Alaska 2005).

[83] *See id.* at 324 ("We conclude that the superior court correctly ruled that child support had never been referred to the tribal court and that the division could enforce the court's child support order. This disposes of the case and makes it unnecessary to resolve the additional jurisdictional issues.").

[84] *Id.* at 327; *see also id.* ("Although a tribal child support order need not match the format of a support order issued by the Alaska courts, it must, at a minimum, be concrete enough to be enforceable.").

[85] 982 P.2d 738, 763 (Alaska 1999).

support matters. The part of Title IV-D that makes Tribal IV-D programs like Central Council's eligible for federal reimbursement requires each applicant program to "demonstrate[] to the satisfaction of the Secretary [of the Department of Health and Human Services] that it has the capacity to operate a child support enforcement program meeting the objectives of this part, including . . . establishment, modification, and enforcement of support orders."[86] Similarly, the regulations enacted to govern Tribal IV-D eligibility require that all applicant programs include "a description of the population subject to the jurisdiction of the Tribal court or administrative agency for child support enforcement purposes."[87] Central Council's application identified its tribal court jurisdiction over child support matters as stemming from the tribal code and constitutional provisions that allow jurisdiction based on certain acts of affiliation with the Tribe, rather than asserting a territorial basis for jurisdiction. By accepting Central Council's application to make the Tribal Child Support Unit a Tribal IV-D program, the Secretary of the Department of Health and Human Services confirmed that this assertion of non-territorial jurisdiction over child support matters complies with the federal statutory and regulatory requirements for Tribal IV-D programs.

The State argues that the near certainty that state agencies will be involved with the enforcement of child support orders issued by tribal courts distinguishes this case from our previous decisions regarding child custody. The State maintains that requiring its state child support program, CSSD, to coordinate with many tribal courts will impose additional costs and disrupt the uniformity of child support awards.[88] In

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[86] 42 U.S.C. § 655(f) (2012).

[87] 45 C.F.R. § 309.70 (2015).

[88] We note that while coordination costs will no doubt increase, it is hardly (continued...)

particular, the State points to the potential difficulty of modifying a tribal support order, which might prevent the State from recouping funds it spends on children in its custody who are subject to a tribal order.[89]

But these concerns do not limit the exercise of tribal court jurisdiction. Our decisions exploring the retained inherent self-governance powers of Alaska tribes contain no suggestion that the burden on state agencies associated with recognizing tribal authority is part of the analysis. The State's reliance on the United States Supreme Court's discussion of "considerable" state interests in *Nevada v. Hicks*[90] is inapposite. That case concerned "tribal authority to regulate state officers in executing process related to the violation, off reservation, of state laws."[91] The Supreme Court explicitly held that such authority "is not essential to tribal self-government or internal relations —

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[88](...continued)
clear that enforcement costs will similarly rise. Central Council's Tribal Child Support Unit distributed nearly $500,000 in child support collections in fiscal year 2012. OFFICE OF CHILD SUPPORT ENFORCEMENT, FY 2012 PRELIMINARY REPORT TO CONGRESS (2013), Tbl. P-37. Without the Unit it would have fallen to CSSD to distribute those same collections. To the extent that CSSD's enforcement costs may rise as a result of more tribal children and custodial parents having ready access to a tribunal that can adjudicate their child support disputes, those increased costs will reflect an increased realization of the role that CSSD already performs so admirably: serving Alaskan children.

[89] UIFSA provides for modification of an out-of-state child support order only when: (1) all parties consent; (2) none of the parties reside in the issuing state, the party seeking modification "is not a resident of this state," and "the respondent is subject to the personal jurisdiction of the tribunal of this state;" or (3) "all of the individual parties reside in this state and the child does not reside in the issuing state." AS 25.25.611, .613. We do not have occasion in this case to decide how the statutory references to residence should be interpreted when the issuing tribunal exercises membership-based jurisdiction.

[90] 533 U.S. 353, 364 (2001).

[91] *Id.*

to 'the right to make laws and be ruled by them.' "[92] This holding did not depend on the extent of the state's interest, but instead flowed from the Court's exploration of "what is necessary to protect tribal self-government and control internal relations."[93]

State agencies are also involved in enforcing child custody orders, and non-compliance with these orders can expose parents to criminal contempt charges and imprisonment.[94] And there is little doubt that child support enforcement frequently requires more routine and sustained contacts between a state enforcement agency and a noncustodial parent. But this does not make child support any less focused on "[t]he welfare of tribal children."[95] In both child custody and child support matters, the instruments of state government are employed as a means of enforcing duties that run between parents and children; their involvement does not transform the power at issue into one that is no longer concerned with internal domestic relations.

Ensuring that parents financially care for their children is a pillar of domestic relations and is directly related to the well-being of the next generation. Setting, modifying, and enforcing such obligations is one way that "[t]ribal courts play a vital role in tribal self-government."[96] We hold that tribal courts have inherent, non-territorial subject matter jurisdiction to adjudicate parents' child support obligations.

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[92] *Id.* (citing *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997)).

[93] *Id.* at 360; *see also Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("[E]ven if the State's interests were implicated by the tribal taxes, a question we need not decide, it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.").

[94] AS 09.50.010(5).

[95] *Simmonds v. Parks*, 329 P.3d 995, 1008 (Alaska 2014).

[96] *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987).

C. Tribal Courts' Inherent, Non-Territorial Subject Matter Jurisdiction Over Child Support Reaches Nonmember Parents Of Children Who Are Tribal Members Or Are Eligible For Membership.

In the State's briefing before the superior court it argued that jurisdiction over nonmembers is an issue of subject matter jurisdiction, not merely personal jurisdiction. In its briefing before this court and at oral argument the State urged us to address Central Council's subject matter jurisdiction over nonmembers. As discussed *supra* in Part IV.A, we agree that identifying the individuals and families who might properly be brought before a tribal court is a question of subject matter jurisdiction.[97] We also agree with the State that the issue is ripe for a decision, as the Tribe's complaint here asserted jurisdiction over all cases where the child is a member or is eligible for membership.[98] As the State noted at oral argument, that set of cases "necessarily includes" cases in which the child is a member or is membership-eligible but one parent is not. And the issue is far from being an abstract question: Central Council's tribal courts have already decided child support cases over the jurisdictional objections of obligor parents who are neither members of the Tribe nor eligible for tribal

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[97] This analysis does not change when one parent is not a member of the tribe, notwithstanding any separate personal-jurisdiction challenges that a nonmember parent might raise.

[98] Although the Tribe argued that we need not address the question of *personal* jurisdiction over nonmember parents, it took the position that the Tribe's subject matter jurisdiction depends only on the membership status of the child. Under this theory, the nonmember status of a parent is not a bar to subject matter jurisdiction. It also urged us to affirm the superior court's decision, which recognized the Tribe's subject matter jurisdiction over child support orders for tribal children without making an exception for nonmember parents.

membership.[99] Finally, as reflected in the parties' statements at oral argument, guidance from this court can resolve this long-standing question and allow the parties to move forward together in enforcing child support orders for the benefit of the Tribe's and the State's children.

1. Because child support jurisdiction is tied to a tribe's inherent sovereignty, *Montana v. United States* does not apply.

The State argues that the United States Supreme Court's decision in *Montana v. United States*[100] permits a tribe to regulate a nonmember only if the nonmember enters into a consensual business relationship with the tribe or its members or if the nonmember's conduct on land the tribe owns within a reservation imperils the very existence of the tribal community. The State contends that child support adjudication does not fit within either of these circumstances, and thus that Central Council cannot exercise subject matter jurisdiction over nonmember parents in child support cases.

We considered a similar argument in *Simmonds v. Parks*.[101] That case arose out of a tribal court order terminating the parental rights of a nonmember.[102] Rather than appeal the decision within the tribal court system, the nonmember father sought to regain

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[99] *Cf. State v. Native Village of Tanana*, 249 P.3d 734 (Alaska 2011) (noting "a number of *hypothetical* fact patterns raising difficult questions" about jurisdiction over parents, *id.* at 748, and the absence of "sufficient facts" to decide those questions, *id.* at 751, and therefore explicitly declining to decide "the extent of tribal jurisdiction over non-member parents of Indian children," *id.* at 752 (emphasis added)).

[100] 450 U.S. 544 (1981).

[101] 329 P.3d 995 (Alaska 2014).

[102] *Id.* at 998.

custody of his daughter in state court.[103] We adopted the federal exhaustion of tribal remedies doctrine and held that parties are not permitted to collaterally attack tribal court judgments unless they have exhausted all available appellate tribal court remedies or satisfy one of the recognized exceptions to the doctrine.[104]

In *Simmonds* the State intervened and argued that exhaustion was not required because the tribal court plainly lacked jurisdiction over nonmember parents of tribal children.[105] The State's argument relied heavily on its understanding that *Montana* and a subsequent decision by the United States Supreme Court, *Strate v. A-1 Contractors*,[106] jointly created a presumption that tribal courts lacked jurisdiction in circumstances like the one then at issue.[107]

We rejected the State's argument and instead held that "tribal jurisdiction [over nonmember parents in parental rights termination proceedings] is, at the very least, colorable and plausible."[108] We carefully examined the federal cases that the State contended created a presumption against jurisdiction and determined that those decisions were significantly more limited in scope than the State had acknowledged. "The United States Supreme Court has repeatedly and explicitly emphasized the context-bound nature of each of its rulings on tribal court civil jurisdiction, looking to various indices of congressional and executive action and intent in enlarging or diminishing retained

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[103] *Id.*

[104] *See id.* at 1011-14.

[105] *See id.* at 1019.

[106] 520 U.S. 438 (1997).

[107] *See Simmonds*, 329 P.3d at 1019.

[108] *Id.* at 1017.

inherent tribal sovereignty."[109] The question of tribal court jurisdiction over parental rights termination proceedings significantly differed from the land management issues at play in *Montana*; no decision from any court had held that *Montana* prevented a tribal court from properly deciding a child custody proceeding involving nonmembers.[110] Given the readily apparent distinctions between the legal authority exercised by the tribal court in *Simmonds* and that at issue in *Montana* and other cases, we concluded that the tribal court's claim to jurisdiction was both colorable and plausible, and therefore that the nonmember had not been excused from the requirement that he exhaust tribal appellate remedies before launching a collateral attack in state court.[111]

In *Simmonds* we were only charged with determining whether the tribal court's claim to jurisdiction over a nonmember parent on the basis of a child's membership or eligibility for membership was colorable or plausible.[112] This case, in contrast, requires that we decide whether tribal courts' inherent, non-territorial subject matter jurisdiction does in fact extend to the adjudication of the child support rights and obligations of nonmember parents of children who are members or eligible for membership. We hold that because tribes' inherent authority over child support stems from their power over family law matters concerning the welfare of Indian children — an area of law that is integral to tribal self-governance — the basis and limits of that authority are tied to the child rather than the parent.

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[109] *Id.* at 1019.

[110] *See id.* at 1021-22.

[111] *See id.* at 1022.

[112] *See id.*; *see also Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) (noting that exhaustion of tribal court remedies in a custody dispute was not excused because "[a]lthough the rights of non-member Plaintiff are affected, it is not clear that that fact alone would strip the Tribal Court of jurisdiction").

In this appeal, the State once again argues that *Montana* dictates the outcome in this case and precludes subject matter jurisdiction over nonmember parents. *Montana* is a case about the power of a tribe to regulate "hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe."[113] The Supreme Court held that such regulation could not be sustained "as an incident of the inherent sovereignty of the Tribe over the entire Crow Reservation."[114] The Court announced "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,"[115] and then identified what have come to be known as "the *Montana* exceptions"[116] to this proposition:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[117]

The Supreme Court has clarified that "[t]hese exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule' or 'severely shrink' it."[118]

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[113] *See Montana v. United States*, 450 U.S. 544, 564 (1981).

[114] *Id.* at 563.

[115] *Id.* at 565.

[116] *E.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

[117] *Montana*, 450 U.S. at 565-66 (citations omitted).

[118] *Plains Commerce*, 554 U.S. at 330 (first quoting *Atkinson Trading Co. v.*
(continued...)

"While the *Montana* Court stated its 'general proposition' in categorical terms, its actual conclusion depended on its examination of federal executive and legislative action and intent regarding the regulation at issue."[119] The *Montana* Court described the regulatory issue before it as "a narrow one."[120] The Supreme Court has subsequently held that determining the "existence and extent" of a tribal court's civil jurisdiction "will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."[121] It has also called for "a proper balancing" of the interests of tribes and nonmember litigants.[122] Justice O'Connor, in a concurring opinion, noted that the holding in *Montana* and its progeny "that tribal jurisdiction must 'accommodat[e]' various sovereign interests does not mean that tribal interests are to be nullified through a per se rule."[123]

Moreover, it is important to consider the source of tribal authority that *Montana* and ensuing cases have analyzed, because it critically differs from the source

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[118](...continued)
Shirley, 532 U.S. 645, 647, 655 (2001); then quoting *Strate v. A-1 Contractors*, 520 U.S. 438, 458 (1997)).

[119] *Simmonds v. Parks*, 329 P.3d 995, 1020 (Alaska 2014) (citing *Montana*, 450 U.S. at 557-63).

[120] *Montana*, 450 U.S. at 557.

[121] *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-56 (1985) (citation omitted).

[122] *Nevada v. Hicks*, 533 U.S. 353, 374 (2001).

[123] *Id.* at 395 (O'Connor, J., concurring in part) (alteration in original) (quoting *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 156 (1980)).

of authority at issue here. "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory."[124] The authority Central Council invokes in this appeal stems from its sovereignty over its members. In contrast, the *Montana* Court analyzed the breadth "of the inherent sovereignty of the Tribe *over the entire Crow Reservation*"[125] — a distinctly territorial basis of sovereignty. The Supreme Court's later statements regarding the reach of tribal court jurisdiction have similarly arisen in cases in which tribes invoked authority based on territory.[126] Translating the *Montana* Court's analysis from the context in which it was delivered to that of this appeal is not the simple matter the State portrays it to be, but instead requires understanding how the limits of land-based sovereignty are related to its territorial basis, and thus what similar limits may exist on inherent sovereignty based on tribal membership.

The Ninth Circuit considered the applicability of the *Montana* rule and the proper application of the *Montana* exceptions with regard to territorial sovereignty in a 2011 case, *Water Wheel Camp Recreational Area, Inc. v. LaRance*.[127] In *Water Wheel* a tribal court exercised jurisdiction over claims arising from the tribe's lease of tribal

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[124] *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *cf. John I*, 982 P.2d 738, 759 (Alaska 1999) ("The federal decisions contain language supporting the existence of tribal sovereignty based on either land or tribal status.").

[125] *Montana*, 450 U.S. at 563 (emphasis added).

[126] *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 320-23 (2008) (contract and other claims arising out of sale of non-Indian fee land within reservation); *Hicks*, 533 U.S. at 356-57 (tort and civil rights claims arising out of search pursuant to state-issued warrant on tribal lands within reservation); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997) (tort claim arising out of accident on state highway within reservation).

