

# Tribal Domestic Violence Case Law

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*Annotations for Selected  
Tribal Court Cases*



California Office:  
8235 Santa Monica Blvd.  
Suite 211  
West Hollywood, CA 90046  
(323) 650-5467  
Fax: (323) 650-8149

Minnesota Office:  
1619 Dayton Ave.  
Suite 305  
Saint Paul, MN 55104  
(651) 644-1125  
Fax: (651) 644-1157

Montana Office:  
501 N. Sanders St.  
Suite 204  
Helena, MT 59601  
(406) 443-8202  
Fax: (406) 545-2227

Tribal Court Clearinghouse: [www.tlpi.org](http://www.tlpi.org)

# **TRIBAL DOMESTIC VIOLENCE CASE LAW**

## **Annotations for Selected Tribal Court Cases**

**A Product of the Tribal Law and Policy Institute**

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**Primary Authors:**

Sarah Deer, *Muscogee (Creek) Nation*, Assistant Professor, William Mitchell College of Law

**Contributors:**

Jerry Gardner, *Cherokee*, Executive Director, Tribal Law and Policy Institute

Carrie Garrow, *St. Regis Mohawk*, Executive Director, Center of Indigenous Law, Governance, and Citizenship, Syracuse University

M. Catherine OliverSmith, Student Research Assistant, UCLA

Heather Valdez Singleton, Deputy Director, Tribal Law and Policy Institute

Abigail Wahl, Student Research Assistant, William Mitchell College of Law

Diana Webster, *White Earth Band of Ojibwe*, Tribal Court Specialist, Tribal Law and Policy Institute

Maureen L. White Eagle, *Métis*, Legal Consultant, Tribal Law and Policy Institute

**Editorial Assistant:**

Christine Dunn, Dunn Write Editorial

## **VIOLENCE AGAINST NATIVE WOMEN RESOURCES COMMUNITY BASED LEGAL DEVELOPMENT**

*With support from the Office on Violence Against Women (OVW), the Tribal Law and Policy Institute (TLPI) has developed the following resources to assist tribal governments in creating a comprehensive, community based, victim-centered response to violence against Native women. Each resource is designed to help your tribal government customize laws and policies that fit your community's values, principles, and capacities. These resources are all freely available for downloading on the Tribal Court Clearinghouse ([www.tlpi.org](http://www.tlpi.org)) except the textbook.*

### **Tribal Legal Code Resource: Domestic Violence Laws**

This guide for drafting or revising victim-centered tribal laws against domestic violence is written with a philosophy that tribal laws should reflect tribal values. In addition, writing a tribal law usually requires careful consideration of how state and/or federal laws might apply in the community. This resource guide includes sample language and discussion questions which are designed to help tribal community members decide on the best laws for their community.

### **Listen to the Grandmothers Video and Video Discussion Guidebook**

This video and discussion guide is designed to assist tribal programs with incorporating cultural traditions into contemporary responses to violence against Native women. The "Listen to the Grandmothers" video features Native elders speaking to the problem of violence against Native women. The video provides a historical overview of violence against Native women, traditional responses, and an analysis concerning the incorporation of cultural traditions into contemporary responses to violence against women.

### **Sharing our Stories of Survival: Native Women Surviving Violence**

This textbook is a general introduction to the social and legal issues involved in acts of violence against Native women, this book's contributors are lawyers, advocates, social workers, social scientists, writers, poets, and victims. In the U.S. Native women are more likely than women from any other group to suffer violence, from rape and battery to more subtle forms of abuse, and *Sharing Our Stories of Survival* explores the causes and consequences of such behavior. The stories and case-studies presented here are often painful and raw, but a countervailing theme runs through the book: Many of the women who appear in these pages are survivors, often strengthened by their travails, and the violence examined here is human violence, meaning that it can be changed, if only with much effort and education.

[www.TribalProtectionOrder.org](http://www.TribalProtectionOrder.org) This website is designed to provide tribal and non-tribal entities with information and resources pertaining to the issuance and enforcement of tribal protection orders.

### **Tribal Domestic Violence Case Law: Annotations for Selected Cases**

This resource is designed to assist tribal judicial officers in understanding how some tribal governments have handled certain legal issues within the context of domestic violence cases. While a great deal of research has been done on case law in the state systems, little to no analysis has been done on the tribal judicial approach to domestic violence. This compendium, developed as part of an overall code-writing workshop curriculum for tribal governments, will assist tribal legislators as well. Understanding how laws are interpreted by the court systems may impact the development of laws that provide safety to tribal citizens

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## INTRODUCTION

This compendium is designed to assist tribal judicial officers in understanding how some tribal governments have handled certain legal issues within the context of domestic violence cases. Although a great deal of research has been done on case law in the state systems, little to no analysis has been done on the tribal judicial approach to domestic violence. This compendium, developed as part of an overall code-writing workshop curriculum for tribal governments<sup>1</sup>, will assist tribal legislators. Understanding how laws are interpreted by the court systems may impact the development of laws that provide safety to tribal citizens.

This compendium does not include every tribal court opinion on domestic violence. It is limited to those tribal court opinions that have been published and disseminated to the public, including cases found in the Indian Law Reporter (ILR), the Oklahoma Tribal Court Reports, and the Northwest Regional Appellate Court Reporter, and cases available on the Internet through the Tribal Court Clearinghouse<sup>2</sup>, a project of the Tribal Law and Policy Institute, as well as other Internet sources. Tribal courts that do not publish opinions are not included in this compendium.

## HOW TO USE THE COMPENDIUM

The decisions listed in this compendium are not binding on any jurisdiction other than the one that issued the decision. Whether a particular tribal court chooses to cite another tribal court's opinion (as persuasive authority) is dependent upon a number of factors, including tribal statutes, cultural similarities, and precedence. Citing any case outside the pertinent tribal legal system should only be done after careful analysis of the relevance to and impact on sovereignty.

Note: Domestic violence is most often defined as "intimate partner violence<sup>3</sup>," but many tribes define domestic violence much more broadly.

A special thank you to Claudia Bayliff of the National Judicial Education Project, a project of Legal Momentum, for allowing us to use her compendium model as a template; and thank you to M. Catherine OliverSmith and Abigail Wahl for their research assistance.

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<sup>1</sup> Tribal Law and Policy Institute (with the support of OVW) has developed a series of publications to assist tribal governments in creating comprehensive, community based, victim-center responses to sexual violence, domestic violence and stalking. The resources are available at <http://www.tribal-institute.org/lists/vaiw.htm>.

<sup>2</sup> <http://www.tribal-institute.org/lists/decision.htm>

<sup>3</sup> See the Office on Violence Against Women website for a more expansive description of domestic violence. <http://www.ovw.usdoj.gov/domviolence.htm>

## I. CIVIL CASES

### A. CHILD CUSTODY

#### ❖ Hoopa Valley Tribal Court of Appeals

*In the Matter of E. M., a Minor, Minor's Mother v. Minor's Father*, JC-07-027/A-08-O01 (Hoopa Valley App. 2008) [http://www.nics.ws/hoopa/In the Matter of E.M., a minor.pdf](http://www.nics.ws/hoopa/In%20the%20Matter%20of%20E.M.,%20a%20minor.pdf)

*Facts:* This is a custody dispute between the two unmarried parents of E. M., a two-year-old child. All parties are members of the Hoopa Valley Tribe. In November 2007, Mother filed a Petition in Support of Parenting Plan, seeking both a temporary and permanent parenting and visitation plan.

In her petition, Mother requested that E. M. reside with her and that she have sole decision-making authority in the areas of E. M.'s education, health care, and religious or spiritual upbringing, with weekend visitation for the father. In addition, Mother filed a Motion for Restrictions in the Parenting Plan due to Father's history of domestic violence and drug and alcohol abuse. Father filed a response requesting equal access to the child and an equal say in any parenting decisions.

The tribal court held a series of six hearings between November 2007 and February 2008, and motions were filed to amend the orders for one reason or another after each hearing. Judge Blake handled five hearings and orally presented his findings at the fifth hearing. Judge Blake was satisfied that Father's living arrangements were appropriate and found no reason why Father should not share 50% legal and physical custody. However, prior to finalizing the parenting plan at the hearing, Mother asked for additional evidence to be considered, and a hearing was scheduled for February 12, 2008. A different judge heard the case on February 12. The judge listened to arguments on all the issues, although no one submitted sworn testimony at this hearing. Following the hearing, he issued an order dated February 13, 2008, awarding joint legal custody to both parties and physical custody of the child to Mother. He ordered a visitation schedule for Father, along with orders on a number of other issues. Father appealed the February 13th order to the Hoopa Valley Tribal Court of Appeals arguing that Judge Blake's finding 'that Father should have 50% legal and physical custody' was ignored by the ruling judge.

*Holding:* The appeals court found that the order, although not a "final order," but one in a series of temporary orders regarding the parenting plan, was a "judgment on a dispositive motion" and thus appealable. The court's finding "that joint physical custody was not in the best interest of the child" goes directly to the heart of the dispute between the parties and is dispositive of that issue. Further, the appeals court found that the trial court abused its discretion, as the ruling judge's findings were inconsistent with the oral findings of the previous trial judge who had heard testimony and evidence. In order to overrule the previous judge's findings, it would be

necessary to explain how the earlier findings were clearly erroneous based on the evidence. Failing to do so was an abuse of discretion.

