

TRIBAL PATERNITY ESTABLISHMENT

By Bill Woods – Staff Attorney
Three Affiliated Tribes Division of Child Support Enforcement

Any discussion of Tribal Paternity Establishment must begin with the concept of Tribal Sovereignty¹ in the United States. Tribal Sovereignty is the most fundamental concept of the inherent authority of indigenous tribes to govern themselves within the borders of the United States. Based upon concepts of sovereignty, many tribes have developed tribal courts and tribal codes, including provisions for the establishment of paternity.

There are 574 federally-recognized American Indian and Alaska Native nations² in the U.S., according to the federal Bureau of Indian Affairs (BIA). Each is a government entity with its own policies, processes, and system of governance. There are 63 state-recognized tribes in 11 states—Alabama, Connecticut, Georgia, Louisiana, Maryland, Massachusetts, New York, North Carolina, South Carolina, Vermont, and Virginia. Each tribe acts independently of each other. No model tribal codes exist such as those established for states by the Uniform Law Commissioners, although some tribes have adopted the Uniform Parentage Act.³

Historically speaking, federal legislation has varied in its impact on the powers of tribal courts across the United States. In 1953, Congress enacted Public Law 83-280 (Public Law 280),⁴ which authorized states to impose jurisdiction over reservations, with or without tribal consent. Public Law 280 States include Alaska (except the Metlakatla Indian Community on the Annette Island Reserve, which maintains criminal jurisdiction), California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. With the passage of Public Law 280, state courts in those states asserted jurisdiction over domestic matters on reservations, including the establishment of paternity. The Indian Civil Rights Act narrowed the reach of Public Law 280 by requiring tribal consent (majority consent of the adult members) for state imposition of jurisdiction. Since its passage, no tribe has consented to a relinquishment of exclusive authority over their members in Indian country. Most tribes in Public Law 280 states have now developed their own codes and court systems, and paternity establishment involving a party who is an Indian usually is filed in a tribal court with personal jurisdiction over the parties.

¹ "Sovereignty for tribes includes the right to establish their own form of government, determine membership requirements, enact legislation, and establish law enforcement and court systems." The National Conference of State Legislatures.

² Tribes must compile historical, anthropological, and genealogical information, which can be costly and timely. From there, the tribe must meet all of the requirements of the BIA, including proof of descending from a historic tribe.

³ See, e.g., Kickapoo Tribe - Chapter IV, Paternity and Genetic Tests § 401.

⁴ In 1953, Congress enacted Public Law 83-280 (67 Stat. 588) to grant certain states criminal jurisdiction over American Indians on reservations and to allow civil litigation that had come under tribal or federal court jurisdiction to be handled by state courts.

Most Indian tribes reside on and within land bases known as reservations.⁵ Within these reservations, tribes are allowed to exercise self-determination⁶ and tribes have the ability to self-govern and make decisions concerning their people. The idea that tribes have an inherent right to govern themselves and create court systems was first recognized in *Iron Crow v. Ogallala Sioux Tribe*, 129 F. Supp. 15 (1955).⁷ The decision held that tribes have power to create and change their court system and that power is limited only by Congress, not the courts.

A recent review of tribal codes from eight tribes⁸ reveal common components, such as acknowledgment of paternity, genetic testing, adjudication of paternity by a civil proceeding before a judge, and presumptions of paternity. Some codes have more expansive provisions addressing such matters as personal and subject matter jurisdiction, best interests of the child, full faith and credit to orders, the impact of paternity establishment on tribal enrollment, and artificial insemination. It is important to review the code provisions of any tribe in which enrolled members⁹ or persons eligible for enrollment¹⁰ are part of your family unit for child support purposes, as each code may vary. Most tribal paternity codes have common components, which include:

Acknowledgment of Paternity – All eight tribal codes reviewed include provisions addressing an acknowledgment of paternity. Some jurisdictions require that both parties sign the acknowledgment. Other tribal codes provide for the acknowledgment to be signed by the father, and then sent to the biological mother to potentially object. Some jurisdictions¹¹ have Denial of Paternity Acknowledgment forms. Denial of Paternity forms are executed by presumed fathers, in conjunction with tribal acknowledgments by another man.

Rescission and Statute of Limitations – Each of the eight tribes has proceedings for rescission of an acknowledgement of paternity, with a general limitation period of 60 days.¹² Proceedings are held in court and are conducted in the same manner as proceedings to adjudicate paternity. Timeframes for actions to determine the existence of a parent and child relationship depend upon whether there is a presumed father. There are no limitations in most codes, or possibly no limitations until the child turns age 18 when there is no presumed father. In cases with a

⁵ In 1851, Congress passed the Indian Appropriations Act, which created the Indian reservation system and provided funds to move Indian tribes onto farming reservations and hopefully keep them under control.

⁶ Self-determination is defined as the movement by which Native Americans sought to achieve restoration of tribal community, self-government, cultural renewal, reservation development, educational control, and equal or controlling input into federal government decisions concerning policies and programs.