[127] 642 F.3d 802 (9th Cir. 2011).

lands within a reservation to a non-Indian corporation owned by a non-Indian.[128] A federal district court determined that the tribal court had jurisdiction over the corporation under the "consensual relationship" *Montana* exception but rejected its assertion of jurisdiction over the owner personally.[129]

The Ninth Circuit reversed and held that the district court had "appl[ied] *Montana* unnecessarily."[130] It noted that "the Supreme Court has on only one occasion established an exception to the general rule that *Montana* does not apply to jurisdictional questions arising from the tribe's authority to exclude non-Indians from tribal land."[131] That sole exception, *Nevada v. Hicks*, concerned "tribal-court jurisdiction over state officers enforcing state law," who are "a narrow category of outsiders" whose liability is of special state interest.[132] And even *Hicks* "explicitly recognized that in some cases, land ownership 'may sometimes be a dispositive factor' in establishing a tribal court's regulatory jurisdiction over non-Indians."[133] Thus, the *Water Wheel* court concluded, "Supreme Court and Ninth Circuit precedent, as well as the principle that only Congress may limit a tribe's sovereign authority," all counseled in favor of applying *Montana* to jurisdictional questions arising on tribal land "only when the specific concerns at issue

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[128] *See id.* at 804-07.

[129] *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, No. 08-0474, 2009 WL 3089216, at *13 (D. Ariz. Sept. 23, 2009).

[130] *Water Wheel Camp Recreational Area, Inc.*, 642 F.3d at 807 n.4.

[131] *Id.* at 813.

[132] *Id.* (quoting *Nevada v. Hicks*, 533 U.S. 353, 358 n.2, 371 (2001)).

[133] *Id.* (quoting *Hicks*, 533 U.S. at 360).

in [*Hicks*] exist."[134] Because the lease dispute in *Water Wheel* did not involve state law enforcement, "*Montana* [did] not apply to this case."[135]

Water Wheel warned against the rote expansion of *Montana* to cases that arise on tribal land and thus are closely tied to the territorial basis of inherent tribal sovereignty.[136] The same care must be paid when tribal courts claim jurisdiction over matters that are closely tied to the membership basis of inherent tribal sovereignty. As discussed in Part IV.B, *supra*, child support is a pillar of domestic relations and is directly related to the well-being of the next generation of tribal members. Central Council does not claim general jurisdiction over nonmember parents, but rather asserts specific jurisdiction to adjudicate child support matters arising out of a parent's obligations to his or her tribal child, whose membership is the basis of inherent tribal

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[134] *Id.*

[135] *Id.* at 816; *see also id.* at 813 ("[Applying *Montana*] would impermissibly broaden *Montana*'s scope beyond what any precedent requires and restrain tribal sovereign authority despite Congress's clearly stated federal interest in promoting tribal self-government.").

[136] *See id.* at 812 n.7 ("Further bolstering our conclusion that the tribe has regulatory jurisdiction is the fact that this is an action to evict non-Indians who have violated their conditions of entry and trespassed on tribal land, directly implicating the tribe's sovereign interest in managing its own lands."); *see also Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 940 (8th Cir. 2010) ("Tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner."); *cf. Montana v. United States*, 450 U.S. 544, 557 (1981) ("The Court of Appeals held that the Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits." (citation omitted)).

sovereignty. The jurisdiction claimed is thus intimately tied to the identified basis of inherent tribal sovereignty. *Montana* does not apply to this case.

2. An alternative analysis under the *Montana* exceptions would also allow a tribe to exercise jurisdiction.

Even if *Montana* did apply, Central Council's exercise of subject matter jurisdiction over nonmember parents would fit within either of its two exceptions. The first exception provides that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[137] This "consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself."[138] The "consent may be established 'expressly or by [the nonmember's] actions.' "[139]

Contrary to the State's argument, even in territory-based sovereignty cases the exception applies to more than just business relationships. As described in *Montana* it encompasses "other arrangements,"[140] which, as the Supreme Court later clarified in *Hicks*, refer to "private consensual relationship[s]."[141] In *Smith v. Salish Kootenai College* the Ninth Circuit, sitting en banc, recognized that the exception can

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[137] *Montana*, 450 U.S. at 565.

[138] *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001).

[139] *Water Wheel*, 642 F.3d at 818 (alteration in original) (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008)).

[140] *Montana*, 450 U.S. at 565.

[141] 533 U.S. 353, 359 n.3 (2001).

reach consensual bonds that do not involve a business relationship.[142] The *Smith* court expressly rejected the suggestion that the first *Montana* exception is limited to commercial arrangements and instead explained that, in its view, "the Court's list in *Montana* is illustrative rather than exclusive."[143] And in *Water Wheel* the Ninth Circuit further explained that tribal court jurisdiction under the first *Montana* exception "depends on what non-Indians 'reasonably' should 'anticipate' from their dealings with a tribe or tribal members on a reservation."[144]

A relationship that leads to the birth of a child is one that has significant consequences and obligations. When two people bring a child into being each should reasonably anticipate that they will be required to care for the child and perhaps may need to turn to a court to establish the precise rights and responsibilities associated with the resulting family relationship. This may require litigating in a court that is tied to the child but with which the parent has more limited contacts.[145] As applied to the broad category of nonmember parents, such events are, in at least some circumstances,

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[142] 434 F.3d 1127, 1140-41 (9th Cir. 2006) (en banc).

[143] *Id.* at 1137 n.4.

[144] *Water Wheel*, 642 F.3d at 817 (quoting *Plains Commerce*, 554 U.S. at 338); *see also id.* at 818 ("We are to consider the circumstances and whether under those circumstances the non-Indian defendant should have reasonably anticipated that his interactions might trigger tribal authority.").

[145] *See, e.g.*, AS 25.30.300(a)(1) (courts in a child's home state have jurisdiction to make initial child custody determinations); AS 25.25.201(6) (courts may exercise personal jurisdiction over nonresidents in child support matters if, among other bases, the nonresident "engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse"); *Parker v. State, Dep't of Revenue, Child Support Enf't Div., ex rel. R.A.W.*, 960 P.2d 586, 588 (Alaska 1998) (upholding state court personal jurisdiction to establish paternity and child support obligations of a nonresident who conceived a child with an Alaska resident in Alaska).

reasonably foreseeable.[146] In the context of membership-based inherent tribal sovereignty, relationships that give rise to the birth of a child fit within the first *Montana* exception.

The second *Montana* exception provides that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[147] "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community."[148]

Although the United States Supreme Court "has never found the second exception applicable,"[149] the lower federal courts have. In *Elliott v. White Mountain Apache Tribal Court* the Ninth Circuit held that a tribal court did not plainly lack jurisdiction over a civil action that the tribe brought against a nonmember arising out of a fire she had set on tribal land within the tribe's reservation.[150] The court decided that the tribal court's claim to jurisdiction under the second *Montana* exception was "compelling . . . particularly in light of the result of the alleged violations of those regulations in this very case: the destruction of millions of dollars of the tribe's natural

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[146] As discussed in Part IV.D, *infra*, our decision in this appeal is only concerned with tribal court subject matter jurisdiction over nonmember parents as a category. We offer no opinion on the proper contours of personal jurisdiction.

[147] *Montana v. United States*, 450 U.S. 544, 566 (1981).

[148] *Plains Commerce*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566).

[149] CONFERENCE OF W. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK 209 (Clay Smith ed., 4th ed. 2008).

[150] *See* 566 F.3d 842, 844-45 (9th Cir. 2009).

resources."[151] The Eighth Circuit, in *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, similarly looked to the magnitude of the alleged violation in holding that tort actions arising from an attempted physical takeover of a tribal casino fit within the second *Montana* exception.[152] And in *Water Wheel* the Ninth Circuit held that even if *Montana* applied, the fact that "the commercial dealings between the tribe and [the non-Indian owner] involved the use of tribal land, one of the tribe's most valuable assets," would fit the action within the second *Montana* exception.[153]

In light of these precedents we have no difficulty holding that the adjudication of child support obligations owed to tribal children falls within the second *Montana* exception. Congress has explicitly found "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[154] And as the superior court correctly recognized, "[e]nsuring that tribal children are supported by their noncustodial parents may be the same thing as ensuring that those children are fed, clothed, and sheltered. The future of a tribe — like that of any society — requires no less." In light of federal precedent that recognizes that serious damage to territorial resources fits within the second *Montana* exception when a tribe's inherent sovereignty is based on territory, the serious potential for damage to the next generation of tribal members posed by a tribe's inability to administer parental financial support of member

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[151] *Id.* at 850.

[152] *See* 609 F.3d 927, 939 (8th Cir. 2010).

[153] *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 818 (9th Cir. 2011).

[154] 25 U.S.C. § 1901(3) (2012).

or member-eligible children brings the power to set nonmember parents' child support obligations within the retained powers of membership-based inherent tribal sovereignty.

In addition to complying with federal judicial precedent, our recognition of Central Council's jurisdiction over nonmember parents in the child support realm also complies with the federal executive branch's determinations. As discussed above, the Secretary of the Department of Health and Human Services had to approve Central Council's application to make the Tribal Child Support Unit a Tribal IV-D program, and by federal regulation that plan had to include "a description of the population subject to the jurisdiction of the Tribal court or administrative agency for child support enforcement purposes."[155] Central Council's application asserted jurisdiction on, among other things, the basis of "sexual conduct which results in the paternity of a [Central Council] child and the corresponding obligation to provide for the child." By approving Central Council's application, the Secretary implicitly recognized that tribal courts' assertion of subject matter jurisdiction over nonmember parents complied with the federal statutory and regulatory requirements for Tribal IV-D programs.

The holding we announce today comports with our previous decisions on the inherent, non-territorial subject matter jurisdiction of tribal courts. In *John I* we held that "[a] tribe's inherent sovereignty to adjudicate internal domestic custody matters depends on the membership or eligibility for membership of the child."[156] Whether the children whose custody was at issue were in fact eligible for tribal membership was contested, and we determined that their eligibility was "a critical fact that must be

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[155] 45 C.F.R. § 309.70 (2015).

[156] 982 P.2d 738, 759 (Alaska 1999).

determined by the superior court on remand."[157] On remand, the superior court "concluded that the children were eligible for membership." In our view, the superior court "correctly determined that [the tribe] had subject matter jurisdiction."[158]

Our "focus on the tribal affiliation of the children"[159] in *John I* did not reflect any confusion over the membership status of the parents. To the contrary, we repeatedly noted that "John is not a member of Northway Village."[160] We also noted that John "consented to Northway's jurisdiction."[161] Our recognition of this fact was critical because "subject matter jurisdiction is a threshold determination and prerequisite for a court to hear a case;"[162] it "cannot be waived" by a party's consent.[163] If the subject matter jurisdiction of a tribal court to hear a custody proceeding turned on the tribal affiliation of both parents rather than the child, the issue was squarely before us in *John I*, and we failed to fulfill our duty as a court to raise the issue ourselves.[164] That is not what happened. Instead, we recognized in *John I* that a parent's membership status

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[157] *Id.*

[158] *John II*, 30 P.3d 68, 73 (Alaska 2001).

[159] *John I*, 982 P.2d at 759.

[160] *Id.*; *see also id.* at 743 ("Anita John, the children's mother and a member of Mentasta Village, consented to Northway's jurisdiction.").

[161] *Id.* at 743.

[162] *Hawkins v. Attatayuk*, 322 P.3d 891, 894 (Alaska 2014).

[163] *Id.* (quoting *Robertson v. Riplett*, 194 P.3d 382, 386 (Alaska 2008)).

[164] *See id.* at 894-95 ("The issue of subject matter jurisdiction 'may be raised at any stage of the litigation and if noticed must be raised by the court if not raised by one of the parties.' " (quoting *Hydaburg Coop. Ass'n v. Hydaburg Fisheries*, 925 P.2d 246, 248 (Alaska 1996))).

does not limit the tribal court's subject matter jurisdiction over the custody of tribal children. In both custody matters like that before us in *John I* and the child support matters like that before us today, tribal courts' inherent, non-territorial subject matter jurisdiction "depends on the membership or eligibility for membership of the child."[165]

Federal courts that have examined whether nonmember parents fall within tribal courts' inherent, non-territorial subject matter jurisdiction have reached the same conclusion. In *Kaltag Tribal Council v. Jackson*, the federal district court addressed the argument that a tribe's inherent sovereignty only extended to domestic disputes in which all parties are members of the tribe.[166] It rejected that argument, and instead held that "it is the membership of the child that is controlling, not the membership of the individual parents."[167] The Ninth Circuit affirmed,[168] and we reach the same conclusion in today's opinion.

"We have previously emphasized respect for tribal courts, and this respect must inform our analysis."[169] We are sympathetic to the concerns that nonmember parents may have about contesting their child support rights and obligations in a court system that may be less familiar to them than the state courts. But tribal courts that take on this responsibility share the goals of state courts and parents everywhere: They are, as Central Council's child support enforcement agency states in the first sentence of its governing policy guide, "motivated and dedicated to bettering the future of our children."

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[165] *John I*, 982 P.2d at 759.

[166] No. 3:06–cv–211, 2008 WL 9434481 (D. Alaska Feb. 22, 2008), *aff'd*, 344 F. App'x 324 (9th Cir. 2009).

[167] *Id.* at *6.

[168] *Kaltag Tribal Council v. Jackson*, 344 F. App'x 324 (9th Cir. 2009).

[169] *Simmonds v. Parks*, 329 P.3d 995, 1011 (Alaska 2014).

And what was true in 1999, when *John I* was decided, remains true today: "Recognizing the ability and power of tribes to resolve internal disputes in their own forums, while preserving the right of access to state courts, can only help in the administration of justice for all."[170]

D. This Appeal Does Not Present Questions Of Personal Jurisdiction.

The superior court's order granting Central Council summary judgment discussed the possibility that in some cases, "the exercise of [personal] jurisdiction by the tribal court may well violate due process," citing the United States Supreme Court's decision in *Kulko v. Superior Court*.[171] However, it found it unnecessary "to decide the precise outer limits of the [tribal] court's jurisdiction," and the declaratory judgment and permanent injunction it issued did not address questions of personal jurisdiction. Both Central Council and the State submitted that these issues should be left "for decision in future cases." We agree that the question whether a tribal court exercising inherent, non-territorial subject matter jurisdiction has personal jurisdiction over the parties whose rights and obligations it adjudicates should be decided in cases presenting concrete factual records and a full opportunity to develop the factual and legal arguments.

V. CONCLUSION

The superior court's order is AFFIRMED.

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170 982 P.2d at 760.

171 436 U.S. 84, 91-92 (1978).

WINFREE, Justice, with whom STOWERS, Justice, joins, concurring in part.

The superior court made two legal rulings underlying the declaratory and injunctive relief entered in favor of the Central Council of Tlingit and Haida Indian Tribes of Alaska (the Tribe). First, relying on our seminal holding in *John v. Baker* that Alaska tribes retained non-territorial-based inherent sovereign authority to adjudicate custody disputes over children who are tribal members or eligible for tribal membership,[1] it ruled that this inherent sovereign authority encompassed adjudication of child support disputes over tribal children even if custody were not in dispute. Second, it concluded that with respect to child support orders issued by the Tribe, the State of Alaska was required to comply with the Uniform Interstate Family Support Act (UIFSA) and related federal and state regulations. Today the court affirms those legal rulings and the associated injunctive relief, and I join that part of its decision.