Additionally, the trial court failed to follow the Hoopa Valley Domestic Relations Code, which requires that the court hold a trial on the merits for a Petition for a Permanent Parenting Plan and enter an appealable final order with a permanent parenting plan within a reasonable time. The overriding policy objective of the code is “the best interest of the child.” It is not in the best interest of the child when the trial court presides over a series of hearings and issues temporary orders, rather than conducting a formal trial and issuing a permanent placement order as required by the tribal code. The use of terms such as *physical custody* and *legal custody* in the order, which are not used in the tribal code, is inappropriate. The Hoopa Valley Domestic Relations Code does not use the terms *physical custody* or *legal custody*, but rather *decision-making authority* and *residential provisions*. The failure to comply with the process and requirements of the tribal code is unacceptable. The order was reversed and case remanded for a trial on the merits of the case.

*Practical Application:* A temporary custody order may be appealable if findings go to the heart of the matter in dispute and it is dispositive of a key issue, such as custody. The best interest of the child requires a permanent parenting plan within a reasonable time of the filing of the petition. The trial judge hearing testimony and other evidence is in the best position to make appropriate findings. Overruling those findings, even if only made orally, requires showing that they are clearly erroneous based on the facts in evidence.

#### ❖ **Eastern Band of Cherokee Indians Supreme Court**

*Arneach v. Reed*, 98-CV-332 (Cherokee S. Ct. 2000),  
<http://www.tribal-institute.org/opinions/2000.NACE.0000003.htm>.

*Facts:* Arneach (Father) and Reed (Mother) have three children in common. Father is an enrolled member of the Eastern Band of Cherokee Indians and resides on Cherokee trust lands. Mother is a citizen and resident of Ohio and is not an enrolled member of a tribe. Although Arneach and Reed previously lived together on Cherokee trust lands, they were never married. The youngest child, daughter S. A., never lived on tribal land and was not enrolled in the tribe, although she is listed on her birth certificate as being part Indian. The two boys, W. A. and S. A., are enrolled members of the Eastern Band of Cherokee Indians and have lived on reservation land.

Mother filed for an emergency domestic violence restraining order against Father in a state court in Ohio and was granted temporary custody of the three children. Two days later, Father filed a custody suit with the Court of Indian Offenses (now the Cherokee Court). Ten days afterward, Mother filed a Consent Agreement and Domestic Violence Protection Order in the Ohio courts. She was granted temporary custody of the children with visitation to Father. She motioned to dismiss the custody determination in the Court of Indian Offenses. The court filed its order on

January 27, 1999, finding jurisdiction over custody matters involving the children of the parties under the Eastern Band of Cherokee Indians Tribal Ordinance No. 168 (1994).

*Holding:* The Ohio domestic violence restraining order conferring custody to Mother was a temporary assignment. The Ohio order stated that any valid order issued by a court of competent jurisdiction regarding issues of custody or visitation would supersede the restraining order. The Eastern Band of Cherokee Indians court has jurisdiction for the purposes of determining child custody over the sons, but the court does not have jurisdiction over the daughter (because she is not enrolled and has not lived on the reservation).

*Practical Application:* A tribal court custody order may supersede a temporary custody assignment in a state protection order, provided the tribal court has jurisdiction.

### ❖ **Supreme Court of the Navajo Nation**

*Davis v. Crownpoint Family Court*, No. SC-CV-46-01 (Navajo S. Ct. 2003),  
<http://www.tribal-institute.org/opinions/2003.NANN.0000012.htm>.

*Facts:* Davis (Mother) has two minor children. At the time of this litigation, Halloway (Mother's intimate partner) had never established paternity. Halloway alleged that he was the victim of domestic abuse by Mother. The Crownpoint Family Court granted an  *ex parte*  temporary restraining order to Halloway, giving him custody of the two children. The Crownpoint Court further found that Mother was an unfit parent, and she was detained at the Crownpoint Public Safety Facility. No proof was offered by Halloway to show that Mother was abusive, and Mother was not afforded the opportunity to rebut the presumption of unfitness. Halloway subsequently removed the children from the state and enrolled them in a new school. Mother challenged the court ruling and requested that the Supreme Court order the children returned to the Navajo Nation.

*Holding:* The Supreme Court reversed the decision of the Crownpoint Family Court and issued a writ of habeas corpus to have the children returned to Mother. The lower court violated Mother's due process rights by finding that she was unfit without a hearing or without proof that she committed acts of abuse. The Supreme Court further ruled that a family court has no jurisdiction to grant custody of a child without a legal determination of paternity. Mere claim of biological parenthood is not enough to entitle a parent to child custody. The best interests of a child are paramount in custody decisions and a determination of paternity.

*Practical Application:* A legal finding of unfitness must be based on evidentiary proof and a mother who is alleged to be unfit should have the opportunity to rebut that presumption. An unmarried father must establish paternity before being awarded custody.

***Smith v. Kasper***, No. SC-CV-30-07 (Navajo S. Ct. 2009)

[http://www.navajocourts.org/NNCourtOpinions2009/16Bernice Smith v Michael Kasper.pdf](http://www.navajocourts.org/NNCourtOpinions2009/16Bernice%20Smith%20v%20Michael%20Kasper.pdf).

*Facts:* This is a case of Smith (Mother) who on behalf of her minor child, sought protection against Kasper (Father), the custodial parent, for alleged physical abuse. The Navajo Family Court issued a five-year protection order, which included a transfer of temporary custody to Smith. Kasper appeals arguing that he was not afforded sufficient and adequate notice of the allegations, as the petition did not contain specific dates and descriptions of abuse, and he only had three days to respond. Further, the court erred in determining child custody for a period of five years in a protection order.

*Holding:* The court noted that Kasper had not expressed a need for more time to respond or requested a continuance of the hearing, so he waived his right to raise this issue. However, the court found that the lower court did abuse its discretion by determining child custody for a period of five years. It noted that the original custody order was from a foreign jurisdiction, and the order had never been domesticated in the Navajo Nation's jurisdiction. In order to justify a permanent change of custody, a motion for modification must be filed with proper service on the opposing party, showing why a change of custody is in the child's best interest and that there has been a substantial change in circumstances since the last custody order.

Protection orders are granted when a preponderance of the evidence shows that it is more likely than not that an act of domestic abuse has occurred or is about to occur, with the purpose of preventing the occurrence or recurrence of abuse. This low burden of proof is insufficient for a permanent determination of custody. Protection orders are intended to prevent abuse not to determine permanent custody. In a protection order proceeding, the trial court may make only a temporary custody assignment based on a preponderance of the evidence.

*Practical Application:* A protection order cannot be used to change custody permanently. Only a temporary custody award is possible through a protection order. In order to modify a custody award, a motion for modification must be filed and served, and evidence must support a showing that a change of custody is in the best interest of the child and that there has been a substantial change of circumstances since the last custody order.

***Sombrero v. Keahnie-Sanford***, No. SC-CV-41-02 (Navajo S. Ct. 2003),

<http://www.tribal-institute.org/opinions/2003.NANN.0000011.htm>.

*Facts:* Sombrero (Mother) was granted a temporary protection order against Sandoval Crank, an intimate partner. In her initial filing, Sombrero stated that Crank was the biological father as the basis for her claim to child support. At the hearing, the court entered the parties' stipulated mutual domestic abuse protection order. Crank was ordered to pay monthly child support. Following a home study, the Navajo Nation Division of Social Services recommended that Sombrero be given primary care of the child, Crank be given unlimited visitation rights on his

nonworking days, and child support be paid by Crank in the amount of \$214 per week. Crank alleged that Sombrero refused to allow access to the child for visitation. Crank sought enforcement of the orders in the court. The court enforced the orders and fined Petitioner, as well as ordering Petitioner to pay all attorney fees. Crank resorted to the courts twice to enforce the visitation order because Petitioner continued to refuse him access to the child. At no time was a finding made concerning Crank's paternity. The record shows Crank did not contest being the father of the minor child. However, the court did not make a determination of paternity.

*Holding:* Case was remanded to Kayenta Family Court for a finding of paternity. Custody and visitation should not have been decided without a determination of paternity even when, as here, the parties stipulate to custody and visitation without a full evidentiary hearing. The family court erred when it granted custody and visitation without first making the jurisdictional determination concerning Crank's paternity.

*Practical Application:* In this case, the appellate court found that child custody, support, and visitation orders were invalid without a finding of paternity. If the court does not make an actual legal finding of paternity when the parties are not married, then custody and visitation orders may not be enforceable.

## **B. DEFINITION OF DOMESTIC ABUSE**

### **❖ Ho-Chunk Nation Trial Court**

*Mike v. Mike and J.T.M. (Minor Child)*, 7 Am. Tribal Law 186 (Ho-Chunk Tr. Ct. 2007).

*Facts:* In 1999, plaintiff Pauline Mike (Grandmother), brought a case alleging elder abuse by Defendant, J. T. M. (Grandson) and requested a temporary restraining order against him. The findings of fact at trial found that Grandson put Grandmother in fear by acts of violence and displays of temper and violence and that her Grandson and his codefendant mother (Daughter) generally acted “deaf” around her. The court granted a temporary restraining order after a hearing, but due to a death in the family of the presiding judge, the written order was never executed.

