Family Law Outline

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I. General

A. Definitions

1. Adoption

- Adoption is a legal process by which the law makes a substitution of parents for a child and terminates the parent and child bond with the natural parents, at least legally speaking. The adoption process requires the termination of the legal bond with the natural parents because of the idea that there can only be one parent and child relationship at any one time. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

2. Child in need of supervision

- The Children’s Code reflects the clear intent of the Navajo Nation Council that CHINS children are a distinct group from juvenile delinquents and require a different type of treatment. As defined by the Children’s Code, children in need of supervision have not committed a criminal offense, but are in need or care or rehabilitation. *M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. (Nav. Sup. Ct. March 14, 2007).

3. Delinquent child


4. Child

- The term “child” is defined as an enrolled member of the Navajo Nation or one who is eligible for enrollment with the Navajo Nation, or any other person who is subject to the jurisdiction of the Navajo Nation and is under the age of eighteen years. *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005).

5. Navajo child


6. Dependent child

- A dependent child is defined as one who has been sexually abused by his parent. *Navajo Nation v. O’Hare*, 5 Nav. R. 121 (Nav. Sup. Ct. 1987).

7. Alimony

- Alimony is a sustenance or support of the wife by her divorced husband. *Sells v. Sells*, 5 Nav. R. 104 (Nav. Sup. Ct. 1986).
8. Member of the Navajo Tribe

- A person who is at least one-fourth degree Navajo blood may become a member of the Navajo Tribe. *Validation of Marriage of Garcia*, 5 Nav. R. 30 (Nav. Ct. App. 1985).

B. Civil nature of proceedings

- The mere fact that the Children’s Code classifies juvenile proceedings as civil, without more, does not mean it is truly “civil” in nature. The Court must examine the essential nature of the proceeding. *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005).
- If detention is possible, the civil label will be disregarded and the matter will be deemed “criminal” in nature for the purpose of defining the juvenile’s rights. *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005).
- Where the Court is prohibiting the use of detention, juvenile matter will be treated as civil for jurisdictional purposes. *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005).

C. Role of the Family Court and the District Court

- The Children’s Code gives the Family Court exclusive jurisdiction over all proceedings in which a child is alleged to be delinquent. *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005).
- Under Navajo statutory law, the Family Court generally has delinquency jurisdiction over non-Indian children. *In the Matter of A.P.*, 8 Nav. R. 671 (Nav. Sup. Ct. 2005).
- The roles and powers of the District Court and the Family Court in DAPA cases are clearly separate. Under DAPA the District Court only has jurisdiction to enforce a protection order through prosecution for interfering with judicial proceedings under 17 N.N.C. § 477. *Thompson v. Greeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).
- If a respondent in a DAPA case violates a protection order, the family court or the police department may refer the incident to the prosecutor for criminal prosecution. *Thompson v. Greeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).
- The Family Court lacks jurisdiction to hear a criminal case, meaning the prosecutor is required to file the criminal complaint in the District Court. *Thompson v. Greeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).
- Where that both parties are Navajos and alleged conduct occurred within the territorial jurisdiction of the Navajo Nation, Family Court has jurisdiction under DAPA. *Morris v. Williams*, 7 Nav. R. 426 (Nav. Sup. Ct. 1999).
• Family Court [f/k/a “Children’s Court] shall have exclusive jurisdiction over any Navajo child who resides or is domiciled within the borders of Navajo Indian country. Matter of Custody of S.R.T., 6 Nav. R. 407 (Nav. Sup. Ct. 1991).

• In a dependency proceeding, the Family Court [f/k/a Children’s Court] has exclusive original jurisdiction of all proceedings under the Family Court in which a child is alleged to be a dependent child. In re A.O., 5 Nav. R. 285 (Ship. Fam. Ct. 1987).

• The Family Court [f/k/a Children’s Court] has exclusive original jurisdiction of all proceedings under the Children’s Code in which a child is alleged to be a dependent child. Navajo Nation v. O’Hare, 5 Nav. R. 121 (Nav. Sup. Ct. 1987).

D. Interplay with state and federal law

• Since there is concurrent jurisdiction with a state court, Navajo Nation Family Court would have no authority to enforce its orders outside the boundaries of the Navajo Nation if what it must enforce is contrary to the state court. Moreover, the Family Court could not have its contrary orders recognized by courts in other states because those courts are bound under the United States Constitution to recognize the decisions of the state courts. States merely defer to decisions of the Navajo Courts as a matter of comity. In the Matter of the Guardianship of J.N.T., 8 Nav. R. 829 (Chin. Fam. Ct. 2005).

• Domestication of a state Order may be granted by a Navajo court only after a full independent review of such state proceedings has determined the state court had jurisdiction over the Navajo child, the provisions of the Indian Child Welfare Act were properly followed, due process was provided to all interested parties, and the state court proceedings does not violate the public policies, customs or common law of the Navajo Nation. In the Matter of Adoption of Baby Girl H., 8 Nav. R. 812 (W.R. Fam. Ct. 2004).


• Navajo statutes and case law reflect Navajo culture and the unique circumstances and needs of the Navajo people living on the reservation. State determinations of tribal domestic relations, no matter how narrow the intrusion, are always hostile to and in conflict with the needs of the Indian people. Billie v. Abbott, 6 Nav. R. 66 (Nav. Sup. Ct. 1988).


• The law of the State where the spouse and children reside will apply to determine the standard for alimony. Charlie v. Charlie, 3 Nav. R. 30 (Nav. Ct. App. 1980). Note: this holding is in strikeout form because it was overruled by Sells v. Sells, 5 Nav. R. 104 (Nav. Sup. Ct. 1986).

• The government of the United States has not interfered in the local law field of domestic relations law, and state family law has not been interfered with in the field of property except when the state rule would do “major damage” to “clear and substantial” federal interests. Willie v. Willie, 4 Nav. R. 31 (Nav. Ct. App. 1983).

E. Importance of enforceability of orders

• Recognition and enforcement of Navajo Nation custody orders are just as important as a decision that the Nation’s courts have jurisdiction. Miles v. Chinle Family Court, No. SC-CV-04-08, slip op. (Nav. Sup. Ct. February 21, 2008).
II. Diné Bi Beenahaz’áaní

A. Importance of marriage and family

1. General statements of the importance of marriage and family


2. Traditional family is blessed

- When the family is complete, there is peace and harmony, which produces beautiful and intelligent children and happiness and prosperity throughout all the relationships. The family is blessed. *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).
- A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the Holy People. This blessing ensures that the marriage will be stable, in harmony and perpetual. *A.P.S. v. O.N.L.R.*, 6 Nav. R. 246 (Nav. Sup. Ct. 1990).
- A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the Holy People. This blessing ensures that the marriage will be stable, in harmony and perpetual. *Validation of Marriage of Francisco*, 6 Nav. R. 134 (Nav. Sup. Ct. 1989).
- A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be blessed by the “Holy People.” This blessing ensures that the marriage will be stable, in harmony, and perpetual. *Navajo Nation v. Murphy*, 6 Nav. R. 10 (Nav. Sup. Ct. 1988).

3. Traditional rejection of common law marriage

- Traditionally, unmarried couples that live together act immorally because they are said to “steal” each other. *Validation of Marriage of Francisco*, 6 Nav. R. 134 (Nav. Sup. Ct. 1989).

4. Traditions regarding marital property

- By Navajo tradition, at the time of marriage the husband will normally move in with the wife’s clan. Traditionally the father and any children live with the mother’s family, and children are said to “belong” to the mother’s clan. *Apache v. Republic Nat’l Life Ins. Co.*, 3 Nav. R. 250 (W.R. Dist. Ct. 1982).
B. Traditions views of divorce

1. Method of accomplishing divorce

- The Navajo term for divorce is *yoodeyá* or *tse háámaaz* (stone rolled away) as translated by the elderly witnesses means a permanent separation of a married couple. Each leaves the marital home and never cohabitate together again. The wife’s decision is considered law if she decides to separate from the husband and the husband has to respect and abide by her decision. The relatives of the couple become aware of the permanent separation and acknowledge that a divorce has occurred – *yoodeyá* or *tse háámaaz*. *In the Matter of the Estate of Lee*, 8 Nav. R. 820 (Ship. Dist. Ct. 2004).

- There was a custom that terminates a marriage by someone moving, the woman keeping the property when the move is made or the couple makes an equal division of the property before going their own ways. *In the Matter of the Estate of Lee*, 8 Nav. R. 820 (Ship. Dist. Ct. 2004).

- There is a Navajo custom of formally terminating a marriage by someone moving, the woman keeping the property when the move is made or the couple making an equal division of marital property before going their own ways. *Apache v. Republic Nat’l Life Ins. Co.*, 3 Nav. R. 250 (W.R. Dist. Ct. 1982).

- Among the people who follow the old laws, the divorce procedure is very simple; the man merely states as he walks out of the hogan: “*Tse-hah-maz* (Stone Rolls Out.”) He takes with him all the goods that were his before marriage. Any property accumulated during the union remains with his wife. *Apache v. Republic Nat’l Life Ins. Co.*, 3 Nav. R. 250 (W.R. Dist. Ct. 1982).

2. Change of residence


- Under the Navajo principle of *yo de yá*, a husband ended his marriage when he left his wife and home and openly entered into a new relationship and fathered a child with another woman with whom he resided until his own passing. There can be no greater evidence that the husband made it known to his wife and to the general public that he chose to end his marriage. *Hall v. Watson*, No. SC-CV-52-07, slip op. (Nav. Sup. Ct. February 24, 2009).

- When there is a divorce and the couple is living with the wife’s family, the husband simply returns to his own mother’s unit. *Apache v. Republic Nat’l Life Ins. Co.*, 3 Nav. R. 250 (W.R. Dist. Ct. 1982).

- If the divorce takes place at the residence area of the husband, then the wife and children go to her mother’s unit and the husband remains. *Apache v. Republic Nat’l Life Ins. Co.*, 3 Nav. R. 250 (W.R. Dist. Ct. 1982).

- When divorce occurs between a couple living matrilocally the husband returns to his mother’s unit, and the wife and children remain. The same is true in the leadership generation, although divorce is uncommon at the leadership level. When the divorce occurs in patrilocal residence, the wife and the children return to the mother’s unit. The husband of course remains. *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

3. Division of property

- If the marriage does not survive, customary law directs the man to leave with his personal possessions (including his horse and riding gear, clothes, and religious items) and the rest of the
marital property stays with the wife and children at their residence for their support and maintenance. Whatever gains the marital property generates goes to support the wife and children and to a lesser extent the wife’s close relatives. This longstanding customary law is akin to modern spousal maintenance. Naize v. Naize, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).

- Under Navajo custom the woman can simply keep the property of the marriage and send the man to his own family, taking only his own property acquired before the marriage. Apache v. Republic Nat’l Life Ins. Co., 3 Nav. R. 250 (W.R. Dist. Ct. 1982).
- Another traditional method of divorce was counseling by the wife’s father and, when it appeared there could be no reconciliation, the couple would “split the blanket,” dividing equally the goods they acquired during the marriage. Therefore it would appear that in the absence of an agreement, the wife would take all. Apache v. Republic Nat’l Life Ins. Co., 3 Nav. R. 250 (W.R. Dist. Ct. 1982).

4. Importance of finality

- There was a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally breaking ties so the community can soon return to normal which is common sense. In the Matter of the Estate of Lee, 8 Nav. R. 820 (Ship. Dist. Ct. 2004).
- To permit a former spouse to keep such ties that she or he may be said to be lurking behind the hogan waiting to take a portion of the corn harvest is unthinkable, since each spouse returns to his or her own family after the divorce. Each former spouse should return home after making the break and disturb one another no more. In the Matter of the Estate of Lee, 8 Nav. R. 820 (Ship. Dist. Ct. 2004).
- There was a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally breaking ties so the community can soon return to normal which is common sense. Apache v. Republic Nat’l Life Ins. Co., 3 Nav. R. 250 (W.R. Dist. Ct. 1982).
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5. Importance of quickly restoring harmony

- Navajo custom requires that harmony in the community be restored by quickly and finally breaking ties so the community can soon return to normal. To allow a former husband to challenge the fact that there was no longer a marriage where he had moved out and fathered a child with another woman would be nonsensical. The former husband cannot have it both ways. The Family Court was correct in not allowing the former husband to lurk “behind the hogan waiting to take a portion of the corn harvest.” Hall v. Watson, No. SC-CV-52-07, slip op. (Nav. Sup. Ct. February 24, 2009).
- Harmony in the community and in the lives of the divorced spouses should be restored quickly following a divorce. Naize v. Naize, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).
C. Role of women

- Traditionally, women are central to the home and land base. They are the vein of the clan line. The clan line typically maintains a land base upon which the clan lives, uses the land for grazing and agricultural purposes and maintains the land for medicinal and ceremonial purposes. Riggs v. Estate of Attakai, No. SC-CV-39-04, slip op. (Nav. Sup. Ct. June 13, 2007).
- The crucial role of women is expressed in the principles established by White Shell Woman and are commonly referred to as Yoolgaii Asdzáán Bi Beehazáanii. These principles include Iliná Yësdáhí (a position generally encompassing life; heading the household and providing home care, food, clothing, as well as child bearing, raising, and teaching), Yódi Yësdáhí, (a position encompassing and being a provider of, a caretaker of, and receiver of materials things such as jewelry and rugs), Nitl’iz Yësdáhí (a position encompassing and being a provider of and a caretaker of mineral goodness for protection), and Tsodizin Yësdáhí (a position encompassing spirituality and prayer). Riggs v. Estate of Attakai, No. SC-CV-39-04, slip op. (Nav. Sup. Ct. June 13, 2007).
- This is why the women are attached to both the land base and the grazing permits. For the most part, Navajos maintain and carry on the custom that the maternal clan maintains traditional grazing and farming areas. Riggs v. Estate of Attakai, No. SC-CV-39-04, slip op. (Nav. Sup. Ct. June 13, 2007).
- Because they are keepers of the clan line and land base, Navajo women are often the most logical persons to receive land use rights to hold in trust for the family. They are also the ones who are burdened with putting the land base to its most beneficial use by managing the herd and the land upon which the herd graze for the benefit of the clan group. This means that keepers have to balance the number of sheep units with the size of the land base, making sure the land base remains compatible, sustainable and feasible for sufficient continued beneficial use. Riggs v. Estate of Attakai, No. SC-CV-39-04, slip op. (Nav. Sup. Ct. June 13, 2007).
- As his primary custodian, the mother should be concerned about providing child with an ongoing relationship with as many members of his family (paternal and maternal) as possible. In the Matter of S.R.E., 8 Nav. R. 869 (W.R. Fam. Ct. 2005).
- Navajo society is matrilineal and matrilocal. Navajo Nation v. Murphy, 6 Nav. R. 10 (Nav. Sup. Ct. 1988).
- Navajo tradition and culture have always revered the role of Navajo women within Navajo society. Navajo Nation v. Murphy, 6 Nav. R. 10 (Nav. Sup. Ct. 1988).

D. Importance of clan

1. General statements regarding the importance of clan

- Navajos do not put the same emphasis on the nuclear family as do the states. While the basic family of unit of mother, father and children are the foundation and center of Navajo life, children are also given a great deal of care and support by an extended network of relatives. Moreover, children understand this relationship of extended relatives, and this early relationship cements their future as adults with having a large network of blood relatives and clan relatives upon whom they can rely. This is something that Navajo children “inherit” as part of being raised in a Navajo tradition of many relatives who may assume the role of parent. In the Matter of A.M.C., 8 Nav. R. 874 (Chin. Fam. Ct. 2005).
• In the Navajo language, and throughout Diné biʼiʼool’iįįl (the Diné Life Way), we understand the importance and complexities of family and clan relationships, and the bonds between children and parents and community. In the Matter of S.R.E., 8 Nav. R. 869 (W.R. Fam. Ct. 2005).

• Traditional Navajo custom emphasizes the mother’s clan in rearing children in the absence of the mother. However, this is done in consultation and agreement with the natural father of the children. This is true even if the father is not Navajo. In the Matter of the Guardianship of J.N.T., 8 Nav. R. 829 (Chin. Fam. Ct. 2005).

• Family relationships are very important for the Navajo. For Navajos, unlike the basic nuclear family prevalent in most of America, the primary family is not only the children and parents, but it is all relatives who can also serve as parents in some respects and act together as one large, extended family. In the Matter of Custody of A.M.C., 8 Nav. R. 825 (Chin. Fam. Ct. 2004).


2. Clan as legal institution

• The Navajo law builds on relationships. It works because of them. The people’s conduct is guided by family and clan relationships. Therefore a clan is a legal institution. Ben v. Burbank, 7 Nav. R. 222 (Nav. Sup. Ct. 1996).

3. General descriptions of clan

• Navajo common law on the family extends beyond the nuclear family to the child's grandparents, uncles, aunts, cousins and the clan relationships. This is inherent in the Navajo doctrine of ak’ei (kinship). In the Matter of A.M.C., 8 Nav. R. 874 (Chin. Fam. Ct. 2005).

• Relatives are important to the Navajo child. One noted writer has said of that relationship: “The importance of his relatives to the Navaho (sic) can scarcely be exaggerated. The worst that one may say of another person is, ‘He acts as if he didn’t have any relatives.’ Conversely, the ideal of behavior often enunciated by headmen is, ‘Act as if nobody were related to you.’” Thus the Navajo child fits into an atmosphere of family and relatives. In the Matter of A.M.C., 8 Nav. R. 874 (Chin. Fam. Ct. 2005).

• Not only is marriage important in Navajo common law, but relatives and relationships are as well. Navajos think of such relationships (kinship) in a much broader and different sense than does the general American population. There is the biological family, with husband, wife and unmarried children; the extended family, which adds married daughters and their husbands as well as unmarried children, the outfit, with mixes of extended or biological families; the clan, with relationships which are not restricted to biological connections; and linked clans, with relationships among clans. In the Matter of A.M.C., 8 Nav. R. 874 (Chin. Fam. Ct. 2005).

• Navajos expect this extended family network for all their children operating for them as closely as the basic nuclear family, and make little separation between it and the nuclear family. It is in the best interests of the children that they maintain relationships with the relatives of their mother, who if they follow traditional Navajo custom, do not consider themselves any less a parent to their nieces and nephews as did their mother. By developing such relationships the children can have the opportunity to establishing close ties to their blood and clan relatives, which can sustain them for their whole lives. In the Matter of A.M.C., 8 Nav. R. 874 (Chin. Fam. Ct. 2005).
• Navajo common law on the family extends beyond the nuclear family to the children’s grandparents, uncles, aunts, cousins and the clan relationships. This is inherent in the Navajo doctrine of ak’ei (kinship). *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

• The importance of his relatives to the Navaho (sic) can scarcely be exaggerated. The worst that one may say of another person is, “He acts as if he didn’t have any relatives.” Conversely, the ideal of behavior often enunciated by headmen is, “Act as if nobody were related to you.” *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

• Navajos think of kinship in a much broader and different sense than does the general American population. There is the biological family, with husband, wife and unmarried children the extended family, which adds married daughters and their husbands, as well as unmarried children; the outfit, with mixes of extended or biological families; the clan, with relationships which are not restricted to biological connections; and linked clans, with relationships among clans. *A.P.S. v. O.N.L.R.*, 6 Nav. R. 246 (Nav. Sup. Ct. 1990).

• The Navajo live together in family groups which can include parents, children, grandparents, brothers and sisters. Some call these family and clan members living together a “residence group” and some call them a “camp.” *Estate of Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).


• The Navajo clan system is very important, with a child being of the mother’s clan and “born for” the father’s clan. *Matter of Estate of Apachee*, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).

• Traditionally the father and child lived with the mother’s family, and the child was said to “belong” to the mother’s clan. When a visitor came, the small children would stay close to their mother. While the child belonged to the mother’s clan, it was said to be “born for” the father, and a child might say “I am Bitter-Water, born for Salt.” *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

• The Supreme Court takes judicial notice of the fact that in Navajo culture and tradition children are not just the children of the parents but they are children of the clan. In particular children are considered members of the mother’s clan. *Goldtooth v. Goldtooth*, 3 Nav. R. 223 (Dist. Ct. 1982).

• Children are to be taken care of and that obligation does not simply belong to the child’s parents. Navajo people have very strong family ties and clan-ties. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

• In Navajo Common Law a child is said to be born for his father’s clan and a member of his mother’s clan. This means that the child is an integral part of a functioning self-reinforcing and protecting group. Anglo-European law is primarily concerned with immediate parent and child relationship while Navajo Law is concerned with the relationship of a child to a group which shares the expectation that its members will take care of each other’s children. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

4. **Clan as economic unit**

• The clan system is very important with a child being of the mother’s clan and “born for” the father’s clan. The family as an economic unit is vital. *Estate of Thomas*, 6 Nav. R. 51 (Nav. Sup. Ct. 1988).

• The clan is important, and the family as an economic unit is vital. The Navajo live together in family groups which can include parents, children, grandparents, brothers and sisters, and all the members of the family group have important duties to each other. These duties are based on the
need to survive and upon very important religious values which command each to support each other and the group. Some call these family and clan members living together a “residence group,” and some call them a “camp.” Matter of Estate of Apachee, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).

- Groups of Navajo who are related by blood or clan will live together for mutual protection and the common good, and the important point is that there is a difference in the distribution of property, depending upon whether it is an essential piece of property for the maintenance of the camp. Matter of Estate of Apachee, 4 Nav. R. 178 (W.R. Dist. Ct. 1983).