But the court unnecessarily moves further and reaches out to provide an advisory opinion[2] on yet another legal issue: whether a tribal court with non-territorial-based inherent sovereign authority to adjudicate matters involving tribal children necessarily has adjudicatory authority (subject to some unstated personal jurisdiction limitations) over non-tribal-member parents. This issue is not necessary to the decision before us, there is no specific controversy in this case necessitating a decision on the issue, there is no party in this case truly advocating for the interests of non-member

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[1] 982 P.2d 738, 748-49 (Alaska 1999).

[2] *Cf. Laverty v. Alaska R.R. Corp.*, 13 P.3d 725, 729 (Alaska 2000) (noting Alaska's Declaratory Judgment Act (AS 22.10.020(g)) does "not open the door for hypothetical adjudications [or] advisory opinions").

parents on the issue, and neither the Tribe nor the United States considered the issue worthy of significant briefing; I therefore do not join the court's advisory opinion.[3]

I start with the basic proposition that this case does not involve an actual child support dispute between the Tribe and a non-member parent based on an allegation that the Tribe lacked adjudicatory authority over the parent. This case involves the Tribe's demand that the State comply with UIFSA in connection with the Tribe's child support orders. The superior court recognized that under its ruling a tribal court "could claim jurisdiction" to enter a child support order against a non-member parent, but believed personal jurisdiction considerations would define the contours of a tribal court's authority and that further refinement was unnecessary at this time.

On appeal the State continues to argue that the Tribe does not have adjudicatory authority over non-member parents. The Tribe and the United States respond that this case does not raise any real dispute about tribal court adjudicatory authority over non-member parents and that the potential involvement of non-member parents in some cases does not divest the Tribe of its otherwise inherent sovereign authority to adjudicate child support for tribal children. I agree with the Tribe and the United States. And I find it ironic that they — albeit backhandedly — are willing to give non-member parents a future opportunity to be heard on the Tribe's adjudicatory authority while the court is so anxious to decide the issue today without ever hearing from a non-member parent.

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[3] If today's decision is not dictum, then it seems clear — at least under the court's interpretation of federal law — that whenever a tribal court has adjudicatory authority over a tribal or tribal-eligible child it automatically has adjudicatory authority over the child's non-member parent in any matter involving the child without regard to, or a required nexus with, Indian country.

This case comes to us much like *State v. Native Village of Tanana*,[4] involving the Indian Child Welfare Act (ICWA).[5] In that case we concluded that federally recognized Alaska Native tribes that had not reassumed exclusive adjudicatory jurisdiction still have concurrent jurisdiction to initiate ICWA-defined child custody proceedings — both inside and outside of Indian country — and are entitled to all the rights and privileges of Indian tribes under ICWA, including full faith and credit with respect to their ICWA-defined child custody orders.[6] But with an appropriate exercise of judicial restraint, we rejected the State's entreaty to more particularly define the contours of tribes' adjudicatory jurisdiction, including their adjudicatory authority over Indian children's[7] non-member parents:

> The nature and extent of tribal jurisdiction in any particular case will depend upon a number of factors, including but not limited to: (1) the extent of the federal recognition of a particular tribe as a sovereign; (2) the extent of the tribe's authority under its organic laws; (3) the tribe's delegation of authority to its tribal court; and (4) the proper exercise of subject matter and personal jurisdiction. Among the many issues we are not deciding today are: . . . (2) *the extent of tribal jurisdiction over non-member parents of Indian children*; and (3) the extent of tribal jurisdiction over Indian children or member parents who have limited or no contact with the tribe. We therefore do not need to address the varied hypothetical situations posited by the State as creating

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[4] 249 P.3d 734 (Alaska 2011).

[5] 25 U.S.C. §§ 1901-1963 (2012).

[6] *Native Vill. of Tanana*, 249 P.3d at 751.

[7] *See* 25 U.S.C. § 1903(4) (defining "Indian child").

> difficult jurisdictional questions — we leave those for later determinations under specific factual circumstances.[8]

I see no reason to dispense with this judicial restraint today.

The context of this case — a political jurisdictional battle between two sovereigns — provides an additional reason for judicial restraint. As outlined in *Native Village of Tanana*, the State's position on the nature and extent of tribal sovereignty has waxed and waned depending upon the politics of the day.[9] But jurisdictional battles between the State and Alaska Native tribes are inter-governmental and generally intended to delineate exclusive and concurrent jurisdiction boundaries and flesh out related concepts like full faith and credit for tribal court orders. In those battles — such as in this case and in *Native Village of Tanana* — the State and the tribes are the primary interested parties. Here, for example, the State's argument that the Tribe lacked any adjudicatory authority over non-members (with or without consent) to enter child support orders was not out of a concern about non-members forced to appear in tribal courts without consent, but rather out of a concern for its own budget — it simply did not want to have to enforce *any* of the Tribe's child support orders — and as a result of the litigation the State now will, *as a general matter*, have to enforce the Tribe's child support orders.

On the other hand, a specific non-member parent's objection to a tribal court's adjudicatory authority to issue a child support order would place the issue in a very different factual and legal context. It is not so clear to me that the State would be an interested party to that specific dispute although, like the United States often does in

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[8] *Native Vill. of Tanana*, 249 P.3d at 751-52 (emphasis added). If today's decision is not dictum, then it seems clear the court now has answered the noted issue left open in that case.

[9] *Id.* at 744-47.

Indian jurisdictional disputes, the State could participate as an amicus curiae. And given Alaska's unique Indian law environment — where inherent sovereign authority is for the most part untethered to Indian country — existing U.S. Supreme Court precedents seem an imperfect roadmap for determining whether a tribal court has such adjudicatory authority.[10]

Perhaps this distinction can be made more clear with the following comments and questions. The choice to seek U.S. Supreme Court review of today's decision belongs solely to the State, not to a non-member parent of a tribal child. That decision — like all previous State decisions regarding tribal sovereignty — will be primarily a political decision, based on how the State wishes to co-exist with sovereign tribes within its boundaries. Who in this case represents the legal interests of non-member parents of tribal children? No one. I do not find this particularly satisfying for a court that prides itself on procedural fairness.

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[10] With this in mind I make three casual observations about the court's decision. First, I am dubious of any analysis about tribal court adjudicatory authority over non-members that begins by rejecting *Montana v. United States*, 450 U.S. 544 (1981), as the fundamental lens for the analysis. Second, the court conspicuously avoids discussing substantial case law indicating that the *Montana* exceptions to the presumption that tribal courts do not have adjudicatory authority over non-members relate only to non-member conduct within reservations, which are virtually non-existent in Alaska. *See, e.g.*, *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327-35 (2008) (explaining *Montana*'s general principle's scope, specifying that "*Montana* and its progeny permit tribal regulation of non-member *conduct* inside the reservation that implicates the tribe's sovereign interests"). Finally, under a *Montana* exception a non-member may consent to tribal court jurisdiction even if the tribal court otherwise would have no adjudicatory authority over the non-member. 450 U.S. at 565. It is difficult to understand why the non-member parent's consent to tribal court adjudicatory authority in *John v. Baker*, 982 P.2d 738, 743 (Alaska 1999), now — in retrospect — demonstrates that tribal courts have adjudicatory authority over all non-member parents of tribal children regardless of consent.

In my view whether tribal courts have adjudicatory authority over non-member parents of tribal or tribal-eligible children with respect to matters involving those children — when those matters arise untethered to Indian country — is a matter best left for a day when we actually have before us a dispute between a tribe and a non-member parent. Although the court's ultimate conclusion certainly is not implausible,[11] I do not join it or its underlying analysis.

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[11] *Cf. Simmonds v. Parks*, 329 P.3d 995, 1017-22 (Alaska 2014) (concluding tribal court's non-territorial-based claim of adjudicatory authority to terminate non-member parent's parental rights to tribal child was "plausible" so that non-member parent was required to exhaust tribal court remedies before seeking state court relief).

Bloomberg BNA

Family Law Reporter®

VOL. 42, NO. 21 APRIL 5, 2016

HIGHLIGHTS

State Must Enforce Tribal Court Child Support Orders
Alaska's child support enforcement agency must recognize and enforce support orders entered by Native American tribal courts, that state's Supreme Court holds. After determining that tribal courts have inherent subject-matter jurisdiction to determine support obligations owed to children who are members of (or eligible for membership in) the tribe, it says that their orders must be treated in the same manner as all other foreign support orders under the Uniform Interstate Family Support Act. **Page 1251**

Mississippi Statutory Ban on Gay Adoption Falls
A Mississippi law barring adoption by same-sex married couples is an unconstitutional violation of such couples' equal protection rights, the U.S. District Court in Mississippi declares. Entering a preliminary injunction enjoining its enforcement, the court looks to *Obergefell v. Hodges* and finds it ''highly unlikely that the same court that held a state cannot ban gay marriage'' would conclude that married gay couples should be denied the benefits of marriage—including the right to adopt. **Page 1255**

Children May Be Immunized Over 'Unfit' Mother's Objection
A parent who is adjudicated unfit in child protective proceedings loses the right to veto his or her child's vaccination on religious grounds during the dispositional phase of that action, the Michigan Court of Appeals rules, explaining that ''only 'fit' parents'' enjoy the ability to make decisions for their children ''unfettered by governmental interference.'' Thus, the court says, the trial judge may enter an inoculation order if such is ''appropriate to the welfare of the juvenile and society.'' **Page 1252**

Absconding Mom Needn't Pay Abusive Dad's Hague Expenses
A father who prevailed on his petition under the Hague child abduction convention for his wife's return of their child to Singapore is not entitled to an order requiring her to pay his fees and expenses, because her removal of the child was a result of his intimate partner violence against her, the Fifth Circuit Court of Appeals decides. It points out that the Convention's implementing legislation—the International Child Abduction Remedies Act—allows the denial of fee awards that are ''clearly inappropriate.'' **Page 1254**

Also . . .
No right to jury trial in parental rights termination proceeding, Nevada court declares (**Page 1258**) . . . Missouri court says *Mansell* doesn't preclude order that man comply with agreement to pay ex-wife half the military disability benefits he receives in lieu of retired pay (**Page 1258**) . . . Father should have been ordered to keep girlfriend's dogs away from allergic chid, Florida court holds (**Page 1257**)

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PARENTAL RIGHTS TERMINATION: Vermont court affirms termination order based on father's extended incarceration while awaiting trial on unrelated criminal charges. **Page 1258**

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Family Law Reporter (ISSN 0148-7922) is published weekly, except the last week in March, the week following July 4th, and the last week in December at the annual subscription rate of $1,569 per year, for a single print copy, by The Bureau of National Affairs, Inc., 1801 S. Bell St., Arlington, VA 22202-4501. **Periodicals Postage Paid at** Arlington, VA and at additional mailing offices. **POSTMASTER:** Send address changes to Family Law Reporter, BNA Customer Contact Center, 3 Bethesda Metro Ctr, Suite 250, Bethesda, MD 20814.

Court Decisions

Native Americans

Tribal Child Support Orders Must Be Enforced by State

Tribal courts have inherent subject-matter jurisdiction to determine support obligations owed to children who are tribal members or eligible for membership, the Alaska Supreme Court ruled Mar. 25. Thus, it said, Alaska's Uniform Interstate Family Support Act requires that the state's child support enforcement agency recognize and enforce tribal court support orders (*State v. Central Council of Tlingit and Haida Indian Tribes of Alaska*, 2016 BL 92881, Alaska, No. S-14935 (7093), 3/25/16) (*affirming 38 FLR 1015*).

Crucial Decision. In an Apr. 4 e-mail to Bloomberg BNA, Amber Ahola, President of the National Association of Tribal Child Support Directors, said that the association was pleased with the court's decision to uphold tribes' inherent authority to regulate domestic relations among members when adjudicating a parent's child support obligation.

Noting that the NATCSD had filed an amicus brief, she explained that it became involved in this litigation ''to ensure that Alaska, like its sister states, fulfills its obligations under federal law and treats all Native children equally, regardless of where they reside or who their parents are.''

Ahola called the decision ''a crucial aspect of promoting the future of tribal families,'' and said that it ''is fundamental to tribal child support programs across the country.''

Neutral on Jurisdiction. In 2009, Alaska's UIFSA was amended to include Indian tribes or nations in its definition of ''state.'' However, the amendment also included the legislature's view that ''UIFSA does not determine the authority of an Indian tribe to enter, modify, or enforce a child support order'' and stated that the legislative intent was ''to remain neutral on the issue of the underlying child support jurisdiction.''

The state supreme court had previously held that the tribes' powers of internal self-governance included the power to determine custody (*John v. Baker*, 982 P.2d 738, 25 FLR 1538 (Alaska 1999)), to accept transfer jurisdiction of custody cases from state court under the federal Indian Child Welfare Act (*In re C.R.H.*, 29 P.3d 849, 27 FLR 1577 (Alaska 2001), and to initiate child protection cases (*State v. Native Village of Tanana*, 249 P.3d 734, 37 FLR 1209 (Alaska 2011)).

In now saying that such power also includes child support obligations, the court explained that it was a component of a tribe's inherent authority ''to regulate domestic relations among members.''

Tribe Goes to Court. The Central Council of the Tlingit and Haida Tribes is a federally recognized Alaska Native tribe. It has a tribal court system and has adopted a process for adjudicating the support obligations of parents whose children are either tribal members or eligible for membership.

It also operates a federally funded Title IV-D child support enforcement unit. The Tribal Child Support Unit works with its state counterpart (the Child Support Services Division), which refers state court support orders to the Unit for enforcement. CSSD also enforces cases referred to it by the Unit, so long as the original support order was issued by a state court.

Because CSSD has not enforced support orders issued by the Central Council's tribal courts, certain enforcement mechanisms that require CSSD's cooperation—such as garnishing an obligor's state unemployment benefits or Permanent Fund Dividend—have not been available for enforcement of tribal court support orders.

The Central Council obtained a declaratory judgment that its tribal court has subject-matter jurisdiction over support matters for member and member-eligible children. The superior court also granted its request for an injunction requiring CSSD to recognize tribal court support orders in the same way it recognizes orders from other states pursuant to UIFSA. See 38 FLR 1015 (Alaska Super. Ct., No. 1JU-10-376 CI, 10/25/11).

The state appealed, arguing that requiring CSSD to coordinate with the many tribal courts would impose additional costs and disrupt the uniformity of child support awards. It also cited the potential difficulty of modifying a tribal support order, which might prevent it from recouping funds spent on children in its custody who are subject to a tribal order.

Inherent Authority. Chief Justice Dana A. Fabe observed that Central Council did not argue that either Title IV-D of the federal Social Security Act or UIFSA is the source of the tribal courts' authority to decide child support matters. Instead, it contended that such courts have inherent sovereign authority to exercise subject-matter jurisdiction over child support matters and thus are ''authorized tribunals'' for purposes of the Act.

Fabe also noted that as a result of the 1971 federal Alaska Native Claims Settlement Act—which extinguished all Native claims to land in Alaska and revoked all but one Indian reservation in the state—''we have had to examine the inherent, non-territorial sovereignty of Indian tribes, a question of federal law that other 'courts have not had occasion to tease apart'.''