*Holding:* The trial court issued a *nunc pro tunc* order memorializing the order in writing from the date of the original hearing. As the Ho-Chunk Nation lacks an elder abuse statute, the court took testimony from a tribal elder regarding the tribal customs of elder respect and made their ruling based on customary law.

*Practical Application:* Even if not specified in the domestic abuse laws of a tribe, a court can issue restraining orders against family members who have been found to violate the tribal customs regarding the treatment of elders.

### **❖ Supreme Court of the Navajo Nation**

*Morris v. Williams*, No. SC-CV-51-97 (Navajo S. Ct. 1999),  
<http://www.tribal-institute.org/opinions/1999.NANN.0000012.htm>.

*Facts:* A property dispute arose in which Williams allegedly trespassed on Morris’s agricultural land and used abusive language toward Morris. Morris filed for a protection order against Williams. The case was tried as a domestic abuse case and was heard by the Window Rock Family Court. The family court found that there was a “recorded history of incursions” by Williams since the early 1980s, which included the unauthorized grazing of livestock, removal and destruction of a fence line, and disruptive and unruly conduct toward Morris and her family. The family court granted the protection orders. Williams appealed the decision, attempting to enter evidence of landownership into the case.

*Holding:* The Navajo Nation Domestic Abuse Protection Act was passed “to protect all persons: men, women, children, elders, disabled persons, and other vulnerable persons, who are within the jurisdiction of the Navajo Nation, from all forms of domestic abuse as defined by this Act and by Navajo Nation law.” 9 N.N.C. § 1604(A) (1995). The term *domestic abuse* covers many kinds of misconduct, including harassment and damage to property. 9 N.N.C. § 1605(A)(1)(h), and (f)

(1995). The Act does not provide for the distribution of property or the determination of ownership or boundaries of land. The Act is concerned only with the conduct of the parties.

*Practical Application:* The Navajo Nation code contains a very broad definition of *domestic abuse*. Thus, the law may apply to many kinds of relationships, including neighbors. The Navajo Nation Domestic Abuse Protection Act includes harassment and property damage as forms of domestic abuse.

## C. TRIBAL JURISDICTION AND POWER TO EXCLUDE

### ❖ In the Crow Court of Appeals

*Eggers v. Stiff*, Civ. App. Doc. 00-06 (Crow App. 2001),  
<http://www.tribal-institute.org/opinions/2001.NACT.0000002.htm>.

*Facts*: Eggers sought and secured a permanent restraining order against Stiff in the Crow Tribal Court. Both parties are non-Indian. Both were employed at the Little Big Horn College. Stiff argues on appeal that the Crow Tribal Court had no subject matter jurisdiction to issue a restraining order against him, because neither party is a tribal member. He argued that no federal law or treaty confers jurisdiction on the tribal court, and that under the general rule in *Montana v. United States*, 450 U.S. 544 (1981), tribes lack regulatory jurisdiction over nonmembers.

*Findings*: In order for the tribal court to have jurisdiction it must satisfy one of the two exceptions to Montana's rule barring tribal regulatory jurisdiction over nonmembers. The first exception would be if nonmembers enter consensual relationships with the tribe or its members, through, for example, commercial dealings and contracts. The second exception that allows regulatory jurisdiction over nonmembers is when their behavior threatens or has some direct effect on the political integrity, economic security, or health or welfare of the tribe. In the first instance, the court found that Egger's employment with the tribal college was a qualifying "consensual relationship" within the meaning of the *Montana* exception. The tribal court thus had jurisdiction to order injunctive relief to the extent it was directed toward Stiff's conduct at the college. The court also concluded that, to the extent the restraining order regulated Stiff's conduct at the college, it protected the Crow Tribe's integrity by preventing a specific threat to the welfare of tribal member students at the college, satisfying the second exception to *Montana*. To the extent that the restraining order sought to regulate conduct regardless of location (outside the tribal college), the Crow Tribe has no subject matter jurisdiction.

*Practical Application*: The Crow Tribe had jurisdiction to issue a restraining order to regulate the conduct of non-Indians on tribal property when the non-Indians were employees of the tribal college and the tribal students could be threatened by their conduct.

### ❖ Eastern Band of Cherokee Indians, the Cherokee Court Qualla Boundary

*Eastern Band of Cherokee Indians v. Lambert*, No. CR-03-313 (Eastern Band of Cherokee Indians 2003), <http://www.tribal-institute.org/opinions/2003.NACE.0000003.htm>.

*Facts*: Defendant Lambert was charged criminally with domestic violence assault. Lambert is not an enrolled member of any federal recognized tribe. However, he is a "first lineal descendant". Lambert argued that *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), prohibits the tribal court from exercising criminal jurisdiction over her, a non-Indian.

*Decision:* The court concluded that the Defendant is an Indian as the term is generally used, not referring specifically to tribal members but to the race generally—as the family of Indians—as the term *Indian* is defined by federal statutes in 25 U.S.C. § 1301(4). First lineal descendants have certain privileges that others do not possess, and though they lack some privileges that are granted to tribal members, they are Indians and are subject to the criminal laws of the tribe.

*Practical Application:* Defining who is Indian for the purposes of criminal jurisdiction may differ from tribe to tribe. Tribes seeking to ensure enforcement of protection orders may encompass first lineal descendants in their definition in order to permit criminal enforcement.

### ❖ **Skokomish Tribe Court of Appeals**

*Skokomish Tribe v. Chaplin*, 7 NICS App. 127 2006 (Skokomish Tribe Court of Appeals 2006).

*Facts:* Nontribal member Chaplin was divorced from, but still residing with tribal member Giles. She was excluded from the Skokomish Reservation after Pell, the mother of Giles, filed a handwritten complaint with the tribal council in which she alleged that Chaplin had physically attacked her, had stolen \$2,000 worth of her belongings, and was involved with drugs. The council authorized the tribal attorney to file a complaint for her exclusion from the reservation, which was subsequently filed. Following a notice of hearing, Giles filed a letter with the tribal court stating that Pell’s accusations were false, and that Pell had regularly interfered with his relationship with Chaplin. At the hearing, Pell produced no evidence supporting her allegations. Instead, reports showing that Chaplin was the victim of domestic violence at the hands of Giles were introduced as evidence. The judge ultimately granted an order for the exclusion of Chaplin from the reservation, expressing concern that if Chaplin remained on the reservation, the police would have to continue to respond to reports of domestic violence at the residence of Chaplin and Giles. Chaplin appealed the Order for Exclusion to the court of appeals.

*Holding:* The court of appeals reversed the lower court’s decision on both factual and procedural grounds. The court held that the trial court’s findings of fact were clearly erroneous and unsupported by proper documentation and testimonial evidence. They found that no evidence supporting Pell’s initial complaint was presented at the hearing, and the evidence that was submitted was beyond the scope of the allegations in Pell’s petition. Referring to the reports of domestic violence presented as evidence at the hearing and the lower court judge’s concerns about police resources being used to respond to Chaplin’s domestic violence calls, the court of appeals stated, “Being the victim of domestic violence is not conduct within the meaning of the law authorizing the exclusion of Appellant, and no other grounds for exclusion under the ordinance were established.” The court of appeals further held that the complaint, petition, and notice provided to Chaplin all failed to meet the procedural requirements of the Skokomish Tribe’s Exclusion Ordinance.

*Practical Application:* Although the Skokomish Tribe does have the sovereign authority to exclude nonmembers from the reservation, such orders should only be issued when sufficient evidence supports the specific grounds for exclusion permitted in Skokomish law, and when the tribe's ordinance procedures are followed. Being a victim of domestic violence is not grounds for exclusion.

#### ❖ **Ho-Chunk Nation Trial Court**

*Whiteagle-Fintak v. Fintak*, DV-99-01 (Ho-Chunk T.C. 1999),  
<http://ho-chunknation.com/?PageId=176>.

*Facts:* Whiteagle-Fintak and her daughter are enrolled members of the Ho-Chunk Nation. Fintak (Husband), a non-Indian, resides on the Ho-Chunk Nation trust land with his wife. Whiteagle-Fintak filed for a protection order against Fintak and proved that Fintak had engaged in a pattern of physical and mental abuse, including intimidation.

*Holding:* The trial court found jurisdiction over Fintak due to his residing on Ho-Chunk Nation trust land. The traditional laws of the Ho-Chunk Nation require respect between all people. This mandate includes a prohibition against physical violence and intimidation.

*Practical Application:* Because tribal governments do not have criminal jurisdiction over non-Indians, it may be very important for a Native woman who is victimized by a non-Indian to have access to civil remedies. In this case, the trial court turned to traditional law to rule that it had civil jurisdiction over non-Indians who reside on trust land.

#### ❖ **In the Puyallup Trial Court**

*Puyallup Tribe v. Keating*, No. CR 98-512 (Puyallup Tr. Ct. 1999),  
<http://www.tribal-institute.org/opinions/1999.NAPU.0000006.htm>.

*Facts:* This is a hearing on a Keating's (Defendant's) motion to dismiss a criminal complaint of battery under the Puyallup Domestic Violence Code. The victim was a member of the Puyallup Tribe. Keating argues that the tribal court has no criminal jurisdiction because she is non-Indian.