E. Importance of caring for family members

1. Duty of supporting children

- Pursuant to Diné Bi Beñahaz’áanii, parents should be supportive of their children’s efforts to find a place to live independently. Williams v. Lee, 8 Nav. R. 783 (W.R. Dist. Ct. 2003).
- To denounce a child’s efforts to be independent defeats the traditional teaching that it is incumbent upon each individual to become self-sufficient. To achieve self-sufficiency, an individual, on their initiative, must go and put forth the effort to establish a foundation of life. A starting point for self-sufficiency is for an individual to wean themselves from their dependence on their parents. Building one’s home or securing employment are examples of that effort. It is the planting of a seed to establish life and stability of an individual. Williams v. Lee, 8 Nav. R. 783 (W.R. Dist. Ct. 2003).
- Under the customary law of the Navajo people, a father owes his child, or at least the mother, the duty of support. Leuppe v. Wallace, 8 Nav. R. 274 (Nav. Sup. Ct. 2003).
- One who does not provide for a child has “hid behind the hogan waiting for the corn crop to be harvested when he did nothing to help grow that crop.” In the Matter of the Estate of Tsinahnajinnie, 8 Nav. R. 69 (Nav. Sup. Ct. 2001).
- Every parent is obligated to support his or her offspring. Burbank v. Clarke, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).
- Allowing the father to avoid his obligation to his child due to a non-prejudicial, procedural error is contrary to the common law of the Navajo People. Yazzie v. Yazzie, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).
- A father’s absolute obligation under Navajo tradition is to provide support for his children. Alonzo v. Martine, 6 Nav. R. 395 (Nav. Sup. Ct. 1991).
- Navajo custom also requires each parent to contribute his or her reasonable share toward the child’s support, according to each parent’s income and resources. Descheenie v. Mariano, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).
- A father has an absolute obligation under Navajo tradition to provide support for his children. Notah v. Francis, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).
- It is plain under the customary law of the Navajo People that a father of a child owes that child, or at least the mother, the duty of support. Tom v. Tom, 4 Nav. R. 12 (Nav. Ct. App. 1983).

2. “Stealing the child”

- A Navajo maxim states that one who does not provide for their child has “just stole the child.” Similarly, such a person does not have a claim for wrongful death of the child. In the Matter of the Estate of Tsinahnajinnie, 8 Nav. R. 69 (Nav. Sup. Ct. 2001).
• It is plain under the customary law of the Navajo People that a father of a child owes that child, or at least the mother, the duty of support. It is said that if a man has a child by a woman and fails to pay the woman money to support it, “He has stolen the child.” In other words, the man who receives the benefit and joy of having a child is a thief if he does not share in the worldly burdens of taking care of it. This Navajo custom lays out the ground rule for support, and the conclusion to be drawn from the principle is that a man must pay as much as is necessary for the child, given his abilities and resources at any given time. Alonzo v. Martine, 6 Nav. R. 395 (Nav. Sup. Ct. 1991).

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3. Obligation of natural and spiritual law

• A parent who brings a child into the world has a duty imposed by natural and spiritual law to provide for the child’s needs until the child is capable of self-support. The law also helps to turn the Navajo concept of ‘iina (“life - past, present, and future”) into practical experience. Children are viewed as the future, ensuring the existence and survival of the Navajo people in perpetuity. Burbank v. Clarke, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).

• The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect right to receiving maintenance from the parents. Tom v. Tom, 4 Nav. R. 12 (Nav. Ct. App. 1983).

4. Must pay as much as is necessary, given abilities and resources

• A man must pay as much as is necessary for the child, given his abilities and resources at any given time. Notah v. Francis, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).

• This Navajo custom lays out the ground rule for support, and the conclusion to be drawn from the principle is that a man must pay as much as is necessary for the child, given his abilities and resources at any given time. Tom v. Tom, 4 Nav. R. 12 (Nav. Ct. App. 1983).

5. Duty of supporting family

• Navajo common law strongly supports the role of families in meeting the needs of family members. Begay v. Navajo Election Admin., 8 Nav. R. 241 (Nav. Sup. Ct. 2002).

• The importance of his relatives to the Navajo can scarcely be exaggerated. The worst that one may say of another person is, “He acts as if he didn’t have any relatives.” Conversely, the ideal of behavior often enunciated by headmen is, “Act as if nobody were related to you.” Ben v. Burbank, 7 Nav. R. 222 (Nav. Sup. Ct. 1996).
• The importance of his relatives to the Navajo can scarcely be exaggerated. The worst that one may say of another person is, “He acts as if he didn't have any relatives.” Conversely, the ideal of behavior often enunciated by headmen is, “Act as if nobody were related to you.” *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

• The importance of his relatives to the Navajo can scarcely be exaggerated. The worst that one may say of another person is, “He acts as if he didn't have any relatives.” Conversely, the ideal of behavior often enunciated by headmen is, “Act as if nobody were related to you.” *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

• Traditionally, the responsibility for a family whose male spouse either has deserted or is deceased falls upon the family of the female spouse. *Johnson v. Johnson*, 3 Nav. R. 9 (Nav. Ct. App. 1980).

6. Duty of assuming leadership after death of spouse

• After the passing of a spouse, Navajo custom dictates that the surviving spouse must assume the lead responsibility in the family decision-making, and is to be recognized as the head authoritative figure of the family. *Williams v. Lee*, 8 Nav. R. 783 (W.R. Dist. Ct. 2003).

F. Importance of children in Navajo culture

1. Scope of parent/child relationship


2. Precious above all else

• Children are a unique group of people in Navajo cultural thinking. They are precious above all else, and are a blessing to Navajo people. *In the Matter of H.M.*, 8 Nav. R. 572 (Nav. Sup. Ct. 2004).

• Children are viewed as the future, ensuring the existence and survival of the Navajo people in perpetuity. *Burbank v. Clarke*, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).

• The lesson regarding the importance of children comes from a chapter in Navajo history called ‘alnaashii jidezdaal (“separation of the sexes”). Due to certain misdeeds of those in authority, the males and females of the tribe separated and took up residence on opposite sides of a wide, swift flowing river. After four years of separation, the wise men of the tribe reunited the genders after explaining that without propagation, the tribe would surely become extinct. *Burbank v. Clarke*, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).

• There is no resource more vital to the continued existence and integrity of the Navajo Nation than its children. Consequently, Navajo courts have a special duty to ensure their protection and well-being. *Matter of Custody of S.R.T.*, 6 Nav. R. 407 (Nav. Sup. Ct. 1991).


• Children are central to the Navajo family and clan, and in the event of family breakup, it is a Navajo court’s duty to fully provide for the needs of the children, utilizing all available resources of their parents. *Alonzo v. Martine*, 6 Nav. R. 395 (Nav. Sup. Ct. 1991).
• Navajo children are the Navajo people’s future, and they must have support to take their equal places in the overall Navajo society. *Alonzo v. Martine*, 6 Nav. R. 395 (Nav. Sup. Ct. 1991).
• The most precious resource of the Navajo Nation is its children. *Navajo Nation v. O’Hare*, 5 Nav. R. 121 (Nav. Sup. Ct. 1987).
• Children are highly valued in Navajo families. Parents depend on their children. They are resourceful in terms of future financial support and education. Youth should have full life to gain money, property and good life. *Benally v. Navajo Nation*, 5 Nav. R. 209 (W.R. Dist. Ct. 1986).

3. **Protected like adults**

- Due to their importance in Navajo society, children’s rights are protected like the rights of adults. *In the Matter of H.M.*, 8 Nav. R. 572 (Nav. Sup. Ct. 2004).
- A parent or guardian protects his or her child’s rights because he or she is responsible for that child. Because there is such a strong sense within Navajo society of children being precious, their rights are customarily protected to the same extent as are the rights of adults. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).

4. **Not allowed to take part in serious discussions**

- Navajo children are not allowed to take part in any serious discussions; not because they have nothing to contribute, but because they have not developed the maturity needed to discuss serious matters. *In the Matter of the Custody of T.M.*, 8 Nav. R. 78 (Nav. Sup. Ct. 2001).
- You are blessed if you have children, regardless if one begins to drift away from the home and family. When Navajo children are in the eye of the public, they are not allowed to take part in any serious discussions; not because they have nothing to contribute, but because they have not developed the maturity needed to discuss serious matters. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).

5. **Must not be mistreated**

- One of the most important societal values included in the natural Navajo feeling is the attitude towards children. Children are highly valued and wanted. The basis for the Navajo life ethics was that the original parents of the first human infant pronounced a death penalty on any creator or being that mistreated the first child. This act or behavior would devalue or humiliate the supernaturals with whom the first human baby was identified. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

6. **Children must know who their ancestors are**

- Navajo child, regardless of blood quantum, skin color or where she blends in, has a right to know her origins. Because she is a minor, that right must e ensured by giving notice to *bimá bighandę́ę́ dabik’éi’ígii* (the minor child’s maternal relatives). It is incumbent on the Navajo Nation to make
• Children must know their father’s clan to avoid incestuous relationships when they come of age. Navajo children are “born for” their father’s clan. Children are owed obligations by their father’s clan, and have obligations to it. Children are the fabric of a clan. Thus, the clan members want to know their children and have a right to know under Navajo common law. *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

• A family cannot achieve stability unless the children know who their father is. *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

• Under the Navajo doctrine of *ak’ei*, the grandparents, other extended family members and the clan relations have a right to know the biological heritage of a child. *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

• The Navajo maxim is this: “It must be known precisely from where one has originated.” *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

• The maxim focuses on the identity of a person (here the child) and his or her place in the world, and is a crucial component of the tenet of family cohesion. *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

• Knowing one’s point of origination (meaning the parents) is extremely important to the Navajo People, because only then will a person know which *adoone’e* (clan) and *dine’e* (people) the person is. *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

• Those precepts are essential to a Navajo’s identity and must be known for Navajo religious ceremonies. One must know them to seek *hózhó* (harmony and peace). When applied to a child, they are necessary for the child’s emotional, physical, and spiritual well-being. Thus, under Navajo common law, the child’s best interests require that the father be determined with reasonable certainty. *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

7. **Traditional view of adoption**

• Orphans of Navajo families or children of large families or broken homes are adopted by other family members or a family member of the same clan as the child. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

• Navajo adoption is based on need, mutual love and help. Children may or may not change the surname. Either way the family is a unit with strong, supportive, extended family and clan ties. It has worked for hundreds of years without adoption agencies and courts of law. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

• Adoption is merely a case of taking the children into the home for a limited time, or permanently, by extending family or parental agreement, depending on the circumstances. The child is raised and treated as one’s own. Grandparents are sometimes the ones to take in and raise the young children belonging by birth to their own deceased or unwed children or other related family members. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

• There is an obligation in family members, usually aunts or grandparents or a family member, who are best suited to assist the child to support and assist children in need by taking care of them for such periods of time as are necessary under the circumstances, or permanently in the case of a permanent tragedy effecting the parents. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

• Upon the inability of the parents to assist a child or following the occurrence of a family tragedy, children are adopted by family members for care which may be temporary or permanent,

G. Interpretation of Children’s Code

1. Children’s Code interpreted consistent with Diné bi beenahaz’áanii


2. Children’s Code’s purpose is to restore family unity

- The primary stated purpose of the Navajo Nation’s Children’s Code is to preserve and restore the unity of the family whenever possible. In the Matter of the Minor Child, M.M.Y., 8 Nav. R. 808 (Crwn. Fam. Ct. 2004).

H. Importance of family cohesion

- Family cohesion under Navajo common law means there is a father, a mother and children. They comprise the complete initial family unit and are protected as such inside and outside the blessed home (hooghan) by the Holy People. The eternal fire burning in the center of the hogan is testament that the family is central to Navajo culture and will remain so in perpetuity. Davis v. Means, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

- The family is the core of Navajo society. Thus, family cohesion is a fundamental tenet of the Navajo People. It is Navajo customary law – Dine Bi Beehaz’aanii – or Navajo common law. Davis v. Means, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

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- The eternal fire burning in the center of the hogan is testament that the family is central to Navajo culture and will remain so in perpetuity. Davis v. Means, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

III. Jurisdiction

A. Exclusive jurisdiction over domestic relations on Navajo Nation

- The Family Courts of the Navajo Nation have original exclusive jurisdiction over all cases involving domestic relations, probate, adoption, paternity, custody, child support, guardianship and all matters arising under the Navajo Nation Children's Code. In the Matter of A.M.C., 8 Nav. R. 874 (Chin. Fam. Ct. 2005).

- The Family Courts of the Navajo Nation shall have original exclusive jurisdiction of all cases involving domestic relations, probate, adoption, paternity, custody, child support, guardianship, mental health commitments, mental and/or physical incompetence, name changes and all matters arising under the Children’s Code. Matter of Harvey and Begay, 6 Nav. R. 413 (Nav. Sup. Ct. 1991).
Because Navajo domestic relations are the core of the tribe’s “internal and social relations,” the Navajo Nation has exclusive power over domestic relations among Navajos living on the reservation. Billie v. Abbott, 6 Nav. R. 66 (Nav. Sup. Ct. 1988).

The Navajo Nation’s exclusive power to regulate domestic relations among Navajos living within its borders is beyond doubt. The Navajo Nation has codified law and case law regulating Navajo domestic relations. Billie v. Abbott, 6 Nav. R. 66 (Nav. Sup. Ct. 1988).

Only Navajo courts using Navajo law can decide a Navajo person’s child support obligation. Only Navajo courts can be used to collect past-due support owed by Navajos living on the Navajo Reservation. Navajo self-government mandates it. Billie v. Abbott, 6 Nav. R. 66 (Nav. Sup. Ct. 1988).

Under the Navajo Children’s Code, if any of the factors (residence, domicile, ward of the court) in 9 N.N.C. § 1055(D) is proven by a preponderance of the evidence, then the Family Court [f/k/a Children’s Court] has jurisdiction over the Navajo child, even where the alleged conduct giving rise to the petition occurred outside the exterior boundaries of the Navajo Indian Reservation. In re A.O., 5 Nav. R. 285 (Ship. Fam. Ct. 1987).

The Family Court [f/k/a Children’s Court] has exclusive jurisdiction over any Navajo child who resides or is domiciled within the borders of Navajo Indian Country or who is a ward of the Family Court. In re A.O., 5 Nav. R. 285 (Ship. Fam. Ct. 1987).

In a dependent child case under the Navajo Nation Children’s Code, if any of the factors (residence, domicile, ward of court) in 9 N.N.C. § 1055(D) is proven by a preponderance of the evidence, then the Family Court [f/k/a Children’s Court] has jurisdiction over the Navajo child, even where the alleged conduct giving rise to the petition occurred outside the exterior boundaries of the Navajo Indian Reservation. Navajo Nation v. O’Hare, 5 Nav. R. 121 (Nav. Sup. Ct. 1987).


Matters of family relationships, including marriage and divorce are areas of concern to a sovereign government. It is universally recognized that sovereign nations have the right and authority to regulate marriage and divorce among those who reside within the territorial boundaries of the sovereign. Yazzie v. Yazzie, 5 Nav. R. 66 (Nav. Sup. Ct. 1985).

The status of marriage which has been brought within the Navajo Nation’s borders by one of the spouses may be terminated by the courts of the Navajo Nation, even though there is no jurisdiction to determine the incidents of marriage such as care and custody of the children, division of property, spousal support, etc. The domicile of the plaintiff or petitioner within the territorial boundaries is necessary to give the court jurisdiction of the status when there is no personal jurisdiction over the defendant/respondent. Yazzie v. Yazzie, 5 Nav. R. 66 (Nav. Sup. Ct. 1985).


The trial court of the Navajo Nation has original jurisdiction over all cases involving the domestic relation of Indians, such as divorces, or adoption matters. Matter of Interest of J.J.S., 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

Navajo courts have jurisdiction over all cases involving the domestic relations of Indians, such as divorce and adoption matters. Matter of Adoption of S.C.M., 4 Nav. R. 167 (W.R. Dist. Ct. 1983).


Navajo courts have exclusive jurisdiction over divorce matters arising between members of the Navajo Tribe living on the Navajo Nation. Arviso v. Dahoya, 3 Nav. R. 84 (Nav. Ct. App. 1982).

The trial court of the Navajo Tribe has original jurisdiction over all cases involving domestic relations. Johnson v. Johnson, 3 Nav. R. 9 (Nav. Ct. App. 1980).
B. Exclusive jurisdiction over resident Navajo children

- The Family Court will have exclusive original jurisdiction of proceedings to determine custody of or to appoint a custodian or guardian for a child. In the Matter of A.M.C., 8 Nav. R. 874 (Chin. Fam. Ct. 2005).
- Family Court [f/k/a Children’s Court] shall have exclusive jurisdiction over any Navajo child who resides or is domiciled within the borders of Navajo Indian country. Matter of Custody of S.R.T., 6 Nav. R. 407 (Nav. Sup. Ct. 1991).
- The Family Court [f/k/a Children’s Court] has exclusive jurisdiction over any Navajo child who resides or is domiciled within the borders of Navajo Indian Country, or who is a ward of the Family Court. Navajo Nation v. O’Hare, 5 Nav. R. 121 (Nav. Sup. Ct. 1987).
- Navajo Nation has power to exercise judicial jurisdiction to determine the custody of the person of the child (a) who is domiciled on the Navajo Nation, or (b) who is present on the Navajo Nation, or (c) who is neither domiciled nor present on the Navajo Nation, if the controversy is between two or more persons who are personally subject to the jurisdiction of the Navajo Nation. Matter of Custody of B.N.P., 4 Nav. R. 155 (W.R. Dist. Ct. 1983).
- If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a *sin qua non* to the preservation of its identity. Matter of Custody of B.N.P., 4 Nav. R. 155 (W.R. Dist. Ct. 1983).
- Except as otherwise provided by Navajo Tribal Council, the Family Courts [f/k/a Juvenile Courts] shall have original jurisdiction of all persons within the territorial jurisdiction of the Tribe: (1) Concerning any child who is alleged to have violated any Federal, Tribal, state, or local law or municipal ordinance, regardless of where the violation occurred. (2) Concerning any child: (A) who is neglected or dependent child, as defined in 9 N.N.C. § 1002; or (B) who is beyond control of his parent, custodian, or school authorities. (3) To determine the custody of any child or appoint a guardian of the person of any child who comes within the purview of the court’s jurisdiction under other provisions of the Navajo Children’s Code. (4) To determine the legal parent-child relationship, including termination of residual parental rights and duties, as to a child who comes within the purview of the court’s jurisdiction under other provisions of the Navajo Children’s Code. (5) For judicial consent to the marriage, employment or enlistment of a child in the armed forces, and to emergency medical or surgical treatment of a child who comes within the purview of the court’s jurisdiction under other provisions of the Navajo Children’s Code. (6) For the treatment or commitment of a mentally defective or mentally ill child who comes within the purview of the court’s jurisdiction under the Navajo Children’s Code. Notah v. Notah, 2 Nav. R. 107 (W.R. Dist. Ct. 1979). Note: this holding is presented in strikeout format because it summarizes the provisions of 9 N.N.C. § 1053 which has been modified and renumbered as 9 N.N.C. § 1055. Reference should be made to the current version of the statute.

C. Jurisdiction over non-resident Navajo children

- Under the plain language of the Children’s Code, Navajo Courts have jurisdiction to decide custody of Navajo children regardless of residency within the Nation. Miles v. Chinle Family Court, No. SC-CV-04-08, slip op. (Nav. Sup. Ct. February 21, 2008).
- The Family Court may hear child custody matters involving Navajo children wherever they may arise. The Court may decline jurisdiction in appropriate circumstances where a forum with concurrent jurisdiction is exercising authority. 9 N.N.C. § 1055(D). Miles v. Chinle Family Court, No. SC-CV-04-08, slip op. (Nav. Sup. Ct. February 21, 2008).
• Navajo courts have jurisdiction over child custody case where the child is a Navajo. Presence within the territory of the Navajo Nation is not necessary, and the residence of the parent is irrelevant. 

• A family court may not decline jurisdiction over a non-resident Navajo child except to defer to a state or other Indian tribe that has already invoked concurrent jurisdiction over the child. 

• The Family Court may hear child custody matters involving Navajo children wherever they may arise. 

D. Jurisdiction over non-Indians

• The Family Court shall have jurisdiction over non-Navajo child custody matters when the parties submit to the jurisdiction of the Court or when the best interests of the child require such an arrangement. 

• Delinquency jurisdiction over non-Indians, as long as detention is not allowed, is civil in nature, and therefore within the jurisdiction of our courts. 

• The Navajo Nation has civil jurisdiction to adjudicate non-Indian children in a delinquency proceeding for activity on tribal lands, as long as detention is not a possible disposition. 

• The Children’s Code does not prohibit jurisdiction over non-Indian children, but such jurisdiction is co-extensive with the Nation’s general authority, presumably as established by the Treaty and general principles of federal Indian law. 

E. Jurisdiction over non-Navaajo Indian children

• Courts of the Navajo Nation do have the authority to determine the custody of any Indian minor properly within the jurisdiction of the Navajo judicial system. Whether they should exercise this authority must be determined on a case-by-case analysis of the contacts with the Navajo Nation and any other Indian tribe. 

F. State court jurisdiction

• State district court lacked subject matter jurisdiction to issue a divorce decree relating to an enrolled resident member of the Navajo Nation. 