Adding that her court's decisions analyzing this inherent, non-territorial subject-matter jurisdiction—i.e., ''a tribe's ability to retain fundamental powers of self-governance''—have implicitly recognized two separate dimensions, she said ''we now expressly recognize'' them; the first, she stated, ''relates to the character of the legal question that the tribal court seeks to decide, while the second relates to the categories of individuals and families who might properly be brought before the tribal court.''

Pillar of Domestic Relations. Fabe then turned to the ''foundational decision'' for the analysis of tribal courts' exercise of subject-matter jurisdiction on the basis of inherent, non-territorial sovereignty, *John v. Baker* (*John I*). She noted that the superior court here relied on *John* and the connection between custody and child support in ruling that Central Council's jurisdiction extended to support adjudications as such was an integral ''part of the tribe's internal domestic relations.''

''We agree,'' Fabe said, ''and we hold that the adjudication of child support obligations is a component of a tribe's inherent power 'to regulate domestic relations among members'.'' *Montana v. U.S.*, 450 U.S. 544, 564 (1981).

''Child support orders are a pillar of domestic relations and are directly related to the well-being of the next generation,'' she continued, citing *U.S. v. Ballek*, 170 F.3d 871, 25 FLR 1241 (9th Cir. 1999).

Tribal Power. ''Recognizing tribal courts' inherent, non-territorial subject-matter jurisdiction over child support matters is consistent with our description of tribal power'' within the context of family affairs, Fabe said, adding that the subsequent history of the *John v. Baker* litigation ''also weighs in favor of Central Council's assertion of subject-matter jurisdiction over child support orders.'' See 30 P.3d 68, 27 FLR 1525 (Alaska 2001) (*John II*); 125 P.3d 323, 32 FLR 1106 (Alaska 2005) (*John III*).

Fabe stated that the actions of the federal executive branch in granting Central Council's application for a tribal IV-D program ''also suggest that Central Council's tribal courts have inherent, non-territorial subject-matter jurisdiction over child support matters.''

As to the concerns raised by the state, she said that any possible burden on state agencies associated with recognizing tribal authority is not part of the analysis, as such concerns do not limit the exercise of tribal court jurisdiction.

Tribal Child. Also noting the state's concern regarding cases in which the child is (or is eligible to be) a tribal member but one parent is not, Fabe held that because tribes' authority over child support ''stems from their power over family law matters concerning the welfare of Indian children—an area of law that is integral to tribal self-governance—the basis and limits of that authority are tied to the child rather than the parent.'' See *Atwood v, Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 34 FLR 1130 (9th Cir. 2008).

Fabe further noted that Central Council does not claim general jurisdiction over non-member parents, ''but rather asserts specific jurisdiction to adjudicate child support matters arising out of a parent's obligation to his or her tribal child, whose membership is the basis of inherent tribal sovereignty.''

Thus rejecting the state's argument that *Montana v. U.S.* permits a tribe to regulate a nonmember only in limited instances, she said that even if *Montana* applied, the tribe's exercise of subject-matter jurisdiction over nonmember parents would fit into either of its two exceptions.

In closing, Fabe observed that this appeal did not present questions of personal jurisdiction.

Advisory Ruling? Justice Daniel E. Winfree concurred in part, joined by Justice Craig F. Stowers. He said the court's ruling on whether a tribal court has adjudicatory authority—''subject to some unstated personal jurisdiction limitations''—over nonmember parents was unnecessary as this case did not present that specific controversy. Thus, Winfree stated, that ruling was advisory and he did not join it.

The state was represented by Mary Ann Lundquist, Senior Assistant Attorney General, Fairbanks, Stacy K. Steinberg, Chief Assistant Attorney General, Anchorage, and Michael C. Geraghty, Attorney General, Juneau. Jessie Archibald, CCTHITA Child Support Unit Attorney, Juneau, and Holly Handler and Sydney Tarzwell, Alaska Legal Services Corporation, Juneau, appeared for the tribe.

By Julianne Tobin Wojay

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Full text at http://www.bloomberglaw.com/public/document/State_v_Cent_Council_of_Tlingit__Haida_Indian_Tribes_of_Alaska_No

Child Abuse & Neglect

'Unfit' Mother Lost Right to Object To Adjudicated Dependent Children's Vaccination

A parent who is adjudicated unfit in child protective proceedings has no right to veto his or her child's vaccination on religious grounds during the dispositional phase of those proceedings, the Michigan Court of Appeals decided Mar. 22, affirming a juvenile court's inoculation order (*In re Deng*, 2016 BL 88572, Mich. Ct. App., No. 328826, 3/22/16).

The appeals court explained that by virtue of being found unfit, the parent loses the right—''at least temporarily''—to make immunization decisions for the child, and ''must yield'' to the trial court's dispositional order ''for the welfare of the child and society.''

It thus held that the juvenile court did not exceed its authority by ordering immunizations for four dependent siblings. It did not address the fact that they were only temporary wards of that court and that there is a possibility of reunification with their adjudicated unfit mother after the vaccinations.

State-Mandated or Physician-Recommended? In a Mar. 25 e-mail to Bloomberg BNA, Mark A. Largent, Ph.D., author of **Vaccine: The Debate in Modern America** (Johns Hopkins University Press; 2012), and an associate dean and professor at Michigan State University, focused on key issues he found were ''not extensively explored within the long defense of the state's power to make medical decisions (including those related to vaccination) for children whose parents have been declared unfit.''

The first issue noted by Largent was that the trial court ''allowed the foster care worker assigned to the case to have the children fully vaccinated with not only the state-mandated vaccines, but with the larger number of physician-recommended vaccines. That is,'' Largent said, ''the court allows the case worker to do more than is required by the state for the children to be considered fully vaccinated.''

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He also pointed out that ''no one, including the mother, questioned the claim that vaccination of the children served the welfare of both the children and of society.''

Potential Problems. Finding ''nothing in the opinion that acknowledges the potential problems that might result when the mother is reunified with her children (as is the stated goal) and the children were now vaccinated,'' Largent said that ''the religious opposition appears to be to the ACT of vaccinating, rather than to the status of BEING vaccinated.''

''If this is true, and the act of vaccinating was undertaken by the state—rather than the mother—and the vaccination status of the children was not relevant to their mother's religious beliefs, there does not appear to be a problem with the state vaccinating the children. But that was left unexplored,'' he noted.

However, Largent concluded, ''I think the significance of the case rests in the first issue—that is, the court expanded the number of vaccines the case worker could allow to be administered to the children beyond the number mandated by the state and up to the number recommended by physicians.''

A Forfeited Right. The mother was adjudicated unfit in 2014 child protective proceedings. Her four children, all of whom were under the age of six, were made temporary wards of the court and placed in foster care. A case service plan was developed with the goal of family reunification.

At the permanency planning hearing, the foster care worker requested an order requiring the children to be immunized. The mother objected to their vaccination on religions grounds. The children's pediatrician testified regarding the benefits of immunization both to protect the children from disease and to protect society by preventing the spread of disease.

The doctor specified that vaccinations were recommended by the American Academy of Pediatrics and the Center for Disease Control.

In ordering that the children receive the physician-recommended immunizations, the trial court concluded that the mother could not prevent the inoculation of her children on religious grounds because she had been adjudicated as unfit and thus had ''forfeited the right'' to make vaccination decisions for them.

The court noted that the Juvenile Code afforded it the authority to direct the medical care of a child within its jurisdiction. See Mich. Comp. Laws § 712A.18(1)(f). It said that although parents generally enjoy a statutory right to prevent vaccinations on religious grounds, that exemption did not apply to parents who had been adjudicated as ''unfit.''

Also noting that courts have routinely rejected parents' religion-based constitutional challenge to immunization under the Free Exercise Clause, it added that, in any event, the mother did not have ''the same level of constitutional rights of child-rearing decisions [ ] as a fit parent would.''

The mother appealed. (Enforcement of the inoculation order was stayed during the appeal.)

'Appropriate for the Welfare.' At the outset, Judge Joel P. Hoekstra noted that Juvenile Code § 712A.18(1) requires dispositional orders to be ''appropriate to the welfare of the juvenile and society.''

Going on to say (in a footnote) that it was ''unnecessary'' to decide the constitutional question raised by the trial court's discussion of Free Exercise challenges, he thus limited his decision ''to parents who have been adjudicated as unfit in the course of a child protective proceeding.''

In finding that juvenile courts have the authority to order vaccination of an adjudicated dependent child during the dispositional phase of such proceedings, Hoekstra explained that ''it is only 'fit' parents who are presumed to act in the best interests of their children, and only 'fit' parents who enjoy the control, care, and custody of their children unfettered by governmental interference.'' See *Troxel v. Granville*, 530 U.S. 57, 26 FLR 1379 (2000).

''[T]hrough the course of the child protective proceedings, particularly the adjudicative phase, the parent loses the presumption of fitness, at which time the state becomes empowered to interfere in the family for the welfare of the child and to infringe on the parent's ability to direct the care, custody, and control of the child,'' he said, citing *In re AP*, 770 N.W.2d 403, 35 FLR 1305 (Mich. Ct. App. 2009).

Broken Liberty Interests. While recognizing that parental rights ''have not been irrevocably lost'' at this stage, he said, however, that ''a determination of unfitness 'so breaks the mutual due process liberty interests as to justify interference with the parent-child relationship'. *In re Clausen*,'' 502 N.W.2d 649, 19 FLR 1415 (Mich. 1993).

''As a result, the court gains broad powers to enter orders for the welfare of the child and the interests of society, and to make decisions regarding a host of issues which would normally fall to the parent to decide, including the ability [ ] to order medical or other health care for the child,'' Hoekstra explained.

''Quite simply,'' he said, after the adjudication—''which affords a parent due process for the protection of her liberty interests''—the parent is no longer presumed fit to make decisions for the child, and that power rests instead with the court.

And consequently, given the unfitness adjudication and the due process safeguards during the proceeding, there is ''no constitutional basis on which [the mother] may prevent the court's interference with her control of her children . . . when the facts proven and ascertained in this case demonstrate that inoculation is appropriate for the welfare of her children and society,'' Hoekstra stated.

Statutory Exemption. He acknowledged that state law exempts a child from the Public Health Code's vaccination requirements if a parent provides a written statement indicating that the requirements ''cannot be met because of religious convictions or other objection to immunization.'' § 333.9215(2).

Thus, Hoekstra stated, if the mother were a fit parent entitled to the control and custody of her children, this provision ''would undoubtedly'' allow her to forego their immunization. However, he explained, the provision is not applicable here ''for the simple reason that the children are not being immunized as a result of the provisions in the Public Health Code.''

Instead, the trial court exercised its broad authority to enter dispositional orders for the welfare of a child under its jurisdiction, including the authority to enter dispositional orders regarding medical treatment,

which is conferred by § 712A.18(1)(f) following adjudication of the parent as unfit, he explained.

Pointing out that the Juvenile Code ''includes no provision restricting the trial court's authority to enter dispositional orders affecting a child's medical care on the basis of a parent's objections to immunizations,'' Hoekstra asserted that ''it would be inappropriate to graft such an exception from the Public Health Code.''

Thus saying that the mother cannot rely on the latter to trump the Juvenile Code's ''broad grant of judicial authority,'' he likewise rebuffed her reliance on the state's Child Care Organization Act.

Hoekstra also was not swayed by her reliance on the parental custody presumption discussed in *Hunter v. Hunter*, 771 N.W.2d 694, 35 FLR 1447 (Mich. 2009), noting that this child protective case involved neither the Child Custody Act nor application of that presumption.

Judges Henry William Saad and David H. Sawyer concurred.

The Department of Health and Human Services was represented by Liisa R. Speaker, Lansing, Mich., and James S. Benison, Grand Rapids. Terese Paletta appeared for the mother; Diane D. St. Claire served as the children's guardian ad litem. Both are from Grand Rapids.

By Julianne Tobin Wojay

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*Full text at http://www.bloomberglaw.com/public/document/In_re_Deng_No_328826_2016_BL_88572_Mich_Ct_App_Mar_22_2016_Court_*

Child Abduction

Father's Domestic Violence Against Mother Warrants Denial of ICARA Fee Award

A father who prevailed on his petition under the Hague child abduction convention for his wife's return of their child to Singapore should not have been granted his expenses where he had engaged in intimate partner violence against her and her removal of the child to the U.S. was related to that abuse, the U.S. Court of Appeals for the Fifth Circuit held Mar. 25 (*Souratgar v. Fair,* 2016 BL 92797, 2d Cir., No. 14-904, 3/25/16) (*on further proceedings in 39 FLR 1368*).

The federal International Child Abduction Remedies Act provides that if a Hague petitioner succeeds, the district court

> shall order the respondent to pay necessary expenses incurred by or on behalf of the petitioner, including court costs, legal fees, [ ] related to the return of the child, unless the respondent establishes that such order would be clearly inappropriate.

The ''clearly inappropriate'' determination, the Fifth Circuit explained, requires district courts to weigh relevant equitable factors, including domestic violence perpetrated by the petitioning parent against the absconding parent.

As part of her defense against the father's petition for their child's return pursuant to the Hague Convention on the Civil Aspects of International Child Abduction, the mother had cited episodes of domestic violence between them and argued that the child faced a grave risk of harm if returned. The district court, however, found that the parents' prior domestic violence did not pose a risk of harm to their son. 2012 BL 448708, 39 FLR 1113 (S.D.N.Y. 2012). The Second Circuit affirmed its return order. 720 F.3d 96, 39 FLR 1368 (2d Cir. 2013).

Pursuant to ICARA (22 U.S.C. § 9007(b)(3)), the district court then ordered the mother to pay the expenses incurred by the father, rejecting her argument that such an award was ''clearly inappropriate'' in light of his abusive behavior against her.

It acknowledged that other courts have found the award of expenses to perpetrators of intimate partner violence to be clearly inappropriate, but said this case was distinguishable because the mother's departure from the marital home in 2011 eliminated the dilemma faced by victims who continued to reside with their abusers. (*Souratgar v. Lee*, 2014 BL 45397 (S.D.N.Y. 2014)). She appealed.

Presumptive Entitlement. Chief Judge Robert A. Katzmann explained that ICARA's ''clearly inappropriate'' caveat ''retains 'the equitable nature of cost awards' so that a prevailing petitioner's presumptive entitlement to an award of expenses is 'subject to the application of equitable principles'[.]'' *Ozaltin v. Ozaltin*, 708 F.3d 355, 374-5, 39 FLR 1171 (2d Cir. 2013).

He noted that courts applying the clearly inappropriate analysis have considered the degree to which the petitioner bears responsibility for the circumstances giving rise to the expenses associated with the Hague petition. See *Whallon v. Lynn*, 29 FLR 1285 (D. Mass., 3/18/03); *Aly v. Aden*, 2013 BL 410826 (D. Minn., 2/14/13); *Silverman v. Silverman*, 30 FLR 1531 (D. Minn., 8/26/04).

''Where, as here, the respondent's removal of the child from the habitual country [of residence] is related to intimate partner violence perpetrated by the petitioner against the respondent, the petitioner bears some responsibility for the circumstances giving rise to the petition,'' Katzmann said.