*Findings:* The court finds that based on the Violence Against Women Act (VAWA) provisions, the *Oliphant* defense is not a valid defense in domestic violence cases. The court found that it had jurisdiction pursuant to 18 U.S.C. § 2265 and 2266. It noted the *Oliphant* defense has one exception, which is domestic violence.

*Practical Application:* The case demonstrates the efforts tribes are taking as they attempt to manage domestic violence situations that frequently involve non-Indians. Most courts have not interpreted VAWA as expanding criminal jurisdictions of tribes over non-Indians.

## **D. TERMINATION OF PARENTAL RIGHTS**

### **❖ Cherokee Nation Judicial Appeals Tribunal**

*E.P. v. Cherokee Nation*, 7 Okla. Tribe 517 (Cherokee Ct. App. 2002).

*Facts:* The Cherokee Nation initiated proceedings to terminate the parental rights of E. P. based on his history of violence against the child's mother. Evidence at a jury trial showed that E. P. had assaulted his wife with a metal chair. E. P. also abused alcohol and showed an unwillingness to put forth a good faith effort to comply with the standards set for him by child protection workers. A social worker testified at trial that future spousal abuse is likely. A jury trial resulted in the termination of the parental rights of E. P., who then appealed the decision.

*Holding:* The appeals tribunal affirmed the judgment of the lower court. Spousal abuse in a child's presence is the same as abusing the child mentally and emotionally. Sufficient evidence was present for the jury to come to the conclusion that terminating E. P.'s parental rights would be in the best interest of the child.

*Practical Application:* Abusing a spouse in the presence of a child can constitute child abuse. A parent who is not likely to stop using violence in a relationship presents a danger to the children, and the tribal government is justified in terminating parental rights in such cases.

### **❖ Northern Plains Intertribal Court of Appeals**

*In the Interest of [D], Jr.*, 17 ILR. 6081 (N. Plns. Intertr. Ct. App 1990).

*Facts:* At a trial for termination of Father's parental rights in the lower court, Mother was granted physical custody of the minor child (two-and-a-half-years old) with legal custody being given to the Sisseton-Wahpeton Sioux Tribe. Mother has a history of alcohol abuse and has been in prison three times for misdemeanor offenses. Father also has a history of alcohol abuse and, at time of trial, was incarcerated for a severe beating he inflicted upon Mother. The minor child was witness to the severe beating. Father's parental rights were terminated, and he appealed to the Northern Plains Intertribal Court of Appeals.

*Holding:* The appellate court found no evidence in the record of emotional abuse of the minor child by Father's action of severely assaulting Mother in the presence of the minor child. The trial court decision was reversed. Father's rights were not terminated.

*Practical Application:* The appellate court indicated that expert witnesses must testify that the child did suffer emotional abuse as a result of having observed the physical abuse of one parent perpetrated by the other. This decision was written in 1990 and may not reflect the contemporary understandings of the impact of domestic violence on children.

❖ **Tribal District Court of the Ponca Tribe**

*In re: T.D.W.*, 7 Okla. Trib. 300 (Ponca D. Ct. 2001).

*Facts:* This case concerns the best interests and custody of child T. D. W. Both parents testified to a history of alcohol abuse, and the mother admitted to inhalant abuse. Father had been incarcerated for committing acts of domestic violence against Mother. Father also admits to having been involved in domestic violence incidents with Mother and with a girlfriend, but claims that he acted in self-defense. Mother has a 1993 protective order against Father, which is still in effect. No evidence of physical abuse toward the child by the father exists.

The child, when present, indicated to the guardian ad litem and to the court that he wished to stay with his father. The father showed numerous school records and awards to the court and stated that the child would be attending camp during July. Social service recommends that the child remain with his father.

*Holding:* The court concludes that it is in the best interest of the child to remain in his father's home and to have frequent visitation with his mother. The court finds that both parents are equally at fault or have equivalent problems with alcohol and mutual abuse. Therefore, the parent with whom the child has been living may likely remain the custodial parent.

*Practical Application:* The Ponca Tribal Code requires that the court consider the best interest of the child when contemplating a change in custody. Best interests of the child may require that the child remain in the custody of a parent who has not met the recommendations of child protective services if the child states a preference for remaining and it would otherwise interrupt continuity of care.

## **E. VIOLATION OF A PROTECTION ORDER**

### **❖ Navajo Nation Supreme Court**

*Johnny v. Greyeyes*, No. SC-CV-52-08 (Navajo S. Ct. 2009),  
[http://www.navajocourts.org/NNCourtOpinions2009/03\\_Johnny\\_v\\_Grayeyes.pdf](http://www.navajocourts.org/NNCourtOpinions2009/03_Johnny_v_Grayeyes.pdf).

*Facts:* In June 2007, Mother was granted a Domestic Abuse Protection Order against Johnny (Father). The protection order prohibited Johnny from harassing or further abusing Mother, awarded temporary custody of the children to Mother, and ordered Johnny to pay child support and certain household bills. Nine days after the order to pay child support expired, Mother filed a petition for an order to show cause that alleged that Johnny had violated the protection order by failing to pay child support and the household bills. Navajo Family Court issued an order to show cause and scheduled a hearing twenty-three days later. Johnny was not personally served with the order to show cause and did not appear at the hearing. After the scheduled hearing date on December 11, 2007, the Navajo Family Court issued a bench warrant for Johnny's arrest.

On October 18, 2008, ten months later, Johnny was arrested on unrelated charges. When booked on these charges, he was served with the bench warrant issued by the Navajo Family Court and was served (in jail) with an Order for Temporary Commitment related to the protection order matter. The Order for Temporary Commitment stated that Johnny should be held until the order to show cause hearing in the protection order case, which was scheduled for twenty days later.

On October 20, 2008, Johnny filed a letter requesting his release with the Navajo Nation Supreme Court. The Supreme Court accepted the letter as a petition for writ of habeas corpus. The Navajo Nation Supreme Court ordered the Department of Corrections to show good cause as to why Johnny should not be released. The Supreme Court further ordered the Navajo Family Court (although not a party to the habeas corpus proceedings) to show how it had the authority to set an order to show cause hearing on an order that had expired on its own terms and how it had the authority to issue a bench warrant and an Order for Temporary Commitment on a protection order that had expired.

At the hearing, the family court argued that the protection order violations occurred prior to the expiration of the protection order, and that the court therefore had the authority to issue a bench warrant and an Order for Temporary Commitment and to proceed with an order to show cause hearing. The Department of Corrections argued that a commitment order is presumed valid and that the department remains neutral on whether such an order violates a prisoner's rights.

Johnny challenged his imprisonment asserting that his due process rights were violated because he did not appear before the family court and was not informed as to why he was being held.

*Holding:* The Navajo Nation Supreme Court held that the family court violated Johnny's due process rights (or K'é, the Navajo principle of fundamental fairness through mutual respect, which requires that an individual is given an opportunity to speak to charges) by failing to

schedule the contempt of court order to show cause hearing within fifteen days as required by Navajo Law. The first order to show cause hearing was scheduled twenty-three days after the initial order to show cause was issued, and the second was scheduled twenty days after the Order for Temporary Commitment. The court also held that the family court failed to serve Johnny personally with the original order to show cause, and later (after his unrelated arrest) failed to provide him with an explanation of the reasons why he was being held and did not give him the opportunity to be heard at the temporary commitment proceedings that occurred while he was in custody.

Lastly, the court ruled that the family court cannot enforce an expired Domestic Abuse Protection Order. Therefore, because the Domestic Abuse Protection Order against Johnny had expired, the family court did not have the legal right to hold an order to show cause hearing, issue a bench warrant, or obtain an Order for Temporary Commitment. Given these violations of Johnny's due process rights, and the family court's inability to prosecute Johnny on violations of an expired Domestic Abuse Protection Order, Johnny was released and the Domestic Abuse Protection Order related charges were dismissed.

*Practical Application:* In order to prosecute someone for violating the terms of a protection order, the charges must be brought prior to the expiration of the order. To comply with the Navajo principles of K'é, and to ensure that defendant's rights to due process are upheld, a defendant must be personally served with a notice of an order to show cause hearing, and the hearing must be scheduled within fifteen days of receiving notice, as required by the Navajo Nation law.

***Thompson v. Greyeyes***, 5 Am. Tribal Law 400 (Navajo S. Ct. 2004),  
<http://www.tribal-institute.org/opinions/2004.NANN.0000009.htm>.

*Facts:* Thompson was charged with interfering with judicial proceedings for violating a domestic abuse order issued against him, and with a bench warrant for failure to appear on these charges. He was found guilty of both charges and was sentenced to 30 days in jail for interfering with judicial proceedings and 90 days in jail for the bench warrant for failure to appear. Thompson filed a petition for writ of habeas corpus, arguing that he was illegally detained because the court did not have the authority to authorize jail time for either offense.

*Holding:* The Supreme Court held that the Thompson's detention was illegal and released him. The district court's sentencing authority is dictated by the language of the Navajo Nation Criminal Code. The code dictates that the offense of interfering with judicial proceedings only allows the district court to order a peace or security bond and/or a sentence of labor or community service. The code does not authorize jail time for this offense, and therefore the detention was illegal. As failure to appear (the charge for which the bench warrant had been issued) also falls in the category of interfering with judicial proceedings, therefore jail time was not warranted.