• Family Court may decline jurisdiction in appropriate circumstances where a forum with concurrent jurisdiction is exercising its authority. 

• Navajo statutes and case law reflect Navajo culture and the unique circumstances and needs of the Navajo people living on the reservation. State determinations of tribal domestic relations, no matter how narrow the intrusion, are always hostile to and in conflict with the needs of the Indian people. 

• There is clearly infringement upon Navajo self-government when a state official decides the child support payments of Navajos living on the reservation. 
• The Family Court [f/k/a Children’s Court] may decline jurisdiction in appropriate circumstances where a forum with concurrent jurisdiction is exercising its authority. In re A.O., 5 Nav. R. 285 (Ship. Fam. Ct. 1987).

• State court jurisdiction was proper where parties lived off reservation while married and filed divorce action within 90 day window before Tribal Court acquires jurisdiction. Frejo v. Barney, 3 Nav. R. 237 (W.R. Dist. Ct. 1982).

• State and Tribal court would have concurrent jurisdiction over child support and custody action where state court originally had jurisdiction but children had been subsequently relocated to Navajo Nation. Frejo v. Barney, 3 Nav. R. 237 (W.R. Dist. Ct. 1982).

• Motion to dismiss on jurisdiction grounds in favor of state forum would be denied because: (1) The parties and the children reside within the Navajo Nation; (2) The parties and the children are Navajo; (3) The children attend school on the Navajo Nation, making their teachers and counselors potential witnesses for the child custody issue; (4) Other potential witnesses with regard to child custody are located on the Navajo Nation, including Navajo Division of Social Welfare social workers, Public Health Service medical doctors and personnel, friends, and neighbors, co-workers, etc.; (5) The state has no authority to cause service of subpoenas upon members of the Navajo Tribe residing within the Navajo Nation (6) Social work reports with regard to the parties and children had already been submitted by the Navajo Division of Social Welfare, and it would not be in the best interests of the children to prolong the child custody dispute any further or cause a duplication of effort which has already been undertaken; (7) Trial court can make a speedy determination of the children’s best interests, in the context and environment of Navajo culture, thereby forwarding the policies of Navajo protection of its children, tribal self-determination with respect to its members and use of a forum closest to the parties in terms of contacts. Frejo v. Barney, 3 Nav. R. 237 (W.R. Dist. Ct. 1982).

G. Jurisdiction in specific situations

1. Allotted lands


2. Adoptions

• Navajo courts have subject matter jurisdiction over an adoption involving a petitioner who is a Navajo Indian and an Indian child. Matter of Adoption of S.C.M., 4 Nav. R. 167 (W.R. Dist. Ct. 1983).

• Navajo courts have personal jurisdiction over an adoptive parent who has submitted himself to the jurisdiction of this court, is a member of the Navajo Tribe and has a legal domicile within the Navajo Nation. Matter of Adoption of S.C.M., 4 Nav. R. 167 (W.R. Dist Ct. 1983).

• Navajo courts do not have personal jurisdiction over an adoptive child who has neither domicile nor residence within the Navajo Nation. Matter of Adoption of S.C.M., 4 Nav. R. 167 (W.R. Dist Ct. 1983).
3. **Jurisdiction procured by fraud**


H. **Determination of domicile**

- “Residence” means living in a place, establishing a home in that place, so that a person can claim certain rights as a legal resident or be subject to certain legal responsibilities or obligations. *In re A.O.*, 5 Nav. R. 285 (Ship. Fam. Ct. 1987).
- The requisites for residence of a child go beyond mere physical presence procured by the violation of an existing visitation right under the custody order of another jurisdiction. To conclude otherwise would be to encourage the type of forum shopping which has repeatedly been discouraged by the Courts of the Navajo Nation. *In re A.O.*, 5 Nav. R. 285 (Ship. Fam. Ct. 1987).
- The domicile of a child who is a ward of the Court is the location of that Court. *In re A.O.*, 5 Nav. R. 285 (Ship. Fam. Ct. 1987).
- Children who are domiciled or residing within Navajo Indian Country are wards of the court when they are voluntarily placed outside the Navajo Nation and the consent for placement is filed with the court. The ward status attaches when the child leaves Navajo jurisdiction. *In re A.O.*, 5 Nav. R. 285 (Ship. Fam. Ct. 1987).
- The general rule is that the domicile of the child in a situation where the child is born out of wedlock is that of the mother. *Matter of Adoption of S.C.M.*, 4 Nav. R. 167 (W.R. Dist. Ct. 1983).
- It is a rule that the child’s domicile is that of his father. *Matter of Custody of B.N.P.*, 4 Nav. R. 155 (W.R. Dist. Ct. 1983).
- Where children have always lived within Navajo Indian Country and the significant ties the children have are to the Navajo people, the Navajo Nation is the “home state” for the children in the legal sense. *Matter of Custody of B.N.P.*, 4 Nav. R. 155 (W.R. Dist. Ct. 1983).

IV. **Special proceedings relating to children**

A. **General**

1. **Navajo Nation role as protector of its children**

- Since mother and primary caregiver of Navajo children was a member of the Navajo Nation and died on the Navajo Nation, and since the Navajo Nation has an acute responsibility, expressed many times that its children are its most important resource, Family Court has a duty to see that the best interests of the children are secured. *In the Matter of A.M.C.*, 8 Nav. R. 874 (Chin. Fam. Ct. 2005).
- Family Court owes a duty to children as wards of this Court to make sure they receive proper care and protection. *In the Matter of A.M.C.*, 8 Nav. R. 874 (Chin. Fam. Ct. 2005).

• Each child under the jurisdiction of the Tribal Juvenile Court shall receive, preferably in his own home, the care, guidance, and control that is conducive to his welfare and the best interest of Tribe, the State and the United States; that family ties be preserved and strengthened whenever possible; and the peace and security of the community and of its individual citizens be safeguarded. *Frejo v. Barney*, 3 Nav. R. 237 (W.R. Dist. Ct. 1982).

• The Court has a duty to protect the child and ensure that there is adequate money for his upbringing. *Joe v. Joe*, 1 Nav. R. 320 (Nav. Ct. App. 1978).

2. Attorney conflict issues

• In children’s cases the representation of both a child and a custodial party by an attorney is specifically disapproved. *N.N. ex rel. Div. of Soc. Welfare in interest of Two Minor Children*, 4 Nav. R. 57 (Nav. Ct. App. 1983).

• In a situation such as this, the question is whether people in such a situation have standing, i.e. the right to assert rights before the courts. The rights of children are normally represented by parents or guardians, and those rights are asserted by the appointment of someone to represent the children’s interests, preferably including independent counsel to act on their behalf. *N.N. ex rel. Div. of Soc. Welfare in interest of Two Minor Children*, 4 Nav. R. 57 (Nav. Ct. App. 1983).

3. Interests of the children

• Children, not foster parents, have standing to attack the custody order. The interests of the children must be represented through either a proper application to act as their independent guardians or the appointment of counsel on their behalf. *N.N. ex rel. Div. of Soc. Welfare in interest of Two Minor Children*, 4 Nav. R. 57 (Nav. Ct. App. 1983).

4. Protection of civil rights


• It is clear that an accused child must be informed of the nature and cause of accusation against him in the same manner and to the same extent as an adult criminal defendant, if not more so. *Matter of Lewis*, 6 Nav. R. 560 (W.R. Fam. Ct. 1991).

• It is shameful, irresponsible and highly unprofessional for any adoption decree or custody judgment to be entered without making certain that each and every due process or statutory requirement is completely fulfilled. *N.N. ex rel. Div. of Soc. Welfare in interest of Two Minor Children*, 4 Nav. R. 57 (Nav. Ct. App. 1983).

• Whenever there is to be a change in the custodial arrangements of a child before the courts, due process requires that there be a hearing. The child’s rights to due process also require that his or her interests be adequately protected. *N.N. ex rel. Div. of Soc. Welfare in interest of Two Minor Children*, 4 Nav. R. 57 (Nav. Ct. App. 1983).
B. Dependency proceedings

- 9 N.N.C.§ 1002(O)(2) requires a finding that the child is without parental care and control or whose subsistence, education, medical or other care or control necessary for his or her well-being is inadequate because of the faults or habits of his parents, guardian or custodian or their neglect or refusal, when able to do so, to provide them. *Baldwin v. Chinle Fam. Ct.*, No. SC-CV-37-08, slip op. (Nav. Sup. Ct. October 30, 2008).

- While Title 9 generally, and 9 N.N.C. § 1002 specifically, enumerates factors to be considered for determining dependency, the Court holds that there are instances when certain traditional concepts are so core to basic values of Navajo tradition, culture and family values that broader considerations beyond the statute are required. The Navajo concept of *k’é* is such a core value. *Baldwin v. Chinle Fam. Ct.*, No. SC-CV-37-08, slip op. (Nav. Sup. Ct. October 30, 2008).

- Family Court’s failure to specify in its findings how a parent’s disclosure of a past diagnosis of a mental health condition should cause the child to be deemed to lack proper parental care and control or to meet any of the conditions listed by 9 N.N.C. § 1002(O)(2) is clearly erroneous and must be overturned. *Baldwin v. Chinle Fam. Ct.*, No. SC-CV-37-08, slip op. (Nav. Sup. Ct. October 30, 2008).


- In dispositional hearings, the court shall give priority to placement of the child with the closest relative who is found qualified to receive and care for the child by the Court after investigation by the Court Counselor or an agency designated by the Court. *In the Matter of the Minor Child, M.M.Y.*, 8 Nav. R. 808 (Crwn. Fam. Ct. 2004).

- The practice of bringing actions to protect dependent and neglected children in the name of the Navajo Nation is specifically approved, since the Navajo Nation is the protector of its children. *N.N. ex rel. Div. of Soc. Welfare in interest of Two Minor Children*, 4 Nav. R. 57 (Nav. Ct. App. 1983).

C. Delinquency proceedings

1. Issues presented in delinquency cases


- Release and dismissal are especially important in juvenile cases, as the explicit restrictions in the Children’s Code reflect that children are not fully emotionally mature and that children experience a gamut of emotions while in custody that can lead to violent acts on themselves and others. *Matter of L.R. v. Greeyes*, No. SC-CV-39-07, slip op. (Nav. Sup. Ct. November 21, 2007).
2. Procedural issues

a) Filing the petition

- Proceedings in children’s cases are commenced by a petition. However, any person may, and any peace officer shall, give the court any information in his possession that a person is or appears to be a child within the jurisdiction of the court. *N. N. ex rel. Div. of Soc. Welfare in interest of Two Minor Children*, 4 Nav. R. 57 (Nav. Ct. App. 1983).

b) Time for filing petition

- A petition alleging delinquency shall be dismissed with prejudice if it was not filed within 30 days from the date the petition is referred to the presenting officer. *Matter of L. R. v. Greyeyes*, No. SC-CV-39-07, slip op. (Nav. Sup. Ct. November 21, 2007).
- A juvenile has been illegally detained when the petition was filed 31 days after a referral because the Children’s Code requires dismissal with prejudice if it is not filed within 30 days from the date of referral. *Matter of L. R. v. Greyeyes*, No. SC-CV-39-07, slip op. (Nav. Sup. Ct. November 21, 2007).
- Where a child has been taken into custody, a petition shall be filed with the Court within 48 hours and if not filed within the stated time, the child shall be released. *Matter of L. R. v. Greyeyes*, No. SC-CV-39-07, slip op. (Nav. Sup. Ct. November 21, 2007).
- Juvenile was illegally detained when the child was taken into custody and not released, where the Children’s Code required a petition to be filed within 48 hours, and mandated release if petition was not filed within that stated time. *Matter of L. R. v. Greyeyes*, No. SC-CV-39-07, slip op. (Nav. Sup. Ct. November 21, 2007).

c) Time for holding hearing

- The police, Social Services, and the courts must strictly comply with the procedures in the Children's Code to take children into custody and keep them detained pending disposition of juvenile cases. *In the Matter of H. M.*, 8 Nav. R. 572 (Nav. Sup. Ct. 2004).
- The court shall hold a detention hearing within twenty-four hours of the filing of the petition to determine whether continued detention is required. The court must give written notification of the detention hearing to the child’s parents, guardian or custodian. If the petition alleges that the child is a delinquent child or in need of supervision, the court must also give notice to the child himself. *Matter of A. W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).
- A preliminary hearing must be held in a juvenile proceeding of delinquency within 10 days after a petition is filed if the child is in detention. *Matter of A. W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).
d) Issues considered

- Release and dismissal are especially important in juvenile cases, as the explicit restrictions in the Children's Code reflect that children are not fully emotionally mature and that children experience a gamut of emotions while in custody that can lead to violent acts on themselves and others. *Matter of L.R. v. Greyeyes*, No. SC-CV-39-07, slip op. (Nav. Sup. Ct. November 21, 2007).

3. Remedies

a) General

- Family courts look to Title 17 to define the elements of an offense a minor commits to be adjudicated delinquent. Adult offenders are punished according to the sentencing provisions in Title 17. Many of the sentencing provisions for specific offenses do not authorize jail time. However, once a minor is adjudicated a delinquent, the Children’s Code gives a family court judge several different options. *Matter of N.B.*, No. SC-CV-03-08, slip op. (Nav. Sup. Ct. April 16, 2008).
- In child delinquency proceedings, the Family Court is authorized to implement any disposition that is authorized for the disposition of a dependent. 9 N.N.C. § 1152(A)(1). *Matter of N.B.*, No. SC-CV-03-08, slip op. (Nav. Sup. Ct. April 16, 2008).

b) Probation

- The Navajo Nation Children’s Code provides for probation revocation against a delinquent child where: “if a finding of probation violation is made, the Court may extend the period of probation or make any other judgment or disposition that would have been appropriate in the original disposition of the case.” 9 N.N.C. § 1161. *Matter of N.B.*, No. SC-CV-03-08, slip op. (Nav. Sup. Ct. April 16, 2008).

c) Rehabilitation


d) Detention

(1) Risks associated with detention

- Incarceration is a severe remedy for a child, and is to be imposed only when absolutely necessary. To allow greater ability to imprison children than that allowed for adults is an outcome wholly

- Under *Dine bi beenahaz’áanii*, children must be treated with the greatest of respect. They are fragile and the utmost care must be taken because of their continued growth. Further, incarcerated children are not fully emotionally mature and experience a gamut of emotions while in custody that can lead to violent acts on themselves and others. *Matter of N.B.*, No. SC-CV-03-08, slip op. (Nav. Sup. Ct. April 16, 2008).

- Children taken into custody experience a gamut of emotions from fear to embarrassment to anger. Problems that may result are violent confrontations with other children or staff of a facility or infliction of mental or physical abuse on themselves. Indeed, suicide may result from the conditions of detention. *In the Matter of H.M.*, 8 Nav. R. 572 (Nav. Sup. Ct. 2004).

(2) Strict guidelines must be followed


- The police, Social Services, and the courts must strictly comply with the procedures in the Children’s Code to take children into custody and keep them detained pending disposition of juvenile cases. *In the Matter of H.M.*, 8 Nav. R. 572 (Nav. Sup. Ct. 2004).


(3) Duration of detention may not exceed maximum permissible time for adult incarceration for same offense


(4) Release from detention


- Navajo Supreme Court may release a child based on the petition itself, on the day of the filing of the petition, without the necessity of the writ and hearing. *In the Matter of H.M.*, 8 Nav. R. 572 (Nav. Sup. Ct. 2004).

- If all three Justices do not agree that the child should be immediately released, the Chief Justice will issue a writ and set a hearing. *In the Matter of H.M.*, 8 Nav. R. 572 (Nav. Sup. Ct. 2004).

- In juvenile habeas corpus cases, the Supreme Court will only grant release from illegal detention. *In the Matter of H.M.*, 8 Nav. R. 572 (Nav. Sup. Ct. 2004).

- If the probation officer views the detention as unnecessary under the criteria set forth in 9 N.N.C. § 1110, then the child shall be released from custody. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).
(5) Rights of the child in temporary detention

- A person taking a child into temporary custody shall, with all reasonable speed: in the case of an alleged delinquent or child in need of supervision, release the child to the child’s parent, guardian or custodian upon a written promise to bring the child before the court when requested by the court. If the parent, guardian or custodian fails when requested, to bring the child before the court as promised, the court may order the child taken into custody and brought before the court; or in the case of an alleged delinquent or child in need of supervision, deliver the child to the probation office or to a place of detention designated by the court. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).

- When taking a child into custody, police should have first attempted to release the child to his parent. If the parent was not available, the police should have delivered the child to the probation office or to a place of detention designated by the court. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).

- If detained, child has a right to be detained by a facility designated and certified by the Family Court [f/k/a Children’s Court]. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).

- At the minimum, a detained juvenile must be provided with a padded area to lie on, a blanket, and food to eat to comply with the Navajo Bill of Rights section against cruel and unusual punishment. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).

- The doctrine of *parens patriae* allows the Navajo Nation to hold delinquent children in protective custody. The protective custody of juveniles must be humane and must provide for the care, protection and wholesome mental and physical development of those children who are detained. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).


- All during the detention procedure, the child shall not be questioned except to determine the child’s identity and to determine the name of the child’s parents or legal guardian. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).

- Once the child is delivered to the probation office or to a place of detention designated by the court, the probation officer must review the need for detention before the child is actually placed in detention. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).

- The person taking the child into custody must give written notice to the child’s parent, guardian or custodian, and to the court as soon as possible, and in no case later than seventy-two hours, after the child is taken into custody. This notice shall also contain a statement of the reasons for taking the child into custody. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).


- In a proceeding alleging the delinquency of a child under the Navajo Children’s Code, the child has the right to be represented by an attorney. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).

- If the child or the child’s parents or guardian cannot afford an attorney, the court will appoint one to represent the child. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).

- Due process in juvenile proceedings must be followed as in adult criminal and civil proceedings. However, in juvenile proceedings the Navajo courts must respect the customary role of the parents in defending their child’s rights. Therefore, the Family Court [f/k/a Children’s Court] must afford notice and an opportunity to present and defend their child’s position to the child’s parent or guardian. *Matter of A.W.*, 6 Nav. R. 38 (Nav. Sup. Ct. 1988).
Incarceration prohibited

- A family court cannot use contempt to accomplish the incarceration of a CHINS child when it could not have incarcerated that child in the original CHINS order. *M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. (Nav. Sup. Ct. March 14, 2007).
- The use of contempt to incarcerate a CHINS child improperly treats that child as delinquent, violates the Council’s clear prohibition on incarceration of such children, and amounts to cruel and unusual punishment under the Navajo Bill of Rights. *M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. (Nav. Sup. Ct. March 14, 2007).
- The power of contempt gives no additional authority to a trial court to imprison those the Council exempts from imprisonment. This principle is especially important in the case of juveniles, as the strict restrictions in the Children’s Code reflect that children are not fully emotionally mature and that children experience a gamut of emotions while in custody that can lead to violent acts on themselves or others. *M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. (Nav. Sup. Ct. March 14, 2007).

Delinquency facilities unavailable for children in need of supervision

- The Code limits the disposition of a child in need of supervision to, among other things, the transfer of legal custody to an agency responsible for the care of children in need of supervision, but not to one which is designed for custody of delinquent children. *M.G. v. Greyeyes*, No. SC-CV-09-07, slip op. (Nav. Sup. Ct. March 14, 2007).

Fines

- In child delinquency proceedings, a family court judge can fine a minor in an amount “not to exceed the fine which would be imposed if the child were an adult.” 9 N.N.C. § 1152(A). *Matter of N.B.*, No. SC-CV-03-08, slip op. (Nav. Sup. Ct. April 16, 2008).

Restitution

- Pursuant to 9 N.N.C. § 1191(6) (*now see* 9 N.N.C. § 1120), court is authorized to “order that the child be required to make restitution for damage or loss caused by his wrongful acts.” *Matter of Interest of D.P.*, 3 Nav. R. 255 (Crpt. Dist. Ct. 1982).
- Court may order restitution even if prosecution did not request it because it may order whatever relief is appropriate and fits under the circumstances. *Matter of Interest of D.P.*, 3 Nav. R. 255 (Crpt. Dist. Ct. 1982).
- Restitution is a matter of Navajo custom and will be ordered in juvenile cases when appropriate. *Matter of Interest of D.P.*, 3 Nav. R. 255 (Crpt. Dist. Ct. 1982).
- To calculate the amount of restitution, it is sufficient that the court have a reasonable estimate of the injury suffered by the victim and that the juvenile be given the opportunity in a disposition hearing to contest the estimate. *Matter of Interest of D.P.*, 3 Nav. R. 255 (Crpt. Dist. Ct. 1982).
- When fixing a restitution order in juvenile cases, any damage done to the victim can be ordered paid, including medical expenses, pain and suffering, loss of wages, orthopedic devices, dependent

- The court should consider the child’s ability to pay before entering a restitution order. Matter of Interest of D.P., 3 Nav. R. 255 (Crpt. Dist. Ct. 1982).
- Award of restitution should be presumed in juvenile cases. Matter of Interest of D.P., 3 Nav. R. 255 (Crpt. Dist. Ct. 1982).

  g) Community service

- If a court finds that a child in fact does not have the means of obtaining the money to repay the victim of the wrongful acts, then at the very least the court can consider some sort of community work to show the victim that action will be taken and to teach the child that the penalty for injuring people is that the community must be paid back. Matter of Interest of D.P., 3 Nav. R. 255 (Crpt. Dist. Ct. 1982).

  h) Work for the victim

- If child cannot afford to pay a restitution order, the court may order him to render services to the victim until services valued in the amount of the restitution order have been provided. Matter of Interest of D.P., 3 Nav. R. 255 (Crpt. Dist. Ct. 1982).

  i) Exclusion

- Exclusion of a non-Indian child is not an independent proceeding, but is a possible disposition after the facts have been established in a delinquency proceeding. In the Matter of A.P., 8 Nav. R. 671 (Nav. Sup. Ct. 2005).