Unclean Hands. Finding that some courts have concluded that ''family violence perpetrated by a parent is an appropriate consideration in assessing fees in a Hague case'' (see *Guaragno v. Guaragno*, 2010 BL 430333 (N.D. Tex., 10/19/10), *adopted by* 2011 BL 452140 (N.D. Tex. 1/11/11); *Aly*; *Silverman*), he drew an analogy to the equitable unclean hands doctrine.

Katzmann also said that considering intimate partner violence as an equitable factor is not contrary to the legislative purpose of ICARA's fee-shifting provision. While the provision is an added deterrent to wrongful removals and retentions, Congress did not provide that this purpose was so overriding that courts must award fees regardless of the circumstances, he said.

Safety Valve. ''Rather, a common sense interpretation of the text indicates that, *even if* an award of fees would serve a deterrent purpose, that purpose must give way if awarding fees would be 'clearly inappropriate','' he explained, noting that this is in contrast to a determination of the merits of a Hague petition, where domestic violence may be considered only if it relates to a potential grave risk of harm to the child.

Katzmann said that in the fee-shifting context, ''Congress built a safety valve directly into the statute, leav-

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ing it to courts to determine when an award of expenses would be clearly inappropriate, notwithstanding the additional deterrence value such expenses might provide.''

Clearly Inappropriate. In reversing the award here, he pointed out that the record shows the father engaged in multiple, unilateral acts of intimate partner violence against the mother and that (contrary to the district court's findings) her removal of the child from Singapore was related to that violence. Finding no countervailing factors in the father's favor, Katzmann said that the award was ''clearly inappropriate.''

He added that although a respondent's inability to pay an award is also a relevant factor, it ''can never be a *countervailing* factor to intimate partner violence'' in cases such as the one here; it is clearly inappropriate to order a victim of such violence to pay an expense award to the perpetrator ''even where the victim is wealthy.''

Judges Christopher F. Droney and Raymond J. Lohier concurred, with Lohier writing separately to emphasized that the majority opinion ''is extremely narrow is scope and confined to its particular facts.''

Robert D. Arenstein appeared for the father. The mother was represented by Gary Serbin (Jordan L. Estes and Nicole E. Shiavo, on the brief), Hogan Lovells US LLP. All are from New York, N.Y.

By Julianne Tobin Wojay

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*Full text at http://www.bloomberglaw.com/public/document/Souratgar_v_Fair_No_14904_2016_BL_92797_2d_Cir_Mar_25_2016_Court_*

Adoption

Mississippi Gay Adoption Ban Is Declared Unconstitutional

A Mississippi law barring adoption by same-sex married couples was struck down by the U.S. District Court for the Southern District of Mississippi Mar. 31 (*Campaign for Southern Equality v. Mississippi Department of Human Services*, 2016 BL 102598, S.D. Miss., No. 3:15-cv-00578-DPJ-FKB, 3/31/16).

Judge Daniel P. Jordan III enjoined state officials from enforcing Miss. Code § 93-17-3(5)—which provides: ''Adoption by couples of the same gender is prohibited''—after finding the statute violated the U.S. Constitution's Equal Protection Clause. The case was brought by two gay right advocacy groups along with four lesbian couples who either sought a private adoption involving one partner's biological child or an adoption through the state foster-care system. Jordan noted that the defendants had ''offered a tepid defense of the statute itself, focusing instead on the Plaintiffs' right to sue them.''

After sorting out the appropriate state defendants (and finding that an unmarried plaintiff couple lacked standing), he considered the plaintiffs' motion for preliminary injunction under the familiar four-part test.

Marriage-Related Benefit. In addressing their likelihood of success on the merits, Jordan looked to the equal protection analysis in *Obergefell v. Hodges*, 135 S.Ct. 2584, 2015 BL 204553, 41 FLR 1411 (U.S. 2015), noting that it made no reference to the rational basis review generally applied in such cases.

Saying that this ''omission must have been consciously made given the Chief Justice's full-throated dissent,'' Jordan observed that the majority opinion evidenced an intent ''for sweeping change'' and that ''it seems clear the Court applied something greater than rational-basis review.''

He noted that ''the Court extended its holding to marriage-related benefits—which includes the right to adopt,'' and thus ''foreclosed litigation over laws interfering with the right to marry, and 'rights and responsibilities intertwined with marriage.' *Id*. at 2606.''

Adding that it ''seems highly unlikely that the same court that held that a state cannot ban gay marriage because it would deny benefits—expressly including the right to adopt—would then conclude that married gay couple can be denied that very same benefit,'' Jordan emphasized that *Obergefell* ''is the law of the land[.] In this case, that means that section 93-17-3(5) violates the Equal Protection Clause[.]''

Stigmatic Injuries. He went on to find that without the injunction, the plaintiff couples would suffer irreparable injury that could not be undone with a monetary award. Recognizing that they will have to complete the adoption process to fully remedy their injuries, Jordan said that the statute ''imposes an unconstitutional impediment that has caused stigmatic and more practical injuries.''

Also finding that the plaintiffs had met their burden regarding the balance of harms, and that ''it is always in the public interest to prevent the violation of a party's constitutional rights,'' Jordan preliminarily enjoined the Executive Director of Mississippi's Department of Human Services (which has authority over foster-care adoptions and certain aspects of private ones) from enforcing § 93-17-3(5).

The plaintiffs were represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, N.Y., McDuff & Byrd, Jackson, Miss., and Ellis Law Firm, Ocean Springs, Mo. The defendants were represented by the Mississippi Attorney General's Office.

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Full text at http://www.bloomberglaw.com/public/document/Campaign_for_Southern_Equal_v_Miss_Dept_of_Human_Servs_No_315cv57

Attorneys

Alleged Misconduct of Wife's Lawyer Doesn't Give Husband Footing to Get Him Booted

A divorcing man lacked standing to seek disqualification of his wife's lawyer based on his alleged misconduct in buying the marital home (which had been awarded to the wife), the California Court of

Appeal, Fourth District, ruled Mar. 17 (*Murchison v. Murchison*, 2016 BL 82289, Cal. Ct. App., No. B264825, 3/17/16).

The husband never had an attorney-client relationship with the wife's lawyer and has no personal stake in the lawyer's continued role as the wife's counsel, Justice Elwood Lui said.

Moreover, no authority permits removal of counsel for ethics violations when the lawyer's client wants the representation to continue and it won't harm the opposing party's interests, Lui said.

Personal Stake Missing. A standing requirement is implicit in disqualification motions, the court said. The complaining party must be the attorney's current or former client, or must have had some sort of confidential or fiduciary relationship with the attorney.

Lui found no California precedent directly prohibiting a party from seeking disqualification without such a relationship. But he said a review of case law showed that parties seeking disqualification of another party's attorney had standing based on the relationship between the moving party and the targeted attorney.

The court acknowledged a minority view recognizing standing in other circumstances. But even under the minority view, as explained in *Colyer v. Smith*, 50 F. Supp. 2d 966, 15 Law. Man. Prof. Conduct 275 (C.D. Cal. 1999), the moving party must establish a ''personal stake'' that's sufficient to satisfy the constitutional standing requirements, it said.

In this case Michael Murchison claimed his wife's attorney, Robert A. Curtis, acted unethically when he bought the marital home after the trial court awarded it to the wife and directed her to list it for sale to extinguish the husband's share of their debt on the property.

Murchison argued that Curtis violated California Rule of Professional Conduct 3-300, which prohibits lawyers from acquiring ownership interests adverse to a client unless certain requirements are satisfied.

The court overturned the trial court's order removing Curtis as the wife's counsel. Murchison doesn't have a ''personal stake'' in the representation and didn't argue that his own relationship with Curtis created a risk of harm to him, it said.

No Continuing Effect. The trial court also erred in relying on its inherent authority to disqualify Curtis for his alleged misconduct in buying the marital home, the court held.

A judge may disqualify a lawyer for misconduct only when it will have a continuing effect on the judicial proceedings, the court said. That wasn't the situation here, Lui said.

There's no precedent permitting a court to disqualify a lawyer for ethics violations when the nonmoving party wishes to continue the representation and the representation doesn't harm the opposing party's interests, the court said.

In that situation the trial court has the option to report the lawyer to disciplinary authorities, but must respect the client's right to chosen counsel, Lui said.

Lawyer-Witness Rule Doesn't Apply. The trial court erred again in using Rule 5-210 as a further basis for disqualifying Curtis, Lui said. That rule generally prohibits a lawyer from acting as both an advocate and a witness for a client.

Murchison said he planned to call Curtis to testify, as the new owner of the marital home, about whether the wife had satisfied her obligation to extinguish the husband's community debt in the mortgage.

Rule 5-210 doesn't apply in bench trials and when the client gives informed written consent, the court said. Moreover, the lawyer's testimony probably wouldn't be adverse to the wife because they both want to demonstrate that the sale was proper, Lui said.

Justices Frances Rothschild and Jeffrey W. Johnson concurred.

Robert A. Curtis, Long Beach, Cal., represented the wife. Michael Murchison, Long Beach, represented himself.

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Full text at http://www.bloomberglaw.com/public/document/Murchison_v_Murchison_No_B264825_2016_BL_82289_Cal_App_2d_Dist_Ma.

In Brief

Attorneys' Fees—Child Support Modification—Fee Award to Non-Prevailing Party

A family court did not err in awarding a mother the attorneys' fees she incurred in a support modification action brought by her children's father, even though she may not have been the prevailing party, the Arizona Court of Appeal, Division One, decided Mar. 22. The father was ordered to pay monthly support when the parties divorced. He moved out of state to seek employment and thereafter petitioned for a downward modification of support, on the grounds that his relocation and new job constituted a change in circumstances. The petition was granted, as was the mother's cross-petition for $20,000 in support arrears. The family court also awarded the mother her attorneys' fees and costs after finding that the father had taken unreasonable positions throughout the litigation. He appealed, arguing that it lacked authority to make the fee award because he was the prevailing party in the modification action, in which he had been granted a substantial reduction in his support obligation. He pointed to Ariz. Rev. Stat. § 25-503(E), which provides that an order modifying/terminating child support ''may include an award of attorney fees [ ] to the prevailing party.''

Affirming the mother's fee award, Judge John C. Gemmill, joined by Judges Diane M. Johnsen and Kent E. Cattani, noted that although the father's support payments were reduced, the mother received an arrearage judgment against him and the family court ''did not make a specific finding of which party prevailed.'' Gemmill went on to say that even assuming the father was the prevailing party, nothing in the statute prevented the family court from awarding fees to the non-prevailing party, as the ''use of the word 'may' in A.R.S. § 25-503(E) provides the family court broad discretion to decide whether to award attorney fees to the prevailing party[.]'' And, he added, the statute does not pro-

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hibit the court from awarding fees to the non-prevailing party if another statute authorizes such an award. Noting that post-decree support modification petitions are not limited to Chapter 5 of Title 25 but may also arise under Chapter 3 of that Title, Gemmill pointed out that § 25-324(A) provides that a court ''may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining, or defending any proceeding.'' Together, he said, § 25-324(A) and § 25-503(E) ''offer the family court distinct—but not mutually exclusive—options for awarding attorney fees'' and thus there was no legal error when the family court awarded fees to the mother under § 25-324(A).

Scott L. Patterson, Tempe, appeared for the mother. The father was represented by David Johnson, of Johnson Hendrickson & Lallis, PLLC, Mesa. (*Clark v. Clark*, 2016 BL 87096, Ariz. Ct. App., No. 1 CA-CV 15-0068 FC, 3/22/16)

Full text at http://www.bloomberglaw.com/public/document/Clark_v_Clark_No_1_CACV_150068_FC_2016_BL_87096_Ariz_App_Div_1_Ma

Custody—Restrictions—Allergic Child—Exposure to Dogs

A divorce court abused its discretion when—in setting out a parenting plan for the parties' child, who suffers from canine allergies—it denied the mother's request for restrictions on the child's exposure to the father's girlfriend's dogs when in his care, Florida's Fifth District Court of Appeal held in a Mar. 24 per curiam opinion. After the parties separated, the father agreed to refrain from exposing the child to dog allergens but did not abide by that promise, which resulted in a number of health issues for the allergic child. The father also admitted to lying about his to failure keep the dogs away from the child. The mother (who was the child's primary caregiver) documented his ''noncompliance and deceit'' and unilaterally denied him contact with the child. In turn, the father claimed that she had broken into his car and removed the child's allergy medications. All of these facts were presented to the court. Its subsequent custody order provided for virtually equal time-sharing but did not restrict the child's exposure to dogs. The mother appealed.

Reversing and remanding for an order limiting the child's exposure to dogs, the appellate court said that both parents ''demonstrated poor judgment and a lack of common sense. Former Husband put his child's health at risk by exposing child to his girlfriend's dogs. Former Wife unilaterally withheld time-sharing, and it appears that the trial judge believed she broke into Former Husband's car and took the child's medications. [ ] While dogs were one cause among several for the child's allergies, every physician involved opined that the child should avoid canine exposure as much as possible. Despite the many benefits we acknowledge pets may offer, Former Husband does not suggest that having child around dogs at this point in his life is in the child's best interest,'' it concluded. Judges William D. Palmer, Jay P. Cohen, and Wendy W. Berger concurred.

Robert H. McLean, of Ayres, Cluster, Curry, McCall, Collins & Banks, P.A., The Villages, appeared for the mother, and Bureus Wayne Argo, of Wayne Argo, P.A., Ocala, for the father. (*Palmer v. Palmer,* Fla. Dist. Ct. App., No. 5D15-2308, 3/24/16)

Full text at http://www.5dca.org/Opinions/Opin2016/032116/5D15-2308.op.pdf

Guardianship—Accounting Request—Court's Discretion

A court that has been asked by an interested person to order a child's legal guardians to account for the child's money is not required to issue such an order, the Colorado Court of Appeals, Division VI, decided Mar. 24, addressing an issue of first impression. Because the mother in this case suffered severe postpartum depression following her child's birth in 1999, the parents asked his aunt and uncle to care for the boy. They were appointed his legal guardians in 2002 and pursuant to court order have filed annual reports since that time. They receive financial support for the child from: (1) the parents, and (2) a portion of the mother's disability benefits. When the child turned 16 (and was still in the guardians' care), the parents filed a motion for an accounting, seeking documentation for the guardians' receipts and expenditures for him. They appealed the denial of that motion.

Noting that legal guardians ''receive, manage, and spend money for the children they protect,'' Judge Diana L. Terry acknowledged that Colorado Probate Code § 15-14-207(2) provides that ''a guardian shall [ ] account for money [ ] subject to the guardian's control, as ordered by the court on application of any person interested in the ward's welfare[.]'' If guardians must account ''as ordered by the court on application'' of interested persons, ''does an application force the court's hand,'' she queried. Deciding it does not, Terry said that ''[s]tanding alone, the words 'as ordered by the court' suggest that the court has discretion whether to issue an order and as to the extent of any order issued.'' She pointed out that the statute does not contain mandatory language directed at the court, such as ''must,'' ''shall,'' or ''is required to.'' She went on to say that ''we read the phrase 'on application' as requiring the court to *exercise its discretion* to decide whether to order an accounting and the extent of any such accounting.'' Thus, she said, the parents' motion ''triggered the court's duty to exercise its discretion as to whether to order an accounting and the extent of any such accounting. The court exercised that discretion by denying the parents' motion.'' Also finding that neither Colorado's fiduciary statutes nor the standard form on which the guardians make their annual reports require that they provide an accounting, Terry went on to find that the court's decision to deny the accounting was supported by evidence—the guardians' explanation—that the guardians' annual expenditures for the child have consistently exceeded the income they received for his use. Judges Anthony J. Navarro and Rebecca R. Freyre concurred.

