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RACE TO JURISDICTION: FORUM DETERMINATION IN DV-RELATED CHILD CUSTODY ACTIONS WHEN SURVIVORS FLEE ACROSS RESERVATION LINES

Joy Barber*

I. INTRODUCTION

You are a state district court judge in a small town just outside an Indian reservation. Before you is a dissolution petition with a parenting plan brought by the mother of two children. All three are tribal members. The family has primarily lived on the reservation for the previous four years. However, after being severely beaten by her non-Indian husband, the mother has fled to her father's home, which is located in your small town. She and the children have resided off reservation for roughly five months. She states in her petition that she thinks her husband may have also filed for dissolution and a parenting plan in tribal court. You are concerned about her safety and the best interests of the children, but you also wonder about this potential parallel tribal court action.[1] Should you find subject matter jurisdiction and proceed with the case?

Child custody actions can be a crucial legal aspect of domestic violence litigation, the adjudication of which has important safety implications for survivors. Harm to children, threatened harm to children, specific parenting plan provisions, and ongoing legal battles over custody can be elements of an abuser's power and control, as can the forum selection for such litigation when it perpetuates survivor contact with a jurisdiction from which she may have fled for her safety and in order to escape the abuse.[2] The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),[3]

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1. Hypothetical adapted very loosely from Garcia v. Gutierrez, 217 P.3d 591 (N.M. 2009).

2. Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence after the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101, 109–12 (2004).

3. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT (1997) (drafted by the National Conference of Commissioners on Uniform State Laws).

adopted by Montana and nearly all fifty states,[4] and the federal statutory Parental Kidnapping Prevention Act (PKPA)[5] include domestic violence-related emergency jurisdiction exceptions to the standard "home state" analysis as well as the option for courts to decline jurisdiction as inconvenient fora.[6] Such provisions prioritize the safety of survivors and their children when fleeing across *state* lines.[7] However, appropriate forum determination becomes less clear when survivors flee across *reservation* lines. Because the location of domestic violence shelters, personal support networks, and resources for survivors may necessitate such flight, empowering Indian[8] domestic violence survivors' choice of forum for family law matters is a critical piece of their escape from abuse.

Montana's adoption of the UCCJEA includes the statutory provision to treat tribes as states for the purposes of applying the Act.[9] Montana has also adopted the provision requiring recognition of tribal court child custody orders made "in substantial conformity" with the UCCJEA.[10] However, if tribes have not adopted the UCCJEA into their tribal codes, such conformity may be more difficult to find. The result of ambiguity is often either a race to "first in time" jurisdiction, state vs. tribal, which contravenes the very purposes of the UCCJEA and PKPA,[11] or a confusing mix of simultaneous tribal and state court proceedings. The latter creates delays in resolution—a circumstance against the best interests of the child.[12] Ultimately,

4. Kathleen A. Hogan, *Understanding the UCCJEA*, 39 SPG FAM. ADVOC. 16, 17 (2017). *See* MONT. CODE ANN. §§ 40-7-101 to 40-7-317 (2019) (as amended by 1999 Mont. Laws Ch. 91 (H.B. 24) to adopt the UCCJEA).

5. 28 U.S.C.A. § 1738A (Westlaw through Pub. L. No. 116-68) (effective Oct. 2000).

6. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT §§ 204, 207; 28 U.S.C.A. §§ 1738A(c)(2)(C)(ii), (f)(2).

7. *See* Goelman, *supra* note 2, at 132–35. *See also* Tamara Kuennen, *Key Provisions of UCCJA, PKPA, UCCJEA, & ICWA and Improvements Made by the UCCJEA for Battered Women*, BATTERED WOMEN'S JUSTICE PROJECT: NATIONAL CENTER ON FULL FAITH AND CREDIT (2005), https://perma.cc/3ZMQ-SY9F (last visited Oct. 1, 2019).

8. "Indian" is used throughout the paper as a legal term, as defined in 25 U.S.C. § 1903(3).

9. MONT. CODE ANN. § 40-7-135(2) (2019).

10. *Id.* § 40-7-135(3).

11. *See* Cmt., UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 101 ("[T]his Act should be interpreted according to its purposes, which are to: (1) Avoid jurisdictional competition . . . in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being; (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child; (3) Discourage the use of the interstate system for continuing controversies over child custody. . . ."). *See also* Parental Kidnapping Prevention Act, Pub. L. No. 96-611, §§ 7(a)(2)–(3), (c)(1)–(5), 94 Stat. 3568, 3568–3569 (1980) (finding inconsistent laws between jurisdictions contributed to seizure and concealment of children, as well as excessive litigation and conflicting court orders; identifying purposes nearly identical to the UCCJEA).

12. *See* In re S.B.C., 340 P.3d 534, 542 (Mont. 2014) (citing to both the ICWA Guidelines and Montana case law for the principle that protracted litigation is harmful to children's best interests).

gaps in state application and tribes' adoption of the UCCJEA result in negative outcomes for both tribal sovereignty and survivor autonomy and safety.

Yet, while adoption of the UCCJEA into tribal codes seems likely to strengthen tribal jurisdiction over domestic violence-related child custody actions involving tribal members, doing so can also have negative implications in terms of tribal code colonization and survivor autonomy. Importantly, adoption of the current UCCJEA into tribal codes may reduce potential tribal jurisdiction by foregoing a membership-based jurisdictional analysis—with potential to reach beyond reservation boundaries—in favor of the strictly geographic analysis emphasized by the UCCJEA and PKPA.[13] As an alternative, tribes should consider strengthening jurisdictional protections for domestic violence survivors and their children by establishing clearer jurisdictional code provisions. As this Article contends, strengthened exercises of tribal jurisdiction over custody actions involving tribal member children are supported by federal policy, Montana and Supreme Court case law, and comity principles.

II. Survivor Importance: Violence Against Women and the Impacts on Children

The careful adjudication of child custody issues is paramount to the safety of domestic violence survivors.[14] Reportedly, "twenty-five to fifty percent of [all] disputed custody cases involve domestic violence,"[15] and whether these cases are decided with consideration for domestic violence is central to the empowerment and safety of survivors and the safety and recovery of children exposed to domestic violence.

There are specific concerns that come with domestic violence-related child custody issues. It is not uncommon for abusers to threaten or actually harm children as a means of influencing and exerting control over their partners,[16] and extended custody litigation is one avenue for abusers to maintain contact with and continue to harass survivors after survivors have fled abusive situations.[17] Custody proceedings provide abusers with oppor-

13. *See* Lesley M. Wexler, *Tribal Court Jurisdiction in Dissolution-Based Custody Proceedings*, 2001 U. Chi. Legal F. 613, 613–14 (2001).

14. The Author uses the term "survivors" as its connotation focuses on empowerment and validates the survival-based choices being made.

15. Zoe Garvin, *The Unintended Consequences of Rebuttable Presumptions to Determine Child Custody in Domestic Violence Cases*, 50 Fam. L. Q. 173 (2016), excerpted in Nancy K.D. Lemon, Domestic Violence Law, 355 (5th ed. 2018).

16. *See* Goelman, *supra* note 2, at 108–09 (noting that in 40 to 60 percent of cases, domestic violence abusers also abuse the children in the home).

17. *See* Peter G. Jaffe, C. Crook & Nicolas Bala, *Summary of "Matching Parenting Arrangements to Child Custody Disputes in Family Violence Cases,"* Discussion Paper for Dept. of Justice, Ontario, Canada (2005), excerpted in Nancy K.D. Lemon, Domestic Violence Law, 347 (5th ed. 2018).

tunities to gain information about and make contact with survivors, allowing for continued monitoring and, potentially, the means to initiate further violence and control.[18] Extended litigation may also have the effect of draining a survivor's financial resources, contributing to continued economic abuse by the abuser, as well as increasing the likelihood of a survivor returning to the abusive home.[19] When custody is shared, communication regarding parenting and exchanges provides opportunities for continued stalking and harassment. Exchanges are contact points that may be dangerous to a survivor's safety and confidentiality. Thus, how parenting plans are decided can also create avenues for an abuser's on-going exertion of power and control.[20]

Additionally, the threatened loss of custody is a tool abusers may use to keep survivors from leaving.[21] Given the propensity of state courts to grant sole or joint custody to abusers,[22] and to sometimes ignore the history of domestic violence in making custody determinations,[23] survivors' concerns about child custody litigation are well-founded.

Careful adjudication of child custody actions is also key to holistically addressing domestic violence as a societal and public health issue, as research has shown children exposed to domestic violence experience trauma that impacts their health and cognitive development.[24]

These issues are critical enough when considered generally, but they become acute and emblematic of a larger crisis when Native women are the partners subject to abuse. The federal government has formally acknowledged the crisis of missing and murdered indigenous women in the United

18. Goelman, *supra* note 2, at 111.

19. Emmaline Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It*, 24 UCLA WOMEN's L.J. 41, 54 (2017).

20. *See* Jaffe, Crook & Bala, *supra* note 17, at 346 (noting the continuation of stalking after separation and that visitation and exchanges provide opportunities for renewed domestic violence abuse). *See also* Campbell, *supra* note 19, at 59 (quoting that 70% of domestic violence victims in an interview reported abusers used children to stay in victims' lives).

21. *See* Goelman, *supra* note 2, at 109 ("Batterers deliberately use the children as weapons after separation to punish victims for leaving or to force them to reconcile.").

22. Campbell, *supra* note 19, at 58. *See also* American Bar Association Commission on Domestic Violence, *10 Myths about Custody and Domestic Violence and How to Counter Them*, AMERICAN BAR ASSOCIATION (2006), https://perma.cc/SVU3-8A3M (noting that batterers are more likely to seek sole custody and are often successful).

23. Joan Zorza & Leora Rosen, *Guest Editors' Introduction to Special Issue of Custody and Domestic Violence*, 11(8) VIOLENCE AGAINST WOMEN 983–990 (Aug. 2005), excerpted in NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW, 352 (5th ed. 2018) (citing to New York Family Court study wherein information about domestic violence had no impact on child custody determinations).

24. David Finkelhor, Heather Turner, Anne Shattuck, Sherry Hamby, and Kristen Kracke, *Children's Exposure to Violence, Crime, and Abuse: An Update*, JUVENILE JUSTICE BULLETIN: NATIONAL SURVEY OF CHILDREN'S EXPOSURE TO VIOLENCE, Office of Justice Programs (Sept. 2015), https://perma.cc/KHY8-FR2W.

