THE DIVISION OF MATRIMONIAL REAL PROPERTY ON AMERICAN INDIAN RESERVATIONS

Submitted by

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Introduction

The *Indian Act*, which governs many aspects of government and law on First Nations reserves in Canada, does not include provisions for the division of matrimonial real property in the event of marital breakdown. Provincial law also is limited on reserve with regard to these issues. Under the *First Nations Land Management Act*, a small number of First Nations (14, with new legislation allowing an additional 30 First Nations to participate) have had the opportunity to develop rules concerning the division of such property in a manner that best suits community interests and needs. However, the fact remains that a large number of disputes over the disposition of matrimonial real property held on Indian lands are essentially resolved in the absence of clear policy. Women and children may suffer (and, anecdotally, *are* suffering) as a result.

The situation in Indian Country in the United States bears comparison. There, as in Canada, there is no single legal regime governing divorce and property matters in divorce. There are many situations in which tribal law, either formal or customary, applies. There also are Indian nations in which state law holds great sway over divorce settlements, and still others that may be more similar to the Canadian situation, where the policy regime that applies – and even what the policy is – may be unclear. All of these possible categories (formal tribal law, tribal customary law, state law, and unclear law) are worthy of research, to gain a better understanding of the ways in which disputes concerning matrimonial real property are resolved. This information would provide evidence of, among other things, the relative success (or lack thereof) of tribal/First Nation sovereignty over matrimonial real property issues, the usefulness of tribal/First Nation policy and tribal/First Nation dispute resolution systems, and the impact of state/provincial dominance.

Methodology

Given the possibilities, we selected several sites for study, a selection based on an *a priori* determination of the type of legal regime that might govern matrimonial real property: the Navajo Nation (decisions may be governed by formal tribal law), the Hopi Tribe (decisions may be governed at least partially by informal/customary tribal law), the Luiseño Indian nations of California (decisions may be governed by state law), and the Native Village of Barrow, Alaska (it may be unclear what legal regime and rules govern the division of matrimonial real property in divorce). Because of the sometimes sensitive nature of the issues to be discussed, we made personal contact with key informants at

each site and followed up on these conversations with site visits.[1] Where possible, the team also reviewed written documents, especially legal cases governing real and other property matters in divorce and tribal constitutions and codes. Finally, we conducted a brief literature review, to better understand Native views of divorce, property, and gender rights. This paper presents our learning from the research (particularly our learning from the case studies), offers a number of observations based on the cases, and concludes with several lessons learned from the American Indian experience.

The Four Cases

The Navajo Nation

The Navajo Nation is the largest American Indian nation in the United States. With an on-reservation, enrolled population of approximately 168,000 (and another 80,000 members living in towns near the reservation), it spans 16.2 million acres (nearly 27,000 square miles) and stretches across northwest New Mexico, northeast Arizona, and southeast Utah.[2]

Traditionally, Navajo political decisionmaking took place at a local level, with bands of ten to forty families comprising political units. The traditional justice system relied on Navajo common law and consensus-oriented judicial procedures, and its aim was simple: to restore harmony. Beginning in 1892, however, with the forced introduction of the Bureau of Indian Affairs' Courts of Indian Offenses, this harmony began to rupture. The Navajo Nation's adoption of a Western court system in 1959 worsened the situation. Over the next 25 years, the Nation wrestled with the alienating and disempowering effects of laws and procedures inconsistent with their culture and history. At best, Navajo judges made decisions according to Navajo custom and tradition, but "dressed up" their verdicts under Anglo law.

By the early 1980s, members of the judicial branch recognized that, in order for the court system to regain its legitimacy and effectiveness, it needed reform. In 1981, the Chief Justice of the Navajo Supreme Court began formally reintegrating traditional Navajo law into the Nation's court system, a policy which received official support with the Navajo Tribal Council's passage of the *Judicial Reform Act* four years later. In 1982, the judicial branch created the Navajo Peacemaking Division, a forum for community-led, consensus-based dispute resolution. The goal of the Peacemaking Division is not to replace the previously established court system, but to provide an alternative to it for certain types of disputes. Resolution techniques are drawn from the Navajo philosophy of *K'e*, which values responsibility, respect, and harmony in relationships. Instead of a

[1] Site visits occurred in March (Native Village of Barrow), April (the Navajo Nation and Hopi Tribe), and late May/early June (the Luiseño Indians of California) 2003. The geographical proximity of a number of southwestern Indian nations, as well as Judge Flies-Away's personal connections, allowed for brief, additional site visits to the Fort McDowell Yavapai Nation, Salt River Pima-Maricopa Indian Community, Gila River Indian Community, and Hualapai Nation.

[2] "Navajo Nation Profile," Navajo Nation Washington Office, <www.nnwo.org/nnprofile.htm>, retrieved August 25, 2003.

single judge adjudicating guilt or innocence and imposing a sentence, Navajo peacemaking is characterized by a participatory process in which the affected parties work with a peacemaker (a group of whom are assigned to each Navajo court district) to resolve their own problems.

Shortly after the adoption of these judicial branch changes, the entire Navajo government underwent substantial governmental reform, in which the roles not only of the judiciary, but also the executive and legislative branches were clarified. Today, the Nation is governed by a three-branch central government with a substantial separation of powers.[3]

As a result of this series of reforms, the Navajo Nation is now known for having one of the strongest, most independent, most developed court systems in Indian Country. Navajo common and statutory laws are the formal "laws of preference" in the Nation's Supreme Court, seven district courts, and five family courts, and 250 Peacemakers help to resolve a wide variety of individual, business, and property disputes. This unique integration of Navajo and Western law occurs on a daily basis. For instance, bar membership rules require formal training in Navajo common law as a condition for practicing in Navajo Nation courts. The courts actively use common law to decide cases, although legal opinions are published in English. Medicine people and elders contribute to the development of common law as they provide testimony to legal proceedings. And, in many instances, disputants can choose to resolve their differences in either a Western-style or traditional (Peacemaker) forum.

Rules governing divorce in the Navajo Nation used to be quite simple: because a husband moved in with the wife's clan, a woman who desired a divorce simply placed her husband's saddle (and other personal belongings) outside the door of their home. Instead of focusing on property settlements, traditional divorce practices emphasized family and clan relationships, with the wife and children staying with the wife/mother's unit.[4] Today, this familial focus remains, but a more complex set of rules and procedures governs divorce and marital property in divorce. These rules and procedures are laid out in the Navajo Nation Code (Title 9 - Domestic Relations) and further specified by judicial rules and common law.[5] Notably, within these regulations and guidelines, judges have a

[3] Besides illustrating the evolution of a complete and distinctly Navajo legal system, this brief history of court and overall government development demonstrates that community building and nation building can be time consuming and difficult. Indeed, reform at Navajo occurred only after substantial governmental crisis. Nonetheless, our sense is that most Navajo citizens feel that the creation of a stronger, self-governing system has been worth the effort.

[4] The focus on family, clan, and matrilocality is reiterated in this more general statement: "The extended kin group, made up of two or more families centered on a mother and her daughters, is an important unit of social organization. It is a cooperative unit of responsible leadership bound together by ties of marriage and close family relationships. Women hold an important social position in the tribe." (Veronica E. Velarde Tiller, *Tiller's Guide to Indian Country: Economic Profiles of American Indian Reservations,* BowArrow Publishing, Albuquerque, 1996, pp. 214-215.)

[5] These Navajo laws apply equally to traditional Navajo marriages, Western civil or religious unions, and common-law marriages (see Navajo Nation Code, Title 9, Chapter 1, Section 3, "Methods of contracting marriage"). While we did not conduct an extensive review, our sense is that many other tribes have marriage and divorce rules in their codes and that the rules for divorce often apply to all types of marriages.

great deal of discretion; as discussed below, much of this discretion focuses on the Navajo conception of equity as distinct from equality.