The parents were represented by Daniel A. West, of Beltz & West, P.C., and the guardians by Leo L. Finkelstein. Both are from Colorado Springs. (*Sidman v. Sidman,* 2016 BL 93834, Colo. Ct. App., No. 14CA2097, 3/24/16)

Full text at http://www.bloomberglaw.com/public/document/Sidman_v_Sidman_2016_COA_44_Court_Opinion

Military Benefits—Pension—Disability Benefits—Decree-Incorporated Agreement

A trial court properly compelled a man's compliance with an agreed-to provision in his divorce decree under which he must pay his ex-wife half of the military disability benefits he receives in lieu of retired pay, the Missouri Court of Appeals, Western District, held Mar. 22. In their decree-incorporated settlement agreement, the parties expressly undertook division of the husband's benefits related to his 23 years military service during the marriage and his retirement due to disability. They agreed the wife would receive 50% of his "military pension" payments, which was defined to include benefits representing his "retired pay . . . actually or constructively waive[d]." Neither party appealed from the 2013 divorce decree. In 2014, the husband ceased paying the wife after discovering that the entire amount of his retired pay was based on disability and that there were no funds for payment under the federal Uniformed Services Former Spouses' Protection Act. He appealed the trial court's contempt order requiring him to resume the monthly "military pension" payments to the wife as directed by the divorce decree.

Finding that the husband "essentially argue[d]" that the court never had authority to divide his military disability payments in the divorce decree, and that any attempt to now enforce the decree violated federal law, Judge Mark D. Pfeiffer observed that "in reality" he was making a collateral attack on the decree as to a matter he had "*requested*" to be incorporated into it. "To state Husband's argument," Pfeiffer said, "is to understand our disdain for it." He pointed out that although a trial court may not on its own accord impose a property division that awards one spouse a share of the other's nonmarital property, the parties themselves may agree to such a division. See *Roberts v. Roberts*, 432 S.W.3d 789, 40 FLR 1391 (Mo. Ct. App. 2014). "The same is true in this case," Pfeiffer said. Going on to say that the husband could not collaterally attack what he claimed to be a mistake of law in the divorce decree as a basis for refusing to comply with its terms, Pfeiffer looked to the state court decision on remand from *Mansell v. Mansell*, 490 U.S. 581, 15 FLR 2035 (1989). See *In re Mansell*, 265 Cal.Rptr. 227, 16 FLR 1111 (Cal. Ct. App. 1989). Here, he noted, there was no question that the divorce court possessed jurisdiction or that the divorce decree was a final judgment. The husband can "not now attempt to impeach the Dissolution Decree nor resurrect" the issue of his retired/disability pay "under the guise of arguing that the issue is 'new' to the [ ] contempt proceeding," Pfeiffer said in affirming the trial court. Presiding Judge Cynthia L. Martin and Judge Karen King Mitchell concurred.

Jill K. Shipman-DeHardt, Lee's Summit, and Richard L. Rollings, Jr., Camdenton, appeared for the wife. The husband was represented by Jeffrey S. Royer, Blue Springs. (*Moore v. Moore,* 2016 BL 86736, Mo. Ct. App., No. WD78641, 3/22/16)

Full text at http://www.bloomberglaw.com/public/document/Moore_v_Moore_No_DOCKET_NUMBER_WD78641_2016_BL_86736_Mo_App_WD_Ma

Parental Rights Termination—Incarcerated Parent—Period of Pretrial Incarceration

A family court was not precluded from basing an order terminating a father's rights on his extended incarceration while awaiting trial on unrelated criminal charges, the Vermont Supreme Court held Mar. 18. In October 2013, the father was arrested and charged with 12 crimes, 10 of which were felonies (one carries a potential life sentence). He was denied bail and was in jail awaiting trial when his four-year-old son was adjudicated dependent in July 2014 because of non-accidental injuries sustained in the mother's care. The Department for Children & Families substantiated the father for abuse based on his alleged criminal conduct. The child was placed with the maternal grandparents with a disposition plan of adoption. The mother relinquished her rights. The father was still awaiting trial in the criminal case at the time of the August 2015 hearing to terminate his parental rights on the statutory best interest ground of his inability to resume parental duties within a reasonable period of time. Finding that even if the criminal charges were dismissed or he was acquitted, the father would still face the administrative substantiation of abuse, have to undergo a psychosexual evaluation, and satisfy DCF's case plan before being reunited with the child, the court terminated his rights. He appealed, arguing that his pretrial incarceration could not support the termination order because it was not an adjudication on the merits in the criminal prosecution. Thus, he contended, the termination decision was based solely on factors beyond his control.

Affirming, Chief Justice Paul L. Reiber said that the termination decision was not based on the assumption that the father would be found guilty of the criminal charges, "but rather a consideration of [the child's] needs and the father's ability to assume a parenting role within a reasonable period of time, given those needs." Going on to say that "it was appropriate for the family court, irrespective of the fact that the criminal charges against him were still pending, to consider father's incarceration and the consequences of his incarceration in evaluating what course of action was in [the child's] best interests," Reiber emphasized that a parent's constitutionally protected parental rights "are not absolute and may be overcome when the child's best interests require it." He added that if the father's argument was accepted, "then the parental rights of a parent with severe mental illness could not be terminated, even if that disability prevented the parent from caring for his or her children." Justices John A. Dooley, Marilyn S. Skoglund, Beth Robinson and Harold E. Eaton concurred.

Michael Rose, St. Albans, appeared for the father. DCF was represented by William H. Sorrell, Attorney General, and Elizabeth M. Tisher, Assistant Attorney General, Montpelier. (*In re M.W.*, 2016 BL 88605, Vt., No. 2015-357, 3/18/16)

Full text at http://www.bloomberglaw.com/public/document/In_re_MW_2016_VT_28_Court_Opinion

Parental Rights Termination—Jury Trial Request—National Trend

Parents of adjudicated dependent children do not have a right to a jury trial under either the federal or state constitutions in state-initiated parental rights termination proceedings, the Nevada Supreme Court held Mar. 31. Noting that the U.S. Constitution's protection of the right to a jury in certain civil cases does not apply to states, Justice Mark Gibbons further noted that the U.S. Supreme Court has not addressed whether due process requires a jury in termination proceedings.

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Explaining that although the parent-child relationship is a protected constitutional interest, such status does not automatically afford the right to a jury in termination cases, Gibbons said that the state's interest in the welfare of children, conservation of judicial resources, and the need for an accurate and fair outcome must also be weighed. A bench trial as opposed to a jury trial ''poses only a minimal risk of an erroneous decision,'' he stated. Adding that requiring jury trials would implicate many of the same policy concerns set out in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), Gibbons observed that ''such a delay would slow the pace of the high volume of cases [ ], yielding a backlog where speedy reunification or permanent placement of the child is of great importance. [ ] Our conclusion,'' he said, ''is further strengthened by the national trend to deny jury trials in termination of parental rights proceedings'' by precedent, statute, local court rule, or common practice. (He noted that the five states that guarantee the right to a jury in termination proceeds do so pursuant to a statute or express constitutional provision.) Chief Justice Ronald Parraguirre and Justices James W. Hardesty, Michael L. Douglas, Michael A. Cherry, Nancy M. Saitta and Kristina Pickering concurred.

The parent was represented by Jennifer L. Lunt and Carl W. Hart, Alternate Deputy Public Defenders, and DSS by Christopher J. Hicks, District Attorney, and Jeffrey S. Martin, Chief Deputy District Attorney. All are from Washoe County, Nev. (*Jesus F. v. Washoe County Department of Social Services (In re M.F.)*, 2016 BL 101262, Nev., No. 67063, 3/31/16)

Full text at http://www.bloomberglaw.com/public/document/Jesus_F_v_Washoe_Cty_Dept_of_Soc_Servs_No_67063_2016_BL_101262_20

Supreme Court

Review Sought

The following case has recently been docketed with the U.S. Supreme Court.

15-1168 Rye v. Women's Care Ctr. of Memphis, MPLLC

Torts—Wrongful birth—Wrongful life—Disruption of family planning—Natural conception and birth.

Ruling below (Tenn., 477 S.W.3d 235, 2015 BL 351269):

The lower courts' grant of summary judgment to a women's health clinic on a claim by a Roman Catholic couple for disruption of family planning, because the clinic failed to treat the woman with a RhoGam injection during a pregnancy to ward off Rh-sensitization, which she developed, and the possibility of fetal complications in future pregnancies, is affirmed. Even though the court in *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), referenced opinions by the U.S. Supreme Court discussing the individual constitutional right to ''be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child,'' procreational autonomy, and parental rights and responsibilities regarding children, the court in no way held or implied that Tennessee law recognizes disruption of family planning as either an independent action or an element of damages in negligence cases.

Question(s) Presented: In light of *Pickett v. Brown*, 462 U.S. 1 (1983), and the fundamental right of procreational autonomy recognized by the U.S. Supreme Court, does it violate the 14th Amendment's equal protection clause for a state to recognize a tort cause of action for ''wrongful birth'' and ''wrongful life,'' which protects the fundamental right of a person to avoid or terminate pregnancy, while refusing to recognize a cause of action for the disruption of family planning, which would protect the fundamental rights of those who wish to conceive and bear children naturally?

Petition for certiorari filed 3/15/16, by Gary K. Smith of Memphis, Tenn.

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Dear California Forum Members,
I am writing to send you an interim update on the **National Convening of Tribal-State Court Forums**, to be held **June 2-3 in Los Angeles, CA**. We continue to await formal approval through the Bureau of Justice Assistance so that we can provide funding for travel and lodging for two representatives from each forum. We do anticipate approval, but it often takes a bit of time to wind through the bureaucracy. In the meantime, I wanted to let you know that a special rate has been secured at the Biltmore Hotel. There is no need to contact the hotel – we will make arrangements on your behalf once final approval is secured.

Biltmore Hotel
506 S. Grand Avenue,
Los Angeles, CA 90071
https://www.millenniumhotels.com/en/los-angeles/millennium-biltmore-hotel-los-angeles/

Our meeting space will be nearby:

Ronald Reagan State Building
300 South Spring Street
Los Angeles, CA 90071

Please let me know if you think you will not be able to attend on June 2-3. Otherwise, you can expect additional details and travel arrangement information in the coming weeks.

Thank you,
Heather

____
Heather Valdez Singleton, Program Director
Tribal Law and Policy Institute
8235 Santa Monica Blvd., Suite 211
West Hollywood, CA 90046
(323) 650-5467 ~ Fax: (323) 650-8149
Email: Heather@tlpi.org
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Please also visit: www.WalkingOnCommonGround.org
Resources for Promoting and Facilitating Tribal-State-Federal Collaborations

Tribal-State Court Forum National Convening
Los Angeles Courthouse
June 2-3, 2016

Day One, Thursday, June 2

9:00AM – 9:15AM Welcome

TLPI: Jerry Gardner, Heather Valdez Singleton, William Thorne
Casey/NAICJA: Sheldon Spotted Elk and Nikki Borchardt Campbell
California Forum Co-Chairs:
Hon. Abby Abinanti, Hon. Dennis Perluss
BJA: Trish Thackston

9:15AM – 9:45AM Brief Introductions

All - Including expectations and forum info

9:45AM – 10:45AM Forum Accomplishments: Part 1

First group of 5 Forums

Five minutes highlighting accomplishments and five minutes highlighting challenges including:

a. Funding sources
b. Staffing
c. Cooperation/collaboration/spirit
d. Support from above
e. Leadership and continuity challenges
f. Dreams

10:45AM – 11:00 AM BREAK

11:00AM --Noon TLOA and/or VAWA: Possible tracks for each team member

Substantive Presentation TBD

Noon – 1:30PM Lunch on your own

1:30PM-2:45PM Forum Accomplishments: Part 2

Second group of 5 Forums

Five minutes highlighting accomplishments and five minutes highlighting challenges including:

a. Funding sources
b. Staffing
c. Cooperation/collaboration/spirit
d. Support from above
e. Leadership and continuity challenges
f. Dreams

2:45PM-3:00PM Break

3:00PM– 4:30PM Small Group Work: Peer to Peer networking
Survey to be conducted on how to group: similar issues (like PL 280) or regional

4:30PM-5:00PM Wrap Up

<u>Day Two, Friday, June 3</u>

9:00AM-9:15AM Agenda Overview

9:15AM – 10:15AM Group Brainstorming: How do we address the challenges?
Judge Bill Thorne (Facilitator)

10:15AM-10:45 AM Needs of Tribal-State Court Forums
Group Discussion
What Can TLPI Provide
What Can Feds Provide
What Can Forums do to Help Eachother

10:45AM – 11:00AM BREAK

11:00AM – Noon Wrap Up, Next Steps

Possible addition:

Judge Tim Connors – motivational talk on states doing peacemaking (co-chair of Michigan forum)

TRIBAL COURT–STATE COURT FORUM MEETING

JUDICIAL COUNCIL OF CALIFORNIA

TRIBAL COURT–STATE COURT FORUM

June 9, 2016
8:30 a.m. to 5:00 p.m.
Second District Court of Appeals
300 S. Spring Street
Los Angeles, CA

Agenda

DRAFT

THURSDAY, JUNE 9

8:30 – 8:35 a.m. **Invocation**

8:35 – 8:45 a.m. **Welcome and Introductions**

- Approve Previous Meeting Minutes

Hon. Abby Abinanti
Hon. Dennis M. Perluss, Cochair, Court of Appeal, Second Appellate District

8:45 – 10:00 a.m. **Session 1: Forum Member Project Updates**

Educational Projects
Hon. Abby Abinanti, Chief Judge, Yurok Tribal Court
Hon. Gail Dekreon, Judge, San Francisco Superior Court

Cross Court Cultural Exchanges- Child Support and Domestic Violence
Hon. Abby Abinanti, Yurok Tribal Court
Hon. Christopher Wilson, Judge, Humboldt Superior Court
Hon. David Nelson, Judge, Mendocino Superior Court
Hon. Joseph Wiseman, Chief Judge, Northern California Intertribal Court System

Tribal Court Access to* California Restraining & Protection Order System (*CARPOS)- Making Full Faith and Credit a Reality
Mr. Olin Jones, Hon. Patricia Lenzi, and Hon. Dennis Perluss

SB 406 Study
Prof. Katherine Foley, U.C. Davis School of Law
Mr. Brian Hebert, Executive Director, California Law Revision Commission
Hon. Lester Marston, Chief Judge, Blue Lake Rancheria Tribal Court