D. Criminal proceedings against juveniles

- 9 N.N.C. § 1121 provides that the District Court shall have original exclusive jurisdiction of a 14 N.N.C. § 707(A) violation involving a child when the person alleged to have committed the violation is a child who has reached his fifteenth birthday. This statute, however, conflicts with sections of the Children's Code which state that a “delinquent act” includes a violation of 14 N.N.C. §707(A), and that a child under the age of eighteen (which logic would dictate would also include a child aged fifteen) would be treated as a delinquent child and not as a criminal defendant. Navajo Nation v. Castillo, 8 Nav. R. 866 (Crwn. Dist. Ct. 2005).

- As a matter of law, because of these contradictory elements of the Children's Code, which make it difficult if not impossible for a child to determine whether or not he may be criminally liable for the behavior he is alleged to have engaged in, make 9 N.N.C. § 1121 void as a matter of law based on the Navajo principle of íishjáni ádoolníl. Navajo Nation v. Castillo, 8 Nav. R. 866 (Crwn. Dist. Ct. 2005).
Marriage and divorce

A. Marriage

1. Presumption of validity

• A marriage is presumed valid and the party attacking the marriage bears the burden of proof of establishing that no marriage in fact existed. Matter of Estate of Tsosie, 5 Nav. R. 261 (W.R. Fam. Ct. 1987).

• A marriage is presumed valid and the party attacking the marriage bears the burden of proof of establishing that no marriage in fact exists. Matter of Validation of Marriage of Ketchum, 2 Nav. R. 102 (Nav. Ct. App. 1979).

2. License requirement


• Marriage solemnized without a license is valid as a common law marriage. In re Daw, 1 Nav. R. 1 (Nav. Ct. App. 1969).

3. Necessity of complying with applicable law

• A Navajo and non-Navajo may have a valid marriage under the laws of the Navajo Nation only if they comply with applicable state or foreign law. Validation of Marriage of Garcia, 5 Nav. R. 30 (Nav. Ct. App. 1985).

• Marriages between Navajos and non-Navajos may be validly contracted only by the parties’ complying with applicable state or foreign law. Matter of Marriage of Garcia, 4 Nav. R. 197 (W.R. Dist. Ct. 1983).

4. Validation of marriage proceedings

• The effect of a validation of marriage by a court is to have it recorded on the Tribal census rolls and to have a certificate of marriage issued. Matter of Validation of Marriage of Ketchum, 2 Nav. R. 102 (Nav. Ct. App. 1979).

5. Forms of valid marriage

a) Traditional marriage

• Navajo marriage has been described as follows: (1) The parties to the proposed marriage shall have met and agreed to marry; (2) The parents of the man shall ask the parents of the women for her hand in marriage; (3) The bride and bridegroom then eat cornmeal mush out of the sacred basket; (4) Those assembled in the hogan then give advice for a happy marriage to the bride and groom; (5) Gifts may or may not be exchanged. Validation of Marriage of Francisco, 6 Nav. R. 134 (Nav. Sup. Ct. 1989).

• Traditional Navajo society places great importance upon the institution of marriage. A traditional Navajo marriage, when consummated according to a prescribed elaborate ritual, is believed to be
blessed by the Holy People. This blessing ensures that the marriage will be stable, in harmony, and perpetual. *Validation of Marriage of Francisco*, 6 Nav. R. 134 (Nav. Sup. Ct. 1989).


b) Common law marriage

(1) General

- Common law marriage differs from other types of legal marriage in that there is no ceremony, traditional or otherwise, to establish the marriage. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).


- A common-law marriage is not solemnized in the ordinary way (i.e. non-ceremonial) but created by an agreement to marry followed by cohabitation. Such marriage requires a positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital duties and obligations. *Validation of Marriage of Francisco*, 6 Nav. R. 134 (Nav. Sup. Ct. 1989).

- Under traditional Navajo thought, unmarried couples who live together act immorally because they are said to steal each other. Thus, in traditional Navajo society the Navajo people did not approve of or recognize common-law marriages. *Validation of Marriage of Francisco*, 6 Nav. R. 134 (Nav. Sup. Ct. 1989).

- Navajo custom does not recognize common-law marriages, regardless of whether one or both spouses are Navajos. *Validation of Marriage of Francisco*, 6 Nav. R. 134 (Nav. Sup. Ct. 1989).

- Navajo law does not recognize an alleged common-law marriage entered into within the territorial jurisdiction of the Navajo Nation. *Validation of Marriage of Francisco*, 6 Nav. R. 134 (Nav. Sup. Ct. 1989). Note: This holding is put in strikeout format because the Navajo Nation Council subsequently passed a resolution allowing common law marriage. 9 N.N.C. § 4(E).


- All purported marriages of members of the Navajo Tribe not contracted by church, state or Tribal custom ceremony as defined by the resolution of the Tribal Council, wherein such members were or are recognized as man and wife in their community, are validated and recognized as valid Tribal custom marriages from the date of their inception. *Matter of Marriage of Garcia*, 4 Nav. R. 197 (W.R. Dist. Ct. 1983).

(2) Elements

(a) General

- As established by the Navajo Nation Code, a “common-law” marriage is a marriage that includes four necessary elements: 1) a present intention of the parties to be husband and wife, 2) a present consent between the parties to be husband and wife, 3) actual cohabitation, and 4) an actual holding out of the parties within their community to be married. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).


- As “common-law” marriage exists only by statute, the elements to fulfill and the prohibitions that may invalidate a common-law marriage are defined exclusively by statute. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).

- A “common law” marriage under the Navajo Nation Code is different than one arising out a traditional wedding ceremony. A “common law” marriage is defined as a marriage, other than through the signing of a marriage license before witnesses or the performing of a church, civil, or Navajo traditional ceremony, that includes four necessary elements: 1) a present intention of the parties to be husband and wife, 2) a present consent between the parties to be husband and wife, and 3) actual cohabitation, and 4) an actual holding out of the parties within their community to be married. *Begay v. Chief*, 8 Nav. R. 654 (Nav. Sup. Ct. 2005).

- For a common law marriage to be valid, there must be proof of: (1) consent to be husband and wife; (2) actual cohabitation; (3) actual holding out to the community to be married. *Matter of Estate of Tsosie*, 5 Nav. R. 261 (W.R. Fam. Ct. 1987).

- The essential features of a common law marriage are present consent to be husband and wife, actual cohabitation and an actual holding out to the community to be married. *Matter of Validation of Marriage of Ketchum*, 2 Nav. R. 102 (Nav. Ct. App. 1979).

(b) Elements must be satisfied by substantial evidence


- This standard does not mean that there cannot be any evidence against the conclusion that there was a marriage. However, evidence is not substantial if it is overwhelmed by contradictory evidence. Furthermore, a mere conclusion without an analysis linking the supporting evidence to each statutory element is not substantial evidence. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).

(c) Mutual consent to be married

- The finding of consent or agreement to be husband and wife will usually be based upon the testimony of the party seeking validation of marriage. *Matter of Estate of Tsosie*, 5 Nav. R. 261 (W.R. Fam. Ct. 1987).
(d) **Holding out to the community**

- In certain remote communities, it may be only clan relatives who are “the community” that can establish that the couple held themselves out as married. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).

- In Diné society, the recognition or acceptance by a close sibling that the woman living with her brother at the family’s sheep camp is caring for the family livestock is substantial evidence that the woman is an in-law (azháá’áád nílį). *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).

- The common law marriage statute only states that the petition must prove to the satisfaction of the court that he or she and his or her alleged spouse were recognized as man and wife in their community. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).

- Mutual present consent alone is not sufficient to establish a common-law marriage. The parties must carry out their agreement to be husband and wife by actual cohabitation. In other words, they must openly live together in the same place as husband and wife. *Navajo Nation v. Murphy*, 6 Nav. R. 10 (Nav. Sup. Ct. 1988).

- The parties must actually hold themselves out to the community as married. There must be some public recognition that the parties are married, because the public and the Navajo Nation have an interest in the marriage agreement. *Navajo Nation v. Murphy*, 6 Nav. R. 10 (Nav. Sup. Ct. 1988).

(3) **Diné Bi Beenahaz’áanii**


- The Navajo Supreme Court had previously noted that under traditional Navajo thought unmarried couples who live together act immorally because they are said to steal each other, and therefore the Navajo people did not approve of or recognize common-law marriages. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).

(4) **Legislative intent**

- The Navajo Nation Council stated that the common law marriage legislation was meant to reflect the present intentions of the Navajo Nation government regarding marriages and remove the impediments to expeditious proof of a valid marriage under Navajo law. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).

  c) **Burden of proof**

6. Prohibited marriage situations

a) Traditional prohibitions

- The Code includes several reasons for rejecting a marriage, including prohibitions deriving from traditional law, such as being the same clan. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).

- The inclusion of certain traditional prohibitions in the Code but the exclusion of others means that the Council intended those reasons to be the only traditional impediments to a lawful common-law marriage. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).

- Neither the fact that putative common-law husband and wife began their relationship before wife obtained divorce nor the fact that husband may have had intimate relations with his ex-wife invalidate common-law marriage. *Matter of Marriage of Smith and Begay*, No. SC-CV-45-05, slip op. (Nav. Sup. Ct. July 19, 2006).

b) Bigamy

- To contract a marriage within the Navajo Nation, both parties must be unmarried. *Begay v. Chief*, 8 Nav. R. 654 (Nav. Sup. Ct. 2005).

- When, as here, either party has been previously married, the previous marriage must have been dissolved by a valid decree of divorce. *Begay v. Chief*, 8 Nav. R. 654 (Nav. Sup. Ct. 2005).

- No person, married by Tribal custom, who claims to have been divorced, shall be free to remarry until a certificate of divorce has been issued by the Courts of the Navajo Nation. *Begay v. Chief*, 8 Nav. R. 654 (Nav. Sup. Ct. 2005).

- No person once married is free to remarry until such divorce certificate is obtained. *Matter of Estate of Tsosie*, 5 Nav. R. 261 (W.R. Fam. Ct. 1987).


7. Husband/wife relationship

a) Responsibility for torts of spouse


b) Spousal privilege


- A rule whose justification is to prevent the breakup of a marriage is not contrary to the beliefs of traditional Navajo society. The husband-wife privilege, as it is invoked in Navajo jurisprudence, is then justified by Navajo society’s interests in preserving the harmony and sanctity of the marriage relationship. *Navajo Nation v. Murphy*, 6 Nav. R. 10 (Nav. Sup. Ct. 1988).

- The burden is upon the party invoking the husband-wife privilege to prove that he and the witness were married during the time of the alleged marital communication. *Navajo Nation v. Murphy*, 6 Nav. R. 10 (Nav. Sup. Ct. 1988).
There cannot be a marriage without a voluntary agreement or consent between the parties to be married. And a husband cannot be a mere boyfriend. *Navajo Nation v. Murphy*, 6 Nav. R. 10 (Nav. Sup. Ct. 1988).

**B. Divorce**

1. **Jurisdiction prerequisites**

- For divorce proceedings, the complaining party shall have resided on the Navajo Nation at least 90 days prior to the commencing of any action for the dissolution of any marriage before the Courts of the Navajo Nation will entertain the action. *Begay v. Begay*, No. SC-CV-65-05, slip op. (Nav. Sup. Ct. May 11, 2006).
- The Court must have jurisdiction over both the original petition and the counterclaim; there is no jurisdiction over the counterclaim merely because it is plead in response to the petition. *Begay v. Begay*, No. SC-CV-65-05, slip op. (Nav. Sup. Ct. May 11, 2006).
- If the court lacks jurisdiction over the original petition, the counterclaim nonetheless survives if there is a separate jurisdictional basis to hear the counterclaim. *Begay v. Begay*, No. SC-CV-65-05, slip op. (Nav. Sup. Ct. May 11, 2006).

2. **Necessity of court decree**

- The court will recognize the validity of a traditional divorce that occurred in 1970. *In the Matter of the Estate of Lee*, 8 Nav. R. 820 (Ship. Dist. Ct. 2004). Note: this holding is presented in strikeout format because it was implicitly overruled by *Begay v. Chief*, 8 Nav. R. 654 (Nav. Sup. Ct. 2005).
- Where first marriage was never ended by divorce decree, Court was powerless to validate purported second marriage. *Matter of Validation of Marriage of Slowman and Billie*, 1 Nav. R. 142 (Nav. Ct. App. 1977).

3. **Interim divorce decree**

- Interlocutory court decree which terminated marriage on the grounds of incompatibility to live together in agreement and harmony and stated that it would serve as a valid certificate of a divorce pursuant to 9 N.N.C. § 405 was effective as a final divorce of the parties at the time the decree was issued. *Hall v. Watson*, No. SC-CV-52-07, slip op. (Nav. Sup. Ct. February 24, 2009).
- Interlocutory court decree was final as to divorce of the parties where the case was decided on the merits, the substantial rights of the party in regards to their marriage was determined and there were no further proceedings remaining in the Family Court on the question of the marriage. *Hall v. Watson*, No. SC-CV-52-07, slip op. (Nav. Sup. Ct. February 24, 2009).
• Navajo courts do not need to inquire into the justifications for divorce, thus summary judgment allowing interim divorce decree was permissible and would be merged into final judgment. Charley v. Charley, 3 Nav. R. 30 (Nav. Ct. App. 1980).

4. Judgment by default disfavored

• Default is disfavored in divorce cases because they are special. In the long run questions of child custody, child support and property settlement are better decided upon the free agreement of the parties or upon a full trial. In the area of child custody, a hearing in which both parents can participate will hopefully produce a harmonious decision where both parents will have free and unhampered access to children. A fair property settlement decision will have a great deal to do with harmony in child visitation and the payment of child support. Child support should, of course, be based upon what the noncustodial parent can afford to pay so that a decree will be obeyed. In sum, the full information provided to a court by all sides being heard out is a superior means of dealing with divorces, and the final decision reached should be the product of full information. Wilson v. Wilson, 3 Nav. R. 145 (Nav. Ct. App. 1982).

5. Division of property

a) Equal division of property

(1) General rule

• In most instances, community property is to be divided equally. Begay v. Begay, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).
• Community property reflects both contributions of labor and material goods to the marriage. The rationale behind the presumption of equal division is that the homemaking partner has contributed services which enabled the financially supporting partner to achieve his or her station in life, and in so doing the homemaking partner has lost ground in the job market. Begay v. Begay, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).

(2) “Fair and just” settlement of property issues

• In divorce matters there shall be a fair and just settlement of property rights between the parties. Yazzie v. Yazzie, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
• Each divorce decree shall provide for a fair and just settlement of property rights between the parties, and also for the custody and proper care of the minor children. Riggs v. Riggs, 6 Nav. R. 375 (Nav. Sup. Ct. 1991).
• Family courts sit as courts of equity in allocating property and responsibility. The process of dividing property fairly, giving values to each item to assure fairness, and the process of fixing dollar amounts of alimony or child support is a difficult one without a clear picture of the property and finances of the parties. The modern trend is to attempt an equal division of property between couples with approximately equal needs, and to fix support and alimony obligations on the basis of financial need and ability to pay. Riggs v. Riggs, 6 Nav. R. 375 (Nav. Sup. Ct. 1991).
• A divorce decree shall provide for a fair and just settlement of property rights between the parties, and also for the custody and proper care of the minor children. Burnside v. Burnside, 6 Nav. R. 551 (T.C. Fam. Ct. 1990).
• Where property is divided pursuant to a divorce, the Tribal Code directs the trial court to provide for a fair and just settlement of the property rights between the parties. *Begay v. Begay*, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).

• The standard in deciding property settlements in divorce proceedings is that they be “fair and just.” *Arviso v. Arviso*, 6 Nav. R. 516 (W.R. Fam. Ct. 1989).

• In a divorce the division of property and debts should be fair and just. *Davis v. Davis*, 5 Nav. R. 169 (Nav. Sup. Ct. 1987).


• In divorce cases, the court must make a fair and just settlement of the rights of the parties. Accordingly, it is important that it receive enough clear evidence to see the full picture. *Battese v. Battese*, 3 Nav. R. 110 (Nav. Ct. App. 1982).

• In divorce proceedings, property division must be fair and just. *Charley v. Charley*, 3 Nav. R. 30 (Nav. Ct. App. 1980).


(3) Factors considered

• Duration of the marriage is equally important. Long-term marriages provide evidence that the spouses have developed a mutually dependent working relationship and long-term relationships are therefore more likely to require equal division of marital property. *Begay v. Begay*, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).

• The amount of property awarded to each spouse depends upon the facts of the particular case, with the object of making an equitable division. The court should consider a variety of factors, including whether the property was acquired before or after the marriage, the efforts and attitudes of the parties toward its accumulation, the respective ages and earning abilities of the parties, the duration of the marriage, their station in life, their health and physical condition, the necessities of the parties, and their financial and other circumstances. *Shorty v. Shorty*, 3 Nav. R. 151 (Nav. Ct. App. 1982).

• In order that a court may make a just and equitable division of the property of the parties it must have evidence concerning the value of the various properties. It is obvious that the trial court abuses its discretion when it orders a division of property without having knowledge of the value of a substantial part of it. *Shorty v. Shorty*, 3 Nav. R. 151 (Nav. Ct. App. 1982).

• District Courts of the Navajo Nation should consider all the circumstances of the parties when making a division of property under 9 N.N.C. § 404, including, but not limited to: (1) The reasonable current market value of each major asset which is community property; (2) The length of the marriage; (3) The economic circumstances of each party, including: a. Age; b. Health; c. Station (work or social position); d. Amount and sources of income; e. Vocational skills or need for retraining or to acquire to acquire new skills; f. Employability; g. Opportunities to acquire capital assets and income in the future; (4) The estate or separate property of each spouse (with values); (5) The needs of each of the parties; (6) The liabilities of each of the parties; (7) The
contribution of a spouse as a homemaker or the contribution of each spouse to the family; (8) Who will have the children, and their needs; (9) The efforts of each spouse in contributing to the family unit and in obtaining or wasting community property; (10) Considerations of traditional and customary Navajo law, where applicable; and (11) All other relevant facts. *Shorty v. Shorty*, 3 Nav. R. 151 (Nav. Ct. App. 1982).

- The words “fair and just” do not mean an equal division of property. They mean that the trial court must look at all the facts and circumstances and use sound discretion, considering a variety of factors. *Battese v. Battese*, 3 Nav. R. 110 (Nav. Ct. App. 1982).

**(4) Unequal distributions of property**

- Dividing community property based on a preference for equal division means that the trial judge must divide community property equally absent specific reasons justifying unequal division. Moreover, where the trial judge is persuaded that unequal division is justified, the judge must recite reasons justifying unequal division in the divorce decree. *Begay v. Begay*, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).
- In reaching a settlement of unequal proportions, a judge is to be guided by (1) The economic circumstances of each party, including: (a) age; (b) health; (c) station (work or social position); (d) vocational skills or need for retraining as to acquire new skills; (e) employability; and (f) opportunity to acquire capital assets; (2) Contribution of the spouse as homemaker or contribution of each spouse to the household; (3) Duration of the marriage; (4) Liabilities of the parties; (5) Who has the children; and (6) Other relevant factors. *Begay v. Begay*, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).
- Where one of the parties is aged or in poor health, the trial judge may consider these factors in making unequal disposition of the marital property. *Begay v. Begay*, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).
- If one spouse demonstrates that he or she has foregone employment opportunities or training during the marriage such as to impair employability, the trial judge may also consider this factor and award that spouse a greater portion of the marital property. *Begay v. Begay*, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).
- Equal division of marital property is not mandated, however, there must be a balancing of all the circumstances of the parties. 5 Nav. R. 35 (Nav. Ct. App. 1985).

***(5) Appraising property***

- It is the responsibility of the parties, not the Court, to obtain an appraisal of property for the purpose of ensuring a fair division. *Joe v. Joe*, 1 Nav. R. 320 (Nav. Ct. App. 1978).

***(6) Adultery irrelevant to distribution of property***

- One factor which is not relevant to constructing a property settlement is an allegation of adultery. A court must divide community property without considering the fault or marital misconduct of either party. *Begay v. Begay*, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).
b) Community property issues

(1) Basis of Navajo community property law

- Navajo community property law is based on the idea that marriage is a community to which each spouse contributes by building it up, and to which each spouse has an equal right when it dissolves. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- The Navajo People’s segmentary lineage system (clanship system) is the foundation of Navajo Nation domestic relations law. The system itself is law. Traditional Navajo society is matrilineal and matrilocal, which obligates a man upon marriage to move to his wife’s residence. The property the couple bring to the marriage mingle and through their joint labors create a stable and permanent home for themselves and their children. The wife’s immediate and extended family benefit directly and indirectly, in numerous ways, from the marriage. *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).
- Community property law is based on the idea that a marriage is a community to which each spouse contributes by building it up, and to which each spouse has an equal right when it dissolves. *Willie v. Willie*, 4 Nav. R. 31 (Nav. Ct. App. 1983).