At Navajo (and indeed throughout Indian Country), a variety of real property and real property-like assets may enter into divorce proceedings, including fee land, individual trust land, home-site leases, land-use permits, houses, grazing permits, and mining claims.[6] Significantly, none of these except for homes (hogans) are "traditional" types of real property – fee and trust land, leases, and mining claims are all by-products of colonialism, in that the U.S. government created these types of property through the *Dawes Act* (typically referred to as the "Allotment Act") and other re-organizations of Indian land and claims. Also traditionally, in a matrilineal and matrilocal society such as Navajo, the hogan would not have been in dispute; it would, according to the "put the saddle out the door" statement of several of our informants, belong to the wife. Yet today, in all instances, the Navajo courts would have jurisdiction over the disposition of these properties in a divorce. Specifically, the Navajo Nation Code states, "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."[7]

An on-line documents search uncovered eight Navajo Nation cases dealing with matrimonial real property in divorce, ten non-real property in divorce cases, and eight child support cases. A review of the findings (particularly of the divorce cases involving matrimonial real property) shows that while the rulings rely on a combination of state law, Navajo codes, and Navajo common law, adjudication in the Navajo court system generates a strong preference for Navajo code and common law. In fact, in at least one case (the child support case *Nez v. Nez*, A-CV-51-91, Supreme Court of the Navajo Nation, 1992), the Navajo Nation Court invalidates a State of New Mexico divorce decree and settlement and replaces it with a Navajo decree and settlement, thus giving *very* strong preference to Navajo law. One interpretation of these actions is that as the Navajo courts have developed, they have moved farther and farther away from state law and standards and incorporated more Navajo law and practice into their decisionmaking and rulings.

Critically, the Navajo courts' preference for indigenous law and traditions results in a focus on "equity" (echoing the Navajo Nation Code and defined by the Navajo Supreme Court in *Shorty v. Shorty*, A-CV-05-08, Court of Appeals of the Navajo Nation, 1982) that is not necessarily synonymous with "equality." Rather, it focuses on the well being of the parties to the suit and of their families and clans. For example, among other factors (*Shorty* lists at least 16), Navajo conceptions of equity take into account both spouses' economic circumstances, which spouse will have the children and the children's needs, and traditional and customary Navajo law (such as rules dictated by clan

[6] This list is not exhaustive.

[7] Navajo Nation Code, Title 9, Chapter 5, Section 404.

relationships). The idea, as summarized in the *Navajo Law Digest*, is that divorced parties should "start divorced life on some sort of equitable basis."[8]

This consideration gives rise to outcomes that may appear facially dissimilar. In *Johnson v. Johnson*, A-CV-02-79 (Court of Appeals of the Navajo Nation, 1980), the Court awarded land leases to a mother (leases which originally had been passed from a father to his son and which the son claimed as his separate property), although she essentially was charged to hold them in trust for the children produced by the marriage. The Court found that it was against Navajo tradition to characterize the land use permits given as gifts as separate property.[9] The same Court in *Livingston v. Livingston*, 5 Nav. R. 35 (Court of Appeals of the Navajo Nation, 1985), ordered a wife to pay the husband, who also had been given custody of the children, for his interest in the hogan, essentially buying him out. *Shorty* is a third example; the ruling gave each party the opportunity to purchase the interest of the other in the family home, to sell the home and home site lease and equally divide the profits, or to have the wife remain in the home until the youngest child reached majority and *then* sell and divide the profits. The common thread in these (and other) decisions of the Navajo courts is adherence to Navajo conceptions of equity, fairness, and justice for the parties to the suit rather than strict (and perhaps more Western) adherence to a "divide equally" rule.[10] Our reading of the persistent focus of the Navajo courts on equitable division is that the standard provides judges with adequate scope to protect parties to suits – particularly women – who might not be best protected by equal division.[11]

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[8] *Navajo Law Digest,* T&B Publishing, Window Rock, Arizona, 1995, p. 189.

[9] *Earl v. Earl*, 3 Nav. R. 16 (Court of Appeals of the Navajo Nation, 1980), implicitly upholds the ruling in *Johnson* – that real property given as a gift to one spouse during marriage is neither separate nor community property but, according to Navajo tradition, belongs to the entire family and is to be held in trust for the benefit of the family's children.

[10] Still other cases support and clarify this statement. *Charley v. Charley*, 3 Nav. R. 30 (Court of Appeals of the Navajo Nation, 1980), states, "Where the state and tribal standards are different, the specific Tribal Code section prevails and the District Court must be fair and just, but it does not need to be equal in the division." *Begay v. Begay*, A-CV-06-89 (Supreme Court of the Navajo Nation, 1989), directs trial judges to begin with the presumption of equal division when dealing with community property (property acquired during the marriage, held in common by husband and wife); if an unequal division is deemed appropriate, *Begay* further directs trial judges to document reasons why, thus providing transparency and clarity should a case be appealed. In other words, with regard to community property, *Begay* gives trial judges a starting point, but still instructs them to ensure that property divisions are fair and equitable. We note further that this standard is not unique in Indian Country to the Navajo Nation; Crow tribal law, for example, also states that property acquired during marriage should be divided equitably (Crow Tribal Code, Section 10-1-120[1]).

[11] Each of the cases mentioned in this paragraph and in the preceding footnote involve spouses who are both members of the Navajo Nation. But the Navajo courts also will rule in divorce cases between members and non-members when they assess that the case is within their jurisdiction. Typically, this occurs when the complaining spouse is a member and meets domicile requirements; for example, see *Lente v. Notah*, 3 Nav. R. 72 (Court of Appeals of the Navajo Nation, 1982) and *Yazzie v. Yazzie*, A-CV-28-84 (Supreme Court of the Navajo Nation, 1985).

In discussions with judges and parties to suits, we found that the problems with divorce are not so much on the decisionmaking side – the Navajo system promotes a sense of equity with respect to real and other property within the Navajo conception of that term, and the parties are generally satisfied with the outcomes, especially when particular questions can be settled through appeal. The "completeness" of the Navajo system, in which well-developed, independent, and sovereign indigenous dispute resolutions processes rely on written Navajo code and customary law, tends to ensure such a result. The problems arise instead, say informants, in executing the proceedings and decisions. For instance, just finding parties and serving them notice of divorce hearings and other matters, such as custody, is very hard. These issues were of much greater concern to parties to divorce suits than real property issues, largely because they have been more difficult to address.[12]

The Hopi Tribe

The 1.56 million-acre Hopi reservation is located in northeastern Arizona and is home to 7,500 Hopi members.[13] The Tribe is known for its intense village loyalties and deep traditional village culture. Indeed, the Tribe is a confederation of twelve villages, each with distinct power over local village matters. While some villages have their own constitutions (such as the Village of Moencopi), all have very specific (although varying) procedures for decisionmaking: an "appropriate" party makes decisions, be that a village Board of Directors, village leader (*Kikmongwi*), or clan leader. Though there is a central Tribal Council, to which most villages send representatives, some villages choose to participate minimally in Hopi central government. Essentially it is a system in which the Tribal Council has authority over certain "big picture" issues, and other, more local issues are village-only matters; these latter issues may even be addressed at the "sub-village" level, within clans or families. One Hopi informant characterized the distinction between the Council and village roles as follows: while the Tribal Council represents the Hopi Tribe externally in interactions with other governments, institutions, industry, etc., village authorities tend to be more focused on matters internal to the nation.

In Hopi tradition, marriage is a community relationship, not just a personal one between a man and a woman. Marriage ceremonies are elaborate and may take many months – even a year – to formally complete. The philosophy of marriage is one of commitment. There are specific ceremonial duties the bride, groom, and various family members must perform, and there is great deal of spirituality, prayer, and liturgy involved. In Hopi

[12] Our sense is that these issues are harder to address because they require that not only tribal courts, but other parts of the tribal justice and social services systems work well – and work in cooperation with the courts. Courts must communicate the names of disputants to police and process servers; police and process servers must be able to find the parties (and be willing to take the time to do so, even when a spouse may be "hiding"); law enforcement officials must be willing and able to help execute the terms of court decisions when the parties themselves hesitate to do so; and, as necessary, social service agencies that work with children or victims of domestic violence must be able to fulfill their duties. Further, when court orders must be enforced off-reservation, in other Native or non-Native jurisdictions, court and law enforcement personnel in those jurisdictions must be willing to give the orders due respect.