As an alternate remedy, the prosecutor or any person could have filed an order to show cause in the family court, and if the respondent was found to have violated the Domestic Abuse Protection Order, the family court could hold the respondent in criminal contempt and incarcerate the respondent for up to 180 days.

*Practical Application:* To enforce a Domestic Abuse Protection Order with incarceration, the prosecutor or any person could file an order to show cause in family court to hold the violator in criminal contempt. The penalties dictated by the NCC for interfering with judicial proceedings do not include incarceration.

***Petition of Austin***, SC-CV-24-98 (Navajo S. Ct. 1998),  
<http://www.tribal-institute.org/opinions/1998.NANN.0000006.htm>.

*Facts:* Austin (Petitioner) was accused of sexual abuse of an elderly lady. The family court granted a temporary protective order against Austin. At the hearing a few days later, Austin admitted to the allegations. The court then entered a Domestic Abuse Protection Order, which ordered (1) Petitioner to stay away from victim's residence and place of business; (2) prohibited Petitioner from threatening, harassing, or abusing victim; (3) prohibited Petitioner from contacting victim by any means; (4) prohibited Petitioner from touching any of victim's property; and (5) ordered Petitioner shall serve 180 days in jail. Austin was then arrested and incarcerated. He filed a writ of habeas corpus, arguing that the detention was unlawful.

*Holding:* In this case, Austin was not charged with violating the protective order, nor was evidence presented that Appellant violated the protective order; therefore, the Navajo Supreme Court held that Petitioner was wrongfully incarcerated and ordered his release. Navajo law requires a finding that a person violated a term of a protection order before jail becomes an option. The family court does not have the option of imposing a jail term based on the admission of allegations by the accused. In this case, the family court erred by imposing a jail sentence on Austin without first finding that he had violated the order.

*Practical Application:* The court is not able to impose a jail term unless and until the protective order is violated. Jail terms should be based on contempt of the court's order and not on the allegation or admission of domestic violence in the application for a protective order. A separate criminal proceeding can be initiated to address the act of violence.

#### ❖ **Penobscot Nation Judicial System Appellate Division**

***Penobscot Nation v. Paul***, 20 ILR 6101 (Penob. Tr. Ct., App. Div. 1993).

*Facts:* Ila Nicola, a Penobscot Nation enrolled member, was granted a protection from harassment order against Paul, also an enrolled member of the Penobscot Nation. The order was granted by the Penobscot Tribal Court in April 1992. In August 1992, Paul physically

approached Nicola in Bangor, Maine, and threatened her. The Penobscot Nation proceeded to charge Paul with violation of a protection order. Paul raised the defense of lack of jurisdiction because he was in Bangor, Maine, at the time of the incident. The court denied his motion and found him guilty of violating the protection order.

*Holding:* The appellate court upheld the trial court's finding that Paul violated the protective order when he threatened Nicola in Bangor, Maine. The violation of the protection order is a contempt of court issue. As the U.S. Supreme Court has rejected the notion that a court's contempt power is limited to violations occurring within its territorial limits, Paul's argument that the Penobscot court lacked jurisdiction in this case did not succeed.

*Practical Application:* Tribal courts may retain jurisdiction over violations of a protection order regardless of whether the violations occur within its territorial limits, because such a violation is considered contempt of court.

## **F. REMEDIES**

### **❖ Confederated Tribes of the Colville Reservation Court of Appeals**

*Echo Crim v. Shon Baker*, 32 ILR 6141 (Colville Confederated Tribes Ct. Ap. 2005).

*Facts:* Echo Crim (Appellant) and Shon Baker (Appellee) ended their six-year relationship, and court proceedings ensued in order to divide the assets of the parties. The court ordered Crim to pay Baker money, because she allegedly threw away some of Baker's clothes and food. She was also ordered to turn over and pay the value of a few other items. The court also issued a restraining order against Baker prohibiting him from contacting, or being within 100 feet, of Crim. Crim appealed the amount of money she was required to pay Baker, stating that the trial court's calculations were incorrect, and some of the items she was ordered to pay for were hers.

*Holding:* The court of appeals held that most of the lower court's findings had a sufficient basis but corrected a mathematical calculation of the money owed to Baker, ultimately reducing the sum. They also remanded some of the issues (regarding the determination of who should pay on a debt incurred during the relationship, the ownership of a vehicle, and the ownership of a few other household items).

*Practical Application:* Upon ending a relationship with an unmarried partner, the court has the authority to divide up the couples' belongings. A person who throws away the belongings of her ex-partner can be held liable for a portion of the value of these belongings, even if the court establishes that the person throwing the items away deserves a restraining order against her ex-partner.

### **❖ Supreme Court of the Navajo Nation**

*Yazzie v. Thompson*, 6 Am. Tribal Law 672 (Navajo S. Ct. 2005),  
<http://www.tribal-institute.org/opinions/2005.NANN.0000006.htm>.

*Facts:* Yazzie filed a petition for a protection order against Thompson. The domestic violence commissioner appointed by the family court found that Thompson had not violated the Domestic Violence Protection Act, and Yazzie's petition was dismissed. The commissioner then stated that Thompson had to pay a \$30 fee for his services. Thompson appealed, arguing that she, as an innocent respondent, should not be required to pay the commissioner's fee.

*Holding:* The Supreme Court held that a Respondent who has not been found to have violated the Domestic Violence Protection Act should not be required to pay commissioner or court fees. The court reasoned that the relevant sections of the Navajo Nation Code, read together, indicate that a Respondent should be charged court fees and costs only when the need for a domestic abuse protection order has been proven.

*Practical Application:* A Respondent in a petition for a domestic violence protection order should not be charged with court costs or fees unless the Respondent is found to have violated the Domestic Violence Protection Act and the protection order is issued.

*Sheppard v. Dayzie*, 5 Am. Tribal Law 374 (Navajo S. Ct. 2004),  
<http://www.tribal-institute.org/opinions/2004.NANN.0000002.htm>.

*Facts:* Sheppard and Dayzie were divorced by the Kayenta Family Court. The court awarded Dayzie (Appellant) the parties' house, which was located on a homesite lease lot. The divorce decree made no mention of the homesite lease. Three years after the divorce, Sheppard requested and was granted a domestic abuse protection order against Dayzie that would be valid for a five year period. The order granted Sheppard and her children possession of the house and required Dayzie to stay away from the house. A month later the court denied Dayzie's motion to reconsider the domestic abuse protection order and gave possession of the homesite lease (where the couple's house was located) to Sheppard. The domestic abuse protection order was modified twice more, ordering Dayzie to remove his belongings from the homesite and home and reassigning the homesite lease and home to Sheppard. Dayzie moved the court to vacate all orders concerning the home and homesite lease. The court denied the motion, and Dayzie appealed.

*Holding:* The Supreme Court vacated the portions of the domestic abuse protection orders that transferred the homesite lease and ownership of the house to Sheppard. The court found that the trial court had abused its authority under the Domestic Abuse Protection Act and the Navajo Rules for Domestic Violence Proceedings, which limit a court's authority in domestic abuse proceedings to regulating conduct and giving temporary possession of houses and property.

*Practical Application:* In domestic violence proceedings, the court has the authority to limit the conduct of the offender and to grant temporary possession of a residence to a party. The court does not have the authority to transfer property in domestic violence proceedings legally.

## II. CRIMINAL

### A. ARREST

#### ❖ Fort Peck Court of Appeals

*Fort Peck Tribes v. First*, Appeal No. 467 (Fort Peck App. 2008),  
[http://www.fptc.org/appellate\\_opinions/467.html](http://www.fptc.org/appellate_opinions/467.html).

*Facts:* First was charged with severe physical domestic abuse and abuse and neglect of a child in violation of the Fort Peck Comprehensive Code of Justice. After pleading not guilty to the charges he was released on bail, and a condition of his release prohibited his use of alcohol or drugs. Upon appearing at the prosecutor's office two months later he exhibited signs of having consumed alcohol. An alcohol screening test showed that his blood alcohol content was .163 percent. The tribal police department then arrested First on the charge of criminal contempt for violating his release conditions. The arresting officer did not advise First of his rights under Fort Peck law at the scene of the arrest, but did so later as he was transported to the jail. The Fort Peck Code Notification of Rights at Time of Arrest requires the arresting officer to inform the arrestee "immediately" that he has the right to remain silent; to obtain counsel at his expense; to make at least one completed phone call to a friend and at least one completed phone call to a lay counselor or attorney immediately after being registered and identified at jail; and that any statements made may be used against him in court. First's counsel filed an application for a writ of habeas corpus arguing that First's detention was illegal as he had not been informed of his rights immediately upon arrest. The tribal trial court granted the application, released First from custody, and dismissed the criminal contempt charges against him.

*Holding:* Fort Peck Tribes appealed the issuing of the writ of habeas corpus and the dismissing the criminal contempt charge, arguing that the court's interpretation of the word *immediately* in the Notification of Rights at Time of Arrest in the tribal code was interpreted too stringently by the trial court. The tribe argued that during an arrest dangerous circumstances often require an officer to manage the situation prior to advising an arrestee of their rights. The court of appeals upheld the lower court's literal interpretation of the word *immediately* as it appears in the Notification of Rights at Time of Arrest, holding that nothing in the record indicated that there were any dangerous or unique circumstances at the time of First's arrest that would necessitate a delay in informing him of his rights.