10:00 – 10:15 a.m. **Break**

10:15 – 10:45 a.m.	***Forum Member Projects Continued: Joint Jurisdictional Court*** *Hon. Suzanne Kingsbury, Presiding Judge, El Dorado Superior Court* *Hon. Christine Williams, Chief Judge, Shingle Springs Tribal Court*
10:45 a.m. – 12:00 p.m.	**Session 2: ICWA Updates (National and Statewide Focus)** ***ICWA Federal Regulations and Federal ICWA Compliance Project*** *Ms. Amber Blaha, Assistant Chief, U.S. Department of Justice* *Mr. Jack Thorpe, Casey Family Programs* ***ICWA California Department of Justice Taskforce Report*** *Hon. Abby Abinanti* *Mr. Michael L. Newman, Director, Bureau of Children's Justice, California Department of Justice* ***ICWA Statewide Workgroup & Consultation Policy*** *Ms. Jennifer Buchholz, Bureau Chief, Special Programs, California Department of Social Services (CDSS)* *Ms. Mary Risling, Tribal Consultant, CDSS* *Tyler Representative* ***California Statutes and Rules of Court – Implementation Issues*** ***Proposed Legislative and Rule Proposals*** *Ms. Ann Gilmour* *Child Welfare Director*
12:00 – 1:00 p.m.	**WORKING LUNCH** **Session 4: State of Tribal Courts** ***Where We Stand After Dollar General and Other Recent Cases*** *Carole Goldberg, Vice Chancellor, University of California at Los Angeles* **Session 3:**
1:00 – 1:30 p.m.	**Session 5: Continuum of Care Reform and ICWA in California** *Ms. Sylvia Deporto, San Francisco Social Services*
1:30 – 2:30 p.m.	**Session 6: *Local ICWA Roundtables- Updates on Strategies for Reducing Disparities and Disproportionality*** *Ms. Mary Trimble-Norris, Bay Area Collaboration of American Indian Resources* *Judge Amy Pellman and Dr. Johnson, Los Angeles Roundtable* *Riverside Tribal Alliance, Chairs* *Sonoma ICWA Collaboration*

DRAFT

2:30 – 3:15 p.m.	**Session 7: National Level News and Programs**
	Tribal Law and Policy Institute *Mr. Jerry Gardner, Director, TLPI* *Ms. Heather Singleton-Valdez, Program Director, TLPI*
	Casey Family Programs *Mr. Sheldon Spotted Elk, Director, ICWA Programs CASEY Family Programs*
	National American Indian Court Judges Association (NAIJA) *Hon. Richard Blake, President, NAIJA*
3:15 – 3:30 p.m.	**Break**
3:30 – 4:30 p.m.	**Session 8: Planning for ICWA Statewide Roundtables 2016-2017** **NAIJA and CASEY Family Programs in Collaboration with Forum** *Ms. A. Nikki Borchardt Campbell, Executive Director, NAIJA* *Mr. Sheldon Spotted Elk*
4:30 – 5:00 p.m.	**Session 9: Forum Priorities 2016-2017** *Hon. Abby Abinanti* *Hon. Dennis M. Perluss*
5:00 p.m.	Adjourn

Sleeping room block has been arranged at the
Millennium Biltmore Hotel Los Angeles
506 South Grand Avenue
Los Angeles, CA 90071

Qualifies for 6 Hours of MCLE and
1 Hour of Elimination of Bias Continuing Education Credits

This meeting is supported with funds from the U.S. Department of Health and Human Services, Court Improvement Program, and the California Department of Social Services.

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Item 3
Approval of Minutes for
February 11, 2016

JUDICIAL COUNCIL
OF CALIFORNIA

TRIBAL COURT–STATE COURT FORUM

www.courts.ca.gov/forum.htm
forum@jud.ca.gov

TRIBAL COURT–STATE COURT FORUM

MINUTES OF OPEN MEETING

February 11, 2016
12:15-1:15 p.m.
By Conference Call

Advisory Body Members Present:	*Hon. Abby Abinanti, Cochair, Hon. Dennis M. Perluss, Cochair,* Hon. April Attebury, Ms. Jacqueline Davenport, Hon. Gail Dekreon, Hon. Leonard P. Edwards, Hon. Cynthia Gomez, Mr. Olin Jones, Hon. William Kockenmeister, Hon. Anthony Lee, Hon. Patricia Lenzi, Hon. Lester Marston, Hon. Mark Radoff, Hon. John H. Sugiyama, Hon. Sunshine Sykes, Hon. Juan Ulloa, Hon. Christine Williams, Hon. Joseph J. Wiseman, and Hon. Daniel Zeke Zeidler
Advisory Body Members Absent:	Hon. Kimberly A. Gaab, Hon. Michael Golden, Hon. Mark Juhas, Hon. Suzanne N. Kingsbury, Hon. John L. Madigan, Hon. David E. Nelson, Hon. Allen H. Sumner, Hon. Claudette C. White, Hon. Christopher G. Wilson, and Hon. Sarah S. Works
Others Present:	Ms. Carolynn Bernabe, Ms. Vida Castaneda, Ms. Ann Gilmour, and Ms. Jennifer Walter

OPEN MEETING

Call to Order and Roll Call

The chair called the meeting to order at 12:17 p.m., and staff called roll.

Approval of Minutes

The committee approved the December 17, 2015 minutes with correction on item 4 “Waiver of Fees” to say “in ICWA cases”.

DISCUSSION AND ACTION ITEMS (ITEMS 1–8)

Item 1
Cochairs Report

- *Welcome Judge Patricia Lenzi, Chief Judge, Cedarville Rancheria of Northern Paiute Indians Tribal Court*
  Judge Abinanti and Justice Perluss welcomed Judge Lenzi to the forum and asked her to introduce herself. Judge Lenzi described her legal expertise and judicial experience. She is Chief Judge of the Cedarville Rancheria of Northern Paiute Indians Tribal Court, which has 28 members. She also serves as a tribal judge for the Colorado River Indian Tribes Tribal Court and appellate justice for the St Regis Mohawk Tribal Court. Previously, she was a state prosecutor in Alpine, Sacramento, and Yolo Counties. She has also served for a number of tribes as their attorney and prosecutor.

- *Process for Filling Forum Tribal Court Judge Vacancy*
  Justice Perluss described the process for selection of Judge Lenzi to fill the tribal court judge vacancy and directed members to the meeting materials to view the memorandum and the cochair letters to tribal leaders describing the process.
- *Meeting with Justice Judith D. McConnell, Chair of Power of Democracy Steering Committee regarding potential forum/committee projects relating to the committee's civics learning and curriculum projects*
  Judge Abinanti described her meeting with Justice McConnell and their discussion about developing a civic learning opportunity for native and nonnative youth to learn about state and tribal courts. Justice McConnell, who chairs the California Chief Justice's Democracy Steering Committee, was very receptive to marrying the Chief Justice's interests in civic education with the forum's area of interest. Judge Abinanti reported that she will be exploring a local initiative with Justice McConnell in Humboldt and Del Norte Counties.
- *California Attorney General's Office Convenes Meeting to Discuss Protection Orders Issued by Tribal Courts, March 15, 2016 (Cochairs seek data/stories to share at the meeting and will report back)*
  Justice Perluss described the upcoming meeting convened by the California Attorney General's Office and provided background about the meeting. The forum has been actively engaging the California Department of Justice to give tribal access to its database, the California Restraining and Protective Order System (CARPOS). Since the forum's inception, tribal court judges have reported that tribal protection orders are not regularly enforced by local county law enforcement unless these orders are in CARPOS. State and federal officials have requested information to understand the scope of the problem. Should the meeting result in the justice partners calling for a legislative solution, data and anecdotal descriptions of the problem would be powerful when approaching a legislative sponsor and seeking support. Justice Perluss requested that forum members send stories to Ms. Walter.

  Forum member Olin Jones also described the meeting and the need for stories. Mr. Jones was optimistic that the meeting would result in, what he referred to as, a policy pathway for a viable solution.

  Judge Marston reported that the Chemehuevi Tribe and Hopland Tribe entered into an intergovernmental agreement with the local sheriff department. These tribal communities are not encountering problems with enforcement of tribal protection orders because the tribal court sends its orders to the local sheriff department and dispatch keeps a copy and enters them into CARPOS.

  A discussion followed, and members concluded several problems with tribal courts not having direct access to CARPOS to enter their protection orders: (1) delay in orders being entered; (2) officer safety- without access to orders, law enforcement does not know the risk posed by restrained persons; and (3) revictimization.

  Forum members expressed concern that a legislative solution would be opposed, and ultimately fail, and instead encouraged an alternative solution such as an Attorney General Opinion or other executive agency directive clarifying that all law enforcement jurisdictions in California must recognize and enforce a tribal protection order issued by a tribal court as required by federal and state law (See 18 U.S.C. § 2265 and California's Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (Fam. Code, §§ 6400–6409).)

Action Item: Forum members to send Jenny Walter instances where orders have not been enforced.

- *Conference of Chief Justices - Tribal Relations Subcommittee, February 1, 2016 – Chief Justices learn about forum*
  Ms. Walter presented to Chief Justices and others from Washington, New Mexico, Minnesota, Alaska, and Oregon. They were very interested in the forum and its accomplishments. The Chief Justices were impressed at how much the forum has accomplished in its short five year history. Ms. Walter invited the Chief Justices to attend the June 2-3, 2016 "Big Forum" meeting in Los Angeles and explored the idea of holding a Western Regional meeting of forums. The Chief Justices were very receptive and asked lots of questions.

Item 2
Recognition of Parentage Orders by the California Department of Public Health (CDPH) and the Issuance of Birth Certificates Update
Presenters: Judge Cynthia Gomez
Dr. James Greene, Center for Health Statistics & Informatics, CDPH
Brandon Nunes, Chief Deputy Director of Operations, CDPH
Jim Suennen, Tribal Liaison/Associate Secretary for External Affairs, California Health and Human Services Agency

During the forum conference call on December 17, 2015, we learned that the California Department of Public Health Division of Vital Statistics, the agency responsible for issuing and amending birth certificates, would not recognize tribal court orders of parentage because tribes are not mentioned in relevant Health and Safety Code provisions, specifically the sections defining "state" (see section 23) and the authority for amending birth certificates (section 102725). As a result, the forum asked Ms. Walter to work with the Judge Gomez to explore a solution in the form of an executive agency directive. Judge Gomez contacted the Secretary of the California Health and Human Services and representatives from the CDPH, and a solution was reached. Thanks to the leadership of Judge Gomez and the other presenters, CDPH issued a letter, dated February 9, 2016, clarifying that all jurisdictions in California must accept certified copies of orders that adjudicate issues of parentage issued by a tribal court with jurisdiction, pursuant to Health and Safety Code section 102725.

Action Item: Judge Gomez to forward a copy of the letter to Ms. Walter, who will send it to forum members.

Item 3
Judicial Council Appellate Advisory Committee's Proposal to Amend Rules 8.400 and 8.407
Presenter: Heather Anderson, Supervising Attorney, Judicial Council's Legal Services Office

The forum reviewed a proposal from the Judicial Council's Appellate Advisory Committee for possible amendments to rule 8.400. The proposal would clarify that the juvenile appellate rules apply to appeals of orders terminating parental rights under Probate Code 1516.5 and that the normal record in juvenile appeals must include various ICWA notices and transcripts of certain hearings. Members generally supported the proposal, but suggested that only adding the transcript from the initial (detention) hearing would not be sufficient for the appellate court to

determine whether all required ICWA inquiries had been made. Judge Zeidler pointed out that oftentimes the parents are not at the initial hearing, and therefore, in these cases, it would be important to include the transcript of the hearing when they first appear and inquiry is made. Forum members agreed and recommended that the normal record in juvenile appeals also include transcripts of the hearing at which a parent first appears in the proceedings.

Item 4
Remote Court Appearances, Waivers, and Access Update
Presenters: Justice Perluss
Judge Mark Radoff

Justice Perluss and Judge Radoff talked to Curt Child of Court Call. They asked whether the arrangement that Los Angeles has with Court Call—waiver of fees for tribes in juvenile dependency cases—could be extended statewide as a public service. Mr. Child was receptive, and suggested that the forum explore a revenue source that might effectuate the waiver extension. Justice Perluss talked to Judge Amy Pellman, Los Angeles Superior Court, and learned that she was successful in obtaining the waiver for tribes because she identified such a revenue source. Court Call agreed to waive its fees for juvenile dependency cases for tribes in Los Angeles as part of an overall arrangement by which it received additional business under the court's contract from private adoption attorneys who requested this service.

Action Step: Forum to pursue statewide contract.

Item 5
Cross Court Educational Exchange on Child Support
Presenters: Judge Abinanti

Materials can be accessed here:
https://ftp.jud.ca.gov/
Username: forum
Password: forum123

Judge Abinanti described the child support exchange as very successful. Before the exchange, the local child support agencies had stopped raising cases for transfer. After the exchange, transfers recommenced. The local partners have agreed to meet quarterly and develop local educational materials. Also, participants at the exchange made policy recommendations in the form of rule changes to improve the transfer process. Staff will be bringing forward a rule proposal as a result of this exchange.

Item 6
Youth Courts and Judicial Council Services: Invitation to Conference, February 18, 2016, San Diego
Presenter: Donna Strobel, Analyst, Judicial Council's Center for Families, Children & The Courts

The California Association of Youth Courts in collaboration with the Judicial Council's Center for Families, Children & the Courts is hosting an all-day roundtable on creating a youth court. This roundtable is the first in a series of the 2016 regional roundtables that highlight promising practices in youth courts and is open to all interested court staff, and justice and community

partners who are considering starting a youth court in their jurisdiction. The roundtable will be held on February 18, 2016 at the Hall of Justice in San Diego.

Action Item: Forum members who are interested in attending the youth courts roundtable should let Ms. Walter or Ms. Strobel know.

Item 7
In Re Abbigail A.
Presenter: Ann Gilmour

Ms. Ann Gilmour gave an update on the status of the two Indian Child Welfare Act cases pending before the California Supreme Court.

The case of In re Isaiah W. raises the issue whether ICWA inquiry and notice violation issues are forfeited if a party fails to appeal the juvenile court's initial order finding that notice under ICWA is unnecessary, which would preclude that party from raising those issues in a later appeal of an order terminating parental rights? This case is fully briefed, but has not yet been set for oral argument. Information on the in re Isaiah W. case may be found at http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2087704&doc_no=S221263

The second case, In re Abbigail A., raises the following issue: do rules 5.482(c) and 5.484(c)(2) of the California Rules of Court conflict with Welfare and Institutions Code section 224.1, subdivision (a), by requiring the juvenile court to apply the provisions of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.) to a child found by a tribe to be eligible for tribal membership if the child has not yet obtained formal enrollment? This case is not yet fully briefed. An amicus brief on behalf of the United States was filed on January 13, 2016. The time for filing of responses was extended to March 3, 2016. At this time it is expected the case will be fully briefed.

Information on the In re Abbigail A. case may be found at http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2083411&doc_no=S220187

Item 8
Recognition of Tribal and Foreign Court Money Judgments:
(1) California Law Review Study (CLRS) and Hearing (2) Forum Surveys
Presenters: Judge Les Marston
Ann Gilmour
Jennifer Walter

Ms. Walter described SB 406, the CLRS study, and the forum's collaboration with U.C. Davis School of Law. Ms. Gilmour attended the CLRS hearing on February 4, 2016 and reported that CLRS has just begun to grapple with the tribal issues. The Legislature will decide whether to sunset the bill on January 1, 2018. Its decision will be based on the CLRS study and any information the forum provides to CLRS and the Legislature. CLRS is holding a number of hearings to develop its findings and recommendations, which it will submit to the Legislature on January 1, 2017.