States,[25] specifically noting the impacts on indigenous women and children.[26] More than half of all Native women have experienced intimate partner violence, and this violence is predominantly perpetrated by non-Indian partners.[27]

As to how this violence impacts children, in their Senate Judiciary Committee testimony supporting reauthorization of the Violence Against Women Act (VAWA), the National Congress of American Indians reported that tribes currently exercising VAWA jurisdiction under the 2013 Act found that "children have been involved as victims or witnesses in [tribal member domestic violence] cases nearly 60% of the time."[28] The Department of Justice has reported that "American Indian and Alaska Native children suffer exposure to violence at rates higher than any other race in the United States,"[29] and, due to exposure to violence, "AI/AN children experience posttraumatic stress disorder at the same rate [22%] as veterans returning from Iraq and Afghanistan and triple the rate of the general population."[30] As a result, the reauthorization of VAWA currently before the Senate includes provisions to authorize tribal prosecutions for crimes against children under Special Domestic Violence Criminal Jurisdiction (SDVCJ).[31] The passage of legislation authorizing SDVCJ and its renewed

25. Savanna's Act, Pub. L. No. 116-165, 134 Stat. 760 (Oct. 10, 2020); Not Invisible Act, Pub. L. No. 116-166, 134 Stat. 766 (Oct. 10, 2020); Establishing the Task Force on Missing and Murdered American Indians and Alaska Natives, Exec. Order No. 13,898, 84 Fed. Reg. 66,059 (Nov. 26, 2019). The State of Montana also passed legislation in 2019 to create a Missing and Murdered Indigenous Person taskforce. *See* Hanna's Act, MONT. CODE ANN. § 44-2-411 (2019).

26. *See Remarks by President Trump at Signing of an Executive Order Establishing the Task Force on Missing and Murdered American Indians and Alaska Natives*, The White House (Nov. 26, 2019), https://perma.cc/R59F-E868.

27. National Congress of American Indians Policy Research Center, *Violence Against American Indian and Alaska Native Women Research Policy Update*, NATIONAL CONGRESS OF AMERICAN INDIANS 1–2 (Feb. 2018), https://perma.cc/RDK2-LE4J (stating that 55.5% of Native women experience intimate partner violence and 90% of physical violence experienced by Native women is perpetrated by an interracial intimate partner). *See also* Violence Against Women Act, H.R. 1620, 117th Cong. § 901(3) (2021) ("The vast majority of Native victims—96 percent of women and 89 percent of male victims—report being victimized by a non-Indian.").

28. *Testimony Before the Senate Judiciary Committee Hearing on the Need to Reauthorize the Violence Against Women Act*, NATIONAL CONGRESS OF AMERICAN INDIANS 2 (Mar. 20, 2018), https://perma.cc/WQ2Q-748G.

29. Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive*, DEPARTMENT OF JUSTICE 6 (Nov. 2014), https://perma.cc/ZRG6-6JEV.

30. Indian Law and Order Commission, *A Roadmap for Making Native America Safer: Report to the President and Congress of the United States*, UCLA 151 (May 2015), https://perma.cc/MHW8-ABQJ, as referenced in the Attorney General's Advisory Committee report, *supra* note 29, at 38.

31. Violence Against Women Act, H.R. 1620, 117th Cong. § 903 (2021). *See* Elizabeth Reese and Virginia Davis, *Overdue Justice: DV Jurisdiction in Indian Country*, DOMESTIC VIOLENCE REPORT, Aug./Sept. 2018, 81, 92–94. *See also* Neoshia R. Roemer, *The Violence Against Women Act of 2018: A Step in the Right Direction for Indian Children and Federal Indian Law*, 66 FED. LAW. 53 (2019). During their campaign, the Biden-Harris administration indicated support for and commitment to the

support in Congress are strong federal policy signals affirming the acute need to address such violence in Indian country.

Also important to this discussion is that around half of all Indian children have a non-Indian parent.[32] This means that domestic violence-related child custody issues involving tribal member survivors and children frequently invoke questions about state vs. tribal jurisdiction over the proceedings.

Given the general need for careful adjudication of domestic violence-related child custody matters, and the pointed need for close attention to domestic violence-related cases involving Indian women and children, uncertainty and competition around jurisdiction over such child custody actions is a critical legal gap. When such uncertainty and conflict lead to litigation delays, necessitate appearances in unsafe or physically distant fora, or increase survivor contact with abusers, it exacerbates the personal, legal, and financial barriers to fleeing abuse.

Native survivors also have particular concerns when pursuing child custody orders in state courts: the potential for racial bias and the historic trauma of previous Indian child removal policies. Thus, custody actions involving Indian children and domestic violence survivors are of enormous importance to not only the parties themselves but also to tribes. Adjudication of these matters and the ability of tribes to exercise jurisdiction over them has implications for tribal sovereignty, for the effective protection of tribal members from violence, and for tribal cultural preservation and integrity.[33]

III. Sovereignty Matters: State Court Bias and Historic Trauma

Recognizing the long assimilationist history of Indian child removal from tribes is critical to contextualizing the importance of jurisdictional questions in tribal member custody actions. Previous assimilation and termination policies and legislation, including the creation and funding of Indian boarding schools, deliberately separated Indian children from their families and communities to impede cultural preservation, thwart community cohesion, and diminish sovereignty.[34]

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expansion of VAWA to specifically address crimes affecting Native women and children. *See Biden-Harris Plan for Tribal Nations*, https://perma.cc/86F2-YQ8N (last visited Feb. 15, 2021).

32. Wexler, *supra* note 13, at 613–14.

33. *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989) (noting the Indian Child Welfare Act provisions "must . . . be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves.").

34. *See* Matthew Fletcher and Wenona Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885, 938–44, 952–55 (2017) (tracing the history of the U.S. government's

The passage of the Indian Child Welfare Act (ICWA) in 1978 was a direct response to state court and social services biases in Indian child custody proceedings that "failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[35] To be noted, the ICWA specifically excepts from its purview custody actions that stem from divorce proceedings or otherwise do not involve custody termination.[36] However, as a statement of federal policy, in the ICWA the federal government recognized tribes' sovereign interests in adjudication of proceedings involving Indian children as an aspect of cultural preservation and tribal integrity. Congressional findings supporting the Act unequivocally state, "[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children . . . ."[37]

Yet, despite full faith and credit provisions in federal law,[38] many state courts continue to resist the oversight of tribal courts in domestic relations, particularly in child custody matters involving a non-Indian parent.[39] State courts may precipitately rely upon historic state jurisdiction over family law issues.[40] State courts may also possess insufficient knowledge about and exhibit distrust of Indian culture.[41]

Per the ICWA, federal policy recognizes the "unique values of Indian culture" and seeks to "promote the stability and security of Indian tribes and

removal of Native children from their families as an assimilationist leverage tool since the time of treaty-making and correlating the rise of state social service removal to the decline of federal boarding schools).

35. Indian Child Welfare Act, 25 U.S.C.A. § 1901(4)–(5) (Westlaw through Pub. L. No. 116-259). *See also About ICWA*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, https://perma.cc/Z77A-HKN6; Elizabeth MacLachlan, *Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters*, 2018 BYU L. REV. 455, 476 (2018).

36. Indian Child Welfare Act, 25 U.S.C.A. § 1903(1) (Westlaw through Pub. L. No. 116-259).

37. Indian Child Welfare Act, 25 U.S.C.A. § 1901(3) (Westlaw through Pub. L. No. 116-259).

38. 28 U.S.C.A. § 1738 (Westlaw through Pub. L. No. 116-259). *But see* Wilson v. Marchington, 127 F.3d 805, 807 (9th Cir. 1997) (finding, "[P]rinciples of comity, not full faith and credit, govern whether a district court should recognize and enforce tribal court judgment.") (cert. denied 523 U.S. 1074 (1998)). Generally, the PKPA, 28 U.S.C. § 1738A(8), includes full faith and credit for "a territory or possession of the United States," and the Fourth Circuit has applied this to tribes (*See* In re Larch, 872 F.2d 66 (4th Cir. 1989)); however, the New Mexico Supreme Court disagreed with this application, citing the PKPA's silence on and therefore inapplicability to tribes, as opposed to the ICWA or the VAWA. *See* Garcia v. Gutierrez, 217 P.3d 591, 604–06 (N.M. 2009) (providing a good overview of the split opinions on this issue). *See also* Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 332–33 (2000).

39. Elizabeth MacLachlan, Note, *Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters*, 2018 BYU L. REV. 455, 481–82 (2018).

40. *See* Ex parte Burrus, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.").

41. MacLachlan, *supra* note 39, at 477–78.

families."[42] Yet, Native Americans can experience white, middle-class bias in state courts that has resulted in the removal of children and best interests of the child rulings based on the personal norms of the judiciary.[43]

Alternately, tribes will "generally believe that the best interest of Indian children is to stay within their culture."[44] The interpretation that Indian children's best interests fundamentally include connection to their tribes has also been recognized by the Supreme Court.[45] Still, research shows that "state courts and judges use the Anglo-American standard of psychological parent theory to determine the child's best interests" rather than acknowledging tribal norms that may include the extended family.[46] Further, "States have used the best interest of the child standard as 'good cause' to retain jurisdiction over an ICWA matter rather than transferring the case to tribal court."[47]

In fact, some state courts have reasoned that "Congress did not intend ICWA to apply to cases in which the child is not part of an Indian home or culture."[48] They have then used their own cultural conceptions of what it means to be "part of a sufficiently Indian family" to determine that ICWA did not apply to some Indian child custody cases and that tribal involvement was unwarranted.[49] Such decisions serve to preclude the determination of tribal membership by tribes—an infringement on core sovereignty interests.[50]

Preclusion of tribal court jurisdiction in tribal member-involved child custody actions can have particularly severe impacts on Indian children and tribes, especially when it results in children's dislocation or rupture from relationships with the tribal community and participation in tribal customs. In essence, it can be seen as "den[ying] Indian children a right to their cultural identity."[51]

Though the ICWA does not apply to non-termination child custody proceedings, state court bias in determining children's best interests has obvious bearing on Indian survivor forum selection for domestic violence-related child custody actions. As noted in the previous Section, threatened loss of custody is a key abuser's tool,[52] and such a threat can be com-

42. Indian Child Welfare Act, 25 U.S.C.A. § 1902 (Westlaw through Pub. L. No. 116-259).
43. MacLachlan, *supra* note 39, at 483. *See also* Garvin, *supra* note 15 at 358.
44. MacLachlan, *supra* note 39, at 482.
45. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49–50 n.24 (1989).
46. MacLachlan, *supra* note 39, at 483.
47. *Id.* at 483.
48. *Id.* at 485–86.
49. *Id*.
50. *Id*.
51. *Id.* at 485.
52. *See supra* notes 20–22.

pounded by a non-Indian parent's threat of adjudication in a potentially biased state court. State court bias can impede survivors' abilities to advocate for child custody arrangements that protect their own and their children's safety, as well as their own and their children's cultural identity. State court distances from reservations may impact a survivor's ability to easily respond to child custody litigation in these fora. And a survivor's access to legal counsel can be impacted by state court differences from a tribal court system that incorporates the use of lay advocates.[53] As noted above, the jurisdictional scramble also has the potential to drag a survivor back to a jurisdiction she fled for safety reasons.

As embodied in the principles underpinning the ICWA, tribes' interests in cultural preservation and integrity are present in all child custody actions involving Indian children. Lack of tribal court involvement in these actions undermines key sovereignty interests, including tribes' interests in the safety and welfare of tribal member survivors and children. When implicated, the ability of tribal courts to fully exercise jurisdiction over domestic violence-related child custody actions is both an important aspect of tribal sovereignty and Indian survivor safety and escape from abuse.

