

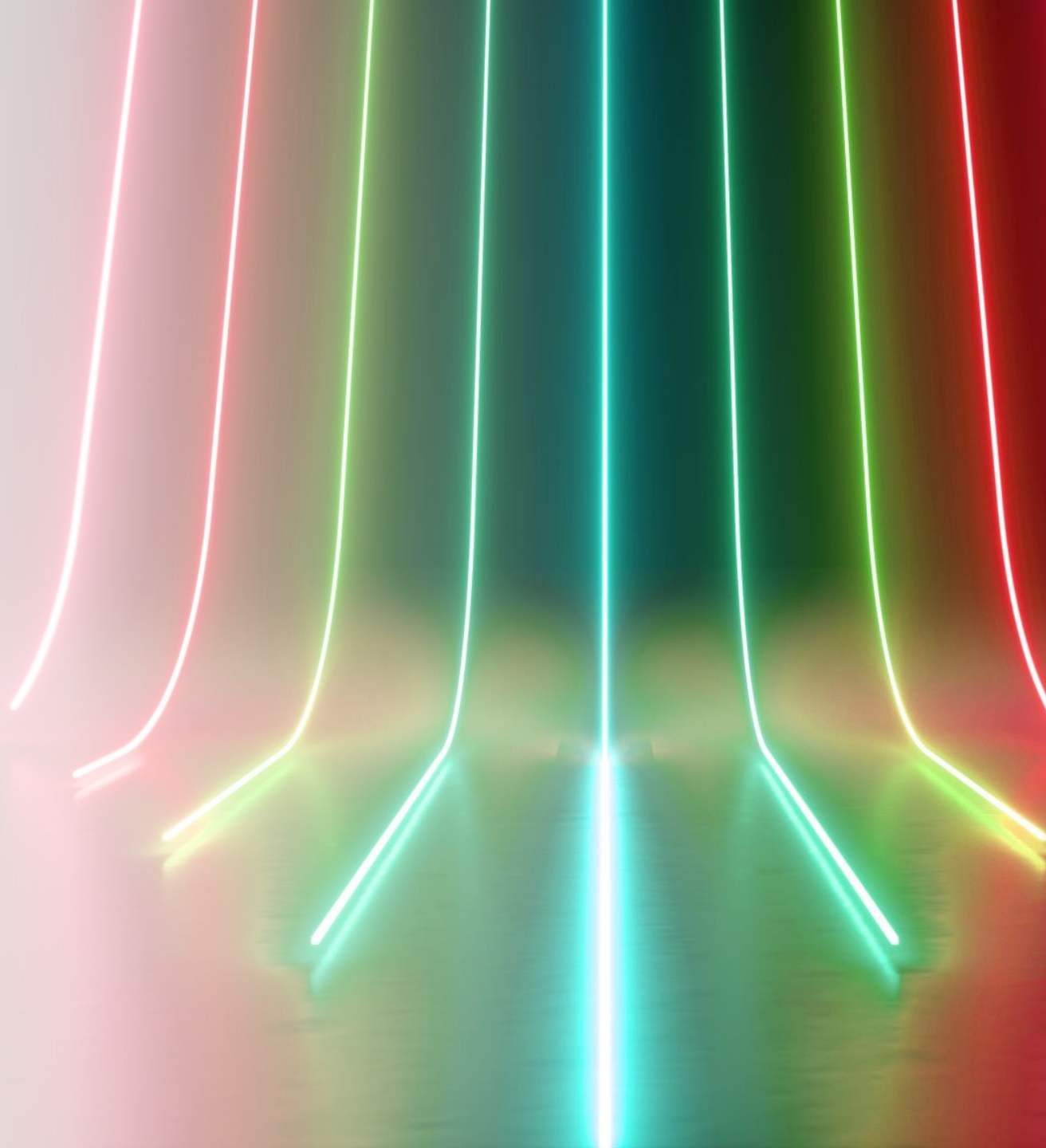


Application of the UCCJEA to custody proceedings involving Native Americans

Mark Fiddler, Esq.

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Loyola University Chicago School of Law



UCCJEA and Native American Custody Cases

- What does UCCJEA say about cases involving Native Americans?
- Interplay with Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*
- What to do when parties assert state and tribal court jurisdiction.

UCCJEA and Native American Custody Cases

- **(a)** A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, United States Code, title 25, section 1901, et seq., is not subject to this chapter *to the extent* that it is governed by the Indian Child Welfare Act. Minn. Stat. § 518D.104

UCCJEA and Native American Custody Cases

Federal definition: “Indian child” means any unmarried person who is under age eighteen and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe *and* is the biological child of a member of an Indian tribe.” 25 U.S.C. § 1903(4).