*Practical Application:* The failure of an arresting officer to advise the arrestee immediately of his rights upon arrest could result in the arrestee's release and the charges against him being dropped, unless unique or dangerous circumstances occurring at the time of arrest require the officer to gain control of the situation before advising the arrestee of his rights.

❖ **Colville Confederated Tribes Court of Appeals**

*Manuel v. Colville Confederated Tribes*, 5 CCAR 39 (Colville Confederated Tribes Ct. Ap. 2001), <http://www.tribal-institute.org/opinions/2001.NACC.0000001.htm>.

*Facts:* Manuel was convicted of battery against his live-in girlfriend. Defendant appealed, claiming that the arrest was invalid. In the course of investigating an incident of domestic violence, the victim gave the tribal police permission to enter Manuel's residence. The victim shared the residence with Manuel. Manuel refused to answer the door after repeated knocking by police and was subsequently charged with both domestic abuse and resisting arrest. Manuel filed a Motion to Suppress Evidence and Dismiss the Case based on the tribal police officer's entrance into his home without a warrant.

*Holding:* The victim had common authority over the house involved, and thus had authority to give consent to law enforcement to validate entry into the house. The case was remanded to the trial court.

*Practical Application:* If a victim has common authority over the premises and the alleged abuser refuses entry or refuses to respond to police requests to exit the premises, then the victim can grant the police the necessary authority to enter the residence.

❖ **Northern Plains Intertribal Court of Appeals**

*Devils Lake Sioux Tribe<sup>4</sup> v. Frederick*, 21 ILR. 6137 (Northern Plains Intertribal App. 1994).

*Facts:* Two tribal police officers responded to a call for assistance from a victim and her mother. One officer removed Frederick from the premises. The other interviewed the victim. The victim stated that Frederick had slapped and pushed her. Neither officer observed Frederick slap or push the victim. The officers arrested Frederick without a warrant. He was charged with assault and battery and a six-person jury returned a verdict of guilty as charged. Frederick appealed on the grounds of improper procedure. He claims that a warrantless arrest for an alleged offense not committed in the presence of a police officer was unlawful, and therefore, the court lacked jurisdiction over him.

*Holding:* The arrest is found to be lawful and the verdict of guilty was upheld. Devils Lake Sioux Law and Order Code § 3-2-104(2) authorizes a police officer to make arrests when the officer has probable cause to believe that the person has committed the charged offense. Furthermore, Devils Lake Sioux Law and Order Code § 3-7-161(3) states that a law enforcement officer shall arrest a person anywhere—with or without a warrant—if the officer has probable cause to

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<sup>4</sup> Now known as the Spirit Lake Nation.

believe (a) an assault has occurred; (b) an assault has occurred and has resulted in bodily injury to the victim whether the injury is visible to the officer or not; or (c) that any physical action has taken place with the intention of causing another person reasonably in all probability serious bodily injury or death, and the victim is the person's family member, household member, or former household member.

*Practical Application:* The Devils Lake Sioux Tribe, through legislation, authorized law enforcement personnel to make warrantless arrests (based on probable cause) for offenses that they do not actually witness.

## **B. CRIMINAL DEFINITION OF *DOMESTIC VIOLENCE***

### **❖ Fort Peck Court of Appeals**

*Fort Peck Tribes v. Longee*, Appeal No. 446 (Fort Peck App. 2007),  
[http://www.fptc.org/appellate\\_opinions/446.html](http://www.fptc.org/appellate_opinions/446.html).

*Facts:* Longee was convicted of severe physical domestic assault in violation of the Fort Peck Comprehensive Code of Justice for physically assaulting the mother of his child and former girlfriend.

Longee appealed his conviction, arguing that he and the victim were not family or household members under the statutory definition of *severe physical domestic assault*. The definition provides that any person who intentionally causes bodily injury of any kind to a “family or household member” commits the crime of severe physical domestic assault. A “household member” is any person residing with the accused, and “residing” means residence in that domicile for a twenty-four-hour period or more. At the time of the assault, the victim and the accused were not living together. Therefore, Longee argued that he and the victim were not “household members” and that he could not be guilty of domestic assault.

*Holding:* The court of appeals reviewed the history of the definition of the term *household members*, noting that the current definition was meant to expand to cover all situations that can be considered what is sometimes called “intimate partner violence.” It affirmed the lower court’s decision, holding that the definition of the term *household member* did apply to Longee and his victim as they had resided together for a period of more than twenty-four hours in the recent past. Under this interpretation of the section’s language, the twenty-four-hour period of coresidence does not refer only to the twenty-four-hour period immediately preceding the assault, but any twenty-four-hour period of co-residence prior to the incident.

*Practical Application:* The history of a statute may be helpful in determining the meaning of a section. The section’s definition of household member as being any two persons having resided together in the same domicile for a period of more than twenty-four hours is meant to cover all kinds of intimate partner violence, and the twenty-four-hour requirement does not need to occur immediately preceding the assault.

## C. DETENTION

### ❖ Eastern Band of Cherokee Indians in the Cherokee Court Qualla Boundary

*Eastern Band of Cherokee Indians v. [B.D.]*, 2003. NACE.

<http://www.tribal-institute.org/opinions/2003.NACE.0000002.htm>.

*Facts:* Father was detained for domestic violence and B. D. (Mother), who was breast-feeding their infant child at the time, was given sole custody. At the hearing, however, it was determined that the mother was the primary aggressor of the violence. Eastern Band of Cherokee law requires a mandatory seventy-two-hour detention period for perpetrators of domestic violence. B. D. appealed the detention, arguing that she would not be able to breast-feed the infant with her while in detention.

*Holding:* The appellate court determined that a breast-feeding mother who was the primary aggressor in a domestic violence incidence could be detained in a location other than jail for the mandatory seventy-two-hour detention period in order to allow her to continue to nurture and care for her minor child for whom she was the sole custodian.

*Practical Application:* This decision is limited to the particular facts in this case. If the facts are substantially alike, then the seventy-two-hour mandatory detention does not have to be in jail but can be in an alternative location.

## D. EVIDENCE

### ❖ Appellate Court of the Hopi Tribe

*Fred v. The Hopi Tribe*, 2007-AC-0003 (Hopi App. 2007),

*Facts:* Defendant Fred pled guilty to and was convicted of assault and battery against his wife, Tammie, as well as injury to public property. He finished a portion of his jail sentence, and the remainder was suspended in lieu of supervised probation. The probation terms required that Fred enroll in a domestic violence reeducation course and that he pay \$50 per month to his wife, per child, in child support. Subsequently, the tribe filed a petition to revoke Fred's probation alleging that he had failed to attend various classes and failed to make the child support payments to his wife.

At trial, Fred pled not guilty to the probation revocation and indicated that he would be representing himself *pro se*. At the start of the trial, Fred indicated that he would not call any witnesses, and that he understood that, as a *pro se* litigant, he would be responsible for calling and examining witnesses and submitting evidence in proper form. Midway through the hearing, Fred requested that the trial court allow him to call his wife as a witness. The trial court denied this request stating that Fred was too late in making the request. The trial court also noted that Fred admitted to failing to make any child support payments and rejected his excuses for failing to do so. Fred appealed the trial court's decision on the grounds that he was denied his right to call witnesses at trial.

*Holding:* The court held that the right to compulsory process extends to probation revocation hearings. Further, although the trial court cannot refuse to allow a *pro se* litigant to call a present witness just because Defendant did not disclose his intent to call that witness at the beginning of the proceedings, the ultimate burden is on Defendant to demonstrate that any witness he wishes to call will provide testimony material to his defense. The court noted that there is no Hopi procedural rule requiring disclosure of witnesses at the beginning of a proceeding, so there was no clear line as to what timeliness of disclosure is. Although it is important that a *pro se* defendant be aware of his rights to call a witness under the compulsory process clause of the Indian Civil Rights Act, the defendant has the burden of demonstrating the materiality of the testimony to his defense. In this case, his wife's testimony would not change the result.

*Practical Application:* A witness can be called even if not presented to the court on a witness list at the start of trial, if the witness may provide material testimony that could be of relevance to the guilt or innocence of a defendant. When dealing with *pro se* defendants, a defendant's right to have compulsory process served in order to secure witnesses on a defendant's behalf may be disclosed in a written statement of rights. The tribe could also develop procedural rules to provide clarity as to when disclosure of witnesses are required in a criminal proceeding. The court gives greater deference to *pro se* defendants on issues of timeliness.

## ❖ Confederated Tribes of the Colville Reservation Tribal Court

*Colville Confederated Tribes v. Marchand et al.*, 33 ILR. 6036 (Colville Confederated Tribes Tr. Ct 2006).

*Facts:* A number of defendants convicted of domestic violence appealed their convictions on the grounds that they had the right to confront the witnesses against them at trial under the Colville Tribal Civil Rights Acts (CTCR) and the Indian Civil Rights Act (ICRA). Appellants did not contend that the witnesses must testify at trial, but that they must be present in order for their written statements to be admissible.