IV. The UCCJEA's Jurisdictional Provisions

Drafted in 1997, the UCCJEA was model legislation meant to resolve inconsistencies between the prior Uniform Child Custody Jurisdiction Act (UCCJA) of 1968 and the PKPA, a federal act passed in 1980 to curtail forum hopping, interstate child abduction, and interstate conflicts in child custody matters.[54] While the UCCJA allowed for *consideration* of "home state" jurisdiction, the PKPA and the UCCJEA have prioritized this as the primary analysis for determining initial subject matter jurisdiction over child custody actions.[55] A child's "home state" is usually where the child has lived with a parent for six consecutive months preceding the commencement of court action, as long as at least one parent still resides in that jurisdiction.[56] The UCCJEA also provides that tribes are to be treated as states in a home state analysis and other provisional applications of the Act.[57] Montana has adopted the UCCJEA, including the provision to treat

53. *See, e.g.*, The Judicial Branch of the Crow Nation: Advocate List, https://perma.cc/KN8T-EQCF.

54. Hogan, *supra* note 4, at 16–17.

55. *See* Kuennen, *supra* note 7. *See also* Mont. Code Ann. § 40-7-201 (2019).

56. Hogan, *supra* note 4, at 17–18. *See* § 40-7-103(7). *See also Id.* § 1-1-215 for Montana's statutory definition of "residence."

57. Unif. Child Custody Jurisdiction & Enforcement Act § 104. *See also* Kelly Stoner and Richard A. Orona, *Full Faith and Credit, Comity, or Federal Mandate? A Path That Leads to Recognition and Enforcement of Tribal Court Orders, Tribal Protection Orders, and Tribal Child Custody Orders*, 34 N.M. L. Rev. 381, 403 (2004).

tribes as states and to recognize tribal court orders made in conformity with the Act.[58]

The PKPA and UCCJEA also provide for emergency jurisdiction in a state other than the home state if the child, sibling, or parent have been subjected to or threatened with abuse.[59] Under the UCCJEA, emergency jurisdiction is usually temporary but can "evolve into home state jurisdiction" when the state with home state jurisdiction declines jurisdiction via an inconvenient forum analysis.[60] Inconvenient forum analysis factors include determining which state offers the best protection against continued domestic violence and the ongoing health of the parties.[61] In *Stoneman v. Drollinger*,[62] the Montana Supreme Court thoroughly examined such a declination in a domestic violence situation via analysis of the factors in Montana Code Annotated § 40-7-108, finding that the district court had abused its discretion in denying the survivor's motion for declination under the UCCJEA because it had "failed to consider [the survivor's] safety and well-being when evaluating . . . transfer of proceedings."[63]

Filing for emergency jurisdiction or inconvenient forum analysis also triggers the judicial communications aspect of UCCJEA,[64] a statutory expectation that the courts will talk to each other. Judges are permitted to share information regarding any abuse in conversations to determine which forum is most appropriate for determining the best interests of the child.[65] The Commissioners' Note for the Montana statute emphasizes that expectations for judicial communications include tribal courts.[66] In simultaneous proceedings, if it is determined an action has previously begun in another forum, a stay is required, and judicial communication is required, rather than permissive.[67]

However, the provisions of the UCCJEA only provide protections for tribal court actions or deference in a simultaneous proceedings analysis if

58. §§ 40-7-135(2)-(3), 40-7-201.

59. Kuennen, *supra* note 7. *See also* § 40-7-204(1).

60. Kuennen, *supra* note 7.

61. Joan Zorza, *The UCCJEA: What Is It and How Does It Affect Battered Women in Child-Custody Disputes*, 27 FORDHAM URB. L.J. 909, 923 (2000).

62. 64 P.3d 997 (Mont. 2003).

63. *Id.* at 998–99, 1002, 1004–05 (holding the Washington court was the more appropriate forum, as well as "urg[ing] district courts to give priority to the safety of victims of domestic violence when considering jurisdictional issues under the UCCJEA").

64. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 204(d). *See also* MONT. CODE ANN. § 40-7-204(4) (2019).

65. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 110. *See also* § 40-7-139 (Commissioners' Note specifically, stating, "This includes communication with foreign tribunals and tribal courts.").

66. § 40-7-139.

67. *Id.* § 40-7-107.

they are "in substantial conformity" with the UCCJEA.[68] Lack of conformity with the UCCJEA has been alternately cited to favor tribal jurisdiction because of the UCCJEA's inapplicability to tribes,[69] as well as to dismiss tribal jurisdiction in favor of state jurisdiction.[70] The jurisdictional analysis under the PKPA and its full faith and credit protections also requires that the state making the child custody determination must have jurisdiction "under its own laws."[71] In application, depending on the scope and clarity of jurisdictional provisions in tribal codes, these aspects of the UCCJEA and the PKPA can work against tribal jurisdiction.

V. SCENARIOS

While the UCCJEA and the PKPA provide clear frameworks for jurisdictional analysis when such scenarios occur between states, their application to contested jurisdiction is muddier between state and tribal courts. At least one Montana practitioner reported[72] that such jurisdictional conflicts do often get decided based on "first in time," precisely the type of race to control forum determination that uniform legislation like the UCCJEA was enacted to prevent. As explored above, such jurisdictional competition also has tribal sovereignty implications when it precipitously precludes tribal courts' opportunities to determine jurisdiction—a contravention of tribal court exhaustion principles.[73]

The following scenarios illustrate the potential complexities of tribal vs. state court subject matter jurisdiction in domestic violence-related child custody actions involving Indian survivors:

68. *Id.* §§ 40-7-135(3), 40-7-139(2). *See also* Duty to Enforce, § 40-7-303(1) and Recognition and Enforcement, § 40-7-313.

69. *See* Tupling v. Kruse, 15 Am. Tribal Law 23, 34–36, 2017 WL 2443081 (Colville C.A.) (Bass, J., dissenting). *See also* Father J. v. Mother A., 6 Mash.Rep. 297, 2015 WL 5936866 (Mash. Pequot Tribal Ct. 2015) (finding that the tribe had not adopted the UCCJEA and the tribe had jurisdiction). For a survey of state cases examining UCCJEA application to tribal courts, *see* Deborah F. Buckman, *Uniform Child Custody Jurisdiction and Enforcement Act's Application to Tribal Courts*, 45 A.L.R. 7TH ART. 5 (2019).

70. *See* Billie v. Stier, 141 So. 3d 584 (3d Fla. Dist. Ct. App. 2014).

71. 28 U.S.C. § 1738A(c)(1) (Westlaw through Pub. L. No. 116-259). *See also* National Center on Protection Orders and Full Faith & Credit, *Interstate Child Custody: A Practitioner's Guide to the Parental Kidnapping Prevention Act (PKPA)*, BATTERED WOMEN'S JUSTICE PROJECT, https://perma.cc/ZN2F-FVRN (last visited Feb. 25, 2021).

72. Telephone Interview with Kathryn Seaton, Indian Law attorney with Montana Legal Services Association (Nov. 14, 2019).

73. *See* National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 855–56 (1985) ("[T]he existence and extent of a tribal court's 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. We believe that examination should be conducted in the first instance in the Tribal Court itself.").

1. An Indian parent lives on her[74] tribe's reservation with her non-Indian partner who is also the parent of her Indian child.[75] The relationship involves physical abuse perpetrated by the non-Indian partner upon the Indian partner. Wishing to escape the abuse, the Indian partner flees with the couple's child to the nearest domestic violence shelter, which is located off reservation, 60 miles away in the nearest metropolitan area.[76] The non-Indian abuser immediately initiates a child custody action in the nearest state district court, which happens to be located in a town just off the reservation, about 50 miles from the shelter where the survivor and child now reside.

2. Alternately, an Indian parent attends college and works in a metropolitan area located about 60 miles from her tribe's reservation. She lives with her non-Indian partner and their Indian child, but experiences domestic violence at the hands of her non-Indian partner. She decides to leave the relationship and flees to the reservation where her family and support network are located, taking the child with her. The non-Indian partner immediately initiates a child custody action in state court in the city where the couple has been living. Within days of leaving, the Indian parent also files for an order of protection and begins a child custody action in tribal court.

These scenarios are not uncommon in areas near Indian reservations.[77] Under a general application of the UCCJEA, in Scenario 1, where the survivor flees to an off-reservation shelter and the non-Indian abuser files for child custody in a state court neighboring the reservation, application of the UCCJEA home state analysis should allow for the survivor to establish home state jurisdiction in the tribal court, given the entire family's on-going, preceding residency on the reservation. However, it is not beyond imagination that the state court may determine it has continuing, exclusive jurisdiction and may dismiss motions to decline jurisdiction under an inconvenient forum analysis based on a "first in time" analysis and the current

74. The female pronoun is used throughout, as the majority of domestic violence survivors are women. *See* Jennifer L. Truman and Rachel E. Morgan, *Nonfatal Domestic Violence, 2003–2012*, U.S. DEPT. OF JUSTICE SPECIAL REPORT 1 (Apr. 2014), https://perma.cc/W2QE-H5AA (stating that 76% of victims of domestic violence are women). However, men also experience domestic violence, and though these examples involve opposite sex couples, domestic violence occurs in same-sex partnerships as well.

75. As defined in 25 U.S.C.A. § 1903(4) (Westlaw through Pub. L. No. 116-259).

76. This situation is not unlikely. *See* Kathryn Ford, *Combatting Domestic Violence in Indian Country: Are Specialized Domestic Violence Courts Part of the Solution?*, CENTER FOR COURT INNOVATION 4 (2015), https://perma.cc/6QY8-FL3Y (noting that "[m]any tribal communities are small and geographically isolated, with limited access to services . . . [and] some specialized services that are readily accessible in non-tribal communities, such as batterers' intervention programs, rape crisis services, trauma-focused mental health care, and domestic violence shelters, may not be available on some reservations.").

77. These scenarios are anecdotal examples drawn from the Author's experiences serving as a Justice for Montanans AmeriCorps member at the Self-Help Law Center in Billings, Montana. Montana practitioner Hilly McGahan also confirmed these were common scenarios she encountered while working for the SAFE Harbor Legal Program, which serves Lake County and the Flathead Reservation in Montana. Interview with Hilly McGahan, Attorney (Mar. 17, 2021).

location of the survivor and the couple's child off reservation.[78] Regrettably, while federal law provides full faith and credit mandates for tribal court judgments in limited subject matter areas such as domestic violence protective orders,[79] child support orders, and orders pertaining to child custody, some states continue to resist tribal court oversight, "The most troubling result of this unfettered lack of compliance [being] that . . . [nearly all] instances of non-recognition involved orders that lie at the very heart of a tribe's ability to regulate domestic relations . . . ."[80]

In Scenario 2, where the survivor flees onto the reservation to escape her abuser, a home state analysis under the UCCJEA is going to favor the state court and empower it to dismiss requests for declination in favor of tribal court jurisdiction. The tribal court may be able to claim temporary emergency jurisdiction, but it will likely have a difficult time dislodging the "first in time" state court filing or strict application of residency, and the state court is likely to ultimately retain continuing jurisdiction.[81] Still, the filing of the order of protection in tribal court and the statutory provisions regarding simultaneous proceedings should induce communication between the courts to determine jurisdiction.

