Nygaard v. Taylor, 602 F. Supp. 3d 1172 (D.N.D. 2022)

- **Holding:** Indian tribes are not a "State" as defined in the Parental Kidnapping Prevention Act and therefore are not required to honor "home State" custody determinations.
- **Summary:** The PKPA, enacted in 1980, provides that "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." 28 U.S.C. § 1738A(a). It further defines the term "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States." *Id.* § 1738A(b)(8). A "home State" is "the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period." *Id.* § 1738A(b)(4).

  This case involved a long-lived dispute between a mother and fathers over the custody to two children. No dispute existed that the home State, for PKPA purposes, was North Dakota. The fathers, relying on the PKPA, sought habeas corpus relief against numerous officials of the Cheyenne River Sioux Tribe and two North Dakota state officials in 2019 after the Tribe's court of appeals declined to enforce a North Dakota state court custody order. The state Defendants eventually moved to dismiss under Fed. R. Civ. P. 12(b)(6), and the other parties cross-moved for summary judgment. The district court granted the state and tribal Defendants' motions.

  As to the state Defendants' motion, the court reasoned:

  > Fathers named the State Defendants because of their role in placing the children with [the mother's brother] back in 2014. There is nothing in the Amended Complaint or record suggesting the State Defendants have any custody or control over the children presently. Rather, the Cheyenne River Sioux Tribal Court rulings placing the children with [the mother's] sister Ducheneaux caused the children's "detention" by order of an Indian Tribe actionable under 25 U.S.C. § 1303. Relief under § 1303 cannot be granted against a party who lacks any custody or control over the individual or individuals being detained by order of an Indian Tribe.

  In sum, "[t]here is no viable claim against them under § 1303, because the Tribal Defendants and the Tribal Court orders, not the State Defendants, are the obstacles to enforcement of the North Dakota custody rulings to release the children from what qualifies under *DeMent* [*v. Oglala Sioux Tribal Court*, 874 F.2d 510 (8th Cir. 1989)] as detention actionable under 25 U.S.C. § 1303."

  Resolution of the cross-summary judgment motions demanded greater analysis. The court acknowledged that "Fathers' argument for applying the PKPA to tribal courts is not without some support in case law. Some courts have relied on a general geographic definition of 'territory,' as land within a jurisdiction's borders, to conclude that Indian Tribes are a 'territory' as defined in the PKPA." But it adopted a contrary reading premised largely on the proposition that in other full-faith-and-credit or comparable statutes Congress has specifically included Indian tribes along with territories:

  > Congress has also distinguished between "tribes" and a "territory or possession of the United States" in statutes passed relatively close in time to the PKPA's

> passage in 1980. The Indian Child Welfare Act, enacted two years before the PKPA in 1978, distinguished between tribes and a "territory or possession of the United States" setting forth that: "[t]he United States, every State, *every territory or possession of the United States*, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity." ... The 1994 Full Faith and Credit statute for child support orders also distinguished between territories and tribes defining "State" as: "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, *the territories and possessions of the United States*, and Indian country (as defined in section 1151 of title 18)." ... Similarly, the 1994 Violence Against Women Act set forth that "[a]ny protection order issued that is consistent with ... this section by the court of one *State, Indian tribe, or territory* ... shall be accorded full faith and credit by the court of another State, Indian tribe, or territory."
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> Thus, "[w]hen reviewing the PKPA alongside of other contemporary full faith and credit statutes, it appears that Congress views a 'territory or possession of the United States' as distinct from an Indian tribe." The court "recognize[d] that this interpretation of the PKPA does not prevent 'jurisdictional competition and conflict between [s]tate' and tribal courts over child custody orders. ... Nonetheless, this Court is bound to interpret and apply the PKPA as it is written, not as how it might or arguably should have been written."

- **Relevant (2021) Deskbook Section:** 6:13 n.18
- **Comment:** The result here is correct, although a strong argument exists that the "State" definition—which the district court deemed ambiguous—is quite clear. "Territories" plainly refers to those entities that possess territorial status under federal law, while Indian tribes and Indian country are unique and quite different jurisprudentially.