(2) What constitutes “community property”

- All property acquired by a spouse during marriage is community property, except for property which is a separate gift or inheritance and except for the earnings of a wife while she lives separate and apart from her husband. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- Community property is all property acquired by either the husband or the wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children while she lives separate and apart from her husband. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- Under Navajo law, all assets earned by the husband and wife during their marriage are considered to be community property. *Arviso v. Arviso*, 6 Nav. R. 516 (W.R. Fam. Ct. 1989).
- Property acquired during the marriage is presumed to be community property unless shown to be separate. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
- All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent or earned by the wife and her minor children while she lives separate and apart from her husband, is the community property of the husband and wife. *Matter of Estate of Tsosie*, 4 Nav. R. 198 (W.R. Dist. Ct. 1983).
- All goods, money, livestock, grazing permits and other real and personal property acquired by the husband and wife during their marriage are community property. *Matter of Estate of Tsosie*, 4 Nav. R. 198 (W.R. Dist. Ct. 1983).
- There are exceptions to what property is included in the community, such as property acquired before marriage or property which is inherited or a gift, but individual as opposed to community ownership depends upon the method and timing of obtaining it. *Willie v. Willie*, 4 Nav. R. 31 (Nav. Ct. App. 1983).
• Under Navajo law all property acquired by a spouse during the marriage is community property, except for property which is a separate gift or inheritance and except for the earnings of a wife while she lives separate and apart. *Willie v. Willie*, 4 Nav. R. 31 (Nav. Ct. App. 1983).

(3) What constitutes “separate property”

• The husband’s separate property is all property, real and personal, of the husband, owned or claimed by him before marriage, and that acquired afterward by gift, devise or descent, and also the increase, rents, issues and profits thereof, is his separate property. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).


• All property owned by the husband before the marriage or property he obtains by gift or inheritance is his separate property and it is not to be counted as a part of the property of the community. *Willie v. Willie*, 4 Nav. R. 31 (Nav. Ct. App. 1983).

(4) What constitutes “family property”

• A tractor acquired largely with the income of the decedent during his marriage is “family property” and not “community property” because it was productive property acquired for use by the family. *Matter of Estate of Chee*, 6 Nav. R. 460 (W.R. Fam. Ct. 1989).

• It is Navajo tradition that when a person gives property to a younger family member (such as a father giving a land use permit to his son), the gift is intended to benefit the entire family, and most of all the children of the family. When a land use permit is given from a father to a son and that son is the head of a household, it is traditionally the intention that the son keep the land use permit in his name, but the gift is really being made to the children. It is therefore, against tradition and custom to characterize the land use permits given as gifts to Plaintiff-Appellant as his separate property. Neither is the gift and are to be used for the benefit of the entire family. *Johnson v. Johnson*, 3 Nav. R. 9 (Nav. Ct. App. 1980).

(5) Transmutation of separate property


• Separate property can transmute into community property through actions of the owner of the separate property or through the conduct of the parties by agreement, gift or commingling. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).

• Party claiming transmutation has burden to prove that this has occurred by clear and convincing evidence. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).

• In relocation case, party claiming that relocation residence has transmuted into community property must overcome presumption that relocation benefits are intended for relocatee. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).

• Separate property commingled with community property is still separate if it can be clearly traced and identified. *Benally v. Denetclaw*, 5 Nav. R. 174 (Nav. Sup. Ct. 1987).
c) Residence

(1) In general

- The most valuable item of marital property to be divided is a homesite lease for a one-acre tract of land and a family home situated on that land. *Shorty v. Shorty*, 3 Nav. R. 151 (Nav. Ct. App. 1982).

(2) Acquisition of interest in residence

- Where husband acquired no property interest in the house until both he and wife entered into the housing agreement, two years after their marriage, home was community property. *Begay v. Begay*, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).

(3) Division of residence

- If the Trial Court must divide a house between two spouses, it can (1) retain jurisdiction over the property and award the property at a later date when its value can be adequately appraised and distributed; (2) award title to one spouse but actual use and possession to the other for a specified period; or (3) award the house to one spouse with an offsetting monetary award to the other. *Begay v. Begay*, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).
- Where value of the house is very speculative, the best value of the house may be equal to the amount of funds expended to date. The Family Court could, therefore, award the spouse not receiving the house one-half of the expended sums, or if the court is persuaded that a different figure is fair then such figure as the court finds fair in the circumstances. *Begay v. Begay*, 6 Nav. R. 160 (Nav. Sup. Ct. 1989).

(4) Residence received as benefit under Navajo-Hopi Settlement Act (“NHSA”)

- Interest in residence given as a benefit under NHSA vested on date individual was certified as eligible for relocation benefits as a head of household. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- If a head of household receives a contract under NHSA to have a house built, the title to such house vests in the head of the household for which it was constructed. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- Where head of household receives a contract under NHSA to have a house built while he is single, home is his sole and separate property. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- Where residence given as a benefit under NHSA is in dispute, the fact that the house was constructed subsequent to the head of household getting married is not relevant. The date the relocatee is determined eligible is the most vital because several years may pass from the date of certification to the date the relocation house is actually constructed. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
- In relocation case, party claiming that relocation residence has transmuted into community property must overcome presumption that relocation benefits are intended for relocatee. *Yazzie v. Yazzie*, 8 Nav. R. 41 (Nav. Sup. Ct. 2000).
d) Railroad benefits

- The federal regulation relating to railroad benefits is inapplicable when the amount of the benefit is set as the amount of alimony, but the benefit itself is not divided as community property. *Biakeddy v. Biakeddy*, 6 Nav. R. 391 (Nav. Sup. Ct. 1991).
- 20 CFR § 295(a) limits the restriction on railroad benefit awards to divorce, annulment or legal separation decrees in which the rendering courts have characterized the specified benefits as property subject to distribution. *Biakeddy v. Biakeddy*, 6 Nav. R. 391 (Nav. Sup. Ct. 1991).
- 20 CFR § 350 states that annuities and accrued annuities payable under the Railroad Retirement Act, sickness and unemployment benefits payable under the Railroad Unemployment Act, and benefits payable under any other Act administered by the Board, are subject, in like manner and to the same extent as if the Board were a private person, to legal process brought for the enforcement of legal obligations to provide child support or to make alimony payments. *Biakeddy v. Biakeddy*, 6 Nav. R. 391 (Nav. Sup. Ct. 1991).
- Under 20 CFR § 350, “legal process” is defined as any writ, order, summons, or other similar process in the nature of garnishment issued by a court and directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual. *Biakeddy v. Biakeddy*, 6 Nav. R. 391 (Nav. Sup. Ct. 1991).
- 20 CFR § 350 is a limited waiver of sovereign immunity granted for the express and narrow purpose of allowing courts to legally access Railroad Retirement benefits when the intended recipient has failed to fulfill a legal obligation of alimony or child support. *Biakeddy v. Biakeddy*, 6 Nav. R. 391 (Nav. Sup. Ct. 1991).
- A court may not offset an award of community property to make up for the fact that the retirement benefits cannot be reached, but a spouse can be compensated by alimony. *Willie v. Willie*, 4 Nav. R. 31 (Nav. Ct. App. 1983).

e) Social Security benefits


f) Pension benefits


g) Insurance proceeds

- Insurance policy obtained and paid for during marriage is community property and spouse is entitled to half of the proceeds upon the death of the insured. *Matter of Estate of Tsosie*, 5 Nav. R. 261 (W.R. Dist. Ct. 1987).
Life insurance proceeds, where premiums were paid out of community property, are community property. *Matter of Estate of Tsosie*, 4 Nav. R. 198 (W.R. Dist. Ct. 1983).


A former wife may lose her interest as a beneficiary under an insurance policy by an agreement of the parties which can be construed as a relinquishment of the spouse’s rights to the insurance. *Apache v. Republic Nat’l Life Ins. Co.*, 3 Nav. R. 250 (W.R. Dist. Ct. 1982).

h) Ceremonial paraphernalia

Because of the unique nature of medicineman paraphernalia, some items can be used only by specific individuals who have acquired them in specific ways, and other items can be used by any member of the Native American Church. Some items may be handed down only by ritual and ceremony, and other items may be given from individual to individual. *Johnson v. Johnson*, 3 Nav. R. 9 (Nav. Ct. App. 1980).

In dividing NAC paraphernalia, Courts seek to achieve as fair a monetary division as possible to enable both parties to have sufficient paraphernalia after division to perform ceremonies. *Joe v. Joe*, 1 Nav. R. 320 (Nav. Ct. App. 1978).

6. Attorneys’ fees

The Navajo Nation courts are permitted to award reasonable attorney’s fees to a party to a divorce action after assessing the parties’ financial resources. *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).

The issues of whether attorneys’ fees should be awarded the appropriate amount are matters best left to the discretion of the trial court. *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).

Trial court did not abuse its discretion in awarding attorneys’ fees in divorce case where party has adequate resources to pay attorneys’ fees and opposing party (1) borrowed money to retain an attorney to defend against the petition; (2) is unemployed and unemployable for different reasons; (3) is illiterate and therefore unable to represent herself; and (4) did not want the divorce initially. *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).

VI. Financial support

A. Child support

1. General

   a) Responsibility of court to provide for care of children

   • 9 N.N.C. § 404 requires the Family Court to provide for the proper care of the minor children. The term proper care is a broad one, and it can encompass many kinds of benefits for children, including recreational opportunities. *Riggs v. Riggs*, 6 Nav. R. 375 (Nav. Sup. Ct. 1991).

   b) Best interest of child

The primary party to be considered is the child, and providing for her support is the goal. *Yazzie v. Yazzie*, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).


Family Court must make findings of fact which support the court’s determination that the terms of the divorce reflect the best interests of the children. *Nez v. Nez*, 7 Nav. R. 25 (Nav. Sup. Ct. 1992).

The court cannot be restrained by the failure of one parent to ask for child support, or back child support, from the other. The court has a duty to ensure that the best interests of the children are provided for, and arrangements between the parents that do not comply with this principle should not be recognized by the court. *Nez v. Nez*, 7 Nav. R. 25 (Nav. Sup. Ct. 1992).


When addressing child support issues, the primary person to be considered is the child, with the goal of providing that child adequate support. *Alonzo v. Martine*, 6 Nav. R. 395 (Nav. Sup. Ct. 1991).


The dominant principle in suits involving children is always the best interests of the child. The court must always act as the parent of the child and it must act in the best interests of the child. This rule imposes upon the district courts a duty to ensure that child support amounts take precedence over other bills that the obligated parent must pay. *Descheenie v. Mariano*, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).

The primary party to be considered in child support cases is the child. *Notah v. Francis*, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).

In child support cases, the primary issue is the best interests of the child. *Arviso v. Dahozy*, 3 Nav. R. 84 (Nav. Ct. App. 1982).

c) Court must sit in place of parent


d) Due process

e) Discretion of Family Court


2. Calculations

a) Navajo Nation Child Support Guidelines

(1) Generally

- The Navajo Nation Child Support Guidelines are based on the Income Shares Model which is predicated on the concept that the child should receive the same level of support that he or she would have received if the parents had lived or remained together. *Little v. Begay*, 7 Nav. R. 353 (Nav. Sup. Ct. August 27, 1998).

(2) Court must allow parent to have sufficient money to live on

- The awarding court must not order a parent to pay so much child support that the parent has insufficient money to live on. *Descheenie v. Mariano*, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).
- Court cannot order a party to pay more than he makes or order him to pay so much that the payer himself has insufficient money with which to live. *Joe v. Joe*, 1 Nav. R. 320 (Nav. Ct. App. 1978).

(3) Calculation of net income

- The formula allows the calculation for each parent, whether custodial or non-custodial, to remain essentially the same. Begin with each parent’s monthly net income. Net income is the amount of income left after all mandatory taxes and social security (FICA) have been subtracted. *Descheenie v. Mariano*, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).
- Child support that a parent receives for another child is not added into the net income. From the net income, subtract as adjustments only those amounts for court ordered support of other children, alimony, special medical or educational needs of a child, and expenses for the basic necessities of the parent, such as food and shelter. *Descheenie v. Mariano*, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).
- In an appropriate case supported by competent evidence, other adjustments may be allowed within the discretion of the district court. The custodial parent gets no adjustment for having custody of the child. *Descheenie v. Mariano*, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).
- Once those adjustments have been made for each parent, the amount remaining, the adjusted net income, is added to the adjusted net income of the other parent. The result is the combined adjusted net income of both parents. To determine the percentage of support each parent has a duty to pay, divide that parent’s adjusted net income by the combined adjusted net income figure. *Descheenie v. Mariano*, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).
(4) Calculation of support amount

(a) General considerations

- The amount of child support a child receives each month is not determined by how much the parents say they can afford. To determine the appropriate support amount, the district court must consider the reasonable needs of the child. These may include food, clothing, health needs, child care, and educational expenses, such as paper, writing instruments, et cetera. Descheenie v. Mariano, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).
- The monthly support amount the district court arrives at is then multiplied by the percentage each parent is responsible for in order to calculate the dollar amount each parent pays each month to support the child. Descheenie v. Mariano, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).
- Family Court must take a party’s ability to pay into consideration in determining the amount of support payments. Notah v. Francis, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).
- Family Court must consider the father’s income, property and other resources in setting the period within which the arrearage must be paid. Notah v. Francis, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).
- The primary concern in determining support payments is the child’s welfare, not penalizing the delinquent party, and that the arrearage must be paid as soon as possible consistent with the father’s ability to pay. Notah v. Francis, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).

(b) Child care costs

- Using Worksheet A, a parent is not permitted to deduct child care expenses from his percentage of support in an attempt to reduce the amount of his obligation. Little v. Begay, 7 Nav. R. 353 (Nav. Sup. Ct. August 27, 1998).

(5) Deviations

- The Family Court may deviate from the guidelines upon finding that all of the following five criteria have been met: (a) Application of the guidelines is inappropriate or unjust in the particular case; and (b) Deviation is in the best interest of the child(ren) for whom the child support obligation is being established; and (c) The Office of Hearings and Appeals or court states what award amount is calculated by application of the guidelines; and (d) The Office of Hearings and Appeals or court states the amount of child support which is actually awarded after the deviation; and (e) The Office of Hearings and Appeals or court makes written findings regarding items (a) through (d), above. Little v. Begay, 7 Nav. R. 353 (Nav. Sup. Ct. August 27, 1998).

b) Calculations of arrearages

(1) Method of calculation

- Where parents have children in marriage, back child support may be ordered at the entry of a divorce decree covering the time the non-custodial parent was absent and provided no support. When awarding back child support, the court should consider the equities of the parents, including the period of nonsupport, the parents’ assets, and their abilities to pay. The court should also consider fashioning an appropriate amount of current child support prior to assessing back child support. Back child support obligations may be satisfied as part of the process of making a “fair and just settlement of property rights.” Alonzo v. Martine, 6 Nav. R. 395 (Nav. Sup. Ct. 1991).
(2) Form of order

- Orders to pay child support arrearages should state: (1) The amount of total arrearage; (2) The period of the arrearage (i.e. what months were not paid); (3) The amount to be paid in installments on the arrearage (if that method applies); (4) The amount of continuing monthly child support; (5) The method of payment of the arrearage; (6) The date any payments are to commence; and (7) Other pertinent orders, making certain all the agreements of the parties are in writing. *Arviso v. Dahozy*, 3 Nav. R. 84 (Nav. Ct. App. 1982).

(3) Interest on arrearages

(a) Purpose

- The purpose of assessing interest on the arrearages is not to penalize or punish. Interest is used to reach an equitable amount to be paid. This formula will be used as an incentive for the parent paying child support to pay on time. *Yazzie v. Yazzie*, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).

(b) Family Court must assess interest on arrearages

- Trial court committed reversible error in refusing to apply interest on child support arrearage. There is no discretion to refuse to award interest. *Watson v. Watson*, 8 Nav. R. 638 (Nav. Sup. Ct. 2005).

(c) Amount of interest is discretionary for Family Court

- Family Court has the discretion to set a reasonable amount of interest. *Yazzie v. Yazzie*, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).

(d) Application of state statutes


(e) Manner of calculation

- Interest should be calculated monthly, rather than on the lump sum, because each delinquent child support payment is a judgment. The interest should be calculated on each month’s judgment. *Yazzie v. Yazzie*, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).
- Family Court must use this formula to calculate interest on delinquent child support. A ten percent interest rate shall be applied. This interest rate shall be calculated on a month-to-month basis. To make the calculation, multiply the principal balance due (the delinquent child support amount for that month) by the interest rate (100). Then divide that figure by the number of days in the year (365). The result is the daily interest figure. Next, multiply the daily interest figure by the number of days that interest is owed (the number of days in the month, i.e., 29, 30, 31), and the result is the next amount owed for that month. For example, to calculate the sum owed on $400 per month, first multiply the amount past due for the first month ($400) by the interest rate (100). That is $40. Then divide that figure by 365. That is .109589, the daily interest figure. Next, multiply the daily interest figure by the number of days in that month. For example, if the first month for which child support is past due is April, which has 30 days, multiply .109589 by 30. The result ($3.29) is the
interest owed for the first month. If May goes unpaid also, then take the principal balance due $803.29 ($403.29 plus the $400 for May), and multiply it by ten percent. That is 80.329. Now divide 80.329 by 365, giving you the daily interest figure of 0.2200795. Multiply the daily interest figure by the number of days in May (31). The amount of interest on the balance owed is $6.82. This process is continued for each month child support is not paid. It is a compound interest formula, which means the interest is added to the principal each month. *Yazzie v. Yazzie*, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).

3. Evidence regarding parent’s income

- Where parent was unemployed, that parent’s income would be the imputed federal minimum wage. *In the Matter of S.R.E.*, 8 Nav. R. 869 (W.R. Fam. Ct. 2005).
- The court should require parties to produce income records, such as tax returns, and to provide information as to their income, assets, debts, and living expenses. Where information is imprecise, the court should look first to the child’s needs, and draw inferences against the party who fails to produce adequate evidence. *Alonzo v. Martine*, 6 Nav. R. 395 (Nav. Sup. Ct. 1991).

4. Paternity cases

- A Navajo District Court may order that child support payments commence anytime after a paternity action is properly filed. *Leuppe v. Wallace*, 8 Nav. R. 274 (Nav. Sup. Ct. 2003).
- No parent will be expected to pay 100% of a child’s expenses. However, if a parent wants the child’s other parent to take responsibility for a portion of the child’s support, that parent must file an action for paternity and support as soon as possible after the child’s birth. In this manner the child will be assured support from an early age. *Descheenie v. Mariano*, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).

5. Vesting

- Each installment of support is vested as it becomes due, constituting legal indebtedness for which the law allows the imposition of interest. *Yazzie v. Yazzie*, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).

6. Payment of support

- If mother has another caring for child, support payments must nevertheless be paid to mother. *Notah v. Francis*, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).
- Party owing child support may not substitute with in-kind payments absent the order of the court or the consent of the other party. *Notah v. Francis*, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).
In cases where the court order has not been modified to allow in-kind contributions, the burden of proof shall be on the party providing the contributions to show the other party’s consent. The value of in-kind contributions must be agreed upon by the parties or determined by the court, and may cover all or part of the monthly support payment. *Notah v. Francis*, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).

7. **Defenses**

   a) **Limitations on actions and laches**

   • Child support is a continuing obligation which is not subject to the statute of limitations. *Notah v. Francis*, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).
   
   • Orders providing for child support payments, or for payment of arrearage resulting from delinquent support payments, cannot be barred by the statute of limitations, the doctrine of laches, or any reliance by the father on the mother’s previous failure to act to enforce the father’s obligation. *Notah v. Francis*, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).

   b) **Waiver**

   • Child support is not a right of the mother to payments, which may be waived if the mother does not assert it within a given time, but an obligation of the father to his child, continuing for as long as the child needs that support. *Notah v. Francis*, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).
   
   • Child support cannot be waived by the mother’s failure to take legal action. *Notah v. Francis*, 5 Nav. R. 147 (Nav. Sup. Ct. 1987).

8. **Modification, enforcement and the Child Support Enforcement Act (“CSEA”)**

   a) **Scope of CSEA**


   b) **Modification**

   (1) **Authority of Office of Hearings and Appeals (“OHA”)**

   • CSEA only gives the OHA the authority to modify its own child support orders. It does not have the authority to modify court-ordered child support. *Bedoni v. Navajo Nation Office of Hearings and Appeals*, 8 Nav. R. 349 (Nav. Sup. Ct. 2003).
   
   • Allowing the OHA to modify court-ordered child support defeats public policy. An orderly control of modification and appeal processes is necessary to avoid confusion and shopping for the most sympathetic judge or hearing officer. *Bedoni v. Navajo Nation Office of Hearings and Appeals*, 8 Nav. R. 349 (Nav. Sup. Ct. 2003).
   
(2) Authority of Family Court

- Because children generally become more expensive as they grow older, the custodial parent may go back to the Family Court in the future to have the court recalculate the support amount. Descheenie v. Mariano, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).

(3) Petition to modify support

- Family Court cannot modify an original child support order in the absence of a petition asking it to do so. Burbank v. Clarke, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).
- A properly filed petition seeking modification should contain the grounds for the requested relief and must give the other party an opportunity to present evidence in rebuttal. The petition should also notify the payee that the obligated parent intends to seek modification of the child support order. Burbank v. Clarke, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).
- The method to apply to the Court for modification under CSEA is by petition. This method requires that the individual be served with process under Rule 4(b)(3)(A) of the Navajo Nation Rules of Civil Procedure. Yazzie v. Yazzie, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).