[13] Tiller, *op cit.,* p. 210.

culture, marriage is seen as affecting the cosmos, the weather, and crops, which underscores the Hopi beliefs that marriage is forever and that one is forever bound to one's original spouse. Culturally and spiritually, there is no divorce. "Wedding robes are only made once and cannot be made again," noted a Hopi elder.[14]

Clearly, Hopi customary beliefs and modern practices have diverged. As one Hopi Judge explained, the mere fact that single parents are now common demonstrates that the customs of marriage and family are not adhered to the same way as they were in the past. In fact, many tribal members have married non-Hopi Natives and non-Natives. Many of these couples choose to live outside the Hopi Reservation, often in urban metropolitan areas such as Flagstaff and Phoenix, Arizona, and return only to visit and participate in ceremonies and clan activities. These contemporary realities, including divorce and the issues it raises, have required the Tribe to craft policies and procedures to address them.

Hopi residents file dissolution of marriage petitions in the Hopi Tribal Court. Because the Hopi tribal code requires a residency term before the Tribal Court can assume jurisdiction, some divorce proceedings are, of necessity, filed in state courts instead. Yet in either case, if there is property at Hopi linked to one of the parties, the affected village has original jurisdiction to decide any controversies that arise concerning the property.

This village power to decide domestic matters (such as property issues) is acknowledged in both the Hopi Constitution and in case law. More specifically, Article III, Section 2 of Hopi Constitution expressly reserves to individual villages the power to address family disputes and regulate family relations in villages. In *Ross v. Sulu,* No Docket Number Available (Appellate Court of the Hopi Tribe, 1991), the Court notes, "Only after the village resolves the underlying dispute pursuant to established custom can the parties come to tribal court for enforcement of their rights as determined by the village…" Case law such as *Sanchez v. Garcia*, No. 98AP000014 (Appellate Court of the Hopi Tribe, 1999) additionally affirms that if a decision is reached through an acceptable means or process at the village level, then the decision from that process prevails. A village must waive its jurisdiction before the Tribal Court can proceed with a village-related case.

An important concept behind the practice of making property decisions in divorce at the village level is that this may be the *fairest* place for the decisions to be made. The village, clans, and families will be "close" to the ruling and, therefore, are most likely to render justice in an indigenously equitable way. Put somewhat differently, since village leaders and other decisionmakers have to live with disputants (and/or their relatives), there is a strong incentive to create a fair and peace promoting resolution. Indeed, informants stressed that much of the focus in such decisionmaking at Hopi has been on the appropriate and equitable use of property as opposed to the determination of "ownership," which has not been central to Hopi tradition. But there is not an inflexible application of tradition either. In *Sanchez v. Garcia*, the parties agreed to have a clan relative decide how to divide property in a probate case even though, traditionally, it all

[14] Notwithstanding these traditional decrees against divorce, Hopi informants also indicated that, similar to Navajo custom, if a woman wanted a man to leave a relationship, she would simply place his footwear outside the house.

would have been awarded to the eldest daughter. The clan relative's decision then withstood appeal to the Tribal Court based on its deference to the village-level process ruling.

Like the Navajo Nation, the Hopi Tribe has a "complete system" with respect to the disposition of matrimonial real property in the event of divorce. While many of the rules are unwritten, the involvement of decision makers at the village level who are perceived by the disputants as appropriate generally leads to outcomes that also are perceived as just.

The Luiseño Indian Nations of California

Due to the relatively small size of many California tribes (both in terms of population and land area) and the proximity of many communities, this "case" actually is drawn from the experience of several of the seven Luiseño Indian nations in southern California.[15] The larger sample provides more examples of the complexities and outcomes of real property questions in divorce. Before turning to those examples, however, it is useful to first consider the impact of Public Law 83-280.

Public Law 83-280

This 1953 federal law establishes, for six states (including California and Alaska), state jurisdiction over criminal matters and some civil disputes in Indian Country. *Bryan v. Itasca County,* 426 U.S. 373 (U.S. Supreme Court, 1976), concludes that the civil laws to which Public Law 83-280 refers are laws of "general application," including the laws of contract, tort, marriage, divorce, insanity, and so on. Thus, in California, state courts have concurrent jurisdiction over divorce as authorized by P.L. 83-280, and tribal members can seek dissolution of marriage decrees from either a state or tribal court.

However, a variety of factors, including a lack of funding and a lack of state support (motivated by P.L. 83-280), has meant that most California tribes have yet to develop their courts. Therefore, tribal members seeking to divorce are forced to use state courts or not divorce at all. Indeed, several informants indicated that some people simply separate and do not bother to seek a divorce in state court due to the cost and the perceived difficulty of navigating the state system.

[15] The seven tribes are the LaJolla Band of Luiseño Mission Indians, the Pala Band of Luiseño Mission Indians, the Pauma Band of Luiseño Mission Indians, the Pechanga Band of Luiseño Mission Indians, the Rincon Band of Luiseño Mission Indians, the Soboba Band of Luiseño Indians, and the Twenty-Nine Palms Band of Mission Indians. The combined population of the seven bands in the late 1990s was 4,470, with average membership near 650; the smallest of the Luiseño bands (Twenty-Nine Palms) had fewer than 20 members and the largest (Pechanga) had nearly 1,400 ("Indian Service Population and Labor Force Estimates," U.S. Department of the Interior, Bureau of Indian Affairs, 1999). The average size of each band's reservation is 6,050 acres, with the smallest (Twenty-Nine Palms) having just over 300 acres and the largest (Pala) having nearly 12,000 acres ("Indian Reservation and Rancheria Lands in California," U.S. Department of the Interior, Bureau of Indian Affairs, Pacific Region Branch of Forestry, 2000).

The other wrinkle in the law is that it reiterates states' inability to alienate or encumber any property of an Indian or tribe that is held in trust by the federal government. Only tribal forums may settle trust property issues in divorce cases. In other words, P.L. 83-280 places some states squarely in the midst of divorce matters by giving them jurisdiction and an incentive to discourage tribal court development, but then caps their power by reserving decisions over trust land to tribes.[16]

Anecdotes

To convey a sense of the complexities and outcomes of real property disputes in divorce suits involving Luiseño tribal members, we offer several anecdotes. In introduction, we note that in Luiseño tradition, divorce was, to the best knowledge of our informants, a case of one party simply leaving the home. Due to assimilation, intermarriage, and the imposition of Western law, this method of divorce is no longer possible. Historically, it is also the case that Luiseño people did not really own property. The population lived in villages and, depending on the season, moved from the coast to the desert. The reservation system changed this pattern and placed an emphasis on boundaries, property designation, and ownership (meaning that property had to be designated or set aside, whereas before, it was just there, and people passed through it and used it when necessary, probably with an understanding with other peoples who also passed through the area).

The accounts below bear out the greater complications in divorce and property settlements in divorce under the modern regime, which is a mixture of state law, tribal law, and individuals working things out on their own. None of the Luiseño bands currently have a tribal court,[17] so members must pursue divorce proceedings in state courts. Thus, in particular, the evidence demonstrates the difficulties that state courts and lawyers not trained in Indian law have in addressing real property questions when a member of a Luiseño Indian nation divorces.

- A recent case concerned the divorce of a female tribal member whose husband was a member of another Native nation. Prior to her marriage, the wife obtained a tribal land lease and built a home on the land. These pieces of property – the land and the house – then became disputed in the

[16] 18 U.S.C. section 1162 (b), i.e., Public Law 83-280, states, "Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." This prohibition also has been upheld by case law; see *Boisclair v. The Superior Court of San Diego County*, 51 Cal 3d 1140 (California Supreme Court, 1990).

