

# Should This Case Be in Tribal Court?

A Practical Guide to Trans-Jurisdictional Cases | Brian Webb | The Webb Law Group



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## Arizona's Native American Tribes

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| 1. Ak-Chin Indian Community              | 12. Navajo Nation                         |
| 2. Cocopah Indian Tribe                  | 13. Pascua Yaqui Tribe                    |
| 3. Colorado River Indian Tribes          | 14. Pueblo of Zuni                        |
| 4. Fort McDowell Yavapai Nation          | 15. Salt River Pima-Maricopa Indian Comm. |
| 5. Fort Mojave Indian Tribe              | 16. San Carlos Apache Tribe               |
| 6. Fort Yuma Quechan Tribe               | 17. San Juan Southern Paiute Tribe        |
| 7. <b>Gila River Indian Community</b>    | 18. Tohono O'odham Nation                 |
| 8. <b>Havasupai Tribe</b>                | 19. Tonto Apache Tribe                    |
| 9. <b>Hopi Tribe</b>                     | 20. White Mountain Apache Tribe           |
| 10. <b>Hualapai Tribe</b>                | 21. <b>Yavapai-Apache Tribe</b>           |
| 11. <b>Kaibab Band of Paiute Indians</b> | 22. Yavapai-Prescott Indian Tribe         |

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## **A Brief History of Tribal Self-Governance**

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- Mid-1800s – Treaty Era:
  - Many tribes gain federal recognition as “domestic dependent sovereign nations”
  - Reservation of federal trust lands for tribes
  - Certain rights to self-governance
- 1887-1943 – Allotment + Assimilation:
  - U.S. American Indian policy encourages Anglo-style education and methods of sustenance
  - U.S. uses boarding schools to help assimilate Native Americans (cutting long hair, punishing use of Native languages, etc.)
  - Many tribes establish Anglo-style governments and legal frameworks that resemble Anglo governments (constitutions, tribal councils, presidents/chairpersons)

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## **A Brief History of Tribal Self-Governance**

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- Mid-1900s – Termination + Relocation:
  - U.S. American Indian policy encourages Native Americans to leave reservations in order to further assimilate into American (Anglo) culture
  - Certain rights to self-governance
- 1960s to Present – Tribal Self-Determination:
  - JFK promotes tribes’ right to self-government (“tribal sovereignty”)
  - LBJ signs the Indian Civil Rights Act, which extends many (but not all) of the Bill of Rights’ legal protections to tribal lands
  - Indian Self-Determination and Education Assistance Act (1975) and Indian Child Welfare Act (1978) and other new U.S. laws promote tribal self-governance

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## **Practice Areas with Common Trans-Jurisdictional Issues**

- Protection Orders
  - 18 U.S.C. § 2265: All U.S. states/tribes/territories must recognize each other's OOPs
- Family Law
  - Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")
  - Child support enforcement cases
- Juvenile Law
  - Indian Child Welfare Act ("ICWA")
- Criminal Law
  - "Separate sovereign" doctrine (legally-permissible double/triple-jeopardy)
  - U.S. Supreme Court's *Oklahoma v. Castro-Huerta* opinion (2022)
    - Reverses course from its *McGirt v. Oklahoma* decision (2020)

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## **CAVEAT: Beware of Generalizations**

- Presenter has practice experience in seven of AZ's 22 tribal courts
- This presentation contains generalizations based on presenter's experience, which may be true as to some tribes but false as to others
- For tribe-specific questions, consult the tribe's constitution/code/rules or befriend a lawyer who is licensed and experienced in that tribal court
- AZ and tribal judges' rulings on jurisdictional issues can vary wildly from judge to judge; when in doubt, seek insight from a lawyer with experience in front of that particular tribal judge/court
- Diligent client representation in the forum-selection process requires careful analysis of the pros/cons

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## Protection Orders: Auto-Recognition