Similarly, in the Introduction scenario, finding simultaneous proceedings would invoke mandatory communication with the tribal court.[82] In that situation, the tribal court should easily be able to establish home state jurisdiction given the inability to establish six months off reservation, but concern for the survivor's safety may warrant declination of tribal court jurisdiction in favor of the state court. Arguably, judicial communication about declinations and appropriate fora is key to affecting the most survivor-protective application of the UCCJEA—and to addressing tribal sovereignty concerns. Judicial communication includes the tribal court in assessing tribal concerns, interests, and perspective as part of the jurisdictional determination—a counterbalance against state court bias and the worst outcomes of a purely "first in time" analysis. It also provides the tribal court with a say in the protection of its tribal members, including the opportunity to honor the survivor's forum selection in deference to her safety needs.

Unfortunately, in domestic violence-related custody cases involving flight across reservation lines, a default "first in time" analysis, the presence

78. *But see* MONT. CODE ANN. § 40-7-201(3) (2019) ("Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.").

79. *See* Violence Against Women Act, 18 U.S.C.A. § 2265 (Westlaw through Pub. L. No. 116-259).

80. Leeds, *supra* note 38, at 360–61.

81. *See* In re Marriage of Vanlaarhoven, 55 P.3d 942, 945 (Mont. 2002) (holding that an Oregon district court's exercise of temporary emergency jurisdiction "did not automatically divest the [Montana] district court of jurisdiction").

82. §§ 40-7-107(2), 40-7-135(2). *See also Id.* § 40-7-139.

or residency of the survivor and child off reservation,[83] and the involvement of a non-Indian parent can too frequently work against the survivor's autonomy and safety in forum selection—even though strategic application of the UCCJEA might empower them. When tribal jurisdiction is hastily set aside and judicial communications provisions are not applied to include tribal courts, case outcomes favoring state court jurisdiction work against tribal sovereignty and the ability of tribes to protect their members from violence. However, federal law and Montana state law provide strong support for tribal jurisdiction and tribal court involvement in jurisdictional determinations in domestic violence-related child custody actions involving Indian survivors and children.

VI. Montana Case Law: Infringement and Comity

A. Infringement

In the event state courts or parties challenge tribal court jurisdiction, federal and Montana case law indicate tribal jurisdiction in child custody actions involving Indian children is supported by an infringement analysis under *Williams v. Lee*.[84]

Tribes' inherent sovereign powers over domestic relations involving members are a matter of federal precedent. In *United States v. Quiver*,[85] relying on the Nonintercourse Acts, the Supreme Court held it "became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated . . . according to their tribal customs and laws."[86] A key modern precedent is *Fisher v. District Court of Sixteenth Judicial District of Montana*,[87] which regarded disputed jurisdiction between Montana's Rosebud County and the Northern Cheyenne Tribal Court in a child custody matter. In *Fisher*, the Supreme Court extended a *Williams* infringement analysis to domestic relations involving only tribal

83. *But see Id.* § 40-7-201(3), which provides that physical presence alone is insufficient to make an initial jurisdictional claim.

84. 358 U.S. 217 (1959) (holding federal law and Congressional policy restrict state exercises of power where they "infringe[ ] on the right of reservation Indians to make their own laws and be ruled by them"). *See also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59–60 (1978) (holding the Indian Civil Rights Act did not impliedly waive tribal sovereign immunity nor authorize declaratory or injunctive civil actions against tribes in federal courts; "[W]e must bear in mind that providing a federal forum for issues arising under [ICRA] constitutes an interference with tribal autonomy and self-government beyond that created by the change in substantive law itself.").

85. 241 U.S. 602 (1916).

86. *Id.* at 603–04.

87. 424 U.S. 382 (1976).

members, holding tribal jurisdiction is exclusive when such matters arise on the reservation:[88]

> The right of the Northern Cheyenne Tribe to govern itself independently of state law has been consistently protected by federal statute. . . . State-court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. As the present record illustrates, it would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court. No federal statute sanctions this interference with tribal self-government.[89]

Thus, *Fisher* also rooted support for tribal court jurisdiction in the federal policy of tribal self-determination.[90]

A similar logic informed the Supreme Court's ruling in *Iowa Mutual Insurance Co. v. LaPlante*,[91] which recognized "the Federal Government's longstanding policy of encouraging tribal self-government" and held, "[t]his policy reflects the fact that Indian tribes retain 'attributes of sovereignty over *both their members* and their territory . . . .'"[92] Citing to *Williams*, the *Iowa Mutual* Court also emphasized that "[t]he federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute."[93]

The *Fisher* Court also rejected an equal protection claim regarding tribal member access to state courts, holding that exclusive tribal jurisdiction stemmed from the "quasi-sovereign status" of tribes and was based upon a political classification, not a racial one.[94]

1. On-Reservation Cases

The Montana Supreme Court followed a *Williams* and *Fisher* approach to considering state vs. tribal jurisdiction in the child custody matters in *In*

88. *See* Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power over Children*, 83 MINN. L. REV. 927, 949 (1999). *See also* Wexler, *supra* note 13, at 622–23 ("While the Court decided Fisher prior to Montana and Strate, it seems clear that the case falls within Montana's internal affairs exception.").

89. *Fisher*, 424 U.S. at 386–88.

90. Barbara Ann Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1105 (1989).

91. 480 U.S. 9 (1987) (holding exhaustion of tribal remedies was necessary and that diversity jurisdiction under 28 U.S.C.A. § 1332 did not apply to tribes).

92. *Id.* at 14 (emphasis added).

93. *Id.*

94. Atwood, *supra* note 90, at 1083. *See also* Morton v. Mancari, 417 U.S. 535 (1974) (holding federal Indian preference hiring policies did not violate the anti-discrimination provisions of the Equal Employment Opportunity Act because they were based on political rather than racial classifications and legitimately furthered federal policies supporting Indian self-governance and self-determination).

re Marriage of Skillen.[95] Much as in Scenario 2 above, *Skillen* involved a non-Indian father who had filed a petition in state court and a tribal member mother and child residing on the Fort Peck Reservation. The Montana Supreme Court held that tribal courts have *exclusive* jurisdiction in custody cases involving Indian children and at least one Indian parent residing on reservation.[96]

Though this case was decided under the precursor to the UCCJEA, the UCCJA, its articulation of state policy regarding tribal jurisdiction remains good case law.[97] It also supports a membership-based analysis for arguing for tribal jurisdiction even when tribal member parents and children reside off reservation.[98] Using the same infringement analysis and deference to the federal self-determination policy found in *Fisher*, *Skillen* noted that, though the ICWA expressly excludes dissolution from its provisions, its purposes and principles provide support for the assertion that child custody determinations involving Indian children are vital to the security and integrity of tribes.[99] Recognizing state court unfamiliarity with tribal cultural considerations, the *Skillen* court also found that tribal courts are better equipped to consider "the child's ethnic and cultural identity."[100] Additionally, it considered the purposes of the PKPA and UCCJA, recognizing, "The two laws make clear that jurisdictional disputes over custody are not in the best interest of the child."[101]

Skillen's infringement-preemption analysis tracks with current Montana law regarding whether a state court may exercise jurisdiction on reservation. In *In re Estate of Big Spring*,[102] the Montana Supreme Court held that state courts must apply the *Mountain Apache Tribe v. Bracker*[103] test of "two independent but related barriers" in determining state vs. tribal juris-

95. 956 P.2d 1, 14 (Mont. 1998) (overruled by In re Estate of Big Spring, 255 P.3d 121 (Mont. 2011)).

96. *Id.* at 17.

97. *See* In the Matter of S.B.C., 340 P.3d 534, 545 (Mont. 2014) (McGrath, C.J., with Baker and Shea, JJ., dissenting) (quoting *Skillen* for the principle that "regardless of the child's residence, tribal courts are uniquely and inherently more qualified than state courts to determine custody in the best interests of an Indian child."). *See also* Switzer v. Crow Tribal Courts, No. CV 10–80–BLG–RFC–CSO, 2010 WL 3326870, at *3 n.1 (D. Mont. July 7, 2010) (quoting *Skillen* for the principle that Montana courts are "reluctant to suspend the tribal court's jurisdiction just because a state court may have concurrent jurisdiction").

98. *Skillen*, 956 P.2d at 18. *See also* Wexler, *supra* note 13, at 623 (arguing for "geography-plus" jurisdiction based on membership supported by *Williams* non-infringement and John v. Baker, 982 P.2d 738 (Alaska 1999)).

99. *Skillen*, 956 P.2d at 10–12.

100. *Id.* at 18 (affirming the requirement in In re Bertelson, 617 P.2d 121 (Mont. 1980), for a district court hearing to determine "which forum is better equipped to make a determination . . . [about] the child's best interests").

101. *Id.* at 9.

102. 255 P.3d 121 (Mont. 2011).

103. 448 U.S. 136 (1980).

diction. The two factors are "whether the exercise of state jurisdiction or authority first may be preempted by federal law, or second, may infringe on tribal self-government."[104] *Big Spring* held that "if either one is met a state may not assume civil jurisdiction or take regulatory action over Indian people or their territories within the boundaries of their reservations."[105]

This is important to note because some state courts may invoke the *Montana v. United States*[106] subject matter test[107] to preclude tribal court jurisdiction if family members have been residing on non-Indian fee land within the reservation.[108] But the policies of *Williams* and *Iowa Mutual* carried forward in *Skillen* and *Big Spring* put child custody cases involving tribal members solidly within *Montana*'s general rule, which holds, "tribes retain their inherent power to determine tribal membership, [and] to regulate domestic relations among members."[109] *Montana* also recognized tribes' inherent powers over what is "necessary to protect tribal self-government or to control internal relations."[110] Undergirded by the policies informing the ICWA, but also independently recognized under Montana state law, the vital importance of Indian children's continued tribal connection strongly supports tribal interest and tribal court jurisdiction in domestic violence-related custody determinations. When survivors are located on reservation and petition the tribal court, as in Scenario 2, such considerations weigh strongly in favor of state court declinations, even if the tribal court cannot establish home state jurisdiction under a UCCJEA analysis.

104. In re Estate of Big Spring, 255 P.3d 121, 132 (Mont. 2011) (drawing upon *Williams* and citing to White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)). *Big Spring* overruled the use of the *Iron Bear* test applied in *Skillen*, finding the *Iron Bear* test erroneously allowed states to retain "residual jurisdiction" where federal law had not specifically preempted their jurisdiction. *Big Spring*, 255 P.3d at 131. Again, this signals solid support in Montana case law for tribal jurisdiction in domestic relations cases involving tribal members. It also indicates a generally strong Montana policy favoring tribal sovereignty and self-determination.).

105. *Id.* at 133.

106. 450 U.S. 544 (1981).

107. *Id.* at 565–66 ("Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members . . . . [citations omitted] 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.") (note that under Strate v. A-1 Contractors, 520 U.S. 438, 457–58 (1997), the second *Montana* exception is construed narrowly).