[17] We note, however, that work is proceeding through the Southern California Tribal Chairman's Association on a court that would be used by Native nations located in San Diego County, including the Luiseño bands there.

divorce. The husband claimed he should be compensated $60,000 for improvements he made to the house, which had been appraised at $160,000. The wife noted that the appraisal was likely too high, as it was unclear whether the appraiser took account of the fact that the house stood on inalienable tribal land. Her own lawyer did not understand federal Indian law and was unclear how to handle this issue. On her own, she obtained a letter from the Bureau of Indian Affairs verifying that that lot belonged to the tribe, that the house was deeded to her, and that non-tribal members (such as her husband) were not allowed to live on tribal land unless they were married to a tribal member.

Yet because the case had to be heard in state court, these tribal law real property issues were not well understood. The divorce stalled for five years, costing the wife over $8,000 in attorney fees. In the end, her spouse dropped his claim for compensation because he ran out of funds to pursue the case while waiting for the court to rule on the housing issues.

On reflection, the wife feels that the state system failed her. Neither the state court nor the attorneys in the process were familiar with tribal law or federal Indian law and their effects on state jurisdiction, and this destroyed any security she had in the divorce process. Besides the direct monetary cost of attorney fees, she bore the cost of taking time off from work every time she had to go to court, which was a two-hour drive in each direction. And although her former spouse is delinquent in child support payments, her previous experience in state court has convinced her that pursuing enforcement of the award is not worth the time and money. By contrast, she feels that a tribal court would have been aware of the jurisdictional issues involved and of the various tribal and federal laws in question. Based on this knowledge, it would have been able to construct a more timely resolution, protect the wife's property rights, and ensure the protection of her non-member husband's rights as well. In other words, a tribal court ruling would probably have been faster, less costly, clearer, and fairer.

- A tribal member woman was married to a non-Indian, and the family lived in a home on tribal land that had been assigned to the wife's father and given to the wife. The wife owned the deed to the home. When the couple decided to divorce, the wife hired an attorney who used most of his initial fee to familiarize himself with the law concerning homes on tribal land. Worse, attorneys for both parties attempted to muddy the issue with the prospect of per capita income checks from gaming, even though the tribe did not, at the time, issue such payments. Only after many months and repeated claims by the wife did the lawyers agree that neither per capita monies, nor the land, nor the house should be mentioned in the divorce decree. Instead, the couple's personal property was the focus of the settlement.

This is a case in which the state courts and non-Indian law trained lawyers "got it right." Even so, the process took nearly a year and a half and the female party to the suit felt that "the decision was cold and quick, and there was no sense that the [state] judge knew anything about tribal land." She felt that the process was too impersonal, too uninformed, and especially difficult for an Indian woman who primarily had the best interest of her children in mind. Her strong feeling was that a properly empowered tribal court would have generated a quicker solution and more clearly recognized her rights and feelings.

- A tribal member wife and her non-Native husband lived in a home that was financed through the U.S. Department of Housing and Urban Development (HUD), owned by the tribe's Indian Housing Authority, and leased by the wife. Further, the home was located on trust land assigned to the female spouse, which by tribal custom and with the approval of the tribal membership, she could "give" to her children but not transfer to anyone else. Because the wife did not own the home or the land, nor could her spouse technically lay claim to them (as a non-member, he was ineligible to sign a tribal Housing Authority lease or receive a tribal land assignment), she did not feel they should be considered real property relevant to the case, and she strove throughout the divorce process to keep them out of the settlement. She feared that if the home and the land were mentioned in the settlement papers, it would appear that she had "received" them, and thus, the spouse would receive everything else.

  Her spouse's attorney was especially adamant that the home and the land be part of the case. Both he and the court were confused about whether home ownership should be credited to the wife. In response, the wife repeatedly requested that the spouse's attorney contact HUD and verify that the tribe's Indian Housing Authority owned the house. Eventually the attorney did contact HUD and make the verification; nonetheless, he continued to use language about the wife "receiving" the home in his negotiations. As a result, the settlement papers noted that the house and land went to the wife.

  Even after the settlement, the dispute over the home spilled over into arguments about other property. The husband continued to contend that he was due compensation for upgrades to the house, a claim which he finally dropped when the wife agreed to allow him three of the family's four cars (the settlement had granted them each two cars).

  In this case, the wife claimed to be pleased with the outcome from the state court. While the process involved great struggle and there were clear aspects of the settlement that were not in her favor, she was relatively successful. However, it was her persistence, and not the state system's capacity to appreciate and address her situation, that led to this success.

- A final example concerns a tribal-member woman seeking a divorce who has a home on trust land. Her partner is a member of another tribe and has subjected her to domestic violence. She was initially hesitant to seek relief via the state courts and sought help from her tribal council. The council told her that its only option – absent the infrastructure of a court – was to banish the husband, which it was disinclined to do. In order to gain relief, the woman has had to seek help from the county sheriff and, for her divorce, the state courts. Now she is worried about how issues concerning the family home and land will be decided, particularly because of the tribal council's reluctance to act on the domestic violence issues.

Considering these anecdotes as a group, one common theme is present: The necessity of pursuing divorce actions in state court can cause hardship for members of the various Luiseño bands. It is typical for state court personnel to be unfamiliar with tribes' jurisdiction over trust land, with housing lease and home ownership regulations in Indian Country, and with the kinds of remedies that might protect all parties to a suit. These knowledge gaps tend to increase the time (and probably the monetary cost) required to resolve real property disputes in divorce. Other costs include travel costs to relatively distant state courts, including income losses from increased time off work.

The greater possibility of inequitable outcomes is another aspect of increased hardship caused by state resolutions or partial resolutions. Sometimes state courts assume jurisdiction and then fail to take Indian law (tribal codes, tribal custom and tradition, and federal regulations concerning real property in Indian Country) into account. Alternatively, they opt out of making decisions about real property because of trust issues and defer, explicitly or implicitly, to the tribes. Certainly, the Luiseño tribes have jurisdiction over the types of real property that may enter divorce cases, but lacking the court infrastructure to make use of that jurisdiction or the backing of codes and case law to guide difficult decisions (such as questions concerning who may stay in a family home, what counts as real property, and how property on trust land should be valued), they also frequently fail to resolve matrimonial real property issues. Tribal councils may make rulings, but according to our informants, have not actively done so. Issues not dealt with by the state are then left unresolved or left to the parties to work out on their own. These three possibilities – resolutions arrived at through state court dominance, tribal council decisions, or the parties being left to work things out on their own – can, according to the evidence from the Luiseño nations, result in outcomes that appear unfair or inequitable.[18]

[18] While it is possible for private resolutions to give rise to outcomes that are "bad" for women (for example, a man may have disproportionate power in the negotiation and be able to tilt the outcome his way), this is not *necessarily* the case. The fact that disputing parties are forced to work real property settlements out on their own may lead them to rely more upon culture and tradition, which by Native standards, may give rise to more equitable outcomes. Nonetheless, informants noted that it would be better if the process were either more transparent (as at Navajo) and/or recognized more broadly as appropriate (as at Hopi).

The Native Village of Barrow

The Native Village of Barrow (NVB) is one of more than 200 Native villages (tribes) in the State of Alaska. It is the northernmost of eight Native villages in the Artic Slope Borough of the state, and thus, is geographically quite isolated. The people are Inupiaq and Inuit and share language and culture with the Inuit people in northern Canada and Greenland.

An initial expectation was that this isolated area might be far from the interest of the state, and that state interest would be further attenuated by the Alaska Supreme Court's 1999 decision in the case of *John v. Baker*, 982 P.2d 738 (Alaska Supreme Court, 1999). In this ruling, the court upheld the decision of a tribal court in a custody matter and noted that tribes retain "inherent, non-territorial sovereignty" and can decide internal tribal matters that affect self-government. The court held further that tribal court decisions are to be respected through comity if due process is afforded, the tribal court had personal and subject matter jurisdiction, the order was not obtained by fraud, and the decision does not violate state or federal public policy. Because Alaska is subject to Public Law 83-280, we also knew that for many years, NVB had no formal tribal court and only recently developed a fledging body. Based on *John v. Baker*, the state might assume it could defer to this court, regardless of the existence of tribal-level infrastructure for dealing with divorce and real property disputes in divorce. Thus, we thought it was possible that NVB might be a case in which there was a vacuum or gap in the application of law – either state or tribal – to real property questions in divorce.