UCCJEA and Native American Custody Cases

- The “Clinton Canon”: unless the parent “is” (in the present tense) a member of a tribe, and the child “is” (in the present tense) eligible for membership, ICWA does not apply.
- if a child is eligible for Tribal citizenship based on a grandparent’s citizenship [i.e., there is proof of lineage], that is not the end of the inquiry. ***The statute still requires that the child must either himself or herself be a citizen, or that child’s parent must be a citizen, in order for the child to be an “Indian child.” 81 FR 38807.***
- Congress expressly limited ICWA to child members or children of existing tribal members — not children of future *potential* members. An expansion of the definition that turns on ethnicity or ancestry would run afoul of basic equal protection principles. *In re A.W.*, 741 N.W.2d 793, 810 (Iowa 2007).

UCCJEA and Native American Custody Cases

- Must be “child custody proceeding” under 25 U.S.C. § 1903(1). (“‘foster care placement’ ...action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated”)
- Note definition applies to guardianship proceedings.

UCCJEA and Native American Custody Cases

ICWA does *not* apply to:

- (1) A Tribal court proceeding;
- (2) A proceeding regarding a criminal act that is not a status offense;
- (3) An award of custody of the Indian child *to one of the parents* including, but not limited to, an award in a divorce proceeding; or
- (4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

25 CFR 23.103

UCCJEA and Native American Custody Cases

Applications:

- Grandmother petitions for custody from mom in family court? ICWA applies. *In re Custody of A.K.H.*, 502 N.W.2d 790 (Minn. App. 1993).
- Dad seeks return of child from grandma after custody granted to grandma? ICWA doesn't apply. *Gerber v. Eastman*, 673 N.W.2d 854 (Minn. App. 2004).

UCCJEA and Native American Custody Cases

ICWA's jurisdictional scheme

An Indian tribe shall have jurisdiction exclusive as to any State over any *child custody proceeding* involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child. 25 U.S.C. § 1911(a).

UCCJEA and Native American Custody Cases

Concurrent Jurisdiction

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe. 25 U.S.C. § 1911(b).

UCCJEA and Native American Custody Cases

(b) A court of this state shall treat a tribe *as if it were a state* of the United States for the purpose of applying sections 518D.101 to 518D.210.

(c) A child custody determination made by a tribe under factual circumstances in *substantial conformity* with the jurisdictional standards of this chapter must be recognized and enforced under sections 518D.301 to 518D.317.

Minn. Stat. § 518D.104.

UCCJEA and Native American Custody Cases

Simultaneous proceedings?

Except as otherwise provided in section 518D.204, a court of this state may not exercise its jurisdiction under sections 518D.201 to 518D.210 if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction *substantially in conformity with this chapter*, unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under section 518D.207.

Minn. Stat. § 518D.206

UCCJEA and Native American Custody Cases

Substantial conformity test applied (facts):

After the parties separated, the mother and children returned to their Indian reservation. The father did not return the children after they came to Pennsylvania for a visit. The mother filed for divorce in the tribal court; it granted her a divorce and awarded her full physical and legal custody of the children. About a month before that order issued, the father filed the instant action. After the mother filed a petition under the UCCJEA to enforce the tribal court's order, the trial court had a phone conference with the tribal court and ruled that the tribal court had jurisdiction over the custody dispute.

UCCJEA and Native American Custody Cases

Holding: The appellate court approved the trial court's findings that 1) the children had no "home state," 2) they had significant connections with both Pennsylvania and the reservation, and 3) the trial court was the "modifying court" under 23 Pa.C.S. § 5447. The record supported the trial court's finding that the father had notice of the tribal court proceeding. As the tribal court action was filed first, 23 Pa.C.S. § 5426 barred the trial court from exercising jurisdiction. Under 23 Pa.C.S. § 5422, the tribal court alone could determine whether jurisdiction continued with the tribe.

C.L. v. Z.M.F.H., 2011 PA Super 50, 18 A.3d 1175, 1176

UCCJEA and Native American Custody Cases

- We hold the juvenile court properly applied the UCCJEA and dismissed the dependency action in favor of family court proceedings in Washington state after finding ICWA inapplicable because the child had been placed with his nonoffending parent.

In re A.T., 63 Cal. App. 5th 267, 269 (2021).

UCCJEA and Native American Custody Cases

Appellant also argues that the tribal court has exclusive jurisdiction and is not subject to Minnesota's Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Minn. Stat. § 518D.101-317 (2002). Therefore, appellant contends that the tribal court's *ex parte* order declaring the tribal court's exclusive jurisdiction is entitled to full faith and credit. Appellant relies on section 1911 of the ICWA, which requires Minnesota courts to give full faith and credit to the tribal court's [**11] custody order "to the same extent that such entities give full faith and credit to the . . . judicial proceedings of any other entity." 25 U.S.C. § 1911. Because the ICWA does not apply, however, the UCCJEA governs the current proceedings.

Gerber v. Eastman, 673 N.W.2d 854, 858 (Minn. Ct. App. 2004)

UCCJEA and Native American Custody Cases

- Always make sure to ask whether ICWA applies
- Always think of “substantial conformity” when it doesn’t
- Questions?