108. *See* Garcia v. Gutierrez, 217 P.3d 591, 599–602 (N.M. 2009).

109. *Montana*, 450 U.S. at 564.

110. *Id.*

2. Off-Reservation Cases

Following the principles of *Iowa Mutual* and the ICWA policies recognizing tribes' sovereignty interests in Indian children's welfare, as well as the fundamental importance of tribal connection to Indian children's best interests, *Skillen* also held that "when an Indian child resides off the reservation, the state court and tribal court share concurrent jurisdiction."[111] Additionally, the court upheld the reluctance of *In re Bertelson*[112] to state courts "automatically assum[ing] jurisdiction."[113] In situations where concurrent jurisdiction applies, *Skillen* requires that state courts conduct hearings prior to exercising jurisdiction to determine the most appropriate forum for evaluating the child's best interests. Such determinations should give "due consideration to the child's ethnic and cultural identity" and should be based on the following factors:

a) the existence of tribal law or tribal customs relating to childcare and custody,
b) the nature of the child's personal relationship with caretakers,
c) the child's assimilation into and adjustment to life in the tribe and on the reservation,
d) the parents' ethnic and cultural backgrounds and membership in or ties to the tribe,
e) the length of the child's residence both on and off the reservation,
f) the domicile and residence of the parents,
g) the child's personal relationships with the parents,
h) the contacts of the child and the parents to the tribe and the state,
i) and the tribe's interest in deciding custody.[114]

Thus, rejecting hastily made state court jurisdictional assertions, the court instead required an infringement analysis and signaled a preference for *forum non conveniens* and conflict of laws analyses that "respect federal policy and consider the rights of the child *and the tribe* in deciding whether to accept or to decline jurisdiction."[115] This aligns with the embedded UCCJEA protections for survivors in domestic violence-related custody determinations. And sovereignty considerations argue strongly in favor of tribal jurisdiction when the survivor has chosen a tribal court forum. When a survivor has selected a state court, communication with the tribal court on these issues also respects tribal sovereignty and tribes' involvement in the protection of their members.

Importantly, the recognition of tribal jurisdiction off reservation under *Skillen* expands beyond the standard UCCJEA geographic analysis of juris-

111. In re Marriage of Skillen, 956 P.2d 1, 18 (Mont. 1998).
112. 617 P.2d 121 (Mont. 1980).
113. *Id.* at 126.
114. *Skillen*, 956 P.2d at 18 (citing to In re Bertelson, 617 P.2d 121, 130 (Mont. 1980)).
115. *Bertelson*, 617 P.2d at 126 (emphasis added).

diction, tipping in favor of an ICWA-like member-based analysis. This is consistent with *Mississippi Band of Choctaw Indians v. Holyfield*,[116] which held the domicile of children up for adoption was that of their tribal member parents, even though the children had never resided on the reservation.[117]

It is also of interest that another means of establishing jurisdiction under the UCCJEA involves a "significant connection" test based on more than "mere physical presence" if no other "state" can clearly claim jurisdiction.[118] Presumably, tribal membership and tribal interests in keeping a child connected to his/her culture and community should be weighed under this test. However, given the state court bias addressed above, concern remains that the discretionary assessment of an Indian child's "significant connections" to a tribe by a state court may not favor the tribe. If state courts judge the facts based on non-Indian cultural norms, outcomes under either a *Skillen-Bertelson* infringement analysis or a UCCJEA "significant connections" determination might look more like the "sufficiently Indian" determinations used in some states to preclude tribal involvement under the ICWA.

Similarly, and unfortunately, concurrent jurisdiction often tips in favor of the state court.[119] However, a Montana federal district court has supported the exhaustion of tribal remedies in Indian child custody conflicts, quoting the *Montana* general rule: "Indian tribes retain their inherent power to . . . regulate domestic relations among members."[120] The Ninth Circuit Court of Appeals has also upheld tribal court exhaustion as a matter of comity in *Elliott v. White Mountain Apache Tribal Court*[121] and in *Atwood v. Fort Peck Tribal Court Assiniboine*.[122]

116. 490 U.S. 30 (1989).

117. *Id.* at 48–49.

118. Hogan, *supra* note 4, at 18. *See also* MONT. CODE ANN. § 40–7–201(1)(b)(i) (2019).

119. *See* United States ex rel. Cobell v. Cobell, 503 F.2d 790 (9th Cir. 1974) (holding that a preceding divorce action in state court relinquished tribal court jurisdiction and granting a writ of habeas corpus to remove children from Blackfeet Tribal Court jurisdiction); Garcia v. Gutierrez, 217 P.3d 591, 608 (N.M. 2009) (holding that "the interests of comity do not outweigh the district court's independent obligation to consider the child's best interests in coming to a custody determination"); Langdeau v. Langdeau, 751 N.W.2d 722, 730–31 (S.D. 2008) (holding that "first in time" service of process allowed for state court jurisdiction and that wife was always a resident of the state, even though she also resided on the reservation); In re S.B.C., 340 P.3d 534, 542 (Mont. 2014) (affirming a district court's denial of requested ICWA transfer to Blackfeet Tribal Court because it determined the tribal court request was too delayed).

120. Switzer v. Crow Tribal Courts, No. CV 10-80-BLG-RFC-CSO, 2010 WL 3326870, at *3 (D. Mont. July 7, 2010).

121. 566 F.3d 842 (9th Cir. 2009).

122. 513 F.3d 943 (9th Cir. 2008) (rejecting a claim by a child's non-Indian father of substantive due process violation stemming from tribal court adjudication of a custody dispute).

B. Comity and Abstention

Another analysis that frequently informs declination and jurisdiction decisions is comity, which allows jurisdictions to "honor the laws of other jurisdictions as a matter of deference and mutual respect under an umbrella of federal law."[123] The doctrine arises because mandatory enforcement under the UCCJEA is only invoked if the court issuing the custody determination "exercised jurisdiction in substantial conformity" with the UCCJEA.[124] Many tribes have not adopted the UCCJEA. However, even if tribes have not adopted the UCCJEA into their codes, and tribal courts find it does not apply, concern over state enforcement of child custody determinations under implied principles of comity may influence tribal court decisions and jurisdictional disputes.[125] Comity may also be explicitly invoked to support exclusive or concurrent tribal jurisdiction and to sanction judicial communication conferences to determine jurisdiction.

For example, in *Miles v. Chinle Family Court*,[126] the Navajo Nation Supreme Court held that, while the UCCJEA and PKPA did not apply to tribal court proceedings, Navajo family courts could include a UCCJEA and PKPA analysis in tribal court custody decisions in order to "buttress their jurisdiction" under Navajo Code "by demonstrating how the application of these laws support[ed] Navajo jurisdiction, if deemed necessary to invoke the mandate to recognize the decision under the UCCJEA."[127]

Alternately, in *Garcia v. Gutierrez*,[128] while also finding the PKPA did not apply to tribes and holding the state court had a duty to retain jurisdiction if no judicial agreement could be found, the New Mexico Supreme Court held principles of comity supported concurrent state and tribal jurisdiction and urged the district and tribal court toward judicial communica-

123. Leeds, *supra* note 38, at 333, 340–42 (noting that domestic comity analysis differs from international comity analysis and that some states have codified comity provisions regarding tribes). *See also* Atwood, *supra* note 88 at 946–50.

124. *See* MONT. CODE ANN. § 40–7–303 (2019). *See also* Billie v. Stier, 141 So.3d 584, 585 (Fla. 3d. Dist. Ct. App. 2014) (holding the state court had jurisdiction because the tribal court "did not substantially comply with the jurisdictional requirements of the UCCJEA").

125. Hon. Dennis M. Bear Don't Walk, Chief Judge, Crow Nation Tribal Court, Remarks to Federal Indian Law Class at the Alexander Blewett III School of Law at the University of Montana (Oct. 2020). In a guest speaker presentation to the Federal Indian Law class at the Alexander Blewett III School of Law at the University of Montana, Chief Judge Bear Don't Walk of the Crow Nation Tribal Court described a judicial communication with an Arizona state court to determine jurisdiction in a child custody action wherein the tribal court ultimately retained jurisdiction. He commented that the communication gave him confidence in awarding visitation to the parent in Arizona, knowing that the Arizona state court would uphold the tribal court order.

126. 7 Am. Tribal Law 608 (Navajo 2008).

127. *Id.* at 613–14.

128. 217 P.3d 591 (N.M. 2009).

tions to determine jurisdiction.[129] In *Carson v. Barham*,[130] the Colville Tribal Court of Appeals similarly upheld judicial communications conferences between tribal and state courts as an appropriate procedure for a convenient forum analysis, despite the inapplicability of the UCCJEA under tribal law.[131]

In Montana, as noted in *Skillen*, district court *abstention* from exercising jurisdiction and deference to tribal court exhaustion in jurisdictional disputes have been upheld as obligations upon the state courts under comity principles.[132] Montana's doctrine of abstention is grounded in its *Williams-Iowa Mutual* infringement and self-determination analysis, as articulated in *In re Marriage of Limpy*:

> Sound public policy requires that the Tribal Courts should have the jurisdiction to interpret their Tribal Constitution and Tribal law where the Indian Tribe has established a functioning forum for themselves to adjudicate controversies affecting the custody of their children. There is no basis for the State to assume jurisdiction that would interfere with Tribal self-government.[133]

As a result, under Montana law, tribal court exhaustion and state court abstention are explicitly upheld where simultaneous proceedings are at issue and may be warranted even if a tribal court has not yet exercised its jurisdiction.[134]

Relying upon comity for enforcement or resolution of declination requests necessarily requires the analysis of jurisdiction and due process. In *Malaterre v. Malaterre*,[135] holding the tribal court had jurisdiction over a dissolution and custody determination and upholding a motion to dismiss in a subsequent state action, the North Dakota Supreme Court elucidated:

> [B]efore comity may be relied upon it is necessary to establish that the court which issued the order or judgment had jurisdiction over the matter and the parties involved and that due process was afforded to the parties in the proceedings. If the court is without jurisdiction (at least while mother and child reside on the reservation) then one of the basic requisites, i.e., jurisdiction, would be missing and consequently comity would no longer apply. Furthermore, it appears that due process would be lacking under such situation.[136]

129. *Id.* at 607.

130. 2003 WL 25907717, *4 (Colville C.A. 2003).

131. Cited in Tupling v. Kruse, 15 Am. Tribal Law 23, 27 (Colville C.A. 2017).

132. In re Marriage of Skillen, 956 P.2d 1, 14 (Mont. 1998) (citing to In re Marriage of Limpy, 636 P.2d 266 (Mont. 1981); Montana ex rel. Stewart v. District Court, 609 P.2d 290 (Mont. 1980)).

133. *Limpy*, 636 P.2d at 269.

134. *See* Nielsen v. Brocksmith Land & Livestock, Inc., 88 P.3d 1269, 1272 (Mont. 2004) (holding the district court had not erred in abstaining given pending adjudication in the Fort Peck Tribal Court and noting, "In Limpy, we abstained despite the fact that the tribal court had not yet exercised jurisdiction over the specific case on appeal, because the tribal court had exercised jurisdiction in similar cases which indicated 'a disposition to preempt State jurisdiction.'").