This expectation was not entirely borne out. Inquiries revealed that while the tribal court is not yet ready to hear divorce cases involving NVB members, the long-arm of the Alaska State courts does extend to them. The local Superior Court judge stated that either he or his magistrate would handle most divorce cases involving Alaska Natives, that he applies state law in all of these cases, and that he does not recall parties ever bringing in Inupiaq or Inuit culture or custom. One of the reasons the State of Alaska judicial system is able to govern the territory and apparently minimize the existence of legal "vacuums" is its use of telephonic hearings. Through these, even distant parties are able to access the state system (and vice versa).

However, there are indications that not everything is as cut-and-dried as the Superior Court judge's description implies. When pressed on the issue of Native real property, the judge conceded that he did not have the authority to determine the division of trust land. Thus, decisions affecting these properties (and probably also decisions about trust property-like holdings such as seasonal campsites on federal land[19]) *must* be made outside the state system, and in NVB, there is currently no regularized system for doing so. While NVB has a court in theory and structure (including judges), Village/tribal codes are not in place that would allow the court to rule on disputes over matrimonial real property. Instead, families (and perhaps other traditional bodies) tend to work these

[19] The reality is that the processes and options for the division of many matrimonial real property holdings remain unresolved in Alaska. The complexity of the landholding system (which is explained in greater detail in the text) has led to a situation in which divorce cases have yet to touch on every contingency.

issues out and report trust property settlements back to the Director of Realty for NVB, who then registers the information via telephone conversation and facsimile confirmation with the Bureau of Indian Affairs' Land Office in Anchorage, Alaska.

Of course, settlements are not always reached, and this can lead to difficulties in the long run. One example is the case of a couple who divorced in state court but did not divide their trust property. The state lacked jurisdiction to do so, and the couple did not seek a private resolution themselves after the divorce – they simply continued to hold the small property (approximately 70 by 90 feet, just large enough for a home) in common. The wife died first, without a will, and the administrative law judge gave half the property to her former husband and the other half to the couple's six children. Once the husband died, his half of the property passed to his common-law wife, and upon her death, to her adopted daughter. Today, the property belongs to these seven heirs and is ripe for dispute because of the very small size of each heir's possession. This outcome would have been less probable had a tribal court been able to award the trust property to one spouse or the other in the divorce and, through the award, call attention to the importance of clear possession of such a small tract.

Viewed historically, both divorce and property issues have become more complicated in NVB with the imposition of non-indigenous laws and standards. With regard to divorce, in the past, "Neither husband nor wife had recourse to legal sanctions enforced at a higher level, so family conflicts were worked out between spouses, each calling upon close consanguine kin for assistance as needed. Husband or wife could terminate the union at any time by simply packing up and leaving."[20] Others interviewed affirmed this tradition and noted that even today, some people do not seek a divorce unless they find another person they wish to marry.

With regard to property, for the Inupiaq "the issue of land ownership had always been one of 'relation' rather than possession. That is, the right to use a given site was based on one's relation to previous generations of kin who hunted in the area and the animals located there."[21] Modern divergence from this tradition has created a landholding pattern in Alaska that is even more complicated than that in the lower forty-eight U.S. states. The difference is largely due to the *Alaska Native Claims Settlement Act* (ANCSA), which extinguished Native title to some 365 million acres of land, paid compensation for these lands to 13 regional Native corporations, and conveyed another 40 million acres to the regional corporations and 200-plus village corporations. These actions left Alaska tribes themselves without "reservation" land bases (the regional and village corporations, as opposed to tribal governments, hold fee simple title to the surface estates of village land). Furthermore, the Act ended the allotment process, by which individual Alaska Natives could acquire land to be held in trust for them by the federal government. Existing allotments were not extinguished, and allotment petitions on file at the time of ANCSA's passage were generally honored, but ANCSA prevented the creation of

[20] Margaret B. Blackman, *Sadie Brower Neakok: An Inupiaq Woman*, University of Washington Press, Seattle, 1989, p. 150.

[21] <arcticcircle.uconn.edu/VirtualClassroom/case2a/case2avc.html>, retrieved August 28, 2003.

entirely new allotments. This history means that in the Native Village of Barrow, tribal members live on a mixture of fee land (plots owned by the regional corporation, village corporation, or individuals themselves) and trust land (individual Native allotments), and that both corporations and the federal Bureau of Indian Affairs (through the Reality Office or Solicitor) wield a great deal of decision-making power over real property in NVB.[22]

Reflecting on these changes in both divorce and landholding practices, one informant reasoned that as Western divorce becomes increasingly common and necessary, property disputes in divorce will also increase. Once the tribal court is able to hear divorce cases, Alaska's status as a P.L. 83-280 state means that these future litigants will be able to file in either tribal or state court. Her expectation is that many will choose tribal court, due to the judges' greater capacity to understand Alaska Natives' property issues and claims. However, she noted that some disputants may still desire to file in state court, based on a perception that the close relations of most people in Barrow make the impartiality of tribal decisionmakers impossible. Weighing these pros and cons, she suggested that providing the option of filing for divorce in either tribal court or state court may be the best alternative, and certainly better than having no choice at all (which is the current situation).[23]

In summary, the situation in NVB is remarkably similar to that of the Luiseño nations, in which the state has a degree of jurisdiction (can settle most issues in divorces involving tribal members) but cannot rule on real property issues if such property is held in trust. Yet there also appears to be a more active informal system for decisionmaking on trust property claims, supported in part by the NVB Director of Realty, as well a formal venue (the developing tribal court) in which claims can be heard once codes governing divorce and matrimonial real property issues have been agreed upon.

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[22] NVB's tribal government could (and, indeed, has plans to) contract the trust reality management function from the Bureau of Indian Affairs through Public Law 93-638. Because of ANCSA, however, the regional and village corporations will always control substantial amounts of land in the Village.

[23] It must be stressed that in the four cases examined – the Navajo Nation, Hopi Tribe, Luiseño bands, and Native Village of Barrow – there would be a choice of courts only in the latter two situations, because in both California and Alaska, Public Law 83-280 provides states and tribes with concurrent jurisdiction over divorce. But this choice would not extend to disputes over real property held in trust (or perhaps even to disputes over property only affected by trust land issues). Members of the Hopi Tribe and Navajo Nation living on the nations' respective reservations do not have a choice between state and tribal courts when filing for divorce. At Hopi, as long as residency requirements are met, the Hopi courts have jurisdiction. At Navajo, the Navajo courts have jurisdiction even when only the complaining party meets the residency requirement: "the Navajo Tribal Courts have jurisdiction to grant a dissolution of marriage when one of the spouses is domiciled within the territorial jurisdiction of the Navajo Nation if the complaining party has met the residency requirements even though the other spouse is domiciled outside the Navajo Nation" (*Yazzie v. Yazzie*, A-CV-28-84, Supreme Court of the Navajo Nation, 1985). It is notable that in this case, the non-complaining party was a member of another Indian nation, so it is also true that only one party to the suit must meet the residency *and* membership requirements. Finally, we stress that the Navajo courts actively protect their jurisdiction over divorce; in *Nez v. Nez*, A-CV-51-91 (Supreme Court of the Navajo Nation, 1992), the Navajo courts found a divorce decree entered by the New Mexico state courts invalid because both parties lived on the Navajo Reservation.

A final note to this case is the fact that the State of Alaska has jurisdiction over some "real-like" property belonging to Alaska Natives – their shares in the Alaska Native corporations created by ANCSA. The original language of the Act states that shares would not be alienable outside a Native family until 20 years after 1971 (the year of the *Act*'s passage). *Calista Corp. v. Deyoung*, 562 P.2d 338 (Supreme Court of Alaska, 1977), a case brought in 1977 in the Alaska State courts, held that the state courts had jurisdiction over shares because they were not trust property (despite their origination in Native land) and because they were alienable for purposes of separation, divorce, and child support. The broader point is that Native jurisdiction over Native assets is less secure in Alaska than in other states. Regardless of *John*, *Calista* shows that the State of Alaska has a record of imposing jurisdiction more aggressively than other states, even reaching to jurisdiction over real-like assets with a degree of trust protection. The U.S. Supreme Court's decision in *Alaska v. Native Village of Venetie Tribal Government* , 522 U.S. 520 (U.S. Supreme Court, 1998), provides further support to this claim in its finding that the Venetie tribe's ANCSA lands were not "Indian country" within the meaning of the U.S. Code.