(4) Unilateral reduction of support prohibited without modification order

- Where a court orders a lump sum payment for the support of multiple children, the obligated parent has the burden to modify his or her child support obligation as each child becomes emancipated or reaches the age of majority. Otherwise, the obligated parent must continue to pay the same lump sum support payment originally ordered until the last child is either emancipated or reaches the age of majority. Burbank v. Clarke, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).
- A parent who must pay undivided child support for multiple children cannot unilaterally reduce his or her payments each time one of the children becomes emancipated or attains the age of majority, unless permitted by the original child support order. Burbank v. Clarke, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).

(5) Retroactive modifications

- Court ordered child support payments become vested in the payee as they become due. Thus, our courts should not permit a retroactive modification of a child support order, absent a party’s showing of compelling circumstances. Burbank v. Clarke, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).

(6) Requirement of showing changed circumstances

- Child support awards are modifiable, upwards or downwards, on a showing of changed circumstances. Yazzie v. Yazzie, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).
• Either parent may petition the hearing officer for an order based on a showing of a change of circumstances requiring the other parent to appear and show cause why the decision previously entered should not be prospectively modified. Yazzie v. Yazzie, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).


• Family court did not abuse its discretion in increasing child support where child’s needs had increased in many respects (she eats more than when she was an infant, her clothes are more expensive and she has to pay tuition for the private school she attends) and the parental circumstances had also changed (mother does not have a steady income to provide her daughter with these necessities, mother and her parents pool their income to provide for her daughter, and father is capable and has the resources to pay the increased child support and the arrearages). Yazzie v. Yazzie, 7 Nav. R. 203 (Nav. Sup. Ct. 1996).

c) Enforcement

(1) Purpose of CSEA


• The CSEA was intended to further the process of enforcing valid child support orders, not to provide absent parents with additional and conflicting forums for protection from their duties. Bedoni v. Navajo Nation Office of Hearings and Appeals, 8 Nav. R. 349 (Nav. Sup. Ct. 2003).

(2) Court action

• A custodial parent who intends to collect on a past due court ordered support amount, like the unwed mother seeking child support, should initiate a lawsuit as soon as possible to avoid large arrearages. In this way, neither party will suffer irreparable financial difficulty. Descheenie v. Mariano, 6 Nav. R. 26 (Nav. Sup. Ct. 1988).

• Child support order against a parent may be enforced by contempt proceedings and has the effect of a judgment at law. Heredia v. Heredia, 4 Nav. R. 124 (Nav. Ct. App. 1983).

(3) Garnishment

• In addition to other remedies, the court may issue an order to any employer, trustee, financial agency, or other person within the territorial jurisdiction of the Tribe, indebted to the parent to withhold and to pay over to the clerk of court, moneys due or to become due. Heredia v. Heredia, 4 Nav. R. 124 (Nav. Ct. App. 1983).

• To obtain a wage garnishment, a party entitled to child support must (1) obtain the issuance of a writ of garnishment requiring a third party holding sums payable to the party to appear in court to state whether and in what monies are owed to the debtor for the purposes of the entry of an order against the third party to pay the money over; and then (2) apply to the Court for the issuance of a
writ of execution upon the wages of the party owing child support, which will be served by the Navajo Police by making an inquiry of the employer as to employment and wages owing, and receiving those sums permitted by Federal law. Heredia v. Heredia, 4 Nav. R. 124 (Nav. Ct. App. 1983).

- In the case of wage executions, it is sufficient if there is an opportunity to be heard. If there is a writ of execution which the employer cannot comply with or which would place the employer in jeopardy of running afoul of some regulatory scheme, then the employer will have the right to object or pay over clearly permissible amounts. Heredia v. Heredia, 4 Nav. R. 124 (Nav. Ct. App. 1983).

- It is sufficient for the employer to advise the Navajo Police for the purposes of return to the court by the police or for the employer to file an objection with the court and have an opportunity to be heard in that fashion. Attempts to circumvent valid orders which can be paid legally will be dealt with severely as disobedience to a lawful court order. Heredia v. Heredia, 4 Nav. R. 124 (Nav. Ct. App. 1983).

- Garnishment orders issued by the District Courts must specify in reasonable certainty the schedule of wages to be garnished, the amount or sum certain and the duration of such equitable attachment. Heredia v. Heredia, 4 Nav. R. 124 (Nav. Ct. App. 1983).

- Due process procedures must be maintained in order to guarantee all the parties before the court the opportunity to have a hearing and contest the garnishment due to jurisdiction, termination of employment, satisfaction of debt, etc. Heredia v. Heredia, 4 Nav. R. 124 (Nav. Ct. App. 1983).

- In child support case, the court may issue an order to any employer, trustee, financial agency, or other person within the territorial jurisdiction of the Tribe indebted to the parent, to withhold and pay over to the clerk of court, moneys due or to become due. NTUA v. Foster, 4 Nav. R. 86 (Nav. Ct. App. 1983).

- To obtain a wage garnishment, a party must (1) obtain the issuance of a writ of garnishment requiring a third party holding sums payable to the judgment debtor to appear in court to state whether and in what monies are owed to the debtor for the purposes of the entry of an order against the third party to pay the money over, and then (2) apply to the Court for the issuance of a writ of execution upon the wages of judgment debtor, which will be served by the Navajo Police by making an inquiry of the employer as to employment and wages owing, and receiving those sums permitted by Federal law. NTUA v. Foster, 4 Nav. R. 86 (Nav. Ct. App. 1983). Note: this holding is presented in strikeout form because it was overruled by Heredia v. Heredia, 4 Nav. R. 124 (Nav. Ct. App. 1983).

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- It is sufficient for the employer to advise the Navajo Police for the purposes of return to the court by the police or for the employer to file an objection with the court and have an opportunity to be heard in that fashion. Attempts to circumvent valid orders which can be paid legally will be dealt with severely as disobedience to a lawful court order. NTUA v. Foster, 4 Nav. R. 86 (Nav. Ct. App. 1983).
(4) Property available for enforcement of child support obligations


9. Impact of the Aid for Families with Dependent Children legislation

- Congress has not clearly expressed its intent that the Aid for Families with Dependent Children legislation is meant to abrogate Indian tribal sovereignty. *Billie v. Abbot*, 6 Nav. R. 66 (Nav. Sup. Ct. 1988).

B. Spousal support

1. Authority to award

- Navajo Nation courts, serving as courts of equity, have the general authority to award alimony, particularly in cases where a divorced spouse is not able to provide for his or her own maintenance and that of his or her remaining minor children without some sort of financial aid from the former spouse. *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).
- The power to award alimony exists independent of any Navajo Nation statute on the subject and is justified by the Navajo People’s traditional teachings admonishing not to “throw one’s family away.” *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).
- Public policy also supports the courts’ exercise of the power to award alimony. The general lack of economic and employment opportunities on the Navajo Nation, the Nation’s lack of a well educated and skilled labor force, and the Nation’s high divorce rate, which leaves children dependent on one spouse or relatives, all underlie the many requests to the courts for spousal maintenance. *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).
- If the marriage does not survive, customary law directs the man to leave with his personal possessions (including his horse and riding gear, clothes, and religious items) and the rest of the marital property stays with the wife and children at their residence for their support and maintenance. Whatever gains the marital property generates goes to support the wife and children and to a lesser extent the wife’s close relatives. This longstanding customary law is akin to modern spousal maintenance. *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).
Court would follow state law to award alimony. *Charley v. Charley*, 3 Nav. R. 30 (Nav. Ct. App. 1980). Note: This holding is presented in strikeout form because it was overruled by *Sells v. Sells*, 5 Nav. R. 104 (Nav. Sup. Ct. 1986).


2. Factors to consider

- Party was entitled to spousal support where evidence demonstrated that the parties’ only son resided with her and she (1) was a 58 year-old elderly Navajo lady who was married to the opposing party for 22 years; (2) was uneducated and unemployable; (3) suffered from poor health and illiteracy; (4) was a poor prospect for vocational training or other training to acquire meaningful employment skills; (5) earned no wages; had no chance to acquire capital assets; (6) was in constant need of medical attention; (7) contributed to the marriage, as wife, mother, and homemaker; and (8) needed transportation to get medical care. *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).

- A party seeking spousal maintenance should not have to satisfy every element in *Sells* before a court grants his or her request. The Supreme Court only requires enough evidence to tip the scale in favor of an award of spousal maintenance. *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).

- Alimony is based upon evidence which shows the need of the payee spouse and the ability to pay of the payor spouse. This need is met by the payments made by the payor spouse to the payee spouse. In the Navajo Nation the payments are often the sole source of income for the payee spouse. Mere passage of time does not erase this need. *Yazzie v. Yazzie*, 7 Nav. R. 33 (Nav. Sup. Ct. 1992).


- In establishing alimony, court should consider (1) The needs of the spouse seeking alimony; (2) Age of the spouse requesting alimony; (3) Means of support; (4) The earning capacity, including future earnings of the parties; (5) The length of marriage; and (6) The amount of property (with values) owned by the parties. *Sells v. Sells*, 5 Nav. R. 104 (Nav. Sup. Ct. 1986).

- The Family Court must consider the following in setting alimony: (1) The reasonable market value of marital property apportioned to the spouse seeking alimony and the ability of such spouse to meet his or her needs independently; (2) The economic circumstances of each party, including: a. Health; b. Station (work or social position); c. Vocational skills or need for retraining or to acquire new skills; d. Employability; e. Opportunities to acquire capital assets; (3) The liabilities of each of the parties; (4) The contribution of a spouse as a homemaker or the contribution of each spouse to the family; (5) Who will have the children, and their needs; (6) Considerations of Navajo traditional and customary Navajo law, where applicable; and (7) All other relevant facts. *Sells v. Sells*, 5 Nav. R. 104 (Nav. Sup. Ct. 1986).

- Normally, alimony will be left within the sound discretion of the trial court where it considers the needs of parties and the resources available to satisfy those needs. *Willie v. Willie*, 4 Nav. R. 31 (Nav. Ct. App. 1983).
3. Calculations

a) Interest on arrearages

- Arrearages of spousal support may not be retroactively modified, as each month’s award is an absolute and cumulative debt when it becomes due. *Watson v. Watson*, 8 Nav. R. 638 (Nav. Sup. Ct. 2005).

b) Amount of spousal support may equal Railroad benefits

- Family court may set the amount of alimony to be the same as the amount of Railroad Retirement benefits, but court cannot order that benefits be directly transferred to ex-spouse. *Biakeddy v. Biakeddy*, 6 Nav. R. 391 (Nav. Sup. Ct. 1991).

4. When obligation vests

- Alimony payments, as they become due, become vested. In other words, the debt becomes absolute and cumulative. The payor spouse must pay the full arreage and it may not be retroactively modified. *Yazzie v. Yazzie*, 7 Nav. R. 33 (Nav. Sup. Ct. 1992).

5. Requirement of finality

- There was a principle of finality in Navajo customary divorce, and the principle of restoring harmony in the community by quickly and finally breaking ties so the community can soon return to normal is one which is common-sense. To permit a former spouse to keep such ties that she or he may be said to be lurking behind the hogan waiting to take a portion of the corn harvest is unthinkable, since each spouse returns to his or her own family after the divorce. Each former spouse should return home after making the break and disturb others no more. *Naize v. Naize*, 7 Nav. R. 269 (Nav. Sup. Ct. 1997).

6. Modifications

- For a court to modify an existing decree for spousal support there must be changed circumstances which must be both substantial and continuing. *Watson v. Watson*, 8 Nav. R. 638 (Nav. Sup. Ct. 2005).
- When a court acts to amend, modify or terminate the alimony payments that a spouse receives, it is acting upon a source of income that the divorce court has determined is a necessity. Any modification affects the economic expectations of the former spouses. The payor spouse expects to pay a certain amount each month and the payee spouse expects to receive a certain amount. The expectations of each spouse may not be arbitrarily affected by the court. *Yazzie v. Yazzie*, 7 Nav. R. 33 (Nav. Sup. Ct. 1992).
• A petition explaining why the alimony decree should be changed must first be filed with the trial court before it can act to modify the amount of alimony payments. *Yazzie v. Yazzie*, 7 Nav. R. 33 (Nav. Sup. Ct. 1992).

• The other spouse must have notice of the petition and be given an opportunity to respond to the proposed changes consistent with due process requirements. *Yazzie v. Yazzie*, 7 Nav. R. 33 (Nav. Sup. Ct. 1992).

• To merit modifying an alimony order, there must be proof of changed circumstances which must be both substantial and continuing. *Yazzie v. Yazzie*, 7 Nav. R. 33 (Nav. Sup. Ct. 1992).


• A court may not act on its own to amend, modify, or terminate a decree for alimony payments. A petition must first be filed requesting modification and the non-petitioning spouse must be given notice and an opportunity to be heard on the matter. *Yazzie v. Yazzie*, 7 Nav. R. 33 (Nav. Sup. Ct. 1992).

7. **Payment**

• If allowed in a divorce action, alimony is awarded either in terms of (i) money payment on a periodic or permanent basis, or (2) a lump sum of money of final property settlement on a one time basis. *Sells v. Sells*, 5 Nav. R. 104 (Nav. Sup. Ct. 1986).

• Once a court has determined that alimony in a particular case is necessary and appropriate, the court may order it paid until the court makes other orders modifying the amount or stopping payments all together. *Sells v. Sells*, 5 Nav. R. 104 (Nav. Sup. Ct. 1986).

8. **Remedy for non-payment**

• 13. If the payor spouse fails to satisfy his duty to pay alimony he may be held in contempt and an appropriate remedy to enforce payment may be imposed. *Yazzie v. Yazzie*, 7 Nav. R. 33 (Nav. Sup. Ct. 1992).

9. **Laches**


VII. **Parental rights**

A. **Paternity disputes**

1. **Responsibility of court**

2. Presumption of parentage

a) General rule

- An alleged father named in a birth certificate does not release a Navajo Family Court from making a legal determination of paternity. The court may apply presumption of paternity weighing all the evidence presented. *In the Matter of the Minor Child, M.M.Y.*, 8 Nav. R. 808 (Crwn. Fam. Ct. 2004).
- A married man is presumed to be the father of his wife’s children born during the marriage and is held responsible for the rights and obligations of parenthood from the time of the birth of a child. *Davis v. Crownpoint Fam. Ct.*, 8 Nav. R. 279 (Nav. Sup. Ct. 2003).
- The Navajo traditional view is that children who are born during a marriage are considered the issue of that marriage. *Alonzo v. Martine*, 6 Nav. R. 395 (Nav. Sup. Ct. 1991).

b) Children born out of wedlock


c) Overcoming the presumption

- An alleged father named in a birth certificate does not release a Navajo Family Court from making a legal determination of paternity. While the court may apply a presumption of paternity, the court should weigh all the evidence presented, including rebuttals to the presumption. *Davis v. Crownpoint Fam. Ct.*, 8 Nav. R. 279 (Nav. Sup. Ct. 2003).
- Clear and convincing evidence proving one of the following will overcome the presumption of legitimacy: (1) That the husband is infertile or sterile and unable to father children; or (2) That the husband was entirely absent from his wife during the period conception must have occurred; or (3) That the husband was present but no sexual intercourse took place during the period of conception.
- A wife has equal standing in Navajo Courts to assert that her husband is not the father of her child. *Davis v. Davis*, 5 Nav. R. 169 (Nav. Sup. Ct. 1987).
- Family Court must not rely solely upon the wife’s claims of illegitimacy in awarding custody of the child. *Davis v. Davis*, 5 Nav. R. 169 (Nav. Sup. Ct. 1987).
- The presumption of legitimacy of a child born to a married woman is strong, but it may be rebutted by competent and relevant evidence. The burden of overcoming the presumption is upon the party challenging it, and the evidence must be clear and convincing. *Davis v. Davis*, 5 Nav. R. 169 (Nav. Sup. Ct. 1987).

3. Evidence of paternity

- Paternity would be judicially recognized where (1) father agreed repeatedly at the hearing that he was the father and had no objections to such a claim; (2) mother made no claim against paternity; and (3) the Department of Social Services recognized paternity. *In the Matter of S.R.E.*, 8 Nav. R. 869 (W.R. Fam. Ct. 2005).
The best procedure for resolving the issue of paternity is through blood testing or chromosome (DNA) testing or both. These scientific methods provide the best practical solution given the lack of evidence presented at trial. A Navajo Nation court has power, either on its own motion or on motion of any party, to order scientific testing to aid it in making a decision on paternity. *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

Decisions affecting paternity are too important to Navajo society and common law to be based solely on insubstantial and speculative evidence. *Davis v. Means*, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

Clear and convincing evidence proving one of the following will overcome the presumption of legitimacy: (1) That the husband is infertile or sterile and unable to father children; or (2) That the husband was entirely absent from his wife during the period conception must have occurred; or (3) That the husband was present but no sexual intercourse took place during the period of conception. *Davis v. Davis*, 5 Nav. R. 169 (Nav. Sup. Ct. 1987).

Blood grouping tests have been used with great success in other courts for determining paternity. Blood grouping tests may be used to exclude a person as the child’s father, only where the court has satisfied itself as to the qualification of the expert testifying about the test procedures and results. If the evidence points with an equal degree of certainty to the husband and another man as father of the child, the doubt will be resolved in favor of legitimacy rather than illegitimacy. *Davis v. Davis*, 5 Nav. R. 169 (Nav. Sup. Ct. 1987).

4. Paternity determination necessary prerequisite for custody or visitation request

- A putative father has no standing to request custody or visitation until a legal determination of paternity is made. *Sombrero v. Keahnie-Sanford*, 8 Nav. R. 360 (Nav. Sup. Ct. 2003).
- A Navajo court lacks jurisdiction to grant putative father custody of minors in a temporary protection order without a legal determination establishing paternity and a parent-child relationship. In this regard, not even a putative father has standing to request custody. A paternity determination is a legal precondition in granting custody to a putative parent. *Davis v. Crownpoint Fam. Ct.*, 8 Nav. R. 279 (Nav. Sup. Ct. 2003).

5. DAPA proceedings

- The family court may make a presumptive determination of paternity in an ex parte DAPA proceeding based on sufficient findings, and may enter interim and temporary orders for visitation and custody based on the presumptive determination, but the mother may challenge the presumption at a subsequent hearing. *Sombrero v. Keahnie-Sanford*, 8 Nav. R. 360 (Nav. Sup. Ct. 2003).
B. Custody disputes

1. Governed by Children’s Code


2. No presumption for custody by either parent

- There is no presumption that the mother is the proper custodian of a young child. Help v. Silvers, 4 Nav. R. 46 (Nav. Ct. App. 1983).
- The Supreme Court will not permit use of the rule that “all things being equal” a child of tender years will be with the mother. Help v. Silvers, 4 Nav. R. 46 (Nav. Ct. App. 1983).
- Where necessary the courts will give custody of a child to someone other than the parents because of the child’s relationship to them, even where there is no fault on the part of the parents. Lente v. Notah, 3 Nav. R. 72 (Nav. Ct. App. 1982).

3. Importance of prompt resolution


4. Due process

- Custody of children is such an important issue that only in the direst of circumstances involving the safety of the child should a family court remove a child from the custody of a parent without the opportunity for that parent to respond to the petition before the removal. Miles v. Chinle Family Court, No. SC-CV-04-08, slip op. (Nav. Sup. Ct. February 21, 2008).
- The principle is basic and obvious that the defendant must be given adequate notice and an opportunity to be heard on the custody question. Lente v. Notah, 3 Nav. R. 72 (Nav. Ct. App. 1982).
- In proceedings for the modification of decrees in divorce relative to the custody of minor children, proper notice to the adverse party and an opportunity to be heard are required, whether or not provided for by statute. Lente v. Notah, 3 Nav. R. 72 (Nav. Ct. App. 1982).
- Assuming that an emergency exists the court should not grant an order restraining the custodian from taking the child from the other parent pending an application for a modification without notice to the custodian. Lente v. Notah, 3 Nav. R. 72 (Nav. Ct. App. 1982).
- If the statute on modification does not prescribe any particular type of notice in connection with a motion to change custody, the method of giving notice and the sufficiency of notice must be left to the sound discretion of the trial court. Lente v. Notah, 3 Nav. R. 72 (Nav. Ct. App. 1982).
- Ordinarily the notice to comply with due process must be reasonably calculated to give the adverse party knowledge of the proceedings and an opportunity to be heard. Lente v. Notah, 3 Nav. R. 72 (Nav. Ct. App. 1982).
- The spirit of the kind of notice to be given is summed up in the observation that a change of custody is just as important to the child and to others as an original award of custody, and the
parties should be afforded the same type of hearing on the subsequent application as they are entitled to on an original award. *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

- Notice was insufficient where there was no certificate of service in the motion to show proper notice, and there was no proper actual service. *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

- Given the fact that a change of child custody is an event which may severely injure a child and adversely affect the rights of custodial parties, due process under the Navajo Bill of Rights requires notice to be given in accordance with the service rules of the Navajo Rules of Civil Procedure. *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

- Due process does not require that notice in custody cases be given to every possible family member beyond the jurisdiction of a tribal court. Such a requirement would impose an impermissible burden on the tribal court. *Matter of Guardianship of Chewiwi*, 1 Nav. R. 120 (Nav. Ct. App. 1977).