135. 293 N.W.2d 139 (N.D. 1980).

136. *Id.* at 145.

Both *Malaterre* and *Garcia* also noted that the full faith and credit provision of the United States Constitution, Art. IV, § 1, only applies to states and was not binding on tribal courts as to state court judgments.[137]

In the inverse, *Wilson v. Marchington*[138] held that, as tribes were not explicitly included in the U.S. Constitutional full faith and credit provision, "the Constitution itself does not afford full faith and credit to Indian tribal judgments."[139] In the absence of applicable full faith and credit provisions, *Wilson* therefore relied upon a comity analysis as the exception to the "general principle [that] federal courts should recognize and enforce tribal judgments."[140]

Importing the comity analysis from *Hilton v. Guyot*,[141] the *Wilson* court held that the two mandatory considerations were whether: "(1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law."[142] As a result, due process and jurisdiction are common objections raised when tribal court jurisdiction is disputed in Indian child custody actions.

Given all of the above, it is imperative to tribal member survivor safety, tribal sovereignty, and the intent and purposes of the UCCJEA that tribal courts are full participants in jurisdictional analyses in domestic violence-related child custody actions. Further, in Montana, such integration is a legal obligation of state courts. However, as tribes consider protections for tribal member survivors, it is incredibly important to note that in *Fisher*, it was dispositive that the tribe had an ordinance establishing tribal jurisdiction, and that the enactment of such tribal ordinance was authorized by the Indian Reorganization Act, 25 U.S.C. § 476.[143] This provided the Court with a preemption analysis that defeated state jurisdiction.[144]

Similarly, in *United States ex rel. Cobell v. Cobell*,[145] the fact that the Blackfeet Tribal Code deferred to state law in the area of domestic relations and disclaimed tribal jurisdiction allowed the Ninth Circuit to find the tribal

137. *Id.* at 144; Garcia v. Gutierrez, 217 P.3d 591, 603–05 (N.M. 2009) (also analyzing whether the PKPA applied to tribes or required full faith and credit and holding it did not).

138. 127 F.3d 805 (9th Cir. 1997).

139. *Id.* at 808.

140. *Id.* at 810.

141. 159 U.S. 113 (1895).

142. *Wilson*, 127 F.3d at 810 (also citing four discretionary factors: "(1) the judgment was obtained by fraud; (2) the judgment conflicts with another final judgment that is entitled to recognition; (3) the judgment is inconsistent with the parties' contractual choice of forum; or (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the forum state in which recognition of the judgment is sought").

143. Fisher v. District Court of Sixteenth Judicial Dist. of Mont., 424 U.S. 382, 390 (1976).

144. *Id.*

145. 503 F.2d 790 (9th Cir. 1974).

court had relinquished its jurisdiction of the case.[146] Later, in *In re Marriage of Wellman*,[147] the Montana Supreme Court alternately held the inclusion of state law in Blackfeet Tribal Code did not cede jurisdiction but was merely a choice of law.[148] However, it is obvious that when tribal codes explicitly limit tribal courts' jurisdiction, states have stronger claims to jurisdiction.[149]

Unfortunately, gaps and limitations in the jurisdictional provisions of tribal codes are not uncommon, as "[t]he codes of many tribes were not drafted to resolve jurisdictional disputes with other sovereigns . . . [and] may be silent as to the jurisdictional basis for child custody determinations . . . ."[150] This is important to address, not only for the exercise of tribal jurisdiction in clear cases, but also under the UCCJEA declination framework and comity principles.

VII. Challenges: Personal Jurisdiction and Due Process

As has been noted, while the UCCJEA and PKPA address subject matter jurisdiction, a non-Indian parent may also raise the issue of personal jurisdiction in tribal court, particularly if they reside off reservation. Here, as elsewhere, tribal code ordinances may be a help or a hindrance. For instance, establishing personal jurisdiction that withstands a state court comity analysis may not be possible for off-reservation parties if the code does not sufficiently address service of process or include a long-arm provision. As an example, in *Freund v. Pearson*,[151] the tribal appellate court noted the trial court had "based its personal jurisdiction . . . on the hearing notice and petition to appellant by certified mail, his appearance by legal counsel, his appearance in requesting a continuance in the matter, and the tribal enrollment and domiciles of appellee and her children. It could have also considered . . . the Tribe's long-arm statute as a basis for jurisdiction . . . ."[152]

In *Water Wheel Camp Recreational Area, Inc. v. LaRance*,[153] the Ninth Circuit Court of Appeals upheld personal civil jurisdiction over a non-Indian in tribal court, finding it sufficient that "he was served with tribal process at the Water Wheel location on tribal land . . . ."[154] The court also offered that, "a court may exercise personal jurisdiction over a defen-

146. *Id.* at 795.
147. 852 P.2d 559 (Mont. 1993).
148. *Id.* at 561–62.
149. Wexler, *supra* note 13, at 651.
150. Atwood, *supra* note 88, at 967.
151. 1989 Colville App. LEXIS 1, 1 CCAR 29 (Colville C.A. 1989).
152. *Id.* at 37.
153. 642 F.3d 802 (9th Cir. 2011).
154. *Id.* at 819.

dant where that defendant has sufficient minimum contacts with the forum state such that the suit does not offend 'traditional notions of fair play and substantial justice.'"[155] To be noted, in *Water Wheel*, the defendant's ongoing lease of tribal land and residency and business operations within the reservation for two decades also supported the tribal court's assertion of personal jurisdiction.[156]

However, if a tribe is exercising Special Domestic Violence Criminal Jurisdiction, this might also be raised as a counter to personal jurisdiction challenges in domestic violence-related cases. As authorized by federal law under the Violence Against Women Act (VAWA), Special Domestic Violence Criminal Jurisdiction authorizes tribal jurisdiction over defendants who are spouses or intimate or dating partners of tribal members, even if non-Indians.[157] Interestingly, some stalking and intimidation crimes enumerate internet-based offenses, and use of means such as social media to harass or threaten survivors residing on reservation may also be found to establish the minimum contacts needed for exercise of personal jurisdiction over abusers under a constitutional analysis.[158] Analogizing to VAWA jurisdiction also implicates the scope of Indian country jurisdiction under 18 U.S.C. § 1151.[159] Because § 1151 provides that Indian country includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation," it may also preclude subject matter jurisdiction challenges based on fee status under the *Montana* test. Tribal courts that have been authorized to exercise Special Domestic Violence Criminal Jurisdiction also have the added advantage of already having structures in place to satisfy heightened due process scrutiny under the VAWA and the Indian Civil Rights Act.[160]

Additionally, in terms of personal jurisdiction, it has been suggested that consensual familial relationships with a tribal member provide notice of possible tribal jurisdiction over child custody matters.[161] For example, see *supra* discussion of *Freund*, wherein the tribal enrollment of the mother and children, as well as their domicile, supported a finding of personal ju-

155. *Id.* at 820 (citing to Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945).

156. *Id.*

157. 25 U.S.C. § 1304(b)(4)(B) (2018).

158. *See* Jessica Miles, *We Are Never Ever Getting Back Together: Domestic Violence Victims, Defendants, and Due Process*, 35 CARDOZO L. REV. 141, 161–62 (Oct. 2013).

159. *See* 25 U.S.C. § 1304(a)(3).

160. *See* Jordan Gross, *Through a Federal Habeas Corpus Glass, Darkly—Who Is Entitled to Effective Assistance of Counsel in Tribal Court Under ICRA and How Will We Know If They Got It?*, 42 AM. INDIAN L. REV. 1, 43–46 (for a review of the additional procedural protections beyond those required by ICRA's general provisions).

161. Atwood, *supra* note 90, at 1105.

risdiction. Still, in *In Re: Marriage of Redfox*,[162] the Crow Nation Appellate Court relied on the Northern Cheyenne Tribal Court's finding of personal jurisdiction based primarily on the tribal member parent's residency and service upon the nonmember parent in upholding that court's jurisdiction under principles of comity.[163]

Importantly, the UCCJEA itself indicates that personal jurisdiction is not a requirement for determining child custody actions covered by the Act.[164] However, *Troxel v. Granville*[165] provides for constitutional protection of a parent's fundamental rights to "make decisions concerning the care, custody, and control" of their children as a liberty interest under substantive due process.[166] Similarly, Montana state law provides statutory protection for parental rights.[167] Because of the scrutiny tribal courts face, substantial conformity with the UCCJEA on personal jurisdiction in this sense may be insufficient to withstand substantive due process challenges—particularly in *ex parte* custody determinations.[168] As noted by the Navajo Supreme Court in the *Miles* case, "Custody of children is such an important issue that only in the direst of circumstances involving the safety of the child should a family court remove a child from the custody of a parent without the opportunity for that parent to respond to the petition before the removal."[169]

Despite the attention that survivors' advocates and tribal courts may need to give these concerns in order to uphold exercises of tribal court jurisdiction, ultimately general fears about due process violations in tribal courts appear to be overblown. In a survey of multiple tribal court decisions, Matthew L.M. Fletcher found, "in each case it appear[ed] that the tribal court sought to provide stronger guarantees of fundamental fairness under tribal law than would have been available in applying American jurisprudence in

162. 2001 CROW 13 (Crow Ct. App. 2001).

163. *Id.* at ¶¶ 14, 40, 46.

164. MONT. CODE ANN. § 40-7-201(3) (2019). *See also* Miles, *supra* note 158, at 171–73 (analyzing the open question of the plurality opinion in May v. Anderson, 345 U.S. 528 (1953) and the applicability of "status exceptions"; also quoting the Wisconsin Supreme Court: "[r]equiring minimum contacts would often make termination of parental rights and the subsequent adoption proceedings impractical or impossible"); Wexler, *supra* note 13, at 647–48 ("[P]ersonal jurisdiction is no longer a prerequisite to judicial action in many child custody proceedings.").

165. 530 U.S. 57 (2000).

166. *Id.* at 65, 72.

167. *See* § 40-4-227, which also provides that parental interests yield to the best interests of the child.

168. *See also* United States ex rel. Cobell v. Cobell, 503 F.2d 790, 793–95 (9th Cir. 1974) (upholding a writ of habeas corpus and noting a lack of remedy in the tribal court based on an ex parte restraining order that was without invitation to appear).

169. Miles v. Chinle Family Court, 7 Am. Tribal Law 608, 614–15 (Nav. Sup. Ct. 2008) (holding that due process was not violated, but strongly relying upon the fact that the ex parte custody order was not the only custody order).

the areas of due process and equal protection."[170] Also, as per Louise Erdich: "Tribal judges know they must make impeccable decisions. They know they are being watched closely and must defend their hard-won jurisdiction . . . ."[171] However, these types of challenges to tribal jurisdiction are precisely what Indian survivors face when selecting tribal court jurisdiction for their domestic violence-related child custody actions against non-Indian abusers.