These circumstances create great pressure for Alaska Native villages/tribes to develop courts and rules in order to roadblock potentially harmful state action. This is at least part of the impetus behind the current court development efforts at NVB and underscores the importance of related developments, such as its receipt of exclusive jurisdiction over all *Indian Child Welfare Act* cases. NVB court officers note that their goal, over time, is to handle all cases of controversy concerning their people, including divorce proceedings.

Other Important Case Law Findings

Conroy v. Conroy, 575 F.2d 175 (8th Cir. 1978) is a sigificant federal case not introduced by the four tribal examples. This case began as a divorce action in the Oglala Sioux Tribal Court, which granted the wife a divorce and settled half of the couple's cattle and half of the husband's 320 trust acres on her. However, after the divorce decree, the Superintendent of Pine Ridge Agency of the Bureau of Indian Affairs wrote a letter to the Tribal Court claiming that the Court lacked the authority to make an award involving the husband's trust land. This letter prevented the Tribal Court from enforcing its decree. Alleging a violation of her civil rights, the wife then sought relief in the United States District Court. The federal court found that:

- The Tribal Court *did* have jurisdiction in this matter, jurisdiction which derived from the Tribe's powers of self-government and which included the regulation of members' marriage relationships.

- There is no exemption to court jurisdiction over trust property within the Oglala Sioux Tribe's codes.

- The purpose of the *Dawes Act* (Allotment Act) was the protection of Indians, and there are no provisions within it to "negate a valid decree of a competent tribunal… In sum, we find nothing in the Allotment Act warranting the conclusion that the defendant's interest in trust land here

> involved was beyond the jurisdiction of the Tribal Court to divide as decreed" (*Conroy v. Conroy*, 575 F.2d 175, U.S. 8th Circuit Court of Appeals, 1978, pp. 26-27).

Thus, the District Court concluded that the plaintiff (the wife) had an enforceable property interest in her former husband's trust land. It ordered the former husband to file an application with the Secretary of Interior for the transfer of the property title to the former wife and ordered the Secretary of Interior to give full and fair consideration to the application, with due regard for the decree ordered by the Tribal Court. In other words, the federal courts have upheld tribal courts' jurisdiction over trust property and their right to divide it as they see fit in divorce settlements, and they have directed the Bureau of Indian Affairs, in its role as the recorder of trust property ownership, to facilitate and uphold such divisions.

Observations

Casting an eye over the four situations studied, there are several important observations that can be made about the resolution of divorce disputes concerning matrimonial real property on American Indian reservations.

First, there are two tribes in our sample with fairly clear codes, case law, and customary practice rules for the disposition of real property in the event of marital breakdown – the Navajo Nation and the Hopi Tribe. The Navajo Nation has the most obvious set of rules, with a mention of property issues in the code, in extensive case law, and in Navajo common law. But the Hopi Tribe also has rules that it follows, although they are less transparent, as property issues are resolved almost entirely at the village level according to custom and practice.

These nations are not alone. A review of codes available online suggests that many other American Indian nations have at least some formal (and probably more informal or customary) rules for resolving real property questions in divorce. For example, tribal divorce codes for the Chitimacha Tribe of Louisiana and the Fort Peck Assiniboine and Sioux Tribes recognize tribal court authority to make orders regarding the distribution of trust land (although the court cannot remove land from trust or issue any order that might result in a removal of land from trust). The Eastern Band of Cherokee's code states that the tribal council must decide the division of trust property in the event of divorce. The Mashantucket Pequot Nation's code notes that the tribal court may order the division or sale of non-trust real property. Notably, these rules are not as detailed as the rules the Government of Canada expects First Nations to develop under the pilot projects of the *First Nations Land Management Act*, but they do provide guidance, raise awareness of the issues, and act as a springboard for further policy development.[24]

[24] How detailed codes are varies dramatically from tribe to tribe, on this and all other topics. The differences are a matter both of code development efforts and cultural choice. As among First Nations, there has been a proliferation of American Indian tribal code development where funds (particularly federal

Of course, our study sample also shows that there are a number of American Indian nations without any rules, codes, regular practices, or case law to guide decisionmaking about real property in divorce. The Luiseño Indian nations and Native Village of Barrow are examples in which there is no set of formal rules to guide disposition at the tribal level and, as a result, problems can arise. Rulings may be inconsistent, inappropriate (especially if made by a state court), or not made at all. The Native Village of Barrow case draws particular attention to the importance of codes, rules, and practices, as there, a tribal court exists, but the tribe has yet to develop law for the court to interpret, act upon, and enforce. Thus, the Village continues to cede its jurisdiction over divorce to the State of Alaska and to the partial solutions state courts are able to offer.

Second, there is a critical difference between Native nations that have procedures and practices for settling matrimonial real property questions *and* tribal dispute resolution forums and nations that do not have the two. Again, the Navajo Nation and Hopi Tribe offer positive examples. Both have, as noted above, rules and practices for the resolution of such questions, and they have established indigenous forums for the hearing of cases. At Navajo, a district court may rule on real property issues in divorce, or a decision about property division may be facilitated by a peacemaker and then ordered by the court; at Hopi, property issues in divorce are dealt with at the village level unless there is a strong reason to resolve a particular case in the tribal court.[25] These tribes, in possession of both rules and dispute resolution mechanisms, are able to offer complete solutions to the issues at hand.

By contrast, the Native Village of Barrow has a court but no law or rules governing divorce or the disposition of matrimonial real property in divorce, so even the court is ineffective in this area. And in California, the tribes studied have neither rules nor courts, which as demonstrated in the anecdotes, can lead to negative outcomes. Among the Luiseño tribal members interviewed, there was a strong sense that developing tribal courts would help matters. Already, there is pressure in the Native Village of Barrow to develop rules and law so the court can exercise its jurisdiction.[26] The sense in California was that the development of court infrastructure would create a similar pressure for Native nations to develop practices and law that resolve and clarify real property concerns and conundrums in divorce (such as questions concerning who may stay in a family home, what counts as real property, and how property on trust land should be valued).

Third, in the cases examined, the results of tribal court and tribal dispute resolution processes were generally viewed as equitable, whereas the results emerging from state courts were less frequently seen as fair. The greater dissatisfaction with state-generated

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funds) have been made available for such work. The efforts of many American Indian nations to develop domestic violence codes are a recent example.

[25] The tribal court issues divorce decrees for resident members.

[26] It has met success with this process in other areas. For instance, the NVB developed a children's code that includes provisions for a wellness court process, which now helps the Village deal more effectively with minors charged with alcohol-related delinquent acts.

outcomes appears to stem from several problems litigants experience in state courts: the players (judges, lawyers) usually do not understand the issues concerning real property in Indian Country, Anglo courts do not (and perhaps cannot) apply indigenous standards, the courts do not have jurisdiction over property held in trust, and appeals can be difficult.

The Navajo case is an important example of equitable decisionmaking by tribal courts. As detailed in *Shorty*, Navajo courts are empowered to take a large list of factors into account in their divorce decrees, a list which has the advantage of giving each party ample opportunity to state what his or her situation has been and might be. The courts are then able to craft solutions that may not be strictly equal, but which are equitable by Navajo standards. More specifically, the tribal courts attempt to divide assets in a way that, in Navajo eyes, leave the parties in relatively similar situations after the dissolution of the marriage.

The Hopi example is illustrative as well. There, informants noted that only the village leaders know the customs and traditions that will result in the most equitable solution to real property disputes. A resolution based upon foreign law (non-Hopi law) might not be equitable because it would be based on non-Hopi beliefs. And, it would run the risk of disregarding other community and clan-related interests that could cause further disharmony and conflict among members of the family and village.