5. Factors considered

- Family Court will remove children from custody of their children and award custody to Navajo uncle and aunt where (1) father had failed to allow inspection of his home by a Navajo social services agency, (2) father had not provided any employment and financial information to the Court, (3) father had steadfastly refused to provide discovery information to uncle and aunt, which they had a right to request, (4) father had cut off all contact between his children and their Navajo relatives, (5) the Navajo Division of Social Services recommended placement with Navajo relatives, and (6) the Court had received communications from the minor children indicating they desired to be with their uncle and aunt. *In the Matter of A.M.C.*, 8 Nav. R. 874 (Chin. Fam. Ct. 2005).

- Absent detriment to the child, the most important element of a child’s home life is the bond that exists between the parent and the child. *In the Matter of the Minor Child, M.M.Y.*, 8 Nav. R. 808 (Crwn. Fam. Ct. 2004).

- Absent a showing of harm to the child, the rights of parents to raise their own children is a right so basic and fundamental, that in the balance, the Court has no option but to place such a child with his or her parent or parents as opposed to extended family members. *In the Matter of the Minor Child, M.M.Y.*, 8 Nav. R. 808 (Crwn. Fam. Ct. 2004).

- Because Navajo culture is matrilineal, it is in the best interest of the child to have continued interactions with his maternal grandparents and supervised visits with his mother. *In the Matter of the Minor Child, M.M.Y.*, 8 Nav. R. 808 (Crwn. Fam. Ct. 2004).


- The divorces having the least detrimental effect on the normal development of children are those in which the parents are able to cooperate in their continuing parental roles. Parental cooperation cannot be easily ordered or legislated, but it can be professionally, judicially, and statutorily encouraged and enclosed. “Winner take all” sole custody resolutions tend to exacerbate parental differences and cause predictable post-divorce disputes as parents try to strike back and get the last word. Joint or shared parenting following divorce is an appealing alternative. *Pavenyouma v. Goldtooth*, 5 Nav. R. 17 (Nav. Ct. App. 1984).

- The primary consideration in child custody cases is the child’s strong relationship to members of an extended family. Because of those strong ties, children frequently live with various members of the family without injury. This is the condition throughout Indian Country (as Indian reservations as a whole are called). Therefore the court looks to that tradition and holds that it must consider


- The trial courts must take all factors affecting a child into account and consider the relationship of the child to its parents in all things. It is the relationship that is important, not a mere rule-of-thumb, and the child’s age is important only in consideration of its relationship to the parents. *Help v. Silvers*, 4 Nav. R. 46 (Nav. Ct. App. 1983).

- One of the things that the child’s welfare certainly demands is stability and regularity. If he is continually being transferred from one parent to the other by conflicting court decrees, he may be a great deal worse off than if left with one parent, even though as an original proposition some better provision could have been made for him. *Matter of Custody of B.N.P.*, 4 Nav. R. 155 (W.R. Dist. Ct. 1983).

- Where a child has been living in one home for a long period of time, the court should not disturb that situation except for the most serious reasons, and should presume that situation is in the best interests of the child unless factors such as those found in the case of dependent and neglected children are present. *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

- These are the factors the courts must weigh in custody situations: (1) The actual living or family situation of the child; (2) Encouragement of the Navajo cultural upbringing of the child; (3) Navajo custom and tradition, where appropriate to the case; (4) The child’s tribal enrollment situation and tribal benefits; (5) The time the child has been in its present home; (6) The ages of the child and persons who desire custody; (7) Employment of the parties and income; (8) Whether the individuals are absent from the home frequently; (9) Arrangements for caring for children during absences; (10) Dates of separations from the child; (11) The date of divorce or the initial custody order; (12) Prior divorces of the adults; (13) Previous or present romantic or sexual involvement of the adults, including whether it happened while or while not married, and whether the child was aware of the involvement, whether it occurred in its presence and whether the involvement affected the child in any way; (14) Acts of cruelty, desertion, neglect or non-support toward the child; (15) The relationship of the child with brothers and sisters or other children; (16) The physical and mental condition of the child, including past and present illness, prior treatment history and hospitalization; (17) The school history of the child, where applicable, including the child’s behavior, performance and grades; (18) Any history of connection with social welfare agencies, including the reason for the connection and the findings by those agencies; (19) Any behavior problems of the child, including emotional problems or physical disabilities; (20) Juvenile Court history of the child; (21) The observations of neighbors and relatives about child’s situation; (22) Contact and observation by clergymen or the child’s friends with it (e.g. social organizations, or adults who come into contact pow-wow activities, scouting); (23) The relationship to the paramour (lover) or new spouse of a party to the child; (24) Condition and environment of the home and neighborhood of the parties; (25) The emotional stability of the father, mother and other individuals directly connected with the child including, where it appears necessary, current psychological examinations and a review of past contacts with psychiatrists, psychologists and mental health workers; (26) The education of the parties; (27) The religion of the parties and their relation to the religious training of the child; (28) The race and culture of the parties; (29) The drinking and drug use habits of the parties as they might affect the child; (30) The criminal history of the parties and individuals directly affecting the child, including the nature of offenses and time they occurred; (31) The desires of the child as to who he or she wishes to be with; (32) Prior agreements of the parties as to the child’s custody; (33) The arrangements the parties have made for the financial welfare of the child including wills, trusts, savings accounts or
insurance policies; and (34) The reasons of the parties (preferably given to the court in writing) why they feel they would be the best person to take care of the child and why the other party would not. *Lente v. Notah*, 3 Nav. R. 72 (Nav. Ct. App. 1982).

- Although joint custody is disfavored, it may be appropriate where it appears to be in the best interests of the child. *Goldtooth v. Goldtooth*, 3 Nav. R. 223 (W.R. Dist. Ct. 1982).
- In a divorce the children must be given continuing and full contact not only with their parents but with their extended families, because every member of the family depends upon the others. The court must consider the “family perspective” and look providing “continuity and mutuality of family relationships” in spite of a divorce. The reality is that a divorce changes the form of relationship of family members but it does not end the family. *Goldtooth v. Goldtooth*, 3 Nav. R. 223 (W.R. Dist. Ct. 1982).
- The primary consideration in child custody cases is the child’s strong relationship to members of an extended family. Because of those strong ties, children frequently live with various members of the family without injury. This is the condition throughout Indian Country (as Indian reservations as a whole are called). Therefore the court looks to that tradition and holds that it must consider the entire extended family in order to make a judgment based upon Navajo traditional law. *Goldtooth v. Goldtooth*, 3 Nav. R. 223 (W.R. Dist. Ct. 1982).

6. **Best interest of the child**

- Although father has a superior right to the care and custody of his children, that right is not supreme. That right takes second place to the best interests of the children, which is the ultimate standard for the Family Court in matters of custody. *In the Matter of A.M.C.*, 8 Nav. R. 874 (Chin. Fam. Ct. 2005).
- It is generally in the best interest of children to live with their natural father in the absence of their mother, absent other factors indicating that the father would be harmful to the children or a potential threat to their safety and welfare. *In the Matter of the Guardianship of J.N.T.*, 8 Nav. R. 829 (Chin. Fam. Ct. 2005).
- It is in the best interests of the children to have one court make a decision regarding their custody. While the mother moved to the Navajo Nation and left her children in the care of her relatives prior to her death, she made no attempt to resolve the jurisdiction of the state court or to seek a change of jurisdiction to the courts of the Navajo Nation. There is no benefit to having the children's futures decided by two different courts. *In the Matter of the Guardianship of J.N.T.*, 8 Nav. R. 829 (Chin. Fam. Ct. 2005).
- The standard for this Court in regard to custody is the best interests of the children. This is the beginning and end of all decision-making in relation to their care and well being. *In the Matter of Custody of A.M.C.*, 8 Nav. R. 825 (Chin. Fam. Ct. 2004).
- In the absence of any indications of abuse, neglect, or mistreatment minors should reside with their father. The issue is not who potentially can provide a better home. The father to the minors has a superior right to the care and custody of his children. It is also in the best interests of the children to maintain or develop a close bond with their father. *In the Matter of Custody of A.M.C.*, 8 Nav. R. 825 (Chin. Fam. Ct. 2004).
- It is also in the best interests of the children that they maintain relationships with the relatives of their mother, not only for the connection to the memory of their mother, but also that they may maintain a connection to the Navajo Nation and to Navajo traditions and teachings. This Court considers it is of utmost importance that the children are taught about their clan relationships, the Navajo language, and the opportunity to live on the Navajo Nation and become a part of it if they
so choose when they are of an age to do so. In the Matter of Custody of A.M.C., 8 Nav. R. 825 (Chin. Fam. Ct. 2004).

• The best interests of the child are paramount in custody decisions and a determination of paternity. Davis v. Crownpoint Fam. Ct., 8 Nav. R. 279 (Nav. Sup. Ct. 2003).

• A Navajo court must act as the parent of the child and do what is in the best interest of the child. Davis v. Means, 7 Nav. R. 100 (Nav. Sup. Ct. 1994).

• The dominant principle in custody cases is always the best interest of the child. Barber v. Barber, 5 Nav. R. 9 (Nav. Ct. App. 1984).


• In child custody case, the foremost consideration for the court must be the best interests of the children who come before it, and after that considerations of governmental relations come into play. Matter of Custody of B.N.P., 4 Nav. R. 155 (W.R. Dist. Ct. 1983).

• The guiding principle in custody cases is always the best interests of the child. Lente v. Notah, 3 Nav. R. 72 (Nav. Ct. App. 1982).

7. Role of guardian ad litem

• Guardian ad litem should do a thorough review of the case, including witness interviews and a complete examination of all documentation on the child, and then give an independent, accurate and reliable report to the court as a commentator, but not an advocate. In the Matter of the Custody of T.M., 8 Nav. R. 78 (Nav. Sup. Ct. 2001).

• Trial court should not give too much weight to a guardian ad litem’s report. Court should make its own independent judgment of the child’s best interests. In the Matter of the Custody of T.M., 8 Nav. R. 78 (Nav. Sup. Ct. 2001).

• There should be a guardian ad litem for every child who is involved in a child custody, child welfare, or child protective services case. In the Matter of the Custody of T.M., 8 Nav. R. 78 (Nav. Sup. Ct. 2001).

8. Child’s right to be heard

• Child has the right to be heard in that child’s custody case and the child’s views should be given due weight in light of his or her age and maturity. In the Matter of the Custody of T.M., 8 Nav. R. 78 (Nav. Sup. Ct. 2001).

• Under proper circumstances a child may intervene as a party in an action between his or her parents where that child’s rights or interests are affected. In the Matter of the Custody of T.M., 8 Nav. R. 78 (Nav. Sup. Ct. 2001).

• Whether intervention is proper is within the sound discretion of the trial court and that determination should be made after examining the child’s best interests and whether the child’s interests are adequately represented by the existing parties. In the Matter of the Custody of T.M., 8 Nav. R. 78 (Nav. Sup. Ct. 2001).

• To protect the child’s right to be heard, the family court could (1) conduct an informal interview of the child in the presence of the parties’ counsel; (2) appoint a guardian ad litem; or (3) appoint a spokesperson for the child (this option could include appointing an independent attorney or advocate to serve as the child’s spokesperson. In the Matter of the Custody of T.M., 8 Nav. R. 78 (Nav. Sup. Ct. 2001).
• Trial court committed reversible error in failing to honor child’s suggestion that a custody order should not have been made without considering his best interests separate from an issue relating to contempt. *In the Matter of the Custody of T.M.*, 8 Nav. R. 78 (Nav. Sup. Ct. 2001).

• There is no merit to the proposition that the child should be independently represented by counsel in custody proceedings. The child’s interests are, by definition, covered by the interests of one of the parties. If the court determines that neither party would be a fit guardian, the child’s interest is represented by the court. *Matter of Guardianship of Chewiwi*, 1 Nav. R. 120 (Nav. Ct. App. 1977). Note: this holding is presented in strikeout format because it was impliedly overruled by *In the Matter of the Custody of T.M.*, 8 Nav. R. 78 (Nav. Sup. Ct. 2001).


9. Modification of custody orders

• The procedure for a request for modification of custody requires that a motion for modification be filed with proper service upon the opposing party; that the motion set forth facts showing a change of circumstances and state reasons why a modification of custody is in the best interests of the child; that a hearing be had; that the moving party show a substantial change in circumstances since the last custody order; and that the court find that the change in custody is in the best interests of the child. *Platero v. Mike*, 7 Nav. R. 130 (Nav. Sup. Ct. 1995).

• The burden of proof in a custody modification proceeding is on the party asserting that change of custody is necessary and in the best interest of the child. *Platero v. Mike*, 7 Nav. R. 130 (Nav. Sup. Ct. 1995).

• A court considering modification of a custody order has a special responsibility to act as parent of the child and to act in the best interest of the child. *Platero v. Mike*, 7 Nav. R. 130 (Nav. Sup. Ct. 1995).

• Failure to make findings of fact as to whether a change of custody is in the best interest of the child is reversible error. *Platero v. Mike*, 7 Nav. R. 130 (Nav. Sup. Ct. 1995).


• When a modification of a custody order is sought, a motion for a modification must be filed with proper service upon the opposing party; the motion must set forth facts showing a change of circumstances and state reasons why a modification of custody is in the best interests of the child; a hearing must be had; the moving party must show a substantial change in circumstances since the last custody order; and that the court must find that the change in custody is in the best interests of the child. *Pavenyouma v. Goldtooth*, 5 Nav. R. 17 (Nav. Ct. App. 1984).

• To justify a change of custody, petitioner must show a substantial change of circumstances and must show why the change is better for the child. *Barber v. Barber*, 5 Nav. R. 9 (Nav. Ct. App. 1984).

• A child custody decree may be modified where: (1) This jurisdiction (i) is the home jurisdiction of the child at the time of the commencement of the proceeding, or (ii) had been the child’s home jurisdiction within 6 months before commencement of the proceeding and the child is absent from this jurisdiction because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this jurisdiction; or (2) It is in the best interest of the child that a court of this jurisdiction assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with
this jurisdiction and (ii) there is available in this jurisdiction substantial evidence concerning the
child’s present or future care, protection, training, and personal relationships; or (3) The child is
physically present in this jurisdiction and (i) the child has been abandoned or (ii) it is necessary in
an emergency to protect the child because he has been subjected to or threatened with
mistreatment or abuse or it is otherwise neglected (or dependent). Matter of Custody of B.N.P., 4

- When a modification of a custody order is sought, a motion for a modification must be filed with
proper service upon the opposing party; the motion must set forth facts showing a change of
circumstances and state reasons why a modification of custody is in the best interests of the child;
a hearing must be had; the moving party must show a substantial change in circumstances since
the last custody order; and that the court must find that the change in custody is in the best

- Anyone who asks for a change of an original custody order must show the court there has been a
substantial change in circumstances which affect the current custody arrangement. Lente v. Notah,

- There is no set rule about what a substantial change of circumstances can be, but the court must
always look to the child’s best interests and whether the child’s welfare would be promoted by a

- Changes in child custody are not based upon the wishes of the parents they are based upon the

10. Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”)

- Under the UCCJEA, states need only recognize decisions that conform to that statute’s definition
of jurisdiction. States had the option when adopting the UCCJEA to adopt a provision treating
tribes as “States” under the act. Even if Navajo courts have jurisdiction under Navajo law, states
might refuse to recognize these decisions if they are inconsistent with the UCCJEA, potentially
causing enforcement problems and hardship for Navajo children. Miles v. Chinle Family Court,

- Family courts may buttress their jurisdiction under the Navajo Children’s Code by demonstrating
how the application of the federal Parental Kidnapping Prevention Act and the Uniform Child
Custody Jurisdiction and Enforcement Act supports Navajo jurisdiction, if deemed necessary to
invoke the mandate to recognize the decision by states. Miles v. Chinle Family Court, No. SC-CV-
04-08, slip op. (Nav. Sup. Ct. February 21, 2008).

- Under the Uniform Child Custody Jurisdiction and Enforcement Act, if there is no “home state,”
either the Navajo Nation or a state could assert jurisdiction. Further, the physical presence of a
child is not necessary or sufficient to make a child custody determination. If the child need not be
even present in the state for a state to assert jurisdiction, the fact that the child was not present on
the Navajo Nation has no bearing on which jurisdiction is the appropriate one under the UCCJEA.

11. Federal Parental Kidnapping Prevention Act

- The federal Parental Kidnapping Prevention Act premises jurisdiction on residency, specifically
requiring a child to reside within a state for six consecutive months before that jurisdiction is the
“home state” with exclusive jurisdiction over the matter. Miles v. Chinle Family Court, No. SC-
• The federal Parental Kidnapping Prevention Act does not include Indian tribes in its definition of “State.” *Miles v. Chinle Family Court*, No. SC-CV-04-08, slip op. (Nav. Sup. Ct. February 21, 2008).

• Family courts may buttress their jurisdiction under the Navajo Children’s Code by demonstrating how the application of the federal Parental Kidnapping Prevention Act and the Uniform Child Custody Jurisdiction and Enforcement Act supports Navajo jurisdiction, if deemed necessary to invoke the mandate to recognize the decision by states. *Miles v. Chinle Family Court*, No. SC-CV-04-08, slip op. (Nav. Sup. Ct. February 21, 2008).

12. Allegations of abuse

• Although *Diné* Fundamental Law contains two seemingly conflicting principles, protection of family unity and the right of children and elders to be free from abuse, those principles instruct the court to recognize the unity of parent-child relationships, but to intervene in cases of abuse. *In the Matter of M.M.L.*, 8 Nav. R. 793 (Crwn. Fam. Ct. 2003).

C. Visitation issues

• Generally, the question of whether to limit the visitation rights of the non-custodial parent because visitation would endanger seriously a child’s physical, mental, moral or emotional health is committed to the sound discretion of the trial court but the power is to be exercised with caution and restraint. *Burnside v. Burnside*, 6 Nav. R. 551 (T.C. Fam. Ct. 1990).


• The best interests of the child would be advanced by effecting a reconciliation with her father. To deny visitation rights could only lead to permanent estrangement between the child and the father. *Burnside v. Burnside*, 6 Nav. R. 551 (T.C. Fam. Ct. 1990).

• The Family Court has the power to require the mother to exercise parental control to compel the child to visit her father. *Burnside v. Burnside*, 6 Nav. R. 551 (T.C. Fam. Ct. 1990).

• Where mother had interfered with father’s visitation rights and had encouraged bad feelings toward the father, the best interest of the child would be to remove the child from the mother’s home, place her with social services, and encourage counseling and reconciliation with the father. *Burnside v. Burnside*, 6 Nav. R. 551 (T.C. Fam. Ct. 1990).

D. Adoption and proceedings under the Indian Child Welfare Act (“ICWA”)

1. General ICWA issues

   a) Purpose of ICWA

• ICWA is a federal statute that provides for tribal jurisdiction over certain types of child custody proceedings, even when the child resides outside of the Navajo Nation. Given the historically high number of children removed from tribal families by state courts, Congress set up a process by which state courts transfer placement of tribal children who reside or are domiciled outside tribal lands to tribal courts. *Zuni v. Chinle District Court*, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

• It is now common knowledge among all courts which consider custody matters involving American Indian children that ICWA is a remedial federal statute to protect against the “loss” to

- ICWA also espouses the policy that tribes should make custody decisions under their unique value systems, including involving extended families in the process. *Zuni v. Chinle District Court*, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

b) Discretion to assert jurisdiction


c) Policy regarding adoption by non-Navajos

- The Navajo Tribe neither favors nor disfavors adoption of Navajo children by parents who are not members of the Navajo Tribe but states as its policy that each case shall be considered individually or on its own merits by the Tribal Court of the Navajo Tribe. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

2. Transfer of ICWA cases from other jurisdictions


3. Procedural Issues under ICWA rules

a) Generally

- The Navajo Supreme Court, noting the importance of protecting Navajo children wherever they may be, has developed procedural rules to ensure such protection in the processing of cases between Navajo Nation courts and non-Navajo courts. *Zuni v. Chinle District Court*, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).


b) Proceedings to determine whether jurisdiction will be accepted

- Rule 19(c) requires the Navajo Nation to file a petition to accept jurisdiction, and, within that petition, the Navajo Nation must identify the names and addresses of parents, guardians, custodians or foster parents of the child; names and addresses of persons seeking guardianship, custody, adoption or possession of the child; the name and address of any agency or department seeking either a disposition or to participate in the disposition of the child. *Zuni v. Chinle District Court*, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

- The Rules refer to the hearing as a “jurisdictional hearing” at which the family court hears evidence on the state proceedings, the jurisdiction of the Navajo court, the location and circumstances of the child, the need for temporary custody, and the qualifications of the temporary

• Only after the family court hears the evidence can it accept or deny jurisdiction and grant temporary custody to a custodian. Zuni v. Chinle District Court, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

• The Children’s Code Rules of Procedure are clear, and the Family Court could not have accepted jurisdiction over the child before conducting a jurisdictional hearing with notice and opportunity for the foster parent to participate in that hearing. Zuni v. Chinle District Court, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

c) Service of summons

• Rule 21(b) states that a summons accompanied with a copy of the petition and the notice of hearing shall be served on all persons, agencies and departments identified in the petition in accordance with the Navajo Rules of Civil Procedure. Zuni v. Chinle District Court, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

• The plain language of the Rules requires the identification of a foster parent to a family court and the issuance of a summons to the foster parent to attend the jurisdictional hearing. Zuni v. Chinle District Court, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

• The requirement for a summons necessarily means that a foster parent is deemed a party to the proceeding, and must be given notice and allowed the opportunity to be heard before a family court may take jurisdiction over the case. Zuni v. Chinle District Court, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

• Rule 21(b) reflects a fundamental Navajo principle that persons directly affected by a decision should have the opportunity to be heard. The failure to do so is never “harmless.” Zuni v. Chinle District Court, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

• Foster parents are not constitutionally entitled to notice and an opportunity to be heard before the removal of children placed with them. Navajo Nation ex rel. Div. of Soc. Welfare in interest of Two Minor Children, 4 Nav. R. 57 (Nav. Ct. App. 1983). Note: This holding is presented in strikeout because it is probably no longer good law in light of the holding in Zuni v. Chinle District Court, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

d) Time for hearings

• Rule 21(a) requires the family court to set a hearing on the petition no earlier than fifteen days and not later than thirty days from the date of the filing. Zuni v. Chinle District Court, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

e) Parties

• The Rules do not distinguish or place limitations on who is a foster parent; a foster parent may have been appointed by a state court or by a Navajo court. Zuni v. Chinle District Court, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

• The Rules include a foster parent as a party to the proceeding on the jurisdiction petition. Whether or not a foster parent is a party or must intervene in a custody proceeding, once jurisdiction is properly accepted, depends on the type of proceeding the family court decides is appropriate. Zuni v. Chinle District Court, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).
f) Review hearings

- The family court makes that decision at a review hearing required to be held after the court properly accepts jurisdiction. The foster parent may participate at the review hearing as a party. *Zuni v. Chinle District Court*, No. SC-CV-63-06, slip op. (Nav. Sup. Ct. January 12, 2007).