As a result, tribes must carefully attend to their tribal codes and have difficult decisions to make when considering whether to adopt model code language. Explicit conformity with state laws and state court expectations shores up tribal court jurisdiction and orders against challenges. However, it also runs the risk of *diminishing* jurisdiction over members living off reservation, if adopted code provisions adhere to strictly geographic or territorial jurisdiction. This has implications for domestic violence survivor protection and safety, including the ability for survivors to successfully request state court declinations in favor of tribal court jurisdiction under the UCCJEA.

VIII. Application of the Laws

Under Montana case precedent, what might the current state of the law look like in practice? In Scenario 1, the survivor at the shelter in a nearby metropolitan area may still want her tribal court to adjudicate her child custody matter. In Montana, given *Skillen* and *Fisher*, the tribal court has, at the least, concurrent jurisdiction over her claim because of her and the child's tribal membership. Following *Bertelson*, *Big Spring*, and *Limpy*, as well as the provisions of the UCCJEA, the nearby state court where her partner has filed should decline jurisdiction. The reservation is clearly the "home state" in this instance. She might also avail herself of an inconvenient forum claim or change of venue request if she wishes to pursue adjudication in the state district court nearest to her shelter.[172]

In Scenario 2, where the survivor flees onto the reservation after living off reservation with her non-Indian partner, again, given the concurrent jurisdiction over Indian child custody matters recognized by *Skillen* and the deference to tribal courts' interests and appropriateness in determining child custody issues in *Bertelson*, there is strong support for upholding tribal jurisdiction. Under the Montana abstention and tribal court exhaustion doc-

170. Matthew L.M. Fletcher, *Indian Courts and Fundamental Fairness: Indian Courts and the Future Revisited*, 84 U. Colo. L. Rev. 59, 91 (2013).

171. Louise Erdrich, Op-Ed, *Rape on the Reservation*, N.Y. TIMES (Feb. 26, 2013), https://perma.cc/52JD-L5SZ.

172. *See* In re C.M.R., 372 P.3d 1275, 1277 (Mont. 2016) (citing to § 40–4–211(4)(a)(ii) for the principle that "Parenting Plan proceedings are commenced 'in the county in which the child is a permanent resident or found' ").

trines, the state court should stay its proceedings. The simultaneous proceedings invoke mandatory judicial communication with the tribal court to determine jurisdiction. Analogous to the *Miles* case decided by the Navajo Supreme Court, it is likely the tribal court can establish continuing jurisdiction.

In the Introduction scenario, Montana law provides concurrent jurisdiction; however, the reservation is the home state. Under *Nielsen v. Brocksmith Land & Livestock*,[173] Montana state courts are "open to all Montana citizens, including . . . Indian citizens [citation omitted], [and] [a]s such, Native Americans may sue in state court so long as Congress has not expressly retained jurisdiction in the United States, particularly if the Native American is a Montana citizen and the matter does not interfere with self-government."[174] Yet, the potential simultaneous proceedings and the infringement, abstention, and tribal court exhaustion doctrines necessitate judicial communications with the tribal court.

As shown, Montana case law supplements the state's statutory UCCJEA provisions to provide strong support for tribal member survivors to argue for tribal jurisdiction in their domestic violence-related child custody actions, regardless of their abuser's non-Indian status or their residency off reservation. Montana law also clearly provides for state court selection if such should be a more convenient or safer forum. Additionally, if judicial communications provisions are faithfully applied to include tribal courts, Montana's adoption of the UCCJEA does not per se exist in tension with tribal sovereignty, even if tribes have not adopted the model code. Involvement of tribal courts in emergency jurisdiction determinations facilitates tribal sovereignty interests in protecting tribal member survivors.

Thus, in Montana, clear tribal civil jurisdictional assertions in child custody actions have the weight of state case law precedent, Supreme Court jurisprudence, and federal and state policy in their favor. Tribes can further buttress this authority with careful attention to particular tribal code provisions. However, tribes in states where case law is less deferential to tribal sovereignty may find the adoption of the model code to be a stronger tool for jurisdictional recognition.

IX. Potential Solutions to Gaps

Ultimately, Deer and Tatum identify jurisdictional gaps and resource issues as *the* limitations to "the ability of tribal governments to adequately protect all women in accordance with their customs, traditions, and contem-

173. 88 P.3d 1269 (Mont. 2004).

174. *Id.* at 1272.

porary judicial interventions."[175] Addressing such gaps via tribal code constructions supports tribal sovereignty and the intervention of tribes on behalf of their members.

Yet, tribes should carefully weigh verbatim model code adoption. Model code adoption may greatly impact exercises of tribal sovereignty in that, to the extent it mirrors state law, it may undercut tribal customary and traditional law. Given the importance of children and families to cultural integrity and tribal sovereignty, the adjudication of family law issues according to custom and tradition is of paramount concern. As noted by the Crow Nation Appellate Court in the *Redfox* case:

> In the context of competing jurisdictional claims in domestic relations cases . . . Tribal affiliation is fundamentally different than the relationship that parents and their children have with a State in which they happen to reside at any given time. Of all the areas in which Tribal self-government is desirable, the ability to apply the Tribe's customs and traditions in divorce and custody proceedings involving Tribal-member children is certainly among the most important.[176]

While a tribe's adoption of the UCCJEA may provide for straightforward "substantial conformity"[177] of tribal law to the Act and state law, thereby bolstering order enforcement and deference to tribal court jurisdiction, the effects to tribal law warrant keen consideration.

A. A Tribal UCCJEA Solution

Arguably, adoption of UCCJEA provisions into tribal codes provides a strong basis for recognition of tribal jurisdiction when faced with competing state court jurisdiction. In fact, the UCCJEA contemplates this in § 104, the comment noting that "a Tribe could adopt this Act as enabling legislation by simply replacing references to 'this State' with 'this Tribe.'"[178]

However, there is also a strong tribal sovereignty argument to be made against further colonization of tribal codes. Further incorporation of state and federal laws into tribal codes to make them look more like non-Indian jurisprudence for the comfort of state and federal court systems undermines tribal sovereignty and cultural preservation by moving tribes away from the application of customary and traditional law to legal standards imposed by the dominant culture—a kind of legal assimilation.[179] Even more threaten-

175. Sarah Deer and Melissa Tatum, *Tribal Efforts to Comply with VAWA's Full Faith and Credit Requirements: A Response to Sandra Schmeider*, 39 TULSA L. REV. 403, 418 (2003).

176. In re Marriage of Redfox, 2001 CROW 13, ¶ 41 (Crow. Ct. App. 2001).

177. UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 104(c); MONT. CODE ANN. § 40-7-135(3).

178. Cmt., UNIF. CHILD CUSTODY JURISDICTION & ENFORCEMENT ACT § 104 (1997).

179. Atwood, *supra* note 88, at 978–79 (citing Pommersheim for the principle that replicating state courts would complete the process of colonization and eradicate the cultural legal traditions of tribes).

ing is when, as in *Cobell*, some courts read jurisdictional cessions into tribal codes that appear to wholly to defer to state law.

Additionally, succumbing to the strictly geographic interpretations of subject matter jurisdiction promulgated by the UCCJEA means tribes would forgo any membership-based analysis and potential ability to exercise jurisdiction beyond reservation borders for the protection of their members under *Skillen* and *Bertelson*.[180] "While compliance with the UCCJEA guarantees that states will grant full faith and credit to tribal decrees, it also means that tribes cannot exercise jurisdiction beyond what the UCCJEA permits."[181]

Further, reliance on a geographic analysis of tribal jurisdiction may result in the diminishment of tribal jurisdiction if reservation boundaries are diminished.[182]

B. A Tribal Code Solution

Alternately, tribes could strengthen the jurisdictional provisions in their tribal codes to more explicitly assert their sovereignty interests in and jurisdiction over survivors and children involved in domestic violence-related and other child custody actions. The current moment, given federal recognition of the MMIW crisis and the potential Congressional reauthorization of VAWA—including stronger provisions for the protection of children—provides a platform for tribes to argue interests in and jurisdiction over domestic violence-related civil matters. In the current climate, tribes' assertions of jurisdiction based on the protection of tribal members theoretically have more potential to invoke deference from state courts under federal policy, preemption, and infringement doctrines. The Tribal Law and Policy Institute has observed that, "When drafting . . . civil jurisdiction section[s], tribes can assert the inherent powers of the tribe with strong, broad language . . . . Domestic violence victims can fall through the 'cracks' if tribal law does not strongly assert tribal sovereignty."[183] The guide offers the following example from the Ninilchik Village Tribal Code:

> The personal and subject matter jurisdiction of the Tribal Court of Ninilchik Village under this ordinance is based on the Tribe's inherent authority over its members, Tribal internal affairs and those who enter into consensual domestic relationships with Tribal members. The Court's jurisdiction extends to all persons residing within the tribe's geographic service area for the de-

180. *See* Wexler, *supra* note 32, at 632.

181. *Id.*

182. *See* DeCoteau v. District Cty. Ct. for the Tenth Judicial Dist., 420 U.S. 425 (1975) (finding that because the Lake Traverse Indian Reservation in South Dakota was terminated, the state courts had jurisdiction over a child custody determination because the actions arose on non-Indian lands).

183. *Guide for Drafting or Revising Victim-Centered Tribal Laws Against Domestic Violence*, Tribal Law And Policy Inst. 42 (Feb. 2015), https://perma.cc/9FZG-2STJ.

> livery of federal programs who are Tribal members of Ninilchik Village. The Court's jurisdiction also extends to any other person who resides within the Tribe's geographic service area who consents to the jurisdiction of the court. Persons who on or after the date this ordinance is adopted enter into or remain in a marriage or other similar consensual, personal relationship with a tribal member shall be deemed to have consented to the Court's jurisdiction under this ordinance as long as they reside within the Tribe's geographic service area. As used in this ordinance, the Tribe's geographic service area does not necessarily describe 'Indian country.' Instead, the term 'geographic service area' is used in this ordinance to further define those persons over whom the Tribal Court asserts personal and subject matter jurisdiction because of their domestic relations as or with tribal members and the Tribe's inherent authority to control its internal relationships even outside 'Indian Country.'[184]

Creating tribally based assertions of jurisdiction also has the added benefit of addressing potential separation of powers issues when tribal courts decide jurisdiction based upon court-made doctrines in the absence of tribal law.[185] As noted above, tribes should also attend to their personal jurisdiction code provisions.

In Montana, the *Bertelson* factors specifically weigh "the existence of tribal law or tribal customs relating to child care and custody" and "the tribe's interest in deciding custody" in appropriate forum analyses where concurrent state and tribal jurisdiction exists.[186] Likewise, *Limpy* contemplates the purview of tribal law under state court abstention and declination analyses.[187] Given Montana case law, and considering comity principles and potential due process and personal jurisdiction challenges to tribal jurisdiction, tribes should evaluate their codes for the following:[188]

1) Clear statements about the tribe's interests in child custody determinations;
2) Clear statements about the tribe's interests in protecting tribal members from domestic violence;
3) Specific provisions addressing childcare and custody that incorporate customary and traditional law or reference the importance of tribal customary and traditional law to domestic relations matters;
4) Clear assertions of broad jurisdiction over tribal members and children in whom the tribe claims an interest;
5) Long-arm and service of process provisions that facilitate assertions of personal jurisdiction, potentially including clear assertions that consen-

184. *Id.* at 45–46.