To the extent that a situation is considered unfair after an initial resolution is reached, indigenous systems also offer more appropriate and more complete means of appeal. For example, a number of Navajo cases examined for this research were appealed to the Navajo Supreme Court, which was able to hear and rule on the questions of law raised. The Hopi Tribe Court is able to hear appeals from the villages, and has its own Court of Appeals for final decisions. By contrast, when state court settlements are unsatisfactory, anecdotal evidence suggests that parties may be too fed up with the system to continue along the state route of appeal (after all, higher state courts are likely to have the same problems as lower state courts) or that they are sent to bodies other than the state (for example, tribal councils, for the resolution of matters concerning trust land), which themselves often fail to resolve the disputing parties' concerns.

This is not to say that tribal systems are necessarily fair and state systems unfair. As one informant from the Native Village of Barrow noted, the close relationships of Village members might threaten the equitability of tribal court outcomes. Yet the advantage offered by state forums would have to be substantial – it would have to offset the equity-compromising disadvantages noted above (state courts' lack of jurisdiction over trust land, court personnel's limited knowledge of real property issues in Indian Country, the systems' typical inability to take indigenous ideas into account, and the difficulty of appeals).

The Luiseño examples suggest that tribal forums may produce results that are "more equitable" for non-members as well. Like tribal members, they would avoid wasting time and money as state court personnel acquainted themselves with Native real property issues. Of necessity, tribal court personnel are more knowledgeable about these matters,

and therefore are likely to move more quickly toward the resolution of matrimonial real property disputes, a fact that leaves non-members better off in an absolute sense. And, although the options for real property division will be different from the options that exist when two non-Indians divorce, tribal courts' greater familiarity with the possibilities increases the probability that *some* remunerative property settlement will be reached. Although it is a case between two citizens of the Navajo Nation, *Begay v. Begay*, A-CV-06-89 (Supreme Court of the Navajo Nation, 1989), demonstrates this familiarity; the appeals court provides the trial court with several examples of the way real property might be valued and subsequently shared by the divorcing couple.[27]

Fourth, and related to the knowledgeability point above, tribal courts that are in good form are better able to deal with situations in which there is confusion or a lack of clarity in practice and in law. Their complete jurisdiction helps them see the full picture and, if necessary, craft new case law to deal with the situation. Navajo courts have even adopted the practice common in U.S. courts of recommending legislation that is needed to create greater clarity. This kind of evolution may be possible within state-dominated systems, but it is less likely and would not necessarily fit each tribe that is currently under a state's law, nor could it reach out to trust property issues, which are not under state law.

Fifth, much of the confusion that exists in matrimonial real property disputes is the direct or indirect result of United States government policy. For starters, the different kinds of real property that come into dispute have generally been created by U.S. policy, whether they are trust lands, fee simple lands, mining claims, grazing sites, and even off-reservation hunting and fishing sites. Disputants and courts have had to find ways to work with these types of property (as necessary and where possible, to value, assign, divide them, etc.) and even to deal with the concept of "real property," which is foreign to many Native societies.

Additionally, U.S. policy accounts for the underdevelopment and, in many cases, absence of tribal court systems. Certainly, where the federal government unilaterally gave states substantial jurisdiction over Native nations through P.L. 83-280, incentives for the ongoing use or formalization of tribal systems were limited. This is especially true where tribes were small and there were many other demands on scarce resources. An even more broadsweeping piece of federal legislation, the *Indian Reorganization Act* (IRA), has also led to the underdevelopment of tribal court systems. The constitutions of tribes organized under the IRA, and even the tribal constitutions merely based on the IRA model,[28] largely

[27] Here, the point is only that a tribal court-mediated settlement is likely to be more equitable, not that both parties will necessarily view it as such. The legal differences between Indian Country and the off-reservation setting (and even the legal differences between two American Indian nations) mean that non-members may still feel "cheated." An important consideration, however, is that this sense, when it arises, typically arises from an application of the law – and not from tribal judges' mistreatment of non-member spouses. To the extent that the latter *does* occur, informants stressed that the problem can be corrected through appeal.

[28] Approximately 200 of the 560 American Indian tribes and Alaska Native villages in the United States are organized under the IRA (Robert B. Porter, "Strengthening Tribal Sovereignty Through Government Reform: What are the Issues," *Kansas Journal of Law and Public Policy*, volume 7, 1997, p. 74). Dozens

lack provisions for strong judiciaries – many of these documents note only that tribal councils are empowered to create judiciaries. If a council operating under an IRA or IRA-influenced constitution has created judicial body, it frequently remains under council control. Fortunately, there is a backtracking in some U.S. policy, with a number of federal grants being made available to Indian nations for the creation and strengthening of court systems. Indeed, this is the means by which the Native Village of Barrow, the San Diego County tribes (including the Luiseño nations located there), and many other Native nations are developing and improving their courts.

Remarkably, the Bureau of Indian Affairs has not contributed significantly to problems with the disposition of matrimonial real property. The Bureau's role is largely clerical and administrative – as ordered in *Conroy*, it processes the papers necessary to record any changes to trust land holdings that result from divorce proceedings. The only possibilities of the Bureau having a harmful effect arise if it has kept bad records (some probate records *are* in terrible shape) or if it is very slow in taking action.

Finally, we observe that with regard to the settlement of matrimonial real property disputes, informants from the tribes participating in this research focused more on the right of Native nations to be self-governing than on gender-related concerns. In more general terms, the overall focus in the American Indian setting has been on collective rather than individual rights – American Indians' (including American Indian women's) first priority has been to ensure the survival of their nations and cultures. Even when asked directly, none of the individuals we interviewed felt that there were particular "women's issues" involved in the settlement of matrimonial real property disputes. Indeed, the only reference made to gender concerns at all underscored the preference one Indian woman would have had for a tribal (and, hence, self-governance-promoting) hearing: The wife in one of the Luiseño divorce examples criticized the state court judge for acting like she "was not even there, *which is difficult for Indian women*, especially when there are children involved, because they want to speak up about their children in court. But the judges and attorneys always tell the mothers to be quiet." Her sense was that she would have been afforded greater personal respect in an Indian forum.[29]

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more operate under constitutions that are strongly influenced by the IRA model. Thus, these two categories constitute the majority of the American Indian and Alaska Native nations in the United States.

[29] Various justifications can be offered for American Indian women's dominant focus on collective rights. Echoing the example offered in the text, many Native women feel that their individual rights are better protected in culturally appropriate forums. It is also argued that colonialism is such a huge problem that it must be fought first: "We are *American Indian women*, in that order. We are oppressed, first and foremost, as American Indians, as peoples colonized by the United States of America, *not* as women" (Lorelei DeCora Means, quoted in M. Annette Jaimes and Theresa Halsey, "American Indian Women: At the Center of Indigenous Resistance in Contemporary North America," in M. Annette Jaimes (ed.), *The State of Native America: Genocide, Colonization, and Resistance*, South End Press, Boston, 1992, p. 314). In a related vein, many American Indian women do not support Western women's conceptions of "feminism" (in addition to Jaimes and Halsey, see Nancy Shoemaker, "Introduction," in Nancy Shoemaker (ed.), *Negotiators of Change: Historical Perspectives on Native American Women*, Routledge, New York and London, 1995), and thus, disassociate themselves from its individual rights focus. This is not to say that individual rights and gender concerns are unimportant to American Indian women; for example, in the

Lessons Learned from the U.S. Experience

The examples reviewed for this study give rise to several lessons about the successful division of matrimonial real property on American Indian reservations.

1. *Tribal sovereignty over matrimonial real property issues has been more successful than the alternative(s).*

This study attempted to examine four possible situations among American Indian nations: governance of matrimonial real property decisions by formal tribal law, by informal or customary tribal law, by state law, and by an unclear legal regime. In the end, we found that two rather than four situations are typical – those in which tribal law (often a mix of both formal law and customary law) dominates and those in which there is a mixture of state law and tribal responsibility. Upon examination, we conclude that the resolution of real property disputes under tribal law and by tribal courts has tended to be more successful than dispute resolution under the alternative regime.