The Colville Tribal Code (CTC) states that law enforcement officers who respond to crimes involving domestic violence are encouraged to take a sworn statement from any victim and from the perpetrator, if possible. The CTC also provides that these statements shall be admissible as evidence in court, and that victims of domestic violence are not required to testify in person at any proceedings. However, Appellants argue that the CTC also states that all persons in criminal proceedings shall not be denied their right “to be confronted with the witnesses against him.”

Citing the U.S. Supreme Court decision *Washington v. Crawford*, 541 U.S. 36 (2004), Appellants argue that, except in limited circumstances, statements made by witnesses who are not available at trial are not admissible against a defendant.

*Holding:* The court of appeals rejected *Crawford*, reasoning that the U.S. Supreme Court relied heavily on the English tradition and history giving defendants the right to confront the witnesses against them. The court held that these traditions were not the tradition of the Colville Tribes, and also recognized that Colville tribal case law has previously held that the U.S. Constitution is not binding on their court or tribe. The court further held that the CTC statute allowing the victim’s statements to be used as evidence at trial did not violate Appellants’ right of confrontation under the ICRA and CTRA. Reasoning that rights of victims, defendants, and the community must be balanced in order to interpret statutory rights, the court requested that a panel of elders be formed to explain to the court any traditions or customs of the tribe as they relate to a defendant’s right to confront accusers. After hearing from the elders, the court indicated that it would furnish a written statement of the standards the court would intend to apply in domestic violence cases.

*Practical Application:* A defendant does not have an inherent right to confront witnesses at trial. In domestic violence cases, a victim’s sworn statement is admissible at trial, even if the victim is not present.

*Waters v. Colville Confederated Tribes*, 3 CCAR 35 (Colville Confederated Tribes Tr. Ct. 1996),

<http://www.tribal-institute.org/opinions/1996.NACC.0000007.htm>.

*Facts:* Defendant was convicted of battery against his girlfriend at a jury trial. During the jury trial, the Colville prosecutor repeatedly attempted to present hearsay evidence of the victim's out-of-court statements, despite the trial court's ruling that such evidence was inadmissible. The trial court did not declare a mistrial, despite the fact that all the discussions regarding the evidence occurred in front of the jury.

*Holding:* Defendant's conviction was reversed and remanded to the tribal court for a new trial. It constituted prosecutorial misconduct for the tribes' prosecuting attorney to attempt to introduce inadmissible hearsay testimony repeatedly.

*Practical Application:* Attempting to introduce hearsay evidence that has been ruled inadmissible by the judge may result in a mistrial. *Colville v. Swan* (see following) ruled that the decision in this case is limited to the facts.

***Colville Confederated Tribes v. Swan***, 7 CCAR 38 (Colville Confederated Tribes Tr. Ct 2003), <http://www.tribal-institute.org/opinions/2003.NACC.0000012.htm>.

*Facts:* Defendant was charged with domestic violence against his stepdaughter. The victim recanted and changed her account of what happened. The prosecutor wanted to use an inconsistent statement for purposes of impeachment of the victim, but the court disallowed the introduction of her prior statement. The exclusion of this statement seriously weakened the prosecution's case. The prosecution, therefore, moved for a dismissal. The trial court dismissed the case with prejudice.

*Holding:* The trial court was found to have abused its discretion when it dismissed the case with prejudice. The trial court's effort to expedite the matter went too far by prejudging what might be forthcoming during trial. This appellate court distinguished this case from the *Waters* case (see previous) and indicated that the trial court's action would result in more victims of domestic violence recanting in order to avoid prosecution of the abuser.

*Practical Application:* It is not uncommon for victims of domestic violence to recant. Therefore, it can be important for prosecutors to be able to introduce prior inconsistent statements in order to secure a conviction. Dismissing a case with prejudice will prevent the prosecutor from moving forward with the case should the victim decide to testify for the tribe.

#### ❖ **Eastern Band of Cherokee Indians in the Cherokee Court Qualla Boundary**

***Eastern Band of Cherokee Indians v. Watty***, No. 02-CR-082-084 (Eastern Band of Cherokee Indians 2004), [www.tribal-institute.org/opinions/2004.NACE.0000003.htm](http://www.tribal-institute.org/opinions/2004.NACE.0000003.htm).

*Facts:* Watty was charged with domestic violence against his wife in January 2002. The trial took place in 2004. The wife argued at trial that she could not be compelled to testify due to the

marital privilege of spouses. In 2003, after the charge but before the trial, the tribal council enacted a law that stated that the evidentiary marital privilege does not apply in any criminal proceeding in which a spouse or other family or household member is a victim of an alleged crime involving domestic violence perpetrated by the other spouse. The complaining witness argued that the law is an *ex post facto* law in that the privilege presumably was in effect at the time of the alleged crime, but not at the time of trial.

*Holding:* The wife can be compelled to testify against her husband. *Ex post facto* provisions operate to ensure that there is fair notice as to what acts are criminal and do not apply to evidentiary rules. Refusal to answer proper questions regarding her husband can subject the wife to criminal or civil contempt.

*Practical Application:* A wife can be compelled to testify against her husband in a domestic violence criminal action, as marital privilege does not apply. If she fails to respond to proper questions regarding her husband's conduct, she can be held in contempt of court.

#### ❖ **Fort Peck Court of Appeals**

***Fort Peck v. Darrell Reddog***, Appeal No. 082 (Fort Peck App. 1990),  
[http://www.fptc.org/appellate\\_opinions/082.html](http://www.fptc.org/appellate_opinions/082.html).

*Facts:* Reddog was found not guilty of assault at a bench trial. The prosecutor appealed, arguing that the tribes had met their burden of proof and that the trial court erred in allowing evidence of the victim's character. Evidence showed that Defendant assaulted the victim, knocking out several of her teeth. Reddog offered evidence that the victim had an alcohol problem and had engaged in mutual combat with him.

*Holding:* The appellate court reversed the finding of not guilty of simple assault. The tribes proved that Reddog caused bodily injury to the victim. The appellate court found that the trial court attached too much weight to the evidence of the victim's character.

*Practical Application:* Although character evidence of a victim may be admissible under Federal Rules of Evidence, the evidence of physical assault may outweigh any evidence of the victim's bad character.

***Fort Peck Tribes v. Marvin Youpee***, Appeal No. 237 (Fort Peck App. 1998),  
[http://www.fptc.org/appellate\\_opinions/237.html](http://www.fptc.org/appellate_opinions/237.html).

*Facts:* Youpee was found guilty of criminal mischief and criminal trespass at a jury trial. Two days prior to trial, he was notified that the prosecution would be presenting evidence of his past acts at trial. At trial, the victim testified as to prior confrontations with Youpee, including an incident where he attempted to strangle her. The prosecutor offered this testimony to show Youpee's motive.

*Holding:* The appeals court found that Youpee’s prior acts of domestic violence were admissible in the trial for criminal trespass and criminal mischief and that the trial court did not err in allowing the past acts into evidence. The appeal court further found that sufficient notice was given to Appellant that the prior bad acts would be submitted as evidence at the trial.

The appeals court recognized that a Montana Supreme Court decision, *State v. Just*, 602 P2d 957, 184 Mont. 262 (1979), was persuasive. The four parts to the *Just* test are (1) that the other crimes or wrongful acts are similar; (2) that the other crimes or wrongful acts are not remote in time; (3) that the other crimes or wrongful acts tend to establish a common scheme, plan, or system; and (4) that the probative value of the other crimes or wrongful acts is not substantially outweighed by their prejudice to the defendant. In this case, the past acts of domestic violence were admitted because they showed that a relationship existed between Appellant and the victim. This relationship was pertinent to the charges of criminal mischief and criminal trespass.

*Practical Application:* Past incidents may be admissible against a criminal defendant to show motive.

***Fort Peck Tribes v. Turcotte***, Appeal No. 054 (Fort Peck App. 1988),  
[http://www.fptc.org/appellate\\_opinions/054.html](http://www.fptc.org/appellate_opinions/054.html).

*Facts:* Turcotte was found guilty of attempted aggravated assault against his wife. Turcotte appealed, arguing that the prosecutor did not meet the burden of proof of showing that he had taken “substantial steps” toward the commission of the offense. The victim testified at trial that “he hit me,” “he had a hold of my hair,” and “he had a gun at my head.” The gun, a .22 automatic pistol, was recovered and produced as evidence at the trial.

*Holding:* The evidence was sufficient for the jury to find that Turcotte took “substantial steps” toward the commission of the offense of aggravated assault. It was a “substantial step” for Appellant to strike the victim in the face intentionally and hold her hair with a gun to her head.

*Practical Application:* The Fort Peck Tribes define the term *aggravated assault* as “causing serious bodily injury.” Because Turcotte did not cause serious bodily injury to the victim, but did threaten her with a gun, he was found guilty of attempted aggravated assault.

## E. SELF-DEFENSE

### ❖ Confederated Tribes of the Colville Reservation Tribal Court

*Colville Confederated Tribes v. Davisson*, 35 ILR 6023 (Colville Confederated Tribes Tr. Ct 2008).

*Facts:* Connie Davisson, Defendant in domestic violence proceedings, appealed the trial court's rejection of her jury instruction request regarding self-defense. Davisson appealed on two issues. First, Davisson argued that shifting the burden and standard of proof of self-defense to Defendant was a violation of her due process and equal protection rights. Second, Davisson argued that requiring the tribes to prove that the case was one involving domestic violence by only a preponderance of the evidence (instead of beyond a reasonable doubt) was also a violation of her due process rights, as was regarding "domestic violence" as a sentencing enhancement rather than part of the crime's definition. Davisson argued that the Tribal Civil Rights Act (TCRA) was subordinate and subject to the Indian Civil Rights Act (ICRA), and that because the ICRA was superior, the Colville tribal law was subject to the rights articulated therein.