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- 18 U.S.C. § 2265(a):
  - Any protection order issued that is consistent with subsection (b) of this section by the court of one State, Indian tribe, or territory (the issuing State, Indian tribe, or territory) ***shall be accorded full faith and credit*** by the court of another State, Indian tribe, or territory (the enforcing State, Indian tribe, or territory) ***and enforced by the court and law enforcement personnel of the other State, Indian tribal government or Territory as if it were the order of the enforcing State or tribe.***
    - Subsection (b) just requires that the issuing court had jurisdiction and gave the respondent notice and an opportunity to be heard

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## Family Law: Recognition of Marriages

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- AZ and tribes typically recognize each other's marriages
- Tribal enrollment generally irrelevant to jurisdiction  
(non-natives can generally get married and divorced on tribal lands)
- Navajo: In addition to recognizing Anglo-style marriages (i.e. marriage license), traditional and common-law marriages are also recognized
  - Validation-of-marriage cases can formalize traditional/common-law marriages
  - Validation-of-marriage cases can be (1) contested or uncontested, (2) *inter vivos* or after the death of one or both spouses, and (3) filed by a spouse or any third-party
  - Can be a valuable tool for inheritances, govt benefits, etc.

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## Family Law: Divorce Domicile

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- Both spouses domiciled on-rez?
  - Tribal divorce ok (regardless of spouses' tribal membership)
  - AZ divorce probably ok (but beware if forum is contested)
    - *If one or both spouses are tribal members, the opposing party/counsel might force the case into tribal court, and could get an atty's fees award*
- One spouse domiciled on-rez + one spouse domiciled off-rez in AZ?
  - Tribal divorce ok if pjk over both parties; if not, then smjk only for on-rez property
  - AZ divorce probably ok, but judges could surprise you (pjk?)
- Both domiciled off-rez?
  - Tribal divorce is tribe- and fact-specific
  - AZ divorce obviously OK

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## Family Law: Divorce Domicile

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- Navajo requires petitioner to have 90-day residency on-rez
- Many tribes define domicile loosely ("Home is where the heart is")

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## Family Law: Custody (UCCJEA)

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- Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”)
  - Presenter is unaware of any tribes that have adopted the UCCJEA
  - A.R.S. § 25-1004(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 this article and article 2 of this chapter.”
  - A.R.S. § 25-1004(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 article 3 of this chapter.”

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## Family Law: Custody (Navajo)

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- Navajo Nation Supreme Court’s *Custody of SRT* decision:
  - *Navajo Nation Family Court has jurisdiction over Navajo children even when they live off-rez*

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## **Juvenile Law: Indian Child Welfare Act**

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- 25 U.S.C. § 1901:
  - “... there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe...”
  - “... that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions...”
  - “... that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”

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## **Juvenile Law: Indian Child Welfare Act**

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

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## Juvenile Law: Indian Child Welfare Act

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- Stated purpose is “to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children and placement of such children in homes which will reflect the unique values of Indian culture.”

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## Juvenile Law: Indian Child Welfare Act

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- 19 U.S.C. § 1903(1): “child custody proceeding” shall mean and include—
  - (i) “foster care placement” which shall mean any 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;
  - (ii) “termination of parental rights” which shall mean any action resulting in the termination of the parent-child relationship;
  - (iii) “preadoptive placement” which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and
  - (iv) “adoptive placement” which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

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## Criminal Law: Separate Sovereigns

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- Separate sovereigns (within the U.S.) can prosecute separately
  - Often *without* running afoul of the U.S. Constitution's double-jeopardy clause
- When advising on plea agreements, beware of whether a guilty plea might be used as a statement against interest in a concurrent/future case involving the same offense when prosecuted by a separate sovereign

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## Practice Pointers

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- In divorce/custody consultations, *always* ask whether any family member is "enrolled or eligible for enrollment in any federally-recognized Indian tribe"
  - If you're not asking, you're arguably not diligently representing your client
  - A "yes" answer can have other value, e.g. automatic eligibility for AHCCCS (Can be helpful in Title IV-D child support cases)
- Trans-jurisdictional cases can have pleasant surprises and landmines
- Practicing in tribal court can be quite an adventure...

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