⁷ In this federal case, the plaintiffs, both of whom were enrolled members of the Ogallala Sioux Tribe, had challenged the authority of the Ogallala Sioux Tribal Court to try, convict, and punish them for a crime committed on the Pine Ridge Reservation.

⁸ Review of Codes from Sokaogon Chippewa Community; Nooksack Indian Tribe; Lac Courte Oreilles Band of Ojibwa; Lummi Tribe; Stockbridge-Munsee Tribe; Kickapoo Tribe of Kansas; Standing Rock Sioux Tribe; Three Affiliated Tribes.

⁹ To be considered enrolled members, persons must in turn meet various criteria for tribal membership, which vary from tribe to tribe, and are typically set forth in tribal constitutions approved by the U.S. Bureau of Indian Affairs.

¹⁰ Persons who are considered eligible for enrollment have a lineal ancestor (biological parent, grandparent, great-grandparent and/or more distant ancestor) who is an American Indian or Alaska Native person from a federally recognized tribe in the U.S.

¹¹ See Kickapoo Tribe - Chapter IV, Paternity and Genetic Tests § 409, which allows the father to sign a denial form.

¹² In some cases, the period may be extended upon a showing of fraud, duress, or material mistake of fact, with the burden on the challenger.

presumed father, actions may need to be commenced within two years¹³ or three years¹⁴ of birth.

Presumption of Paternity – Usually a man is presumed to be the father of a child if he and the mother are married to each other and the child is born during the marriage, or within 300 days after termination of the marriage.¹⁵ Some tribes are more expansive, recognizing a presumption of paternity based on an individual's acts before the child's birth and others after the birth of the child;¹⁶ or a man openly holding out a child as his own and the tribal community acceptance of him as the father. Other tribal codes do not address the issue of presumption.¹⁷

Genetic Testing – All eight tribal codes provide that tribal courts, at the request of an interested party,¹⁸ shall require the child, mother, and alleged father(s) to submit to genetic tests¹⁹ by an accredited laboratory. Some codes also allow the court to require a direct descendant of the mother to submit to genetic testing. Generally paternity will be proven if the test results are properly submitted into evidence and have results establishing a certain percentage probability of paternity; the percentage ranged from 96.1% at the low end to the upper end of 99.9 %.

Full Faith and Credit – The federal Full Faith and Credit to Child Support Orders Act²⁰ requires the appropriate authorities of a tribe to recognize and enforce a child support order properly issued by a court or administrative agency of another Indian Tribe or a state subject to a requirement that the court or agency that issued the child support order had subject matter jurisdiction and personal jurisdiction over the contestants (as defined by FFCCSOA), and that reasonable notice and an opportunity to be heard were given to the contestants.²¹ Most tribal codes have similar provisions.

Civil Actions – The eight reviewed tribal codes use civil proceedings to establish paternity, with all actions being initiated by the filing of a summons and petition to determine paternity or a summons and complaint with the alleged father named as a Defendant or Respondent.

¹³ Kickapoo Tribe - Chapter IV, Paternity and Genetic Tests § 457.

¹⁴ Three Affiliated Tribes – Tribal Paternity Act – 5-24-42.

¹⁵ Termination includes generally by death, annulment, declaration of invalidity, divorce, or after a decree of separation.

¹⁶ See Lac Courte Oreilles Band - § DMR.6.5.070 creating a presumption of paternity where an individual and the child's biological mother were married to each other after the child was born but the individual and the child's biological mother had a relationship with one another during the period of time within which the child was conceived and no other individual has been adjudicated to be the father or presumed to be the father due to marriage; Three Affiliated Tribes Chapter 5-24-17.

¹⁷ See Stockbridge Munsee Tribe – Chapter TAE.06 – Paternity; and Sokaogon Chippewa Community Family Code 3.9 Paternity.

¹⁸ Interested parties include the mother, father, child, legal guardian, and Tribal Child Support Agency. The Standing Rock Sioux Tribe also defines interested parties to include the personal representative or parent of an alleged father.

¹⁹ Sokaogon Chippewa Community Family Code 3.9.4 Paternity provides that the court may order any male witness who testifies or will testify about his sexual relations with the mother at the possible time of conception to submit to genetic testing.

²⁰ The Full Faith and Credit for Child Support Orders Act, Pub. L. No. 103-383, 108 Stat. 4063 (1994) (codified at 28 U.S.C. § 1738B (2018)).

²¹ As defined by the Full Faith and Credit for Child Support Orders Act, the term “court” means “a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.” The term “State” means “a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).” Many tribal codes require that foreign support orders need to be authenticated by a certified copy of the original order from the issuing court.

Following a court hearing²² the court makes findings of fact regarding paternity, including whether the parties engaged in sexual contact at or about the time of conception; the probability of paternity as determined by genetic testing; statements by the biological father; expert testimony; and other relevant evidence.²³ No administrative proceedings for establishment of paternity were identified²⁴ in the eight tribal codes reviewed.

