

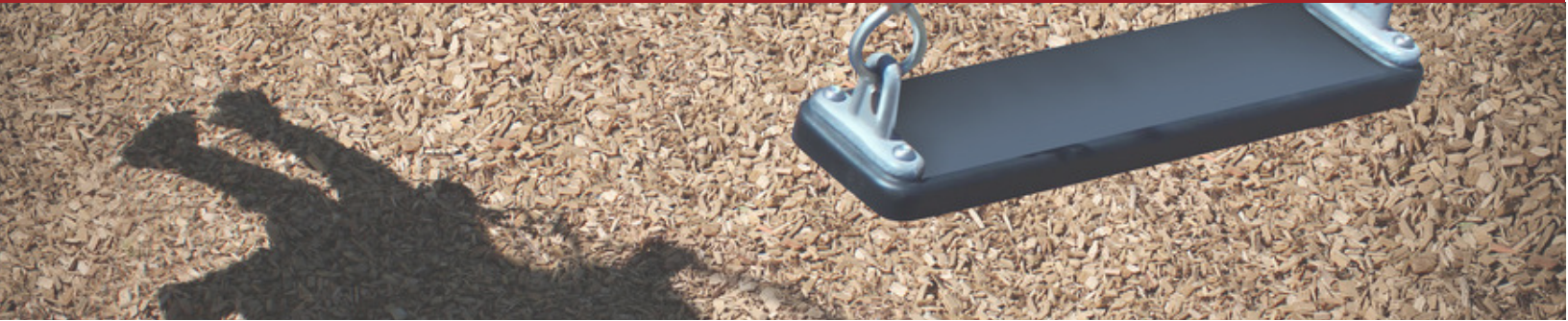


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Indian Tribes and Child Custody

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You may encounter two scenarios while working in the child abduction unit that involve child custody and Indian tribal law. The first situation is when you have a request for assistance in a case where parents are in a custody dispute with each other, and the second situation is when the child custody proceeding involves a foster care placement; termination of parental rights; pre-adoptive placement; or adoptive placement.

The general rule in California is that tribes and the state share **concurrent jurisdiction over child custody proceedings**. When an Indian child is involved in a state court child custody proceeding, the court must first determine whether it has jurisdiction over the child.

Custody Dispute Between Parents

California Family Code Section 3404(b) says that CA courts shall treat a tribe as if it were a state of the United States. This means a parent who has a tribal custody order would treat it like an order from another state and therefore need to register/domesticate the order in California.

Each tribe decides the process for making its own rules, including how their final judgments are delivered. Many tribes do not require formal legal training for their attorneys or judges. Individual tribes may have actual tribal courts and issue tribal orders. Others may have a tribal council and issue tribal resolutions. Other tribes may have different systems altogether. Regardless, do not dismiss a tribal custody determination because it does not look like a formal court order. Tribal custody determinations shall be treated the same as an out-of-state custody order. A "child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this part must be recognized and enforced." See, California Family Code Section 3404(c). If there are simultaneous proceedings, you would request judicial communication to let the state court and tribal court/council determine who has jurisdiction over custody.

If instead, you are trying to enforce a California custody order on an Indian reservation you should become knowledgeable of the state and federal laws as well as the procedures of the specific tribal court/counsel in your case. The UCCJEA may be used in part or completely (or not at all) by the tribe in your matter. It is important to communicate with a tribe that has jurisdiction in the case you are handling.

Indian Child Welfare Act (ICWA)

The Indian Child Welfare Act protects Native American children in adoption and foster care placement and in the termination of parental rights. It generally doesn't come into play when parents are divorcing. That does not mean that tribal courts don't have jurisdiction for child custody. Generally, you would have a case involving ICWA in the child abduction unit when Child Protective Services is seeking your assistance in locating and recovering a child when the court has made an order that essentially gives CPS custody of the child(ren). For example, children who are dependents of the court pursuant to the Welfare and Institutions Code.

ICWA was passed in 1978 in response to high rates of Indian children being removed from homes and placed in non-Indian foster homes. With ICWA, Congress declared a strong policy of preserving the stability and security of Indian tribes by protecting Indian children from removal and, if removal is necessary, placing the child in a home that reflects their tribal cultures and values.

The party seeking to establish the application of the ICWA has the initial burden to establish a prima facie case that an Indian child may be involved, although all parties and the court have a continuing obligation to inquire as to the status of the child. Once membership, or eligibility for membership, is established, and the ICWA is applied and accepted as applicable by all the parties.

The ICWA specifically states that courts have no jurisdiction over the following child custody proceedings:

- Guardianships
- Removal and foster care placements
- Adoptive placements
- Voluntary and involuntary termination of parental rights
- Minor juvenile delinquency cases
- Divorce proceedings or custody disputes in which neither parent will obtain custody

If ICWA is a part of your case, prior to taking action to locate and return a child to comply with a state court order you will want to make sure that the court and ICWA determine who has jurisdiction and only enforce orders from a court or tribe that has jurisdiction to make that custody determination.

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