4. Adoption

a) Statutory nature of proceeding


b) Investigations

- Petitioner may not have an adoption investigation waived. *In the Matter of the Adoption of S.C.M.*, 4 Nav. R. 167 (W.R. Dist. Ct. 1983).
- Upon filing of a petition for adoption the court shall request the Agency Branch of Welfare, with the technical assistance of the state and other government branches of welfare, to make an investigation. Such investigation shall include the history of the child; appropriate inquiry to determine whether the proposed home is a suitable one for the child; and any other circumstances and conditions which may have a bearing on the adoption or custody and of which the court should have knowledge. The report of the investigation shall be a part of the file in the case and shall contain a definite recommendation for or against the proposed adoption stating the reasons therefor. *Notah v. Notah*, 2 Nav. R. 107 (W.R. Dist. Ct. 1979).
- Upon filing of a petition for adoption, the Court shall order an investigation to determine the history of the child, whether the proposed home is a suitable one for the child, and any other circumstances which may have a bearing on the adoption. *Matter of Adoption of Tsosie*, 1 Nav. R. 112 (Nav. Ct. App. 1977).
- [The investigation is to be conducted by the Agency Branch of Welfare, and that Agency is to make a definite recommendation for or against the proposed adoption. The Agency report and recommendation shall be part of the file.] *Matter of Adoption of Tsosie*, 1 Nav. R. 112 (Nav. Ct. App. 1977). *Note: this holding is presented in brackets because it was called into question by Notah v. Notah*, 2 Nav. R. 107 (W.R. Dist. Ct. 1979).

Note: this holding is presented in brackets because it was called into question by Notah v. Notah*, 2 Nav. R. 107 (W.R. Dist. Ct. 1979).

b) When adoption favored

- The Navajo Tribal Council favors the formal adoption of Navajo children in all cases where the parents of such children are dead, or where such children are regularly and continuously neglected by their parents, or where the parents have abandoned such children. The Tribal Council looks with disfavor upon informal arrangements for the custody of such children except for temporary periods pending their formal adoption. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).
d) Consent required

- Where a natural parent seeks relief from an adoption decree because his or her consent was obtained fraudulently, executed improperly, or it was not made knowingly and intentionally, the avenue for relief is usually Rule 60(c)(3) - intrinsic or extrinsic fraud, misrepresentation, or other adverse party misconduct. *Matter of Adoption of J.L.B.*, 6 Nav. R. 314 (Nav. Sup. Ct. 1990).
- Adoption consents are valid if they were signed in the presence of a judge or clerk of court or were acknowledged before a notary public. *Matter of Adoption of S.C.M.*, 4 Nav. R. 167 (W.R. Dist. Ct. 1983).

e) Best interests of the child

- In adoption proceedings, the court may make such reasonable orders which are for the best interests of the child or are required for the protection of the public. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

f) Due process


E. Emancipation proceedings

- When a young Navajo person no longer needs the support, care, and custody of the parents, he or she is said to be a young adult. At this time, the person becomes self-supporting, independent, and free of parental control. The Navajo term for this is *t’aabii ak’inaaldzil* and basically means a person is self-supporting. *Burbank v. Clarke*, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).
- Navajos became self-supporting earlier in their teens during the first half of this century, because of the Navajo people’s minimal reliance on wage income. In contrast, highly developed skills or a post high school education is a must today, if one is to become financially capable of earning a living. For that reason, it takes a minor longer to become independent and self-supporting today. *Burbank v. Clarke*, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).
- Trial court committed reversible error in declaring minor to be emancipated based solely upon the fact that minor had given birth. This may be one factor to consider, but it may not be the only factor. *Burbank v. Clarke*, 7 Nav. R. 369 (Nav. Sup. Ct. 1999).
F. Termination of parental rights

- A search for the minor child’s relatives that ends with the maternal grandmother is insufficient upon which to base a termination of parental rights in this Court, and therefore upon which to domesticate such an order from a state court. In the Matter of Adoption of Baby Girl H., 8 Nav. R. 812 (W.R. Dist. Ct. 2004).
- The Navajo Common Law is not concerned with the termination of parental rights or creating a legalistic parent and child relationship because those concepts are irrelevant in a system which has obligation to children that extends beyond the parents. Matter of Interest of J.J.S., 4 Nav. R. 192 (W.R. Dist. Ct. 1983).
- After terminating the rights of parents, the court may place the child for adoption under applicable laws and regulations. Matter of Interest of J.J.S., 4 Nav. R. 192 (W.R. Dist. Ct. 1983).
- The grounds for terminating parental rights are the unfitness and incompetence of a parent, the abandonment of the child, or the failure to give the child proper parental care and protection. Navajo Nation v. Dodge, 3 Nav. R. 109 (Nav. Ct. App. 1982).
- In cases relating to the termination of parental rights, three of the factors the court should consider are age of the child, passage of time and parental indifference to the care of the child. Navajo Nation v. Dodge, 3 Nav. R. 109 (Nav. Ct. App. 1982).

G. Guardianship proceedings

1. Nature of guardianship

- The term “guardianship” is a bilagáana legal term that describes which individuals have legal rights with respect to a child, and who is in the legal position to represent the child’s rights. Without court intervention, the biological parents are automatically the legal guardians of their minor children. Pursuant to bilagáana law and our statutes, guardianship may be vested in another individual generally if it is found that the parents are unable or unwilling to continue as guardians for the child. In the Matter of S.R.E., 8 Nav. R. 869 (W.R. Fam. Ct. 2005).

2. Due process

- Unfortunately, the provisions in our Navajo Nation Code for guardianship have not been updated since 1945, 9 N.N.C. §§ 801-805. No procedural guidelines for guardianship actions have ever been created. For more than fifty years, whenever petitions for guardians are filed with the court (especially when the subject is an adult) procedures are inconsistent and often fail to protect the subject's due process. In the Matter of Adult Guardianship of Begay, 8 Nav. R. 896 (W.R. Fam. Ct. 2006).
- Because there is no clear guidance from the Navajo guardianship statute, Family Court will look to two remedial statutes for guidance in adopting procedures: the Health Commitment Act of 2006 (Council Resolution CJA-01-06, January 26, 2006) and the Elder Protection Act (9 N.N.C. §§ 1801 et seq.). Both of these statutes provide relief for individuals who are allegedly unable to care for themselves, and for whom the best relief may be to be removed from their own homes, or to have their freedom and liberty otherwise impaired by court order. The Navajo guardianship statute contemplates much the same intentions and relief. In the Matter of Adult Guardianship of Begay, 8 Nav. R. 896 (W.R. Fam. Ct. 2006).
3. Notice

- Due process in guardianship cases should give at least the k'é, respect, compassion, commitment to family and similar concepts of the Health Commitment Act. The Act requires that the subject of the petition be “served with” a copy of the petition and supporting evaluation(s), notice of date time and place of the hearing and an advice of rights. Health Commitment Act of 2006 (Council Resolution No. CJA-01-06, January 26, 2006), p. 9, § 2106(C). Family Court interprets “served with” to mean that the service must comply with Nav.R.Civ.P. 4. See § 2103(C) (“The Navajo Nation Rules of Civil Procedure ... shall apply to all health civil commitment proceedings, unless they are inconsistent with this Act.”). The notice to the individual must be completed at least 72 hours before the hearing is conducted. Id. at § 2106(C). In the Matter of Adult Guardianship of Begay, 8 Nav. R. 896 (W.R. Fam. Ct. 2006).

- Due process in guardianship cases should give at least the k'é, respect, compassion, commitment to family and similar concepts of the Elder Protection Act. That Act requires that the elder be given notice of the proceedings. When someone files a petition for an Elder Protection Order containing allegations that the elder cannot appropriately care for herself, the court may issue a protection order “after affording notice to all affected parties and holding a hearing which demonstrates by clear and convincing evidence that the elder is incapacitated…” 9 N.N.C. § 1815. Although the statute does not define “notice” in the context of the Elderly Protection Act, the Family Court believes that again Rule 4 concepts of service of process would apply. In the Matter of Adult Guardianship of Begay, 8 Nav. R. 896 (W.R. Fam. Ct. 2006).

4. Diné bi beenahaz’áanii

- As this Court understands, there are also traditional notions of guardianship and child care within Diné bi beenahaz’áanii. For example, children are not just the children of the parents, but they are children of the clan, especially the mother’s clan. In the Matter of S.R.E., 8 Nav. R. 869 (W.R. Fam. Ct. 2005).

- Likewise, a child may be given or offered to a maternal aunt or other close family or clan relative to be raised, especially if the extended relatives did not have children of their own. These guardianship arrangements were meant to preserve k'é and harmony within the clan. In the Matter of S.R.E., 8 Nav. R. 869 (W.R. Fam. Ct. 2005).

- Guardianship would not be recognized under Diné bi beenahaz’áanii where the arrangement that lead to child being in the custody of a relative was not intended to be a permanent custodial relationship. Further, although the father may have consented to the arrangement, there was no agreement or consent from the mother. Therefore, the situation is very different than when the mother agrees that it is best for the family or clan that her child be raised by an aunt or other relative. In the Matter of S.R.E., 8 Nav. R. 869 (W.R. Fam. Ct. 2005).

5. Presumption of guardianship by parent

- Where the mother had not been the caretaker or guardian for the child, but there was no evidence that she was unwilling or unable to take up that role, guardianship would not be imposed. In the Matter of S.R.E., 8 Nav. R. 869 (W.R. Fam. Ct. 2005).

6. When guardianship appropriate
The Court shall appoint a guardian for a child if the court determines that the child does not have a parent in a position to exercise effective guardianship. *In the Matter of the Minor Child, M.M.Y.*, 8 Nav. R. 808 (Crwn. Fam. Ct. 2004).


The Fundamental Laws of the Diné on “abuse” is undefined. It appears, however, that something more is required than a simple showing of the “best interest of the child” in guardianship actions involving a petition by non-parent relatives of a child. *In the Matter of M.M.L.*, 8 Nav. R. 793 (Crwn. Fam. Ct. 2003).

If one or both parents object to the guardianship, then the petitioners must be prepared to address the parent’s parenting skills and habits to show some kind of “fault” or “abuse”. *In the Matter of M.M.L.*, 8 Nav. R. 793 (Crwn. Fam. Ct. 2003).

In placing the child under the guardianship or legal custody of an individual or of a private agency or institution, the court shall give primary consideration to the welfare of the child but, whenever practical, may take into consideration the religious preferences of the child and of his parent. *Matter of Interest of J.J.S.*, 4 Nav. R. 192 (W.R. Dist. Ct. 1983).

VIII. Orders under the Domestic Abuse Protection Act (“DAPA”)

A. General

1. Jurisdiction

   Where that both parties are Navajos and alleged conduct occurred within the territorial jurisdiction of the Navajo Nation, Family Court has jurisdiction under DAPA. *Morris v. Williams*, 7 Nav. R. 426 (Nav. Sup. Ct. 1999).

2. Purpose


   DAPA 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. *Morris v. Williams*, 7 Nav. R. 426 (Nav. Sup. Ct. 1999).

   DAPA is designed to protect people from a wide array of violent and abusive conduct, including assault, battery, threatening, coercion, confinement, damage to property, emotional abuse, harassment, sexual abuse, and other conduct. *Morris v. Williams*, 7 Nav. R. 426 (Nav. Sup. Ct. 1999).


3. Not designed for land disputes

   DAPA is not designed to address land dispute matters. The clear thrust of DAPA is to protect people from harm. It is not designed to be used to argue land dispute matters. While disputes over
land may trigger conduct arising to the level of domestic abuse, the Navajo Nation courts are only empowered to deal with the conduct. They cannot decide land titles or boundaries under DAPA. *Sheppard v. Dayzie*, 8 Nav. R. 430 (Nav. Sup. Ct. 2004).

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4. Preliminary paternity determinations

- The family court may make a presumptive determination of paternity in an ex parte DAPA proceeding based on sufficient findings, and may enter interim and temporary orders for visitation and custody based on the presumptive determination, but the mother may challenge the presumption at a subsequent hearing. *Sombrero v. Keahnie-Sanford*, 8 Nav. R. 360 (Nav. Sup. Ct. 2003).

B. What is “Domestic Abuse”

- The Fundamental Laws of the Diné on “abuse” is undefined. It appears, however, that something more is required than a simple showing of the “best interest of the child” in guardianship actions involving a petition by non-parent relatives of a child. *In the Matter of M.M.L.*, 8 Nav. R. 793 (Crwn. Fam. Ct. 2003).

C. Commissioners

- In practice, the commissioner conducts the DAPA hearing and submits his or her recommendations to the family court judge, who then issues or declines to issue the orders based on those recommendations. *Yazzie v. Thompson*, 8 Nav. R. 693 (Nav. Sup. Ct. 2005).
- The family court judge may include some but not all of the commissioner’s recommendations or include additional relief. *Yazzie v. Thompson*, 8 Nav. R. 693 (Nav. Sup. Ct. 2005).

D. Procedural rules

1. Filing fees

- When a petitioner files for a domestic abuse protection order, the court shall not charge the petitioner any fee for filing, copies, forms, service of process, or any other services associated with petitioner for a protection order. *Yazzie v. Thompson*, 8 Nav. R. 693 (Nav. Sup. Ct. 2005).
2. **Time for hearings**

- Under DAPA, due process requires that when a temporary protection order is issued, a hearing is required within fifteen days from date of issuance. The primary purpose of an ex parte temporary order is to maintain status quo until a hearing can be held. *Davis v. Crownpoint Fam. Ct.*, 8 Nav. R. 279 (Nav. Sup. Ct. 2003).

3. **Order of proceedings**

- To deprive an abusive parent of custody under DAPA, the petitioner first carries the burden of proof that the Respondent has been abusive. Once found abusive, the inference that the mother is unfit can be rebutted by the mother to show that she is not abusive of the children and that her abuse of others does not adversely affect them. *Davis v. Crownpoint Fam. Ct.*, 8 Nav. R. 279 (Nav. Sup. Ct. 2003).

4. **Written order must be provided immediately**

- Navajo Supreme Court condemns practice of granting domestic abuse protection order, but refusing to provide written order to petitioner until following day. *Pelt v. Shiprock Fam. Ct.*, 8 Nav. R. 111 (Nav. Sup. Ct. 2001).

E. **Remedies available for domestic abuse protection orders**

1. **Protection orders generally**

- DAPA permits a protection order for any other conduct that constitutes an offense or a tort under the law of the Navajo Nation. *Morris v. Williams*, 7 Nav. R. 426 (Nav. Sup. Ct. 1999).

2. **Child custody**

- Under DAPA, a Family Court may award either party immediate temporary custody of any minor until further ordered by the court or the court may enter a permanent custody order. *Davis v. Crownpoint Fam. Ct.*, 8 Nav. R. 279 (Nav. Sup. Ct. 2003).

3. **Exclusive occupancy of residence**

- Under DAPA, a Family Court can grant exclusive possession of a place of residence to the victim and it can order the perpetrator away from that place of residence as well as give temporary possession of personal property to a victim, each for a specified and limited period. *Sheppard v. Dayzie*, 8 Nav. R. 430 (Nav. Sup. Ct. 2004).

4. **Prohibition on transfers of property**

- Under DAPA, a Family Court can prohibit the transfers, encumbrances or dispositions of specified property mutually owned or leased by the parties. *Sheppard v. Dayzie*, 8 Nav. R. 430 (Nav. Sup. Ct. 2004).
5. Paying costs and fees

- The practice of assessing a fee against all respondents is contrary to DAPA, which forbids the assessment against a prevailing respondent. *Yazzie v. Thompson*, 8 Nav. R. 693 (Nav. Sup. Ct. 2005).
- Under DAPA, 9 N.N.C. § 1660 states that in any protection order proceeding, “once the petitioner has met the burden of proof,” the Court must grant any relief necessary to prevent further abuse. *Yazzie v. Thompson*, 8 Nav. R. 693 (Nav. Sup. Ct. 2005).
- The plain language of Sections 1660 and 1665 anticipate the assessment of fees, including the commissioner fee, only when the need for a protection order has been proven, and not automatically whenever a commissioner holds a hearing. To interpret these provisions otherwise would punish an innocent respondent. *Yazzie v. Thompson*, 8 Nav. R. 693 (Nav. Sup. Ct. 2005).

F. Remedies available for violations of domestic abuse protection orders

1. Criminal prosecution

- If a respondent in a DAPA case violates a protection order, the family court or the police department may refer the incident to the prosecutor for criminal prosecution. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).
- The Family Court lacks jurisdiction to hear a criminal case, meaning the prosecutor is required to file the criminal complaint in the District Court. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).
- The roles and powers of the district court and family court in DAPA cases are clearly separate. Under DAPA the district court only has jurisdiction to enforce a protection order through prosecution for interfering with judicial proceedings under 17 N.N.C. § 477. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).

2. Contempt

- Specifically, DAPA section 1663(B) states any person may move the Family Court for an OSC where there are allegations that the respondent has violated or failed to comply with a DAPO. Furthermore, the law states that the Family Court “shall hold a hearing within 15 days to determine whether the respondent violated the protection order or refused to carry out any judgment, order, or condition.” 9 N.N.C. § 1663(B)(2). In accordance with DAPA’s purpose to provide an efficient and flexible remedy, hearings on alleged violations “shall be expedited.” 9 N.N.C. § 1663(C). *Johnny v. Greyeyes*, No. SC-CV-52-08, slip op. (Nav. Sup. Ct. February 27, 2009).
- Unlike the broad discretion that DAPA affords the Family Court to provide remedies to address domestic abuse and prevent tortious conduct, see 9 N.N.C. § 1604(C), the Family Court’s processing of these cases is strictly regulated. With regard to contempt of court proceedings, the
Family Court is required by law to hold a hearing within 15 days of the issuance of an OSC. *Johnny v. Greyeyes*, No. SC-CV-52-08, slip op. (Nav. Sup. Ct. February 27, 2009).

- Family Court failed to comply with DAPA section 1663(B)(2) where it scheduled hearings more than 15 days after OSC was issued. *Johnny v. Greyeyes*, No. SC-CV-52-08, slip op. (Nav. Sup. Ct. February 27, 2009).
- Family Court abused its discretion in scheduling, then ordering Petitioner's continued custody, pending an OSC hearing set beyond the prescribed timelines of 9 N.N.C. § 1663(B)(2). The Family Court's failure to comply with the law is a violation of Petitioner's right to due process. *Johnny v. Greyeyes*, No. SC-CV-52-08, slip op. (Nav. Sup. Ct. February 27, 2009).
- Any “person” who believes the respondent has violated a protection order can move the family court for an order to show cause. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).
- After a hearing, held within fifteen (15) days after the order to show cause is issued, the family court can hold the respondent in criminal contempt upon a finding beyond a reasonable doubt that he or she violated the order. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).

3. **Incarceration**

- DAPA authorizes the family court to incarcerate the respondent for up to one hundred and eighty days and/or fine him or her $250. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).
- District Court cannot use the threat of incarceration in a Family Court protection order to sentence the respondent for a criminal offense. If the protection order includes a threat of incarceration, the plain language of DAPA only allows it to be enforced through the Family Court as criminal contempt. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).

4. **Fines**

- DAPA authorizes the family court to incarcerate the respondent for up to one hundred and eighty days and/or fine him or her $250. *Thompson v. Greyeyes*, 8 Nav. R. 476 (Nav. Sup. Ct. 2004).

5. **No remedy for expired orders**

- As a general rule, there can be no enforcement of an order which has expired. *Johnny v. Greyeyes*, No. SC-CV-52-08, slip op. (Nav. Sup. Ct. February 27, 2009).
- Family Court may not issue a bench warrant, a temporary commitment order, or conduct an OSC hearing on ancillary matters of an expired DAPO. *Johnny v. Greyeyes*, No. SC-CV-52-08, slip op. (Nav. Sup. Ct. February 27, 2009).