185. *See* Tupling v. Kruse, 15 Am. Tribal Law 23, 28–39 (Colville C.A. 2017) (Bass, J., dissenting).

186. In re Marriage of Skillen, 956 P.2d 1, 18 (Mont. 1998) (citing to In re Bertelson, 617 P.2d 121, 130 (Mont. 1980)).

187. In re Marriage of Limpy, 636 P.2d 266, 269 (Mont. 1981).

188. This section provides a brief review of the tribal codes of Montana tribes for reference only. Any tribe seeking to revise its code should undertake a thorough code analysis to determine the legal effect of revisions.

sual familial relationships with tribal members provide notice of tribal jurisdiction.

For better or worse, the tribes located in Montana have various pieces of federal and state or model statutes incorporated into their codes.[189] The Northern Cheyenne Tribal Code includes an inconvenient forum provision and provides for a UCCJA-style analysis that emphasizes home state and best interest of child analyses for appropriate forum determination.[190] However, absent an emergency jurisdiction provision, the Code's simultaneous proceedings provision contemplates judicial communications only in that concurrent context.[191] Its declination provision also only contemplates declinations for bad conduct—specifically, the wrongful removal of child from another jurisdiction by a parent.[192]

The Crow Tribal Code clearly asserts the authority of tribal custom and tradition in the adjudication of all matters.[193] It also includes specific domestic violence provisions that clearly state the importance of children and families to the Tribe's integrity and the interests of the Tribe in domestic violence matters.[194] Its child custody provisions track with the UCCJEA in that they include declination and emergency jurisdiction provisions.[195] However, the Code does not contain a judicial communications provision.

The Fort Peck Assiniboine and Sioux Tribal Code asserts jurisdiction in child custody actions where at least one party is Indian and at least one party resided on the reservation for 90 days immediately preceding the action.[196] The Crow, Northern Cheyenne, and Chippewa Cree codes have similar 90-day residency requirements for tribal jurisdiction over dissolutions.[197] Notably, the Assiniboine and Sioux Tribes of Fort Peck exercise Special Domestic Violence Criminal Jurisdiction under the VAWA and were one of the pilot tribes.[198] As such, assertions of tribal court jurisdiction

189. All tribal codes referenced can be found at the National Indian Law Library's *Tribal Law Gateway*, https://narf.org/nill/triballaw/index.html. *See also* State of Montana, *Montana Indian Law*, http://indianlaw.mt.gov/ (last visited Apr. 7, 2021).

190. Northern Cheyenne Tribal Code, §§ 8–3–1, 8–4–5 (1998). *See also* Ronald W. Nelson, *UCCJA – UCCJEA Comparison Section-By-Section* 7-8 (2009), https://perma.cc/LT7R-WPPL (noting that, unlike the UCCJEA, the UCCJA did not include provisions specifically recognizing tribal courts. This may have influenced tribes' adoption of its provisions.).

191. Northern Cheyenne Tribal Code, § 8–4–4.

192. *Id.* § 8–4–6.

193. Crow Tribal Code, § 3–1–104 (2005).

194. *Id.* § 8E.1.01(j)–(l).

195. *Id.* § 10–1–130(1)(c)(ii), (d).

196. Fort Peck Assiniboine and Sioux Tribal Code, §§ 301, 304a (2004).

197. Crow Tribal Code, § 10–1–115(1)(a); Northern Cheyenne Tribal Code, § 8–2–1(A)(1); Chippewa Cree Tribal Code, § 5–3–3.1(1) (1987).

198. United States Attorney's Office for the District of Montana, *Montana Tribes Selected as Pilot Project for Prosecuting Domestic Violence Crimes,* Department of Justice (Mar. 10, 2015), https://perma.cc/W332-J563.

in domestic violence-related child custody actions involving members of the Fort Peck Tribes could potentially reference the Code's domestic violence criminal provisions for claims to tribal interests and analogous jurisdiction in such matters.

The Blackfeet Tribe has an extensive Family Code governing its Family Court that clearly states the Tribe's interests in families and children, as well as in protecting tribal members from abuse.[199] The Code also includes a provision recognizing the application of tribal custom and tradition to matters before the Family Court.[200] However, as noted in *Cobell* and *Wellman*, the Blackfeet Code references Montana state law with regard to marriage and divorce.[201]

The Chippewa Cree Tribal Code asserts jurisdiction over children domiciled or residing within the tribal court's jurisdiction, and also "if it is in the best interest of the child that the Tribal Court assume jurisdiction."[202]

Like the Blackfeet Tribal Code, the Fort Belknap Indian Community Tribal Code has an extensive Family Court Act. The Fort Belknap Tribal Code contains strong clear statements regarding the Tribes' interests in adjudicating matters involving the Tribes' children: "The young people of the Gros Ventre and Assiniboine Tribes are the Tribes' most important resources and their welfare is of paramount importance to the Tribes."[203] The code also recognizes the application of tribal custom and tradition,[204] and clearly states the Tribes' interests in the preservation and strength of the Tribes' children's "cultural and Tribal identity."[205] At its outset, the Fort Belknap Family Code also claims exclusive, original jurisdiction over child custody actions.[206] However, its specific child custody provision incorporates a UCCJA-style analysis similar to that of the Northern Cheyenne Tribal Code.[207]

The Confederated Salish and Kootenai Tribes (CSKT) Tribal Code has a nearly identical statement regarding the Tribes' interest in the Tribes' children to the Fort Belknap Tribal Code.[208] The CSKT Code also includes a strong statement of intent to incorporate "to the fullest extent possible" applicable tribal custom and tradition in adjudication of matters involving

199. BLACKFEET TRIBE FAMILY CODE, Ch. 1, Sec. 1, §§ 1–2 (1999).

200. *Id.* Ch. 1, Sec. 1, § 5.

201. United States ex rel. Cobell v. Cobell, 503 F.2d 790, 795 (9th Cir. 1974); In re Marriage of Wellman, 852 P.2d 559, 561–62 (Mont. 1993); BLACKFEET TRIBE FAMILY CODE, Ch. 11, Sec. 1–2.

202. CHIPPEWA CREE TRIBAL CODE, § 5–3–3.8.

203. FORT BELKNAP INDIAN COMMUNITY TRIBAL CODE, § 5-1-1(A) (1999).

204. *Id.* § 5–1–1(C).

205. *Id.* § 5–1–1(D).

206. *Id.* § 5–2–2.1.

207. *Id.* § 5–2–2.2.

208. CONFEDERATED SALISH AND KOOTENAI TRIBAL CODE, § 3–2–101 (2000) (as revised in 2003).

Indian children.[209] The CSKT Code may go farthest in resisting default to UCCJA-like code provisions in that its Domestic Relations chapter does not have a specific provisions about child custody actions.[210]

In Montana, tribal court expertise in tribal custom and tradition is held to be a necessity in determining the best interests of Indian children.[211] Thus, potential opportunities exist to draft tribal code provisions that clearly assert broader exercises of jurisdiction over tribal members in child custody actions while protecting tribal codes from cultural dilution. Close reconsideration of tribal codes in light of the solid possibilities for recognition of tribal court jurisdiction over domestic violence-related child custody actions also supports survivors. And, in some instances, tribal codes asserting clear and explicit interests in cultural preservation and the safety and protection of tribal members may provide for stronger jurisdictional recognition than the partial incorporation of federal and state provisions.

X. Conclusion

In recognition of modern mobility and in response to confusion in the courts, the purposes of the UCCJEA and its antecedent, the PKPA, were to reduce forum shopping and to standardize forum determination in child custody actions in order to support better enforcement.[212] Yet, when model code drafting appears to address application to tribes as an afterthought, it leaves significant gaps in its legislation and, arguably, perpetuates assimilationist promulgations of law which fail to recognize tribes as third sovereigns in the federalist system. While addressing tribal nations in a standardized way is undesirable, as each tribal nation's history and applicable laws present a unique set of circumstances, at the least, it would be helpful for model code drafters to deal more explicitly and specifically with tribal sovereignty and government-to-government relationships in their code drafting and revisions. As this paper has outlined, when state courts apply model codes without deference to tribal sovereignty, it contravenes the federal policy of self-determination and generates inter-governmental friction, to the cost of both Indian and non-Indian citizens. Alternately, faithful application of judicial communications statutory provisions helps to strengthen cooperation between state and tribal courts and to address such conflicts.

209. *Id.* § 3–2–102.

210. *See Id.* Title III, Chapter 1, Part 1. Note that the Children's Code excludes divorce actions. Confederated Salish and Kootenai Tribal Code, § 3–2–105(3).

211. *See* In the Matter of S.B.C., 340 P.3d 534, 545 (Mont. 2014).

212. *See* Stoneman v. Drollinger, 64 P.3d 997, 1000 (Mont. 2003). *See also* Barbara Aaby, *Understanding the Uniform Child Custody Jurisdiction Enforcement Act*, Amer. J. of Fam. L. Spring, 2009, at 11.

State courts are not immune to the quandaries that currently attend determining subject matter jurisdiction when survivors flee across reservation lines and domestic violence-related child custody issues are initiated. In *Garcia v. Gutierrez*, the New Mexico Supreme Court's struggle to unequivocally answer the jurisdictional questions surrounding application of the UCCJEA and PKPA led it to seeming exasperation: "Where does this leave the question of tribal jurisdiction? We are unable, in the absence of congressional guidance, to make any final determination as to that issue."[213]

Similarly, in *Billie v. Stier*, a case before Florida's Third District Court of Appeal, the presiding justice provided a footnote of personal commentary which lamented:

> [T]he statutes in question appear to almost ignore the authority of Native American tribes over their citizens and seem to ignore the explicit federal statutes and case law setting forth strong tribal interest in determinations regarding custody of Native American children. . . . The conflicts within the statutes are for Congress to resolve, but unfortunately this and other courts must grapple with the uncertainties of the statutes until such time as Congress acts.[214]

Arguably, balancing the interests of tribal sovereignty and survivor empowerment and safety might be better served by the added certainty and increased predictability of a more substantial congressional jurisdictional framework. In the meantime, a blanket recommendation that tribes adopt legislation incorporating the UCCJEA into their tribal codes undermines tribal sovereignty by further colonizing tribal law. An alternative recommendation that better serves to advocate for tribal sovereignty is for tribes to analyze their procedural, jurisdictional, domestic violence, and family law codes with an eye to how they do or don't provide for civil jurisdiction over domestic relations proceedings and do or don't address the emergency scenarios examined above. Tribes might then consider enacting legislation that is tailored to respect the tribe's customs and traditions and to reflect the tribe's desires to protect tribal member children and domestic violence survivors in child custody actions through domestic violence-specific provisions, expanded member-based jurisdictional provisions, emergency jurisdiction provisions, and other recommendations as examined herein.

213. 217 P.3d 591, 607 (N.M. 2009).
214. 141 So.3d 584, 587 n. 1 (Fla. 3d. Dist. Ct. App. 2008).