Tribal Enrollment – Tribal paternity codes generally have provisions that set forth that the establishment of paternity shall have no effect on enrollment or membership of the tribe. Many tribes have enrollment offices and procedures outside the court systems to make an application for membership. At least one tribe²⁵ has provisions requiring the Tribal Court and the Enrollment Office to coordinate services and exchange information to obtain Indian Blood Quantum²⁶ essential to tribal sovereignty.

Personal Jurisdiction – Generally speaking many tribes take an expansive view of jurisdiction, and properly assert and liberally construe jurisdiction over their members, wherever they may reside, who are alleged to be the father of an Indian child or a child residing within the boundaries of the tribe.²⁷ Codes may also provide that the tribal court has personal jurisdiction over a person residing within the boundaries of the Indian tribe who is alleged to be the father of a child who resides within the boundaries of the Indian tribe; a person who engaged in sexual intercourse within the lands of the tribe with a person who is a member or eligible to be a member of the tribe and conception occurred;²⁸ or at the request of another tribe which has entered a reciprocal agreement with the forum tribe, over parties who are subject to the jurisdiction of that other tribe.²⁹

Best Interests of Child – Many of the codes studied include paternity provisions addressing the best interests of the child. Exceptions to the requirements to establish paternity exist for conceptions resulting from incest or forcible rape,³⁰ or in cases of sexual abuse of a minor or sexual assault³¹ when proceedings are pending for the adoption of the child.³² These exceptions were developed on the premise that moving forward with a petition for establishment of

²² In the eight tribes reviewed, paternity trials are held as bench trials, with no rights to request a jury trial. These hearings are closed to the public.

²³ Lummi Tribe Chapter 11.05.045(e)(5) allows cultural evidence and/or a reputation in the community as relevant evidence of paternity.

²⁴ 45 CFR § 309.100 establishes the procedures for the establishment of paternity that a Tribe or Tribal Organization must include in its Tribal IV-D plan. Such procedures must provide that the Tribal IV-D agency will (1) attempt to establish paternity by the process established under Tribal law, code, and/or custom; (2) provide an alleged father the opportunity to voluntarily acknowledge paternity; and (3) in a contested paternity case (unless otherwise barred by Tribal law) require the child and all other parties to submit to genetic tests upon the request of any such party, if the request is supported by certain sworn statements.

²⁵ See Lummi Tribe – Chapter 11.05.070.

²⁶ Blood quantum laws are laws in the United States that define Native American status by fractions of Native American ancestry. These laws were enacted by the federal government and state governments as a way to establish legally defined racial population groups.

²⁷ Nooksack Indian Tribe – Chapter 14.06.040 (b)(2).

²⁸ *Id.*; Standing Rock Sioux Tribe – Chapter 6, Section 5-609 (B.).

²⁹ Lummi Tribe - Chapter 11.05.030 and 8.01.010.

³⁰ Nooksack Indian Tribe; Chapter 14.06.110.

³¹ Lummi Tribe - Chapter 11.05.020.

³² Kickapoo Tribe - Chapter IV, Paternity and Genetic Tests § 416.

paternity may result in physical or emotional harm to the child or other persons. The best interests of a child are determined by the court, which may appoint a *guardian ad litem* for the child.

Lastly, cases involving domestic issues, such as paternity establishment, often raise jurisdictional issues between state and tribal courts.³³ There are numerous fact scenarios that do not result in exclusive subject matter jurisdiction with a state or a tribe. States and tribes may have concurrent jurisdiction.³⁴ The challenge is to have only one jurisdiction proceed, so there are not competing orders. Factors to be considered when addressing subject matter jurisdiction include whether the mother of the child is an enrolled member of a tribe, and whether she resides within the boundaries of the reservation. The same questions need to be answered for the alleged father. The last question, and most important in many but not all jurisdictions, is where conception occurred. A Paternity Subject Matter Jurisdictional Matrix aids in the process of answering these five key questions. A sample matrix³⁵ located at: <https://www.childsupport.dhs.nd.gov/partners/lawyers/tribal-jurisdiction-assessment> addresses 32 possible situations to arrive at a jurisdictional conclusion, but each jurisdiction should strive to develop their own respective jurisdictional analysis, based upon their current case law and statutes.

If a state and tribe conclude that they both have subject matter jurisdiction, based upon an informal review by respective legal counsel, it is important to move one step further and decide which jurisdiction would best serve the interests of the child. As paternity is a beginning step in the efforts to gain financial support for the child, focus should be on which jurisdiction is best suited to establish and then, if necessary, enforce the order of support. Generally speaking, the best results are typically conditioned on whether the alleged father resides inside or outside the reservation boundaries.

³³ See Office of Child Support Enforcement, *Essentials for Attorneys*, 4th Ed., Ch. 13 Intergovernmental Child Support, 13-122, 13-123 (2021).

³⁴ Concurrent jurisdiction exists where two or more courts from different systems simultaneously have jurisdiction over a specific case.

³⁵ Jim Fleming, Director, North Dakota Child Support, developed a subject matter jurisdiction matrix with 32 possible child support scenarios addressing when a state has exclusive jurisdiction, when a tribe has exclusive jurisdiction, and when the two governments have concurrent jurisdiction.