In essence, this lesson reiterates several of the observations above. Because they possess complete jurisdiction over all the real property likely to enter divorce disputes (that is, both trust and non-trust property) and because they tend to be more knowledgeable of the laws that govern such property and the possibilities for its disposition, tribal forums applying tribal law are able to make complete settlements that also are generally perceived as fair.

There are caveats to this lesson, however. The first is that the record in the United States demonstrates the importance of both rules *and* dispute resolution mechanisms. Native nations with one but not the other will not and cannot offer the same advantages in the disposition of matrimonial real property in divorce.

A second caveat is that tribal courts do not always "get it right." Some American Indian tribes' courts are tremendously flawed, in that politics influence personnel appointments and decisions (the courts lack independence[30]), judges and other staff are inadequately trained, the laws enforced by the court do not appropriately match indigenous culture,

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United States as in Canada, colonizers either assumed the existence of or imposed patriarchal social structures in their interactions with Native cultures, to Native women's detriment (see, for instance, Katherine M. B. Osburn, "Dear Friend and Ex-Husband: Marriage, Divorce, and Women's Property Rights on the Southern Ute Reservation, 1887-1930," in Shoemaker (ed.), *op cit.*). The point is only that these issues have not been dominant.

[30] In his survey of the constitutional reform efforts recently completed or underway in Indian Country, Lemont concludes, "perhaps no constitutional area has received as much attention as tribal judiciaries" (Eric Lemont, "Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe," *American Indian Law Review*, volume 26, number 2, 2002, p. 163). As the motivation for this attention, he particularly cites "the weak powers and non-independence of judiciaries in many constitutions" (*ibid.*).

and so on.[31] Tribal courts which are not well functioning are also less likely to offer the noted advantages.

2. *If "external" bodies must rule in matrimonial real property disputes, the participation of knowledgeable decisionmakers would improve outcomes.*

As stated above, one of the advantages of tribal forums is the greater likelihood that decisionmakers are knowledgeable about the laws, customs, and constraints that affect real property ownership on reservations. To the extent that this knowledge could be replicated in situations in which decisionmaking must occur beyond the confines of an individual tribe, the quality of the dispute processes and outcomes would improve.

For example, some Native nations do not have the resources to administer their own courts, and one option for them is to participate in multi-tribal trial and/or appeals courts.[32] Judges are less likely to share litigants' customs and traditions (and when they do not, they must take care to exercise personal restraint and give careful consideration to the cultural issues involved), but they *are* likely to have a good understanding of on-reservation real property issues. This should give litigants greater confidence that their concerns will be met in the best manner that tribal and federal law allow.[33]

Other tribes – even those in the process of developing tribal or multi-tribal courts and writing or recognizing rules to govern matrimonial real property disputes – will continue to rely, at least for a time, on state courts. If state court personnel have even basic knowledge of the issues and concerns surrounding on-reservation real property and adequate knowledge of the limits of state jurisdiction, disputants' sense of wasted time

[31] It is critical to recognize, however, that these are not "Indian problems," but more general problems of judicial development, from which no court system is exempt. As recently as 2002, for example, the U.S. Supreme Court heard a case addressing the means by which judges are selected – the concern was the possible politicization of election versus appointment (*Republican Party of Minnesota v. White*, 536 U.S. 735, U.S. Supreme Court, 2002). Indeed, the example suggests that to avoid the use and development of tribal dispute resolution mechanisms is simply to forestall, not prevent, such concerns, and that the way forward is for each nation and court system to recognize and correct the problems on their own.

[32] Two noteworthy examples are the Southwest Intertribal Court of Appeals (lawschool.unm.edu/AILC/switca/index.htm) and the Northwest Indian Court System (www.nics.ws/index.html).

[33] There is a parallel here to an idea introduced by several participants in the focus groups convened to provide background for Cornet and Lendor's work. They saw "a need for a range of dispute resolution mechanisms in addition to access to the [provincial] court system, and in particular saw a need for a specialized tribunal administered by First Nations to provide increased access and greater cultural awareness in judicial-type decisionmaking concerning matrimonial real property in the reserve context" (Wendy Cornet and Allison Lendor, "Discussion Paper: Matrimonial Real Property on Reserve," Cornet Consulting and Mediation, Inc., November 28, 2002, p. 46). In other words, their feeling was that a multi-tribal forum might be especially useful for matrimonial real property disputes involving First Nations' members.

and effort would likely decrease, and the actual content of settlements might also improve.[34]

3. *It takes time for Native nations to develop appropriate rules and adjudication mechanisms to govern matrimonial real property disputes, but these indigenous processes – and their results – should be supported.*

While Native nations that lack rules and systems to govern the division of matrimonial real property can rely on various examples and models to develop this legal infrastructure, they nonetheless face a number of decisions about what will work best for their citizens. Limitations on tribes' financial and human capital also may slow the development of appropriate laws and dispute resolution mechanisms. Thus, decision-making about rules and systems takes time, and the time it takes is unpredictable – each Native nation will move at its own pace on these issues, according to its own processes, and subject to its own constraints.

Of course, one difficulty with this relatively protracted, tribe-by-tribe approach is that some parties to divorces may be harmed while waiting for particular Native nations to put in place rules and systems capable of addressing matrimonial real property questions. If the numbers and grievances are significant, it might be advisable to speed the processes of code and court development along. An approach that has proved workable with respect to other issues and institutions is for interested parties – be they federal or state government agencies, foundations, even other tribal governments – to provide incentives for progress.[35]

In the end, each Native nation will develop rules and systems uniquely suited to its circumstances, as indeed, nations such as the Navajo Nation and Hopi Tribe already have. It is conceivable that some (certain parties to divorces or certain rights groups, for example) might view this variation as another problem with tribal processes. Combined with concerns about individual harms during the rule and system development phase, "inconsistencies" between tribes in the rules and adjudication mechanisms used to decide matrimonial real property disputes, and in the outcomes of these disputes,[36] could be used as a reason to circumvent tribal rulings altogether.

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[34] We stress, however, that even if state court personnel understand federal and tribal law affecting disputants' reservation-based real property, and even if federal laws were changed to provide states with jurisdiction over trust land, the continued involvement of state courts is a second-best solution. As discussed in Lesson 3, solutions that support tribal sovereignty and allow for the incorporation of Native beliefs and principles are preferred.

[35] For example, the U.S. Department of Justice's Drug Courts Program Office has provided grant funding to tribes and other local governments for the development of drug courts, which are a specific type of institution aimed at combating alcohol and drug use. Likewise, money has been provided through the *Children's Justice Act* to the U.S. Department of Justice's Office of Justice Programs for grant programs to spur the creation and improvement of children's codes. See footnote 24 as well.

[36] Here we refer only to "legal" differences in outcomes, that is, those that derive from differences in tribes' laws.

This would be inappropriate. One reason is that only tribally chosen and controlled rules and systems are supportive of Native nations' sovereignty and self-government, which is highly desirable for reasons beyond tribes' success at resolving matrimonial real property concerns. The record among American Indian tribes is that increased opportunities for self-government have tended to accompany greater socio-economic success. To chip away at these opportunities, even in ways that seem unrelated to socio-economic outcomes, tends to diminish that success.[37]

Another reason these issues ought to be resolved by tribes themselves is that Western law is not based on Native beliefs and principles. Thus, solutions designed by non-Natives can be a poor fit for tribal circumstances and culture, and create more problems. This may be especially true when dealing with issues that affect Native women, whose history is different from that of European women's history.[38] Furthermore, individual Native nations' histories vary, so there is not even one indigenous solution to the perceived problems of property disputes within Native lands.

[37] See, for example, Stephen Cornell and Joseph P. Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today," *American Indian Culture and Research Journal,* volume 22, number 3, 1998, pp. 187-214.

[38] Shoemaker notes, "To truly understand Indian women's history, we need to look simultaneously at Indian cultural ideas about gender difference and how these ideas related to the experience of individual women" (o*p cit*., p. 6.).