Judge Marston reported his conversation with CLRS staff who explained that there will be ample opportunity to provide written comment. Judge Marston agreed to prepare written comments for the forum to review and consider submitting to CLRS.

Ms. Walter encouraged forum members to complete the surveys, which include draft survey tools for tribal court judges, state court judges, and tribal court practitioners to determine the impact of SB 406.

Action Item: Judge Marston agreed to prepare written comments for the forum to consider. survey tools to be entered into survey monkey and emailed to target audiences. Judge Marston volunteered to call tribal court judges to increase response rate. Ms. Walter will seek volunteers to make follow-up calls to tribal practitioners. U.C. Davis and council staff will make follow-up calls to state court judges.

ADJOURNMENT

There being no further business, the meeting was adjourned at 1:12 p.m.

Pending approval by the advisory body on April 14, 2016.

Item 4
Report on Meeting Convened by California Department of Justice
March 15, 2016

TRIBAL COURT DV PROTECTION ORDER MEETING

AGENDA
California Office of the Attorney General, 7th Floor Conference Room
1300 I Street, Sacramento, California 95814
March 15, 2016

Conference Call Line:
Dial: 877-336-1828
Participant Code: 2305141

10:00 – 10:15	**Introductions** Olin Jones, Director, Office of Native American Affairs
10:15 – 10:30	**Purpose and Goals of the Meeting** Olin Jones, Director, Office of Native American Affairs
10:30 – 10:45	**Federal Perspective of Full Faith and Credit for Tribal Court Protection Orders**
10:45 – 11:00	**Administration of the California Restraining & Protection Order System (CARPOS)**
11:00 -11:30	**Work Around Solutions: California Courts Protective Order Registry (CPOR) and Registration of Tribal Protection Orders**
11:30 – 12:00	**Scope of Public Safety Gaps Related to Non Direct Filing of Tribal Court DV TROs**
12:00 – 12:15	**Break (Working Lunch)**
12:15 – 2:00	**Open Discussion of Full Faith & Credit in Cross Jurisdictional Recognition of Tribal Court Protection Orders** Facilitator: Kathleen Kenealy, Chief Assistant Deputy Attorney General, Division of Civil Law • Potential Solutions • Next Steps
2:00	**Adjournment**

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HON. TANI G. CANTIL-SAKAUYE
Chief Justice of California
Chair of the Judicial Council

MR. MARTIN HOSHINO
Administrative Director,
Judicial Council

TRIBAL COURT—STATE COURT FORUM

HON. ABBY ABINANTI
HON. DENNIS M. PERLUSS
Co-chairs

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Hon. Daniel Zeke Zeidler

COMMITTEE STAFF
Ms. Jennifer Walter
Tel 415-865-7687

March 21, 2016

Kathleen Kenealy, Chief Assistant Attorney General
Olin Jones, Director Office of Native American Affairs
Office of the Attorney General
1300 I Street
Sacramento, California 95814

Dear Ms. Kenealy and Mr. Jones:

We are writing on behalf of the Tribal Court-State Court Forum (Forum) to thank you for inviting us to the March 16, 2016 meeting on tribal justice protection orders. Although we were disappointed at the group's failure to propose concrete next steps, we found the discussion and perspectives shared informative. Based on our positive dialogue, we would like to propose possible action items in the following areas: (1) data collection; (2) education; and (3) policies.

Data Collection

We recommend that the existing California Law Enforcement Telecommunications System (CLETS) be used to gather information on the number of instances that law enforcement uses the system to verify a tribal protection order. Each time an officer queries CLETS for a tribal protection order, the system would flag the inquiry and compile them into two groups: those with a hit confirmation and those without. If this information were regularly shared with the Tribal Court Judges Association and the Forum, the judges could follow up and gather more qualitative information about the orders and the outcomes and circumstances surrounding the efforts to enforce them.

Education

We recommend that CLETS be used to communicate to law enforcement that a tribal protection order must be accorded full faith and credit. We learned at the meeting that the system can generate autoreplies and recommend that one be added to the system so that every time an officer queried the system for a tribal protection order, an autoreply would direct the officer to enforce the tribal protection order just as it would a state court order, regardless of whether the order was registered or found in the system.

We recommend that your office, in conjunction with the California State Sheriff's Association (CSSA), produce a laminated card, similar to the Marsy's card, with information on federal and state full faith and credit laws and resources on tribal courts (for example, a link to a directory of tribal courts in California).

We recommend mandated Peace Officer Standards Training (POST) classes on full faith and credit: enforcing tribal protection orders. These classes should include law enforcement tools, such as the laminated card and other jurisdictional tools (for example, those recently developed by representatives from our Forum, your office, CSSA, POST, the Tribal Police Chiefs Association, and local law enforcement agencies). Your office should lead a coordinated statewide educational effort to endorse these and other law enforcement educational tools, as well as on-site programs and briefings on full faith and credit: enforcing tribal protection orders.

Policies

We recommend that the California Attorney General, in collaboration with CSSA, reaffirm that federal and state laws require an officer enforce a tribal protection order regardless of whether it is registered in or verified through the California Restraining and Protective Orders System (CARPOS) or other database. A joint policy statement, or one that is coordinated with a similar statement by CSSA and the City Police Chiefs, should be issued to all local (city police departments and county sheriff departments) and state (California Highway Patrol) law enforcement. Such a policy statement should also reassure officers that state law provides for immunity from civil liability for good faith enforcement of tribal protection orders that are regular on their face.

Since we agree that tribal court access to statewide and federal databases is critical to achieve victim and officer safety, we recommend that tribal courts be given this access to enter their orders. Some potential solutions may be a legal opinion or letter by the California Attorney General authorizing access, a technological advance that creates a firewall so orders are entered but not read by tribal courts, or a pilot project through the U.S. Department of Justice to permit access to the federal database.

And finally, we recommend that the California Department of Justice sponsor legislation to amend Government Code section 15155 to add a tribal court judge position to the CLETS Advisory Board to signal that your office supports tribal court access to CLETS.

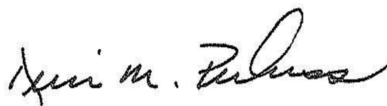
At the end of our meeting, the concept of a local tribal court and state court working in tandem as sister courts was raised. While it is not evident how this concept might assist in achieving our shared goal, the Forum embodies this concept through its composition and operation in recommending policies, implementing education, and promoting partnerships. We welcome the opportunity to learn more about how these shared values can help us achieve a solution.

In conclusion, everyone in attendance at the meeting agreed that federal and state laws mandate that tribal protection orders must be accorded full faith and credit and enforced regardless of whether they are registered or entered into a state or federal database. Yet everyone also agreed, as a practical matter, victim and officer safety could not be achieved without finding a legal and technological way to promptly enter tribal protections orders into CARPOS (or the federal database searchable through CLETS). While these are two separate issues, both must be addressed if we are to accomplish our shared goals.

We would like to propose a conference call within thirty days to discuss these recommendations and any others that your office is contemplating and an in-person meeting within sixty days to explore the viability of potential solutions.

Thank you for your leadership. We look forward to discussing how we can help implement solutions.

Sincerely



Honorable Abby Abinanti　　　　Honorable Dennis Perluss

JW/cb

cc: Hon. Richard C. Blake, Chief Judge, Hoopa Valley, Redding Rancheria, and Smith River Rancheria Tribal Courts
Ms. Marcia Good, Senior Counsel to the Director, Office of Tribal Justice United States Department of Justice
Hon. Patricia Lenzi, Chief Judge, Cedarville Rancheria of Northern Paiute Indians Tribal Court
Mr. Martin Ryan, President, California State Sheriffs Association

Item 9
Report on Responses to SB 406 Study

Survey Information Summaries and Next Steps

Prepared by Jenny Walter

State Courts (58)

- 64% responded to the survey (37 out of 58 courts)
- Of those that responded, 80% reported that they have never been asked to recognize an order from a tribal court
- Respondents that provided court identification:
  Alameda, Butte, El Dorado, Humboldt, Los Angeles, Mariposa, Modoc,
  Orange, Placer, Plumas, Riverside, San Benito, San Diego, San Luis Obispo, San Mateo, Shasta, Solano, Sonoma, Tehama, Tulare, Tuolumne, and Trinity.
- Respondents identified tribal court orders from the following courts:
  Shingle Springs and Redding Rancheria.
- Respondents identified the following tribal court case types:
  domestic violence and family law cases
- In response to the question, *Would you like to see a process similar to the one for civil money judgments extended to other case types?*
  - I would not oppose any case type, but there seems to be very little business from the tribal court in our county.
  - Yes for probate cases
  - Yes for trespass cases
  - Yes for conservatorship cases (two courts)
  - Yes for all types
  - Yes for contract cases
  - Yes, for family law cases
  - Perhaps. It would depend on the due process requirements of obtaining the judgments and whether the person against whom they are to be enforced has consented to Tribal Court jurisdiction. My only problem would be hearing arguments that there has been no consent or that Tribal Law differs so significantly from State law as to make the Judgments unconscionable or otherwise constitute a deprivation of significant rights. By way of example, if in a family law matter Tribal Law permits all property acquired during the marriage to be assigned to the party deemed to not be at fault for the breakup of the marriage I would have difficulty enforcing that judgment. Similar issues could arise in any area. Consent would be a key issue, perhaps the most important issue in my inquiry. This would especially include default judgments without a prior consent, say, in a contract to be bound by Tribal Law. The bottom line is that if Due Process is provided and there has been consent to jurisdiction I have no problem with enforcing any type of judgment.
  - No, Procedures should provide for procedural due process for the Judgment debtor and a meaningful opportunity to present a defense before state court processes are used for enforcement.

Tribal Courts (24)

- 30% of tribal courts responded (7 out of 24)
- Respondents that provided court identification:
  Chemehuevi, Colorado River Indian Tribes, Hoopa Valley, Shingle Springs, and Yurok
- Of those that responded, 100% reported that their courts have jurisdiction under tribal law to hear issues relating to civil money orders or judgments.
- 86% of respondents (6 out of 7) have issued a tribal civil money judgment.
- Only 1 respondent has experienced a challenge by a party to the recognition of the court's tribal court civil money order or judgment in California.
- In response to the question, *Would you like to see a process similar to the one for civil money judgments extended to other case types, the following case type(s) were identified:*
  - Birth Certificate
  - Conservatorships
  - Environmental
  - Guardianships
  - Small Claims
  - Trespass
- In response to the question, *Do you have any other thoughts on the topic of recognition and enforcement of civil tribal court judgments and orders?*
  - It would be helpful to have a handbook that explains to lay persons the process, forms, and how the mechanics of enforcing judgments works. Also, whether it can be used in other tribal courts, and why enforcement cannot be made against tribal entities unless sovereign immunity is waived.
  - A "How to" filing information packet for parties would be helpful.
  - The local state courts seem to have no issue recognizing tribal court orders, but the different state agencies and occasionally social security, sometimes don't know what to do with the Tribal orders.

Tribal Practitioners (200 surveys emailed by California Indian Lawyers Association)
Only one respondent who identified herself as a student. She reported having no experience with obtaining a tribal court civil money judgment, however, she reported interest in seeing a process similar to the one for civil money judgments extended to housing (unlawful detainer) cases.

Next Steps

1. Continue to increase response rate for state courts that have not responded by making follow up calls.
2. Increase response rate for tribal courts that have not responded (Judge Radoff has sent an email, however additional follow up phone calls are needed. Any volunteers?)
3. Need a new outreach strategy to select our sample of tribal practitioners. Any ideas? Consider for discussion: (1) Snowball sampling, which in this case would rely on referrals from tribal court judges who will know practitioners in their courts and could send survey to those individuals. (2) Convenience sampling, which is this case could be an event that tribal court judges may be attending where tribal practitioners are likely to be, and if approached, would be willing to complete our survey. (Any volunteers willing to take the lead? Judge Marston?)

Item 10
Court Improvement Program-
Collaborative Opportunity

REQUEST FOR APPROVAL OF PROJECT PROPOSAL
REQUEST FOR APPROVAL FOR SEEKING GRANT FUNDING

Rev. 10/10/14

Project Scope

ICWA compliance continues to be an issue in California with ICWA appeals constituting a disproportionate amount of juvenile appeals throughout the state. New federal regulations governing ICWA requires adjustment to current practices and a recently released California ICWA Taskforce report highlights problems of ICWA compliance and makes recommendations for improvements.

Potential Court Partners / Stakeholders

- Bay Area Collaboration for American Indian Resources
- California Child Welfare Directors Association
- California Department of Social Services
- California ICWA Taskforce
- California Public Defenders Association
- California Statewide ICWA Working Group
- California Tribal Court Judges Association
- Child Welfare Council
- County Counsels' Association of California
- Tolowa Nation CIP Program
- Tribal Court-State Court Forum

Additionally, this project will identify and bring together partnership courts. The project will assist them in identifying and implementing promising practices to improve ICWA compliance. These promising practices are described below.

Draft Project Deliverables and Timeline

- Collaboration:
  (1) Convene statewide collaborative advisory workgroup meetings – 2 per fiscal year and
  (2) Convene meetings of local partnership courts – 3 per fiscal year.
- Curriculum:
  (1) Adapt existing national ICWA curriculum to California – 1st fiscal year;
  (2) Pilot curriculum at four educational venues (for example, in DRAFT counties, at Beyond the Bench or the Statewide ICWA Conference) – 2nd fiscal year;
  (3) Conduct four regional trainings for judicial officers and dependency attorneys using curriculum – fiscal years 3-5;
- Partnership Courts:
  (1) Identify and bring together 3 partnership courts (north, central, and south) – 1st fiscal year;

(2) Conduct self-assessment and data collection to measure ICWA compliance and other outcome measures identified by the grant – 3 per fiscal year;
(3) Implement pilot projects to measure ICWA compliance and dependency court performance measures and related safety, permanency, and well-being outcomes for children and families – 3 per fiscal year, starting in fiscal year 2.

- Partnership Court Pilot Projects:
  (1) Court appointed counsel for tribes- this project will provide trained attorneys for tribes and assess whether tribal attorneys improve ICWA compliance and dependency court performance measures and related safety, permanency, and well-being outcomes for children and families (contract with agency to hire and train attorney- 1st fiscal year; appoint attorney to cases in fiscal years 2-4; assess compliance and outcomes in 5th FY) and
  (2) Convene and facilitate three local collaborations involving partnership courts per fiscal year to assist with development of local protocols and system improvements such as protocols and agreements concerning transfers to tribal court, exercise of joint jurisdiction of ICWA cases, procedures to facilitate telephonic or other remote forms of appearance for tribes, calendaring of ICWA cases to facilitate tribal participation or other identified areas of system change.
- Technological Initiative: Working with one or two local courts that have adopted the Tyler Odyssey Court Case Management System, develop case management elements and functionality to capture ICWA data and guide courts in ICWA compliance requirements for each hearing type in a juvenile dependency proceeding.