*Holding:* The court held that the tribes, as a sovereign people, adopted the TCRA and that it was the tribal court's duty to interpret and apply the laws therein. The court upheld the Colville Confederated Tribes (CTC) Code 5-5-73, which states that a defendant has the burden to prove self-defense by a preponderance of the evidence. This statute overturned previous Colville tribal case law precedent that held the prosecution had the burden to prove the lack of self-defense in crimes involving domestic violence (overturning *Waters v. CCT*, 7 CCAR 44 [31 Indian L. Rep. 6123] (2004), and *CCT v. Louie*, 2 CCAR 44 [31 Indian L. Rep. 6123] (2004)). The court (relying largely on federal case law) also held that Davisson's rights to equal protection were not violated (by subjecting defendants charged with domestic violence crimes to a different standard on self-defense), holding that the separate standard did not target a suspect class and that sufficient justification existed for the separate standard given the tribes' cultural values. Likewise, the court held that Davisson's due process was not violated by the separate standard because the "beyond a preponderance of the evidence" standard was not unfair. Lastly, the court ruled that the "domestic violence" language was valid as a sentencing enhancement (and not a part of the definition of the crime), because the courts had the authority to use various factors (relating to a crime and a defendant) in order to determine sentencing.

*Practical Application:* The tribal court is sovereign, does not need to adopt the U.S. Constitution or Bill of Rights, and can make its own determination of how to apply concepts of equal protection and due process. Holding defendants charged with domestic violence crimes to different sentencing standards, and a different burden of proof standard, for the affirmative defense of self-defense is not a violation of equal protection or due process and is justified under the tribe's code, case law, and customs.

### ❖ **Confederated Salish and Kootenai Tribes Court of Appeals**

*Confederated Salish and Kootenai Tribes v. Finley*, 27 ILR. 6161 (Confed. Salish and Kootenai App. 2000).

*Facts:* Finley (Defendant) was accused of domestic violence against the victim. A verbal dispute between the two escalated to a physical altercation wherein Finley bit the victim on the neck twice. Finley claims that he bit the victim in self-defense after she pulled his hair. The day prior to the trial, Finley asserted that his presentation of self-defense would shift the burden to the tribe to disprove self-defense beyond a reasonable doubt. The prosecution argues that the burden to prove self-defense beyond a reasonable doubt rests with the defendant. The trial court found that the defense did not provide “sufficient evidence” regarding the claim of self-defense.

*Holding:* The trial court’s rejection of self-defense was upheld for two reasons. First, Finley did not produce sufficient evidence. Second, Finley failed to establish that he had exhausted every reasonable step to escape alleged danger.

*Practical Application:* The tribal statute is silent on the issue of burden of proof in self-defense cases. Therefore, the courts relied on other jurisdictions to establish the law in this case.

### ❖ **Suquamish Tribal Court of Appeals**

*Suquamish Indian Tribe v. Mills*, NW Reg. App. Ct. (Suquamish App. 1991).

*Facts:* Mills was convicted of assault and battery against his live-in girlfriend. At trial, Mills claimed that his girlfriend was attempting to sexually assault him, and that he acted in self-defense when he battered her. The trial court held that even if Mills was acting in self-defense, he used excessive force in resisting.

*Holding:* The appellate court upheld the trial court’s finding that Mills used excessive force in defending himself from the alleged sexual assault, and the conviction for assault and battery was affirmed.

*Practical Application:* Even in cases of mutual combat, the claim of self-defense requires that only such force as is necessary to end the assault is allowed.

## F. VERDICT

### ❖ Puyallup Court of Appeals

*Puyallup Tribe v. Satiacum*, AP 99-165 (Puyallup App. 2001),  
<http://www.tribal-institute.org/opinions/2001.NAPU.0000003.htm>.

*Facts:* Satiacum (Defendant) was charged with domestic violence and disturbing the peace. At trial, the jury returned a verdict of not guilty. The tribe is seeking to set aside the jury verdict because Satiacum allegedly admitted his guilt in closing arguments. The prosecutor argues that public policy supports a judgment notwithstanding verdict in this instance.

*Holding:* The appellate court found that directed verdicts are not allowed in criminal domestic violence cases because of the constitutionally protected right to a jury trial. The appellate court further found that domestic violence is not to be treated differently from other crimes.

*Practical Application:* A defendant's right to a jury trial prevails over a trial court's directed verdict. Courts should not treat domestic violence cases differently when it comes to the right to a jury trial.

## G. SENTENCING

### ❖ Appellate Court of the Hopi Tribe

*Onsae v. the Hopi Tribe*, 7 Am. Tribal Law 329 (Hopi App. 2008).

*Facts:* Appellant George Onsae (Defendant) was charged with and pled guilty to assault, assault and battery, injury to public property, and discharging firearms. Onsae entered into a plea agreement and was found guilty of these charges and sentenced to various amounts of jail time and three years of supervised probation, and was required to enroll in a domestic violence men's reeducation class after his release from jail. Onsae appealed arguing that he did not knowingly and voluntarily enter into the plea agreement and that he had a right to receive treatment for his alcoholism.

*Holding:* The Appellate Court of the Hopi Tribe affirmed the lower court's ruling. It found that the trial court's record provided proof that the trial court made an "active inquiry" in order to determine that Onsae knowingly and voluntarily entered into the plea agreement. It found Onsae understood his rights, the charges against him, and the plea agreement, and had not been threatened or otherwise influenced to make the guilty pleas. The court declined to rule on Onsae's right to treatment for alcoholism.

*Practical Application:* To ensure a defendant's guilty plea made pursuant to a plea agreement is upheld, the trial court should make active inquiry to ensure a defendant understands his rights, the charges against him, and the provisions of the plea agreement. Further inquiry should be made in order to determine that a defendant has entered into the plea voluntarily and knowingly. A record of the active inquiry should be made.

### ❖ Saginaw Chippewa Indian Tribe of Michigan Appellate Court

*Osawabine v. People of the Saginaw Chippewa Indian Tribe of Michigan*, 34 ILR. 6119 (Saginaw Chippewa App. 2007).

*Facts:* Appellant Osawabine (Defendant) pled guilty to and was convicted of family violence (second or subsequent offense), resisting lawful arrest, and personal protection order violation. The court imposed consecutive sentences on Osawabine, including a total of one-year jail time, to be followed immediately by twelve months probation. Osawabine appealed the court's imposition of consecutive sentences arguing that no such authority existed in the tribal code and case law.

*Holding:* The court of appeals upheld the lower court's imposition of consecutive sentences stating that choosing to impose consecutive or concurrent sentences was within the court's discretion. The court agreed with the Colville Confederated Tribes Court of Appeals, which previously found that no actions of Congress existed to divest the tribal court of the authority to

impose concurrent or consecutive sentences. The court also held that analogy to federal or state criminal law was inappropriate as the felony-misdemeanor distinction in crimes does not apply to tribal law.

*Practical Application:* The tribal court does have the discretion to choose between imposing consecutive or concurrent sentencing when a defendant is found guilty of multiple criminal charges.

### ❖ **Tribal Court Appellate Division Passamaquoddy Tribe Pleasant Point**

*Passamaquoddy Tribe v. Francis*, No. 00-CA-01 (Passamaquoddy App. 2001),  
<http://www.tribal-institute.org/opinions/2000.NAPA.0000001.htm>.

*Facts:* On December 29, 1998, during the course of a custody battle for his minor children, Francis entered the office of the director of social services and made threats to the director. Later that day, he entered the office of the governor of the Passamaquoddy Tribe at Sipayik and threatened the governor. On April 4, 1999, Francis hit his wife on the arm. Under a plea agreement with the tribal prosecutor, Francis pled guilty to two counts of assault and one count of criminal threatening. He was placed on probation and ordered not to have any contact with the Pleasant Point Reservation. In order to enter the reservation, Francis would need the permission of his probation officer. At sentencing, Francis did not object to the sentencing and agreed that he understood the plea agreement. Francis appealed his sentence, arguing that the probation requirements violate the Sipayik Tribal Constitution's prohibition against the banishment of tribal members by the Pleasant Point government.

*Holding:* The plea agreement was upheld. The plea agreement requires that Francis stay a certain distance away from the plaintiff, including the plaintiff's home, workplace, and school. Because the land mass of the Pleasant Point Reservation is so limited, Francis is, in effect, prohibited from most, if not all, tribal lands. Francis may enter the reservation with permission from his probation officer. Furthermore, banishment requires the termination of all rights allocated through membership in the tribe. All of Francis's rights were not terminated. Francis's right to enter the reservation was conditional and not permanently terminated, nor were any of his other rights affected. Francis was excluded from the Pleasant Point Reservation. He was not banished from the tribe.

*Practical Application:* Sentencing a perpetrator of domestic violence may include requiring the defendant to stay away from the victim and/or her family members. Such a sentence does not necessarily constitute banishment, even if the land mass of the tribal nation is small.