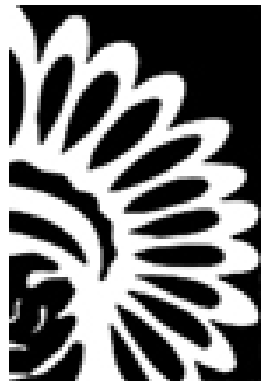


ENFORCING PROTECTION ORDERS USING TRIBAL CIVIL AND CRIMINAL CONTEMPT POWERS



NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES



Presenters

- Hon. Steven D. Aycock- Judge-in-Residence, National Council of Juvenile and Family Court Judges
- Honorable Kelly Gaines Stoner, Victim Advocacy Legal Specialist, Tribal Law and Policy Institute Judge, Seminole Nation of Oklahoma

The Power To Issue A Tribal Protection Order = SUBJECT MATTER JURISDICTION

VAWA 2013: For purposes of this section, a court of an Indian tribe *shall have full civil jurisdiction to issue and enforce protection orders involving any person*, including the authority to enforce any orders through civil contempt proceedings, to exclude violators from Indian land, and to use other appropriate mechanisms, ***in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.***

ASSUMING FOR PURPOSES OF THIS WEBINAR

- The Court that issued the Protection Order had subject matter jurisdiction to issue the Protection Order
- The Court that issued the Protection Order had jurisdiction over the Defendant
- The Court that issued the Protection Order provided due process to the Defendant
- The Court that issued the Protection Order included the full faith and credit language in the Protection Order
- Review Webinars *Issuing Tribal Protection Orders* and *Enforcing Tribal Protection Orders* located at <http://www.tribal-institute.org/lists/webinars.htm>

Enforcement of Protection Orders Using Contempt Powers

- Civil Contempt (coercive to force compliance with the Protection Order)
- Criminal Contempt (willful violation of a term that can no longer be fulfilled)
- Summary Contempt (contempt in the presence of the court- Tribal Judge may use civil or criminal)

CIVIL CONTEMPT

Civil Contempt

- Generally, civil contempt is ordered as a result of a “show cause” hearing brought by the Petitioner.
- Burden is on the contemnor (alleged violator) to demonstrate that the alleged contemptuous behavior was not willful or intentional.
- Burden of proof may be preponderance or clear or convincing evidence.
- The contemnor must further prove that he did not have the ability to comply with the court’s order.
- Civil contempt can result in the imposition of fines and/or in the detention of the contemnor.

Civil Contempt (Cont.)

- Detention cannot be ordered as punishment. Rather, detention is remedial in nature and can only be used to force compliance with a court's previously issued order.
- The contemnor "holds the keys to the jail" and can earn his freedom by complying with the previously issued court order.
- Detention is commonly used against contemnors who repeatedly fail or refuse to comply with a court order.

**NOTE CIVIL JURISDICTIONAL ISSUES
WHEN ANY PARTY IS A NONMEMBER
OF THE ISSUING TRIBE**

IN MATTERS ARISING OUTSIDE OF INDIAN COUNTRY INVOLVING NON-MEMBERS ON FEE LAND

- 1. Look to Tribal Law and Tribal Constitution.
- 2. Review the federal restrictions set forth in the *Montana test*.

Two U.S. Supreme Court cases held that tribes have limited powers over matters involving non-members on non-Indian lands.

Montana v. United States, 450 U.S. 544 (1981) and *Strate v. A-1 Contractors*, 5520 U.S. 438 (1997) resulted in a test to determine whether a tribal court has jurisdiction over non-members in civil matters.

The Montana test requires the tribal court to find that:

- 1) the parties entered into a consensual relationship with the tribe or its members through commercial dealing, contracts, leases or “other arrangements” or
- 2) the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. If neither of the two factors listed in the Montana test are present, the tribal courts may not exercise civil jurisdiction over non-members on non-Indian lands.

CRIMINAL CONTEMPT

Criminal Contempt

- A court may cite a person for criminal contempt for willfully disobeying a lawful order of the court.
- Criminal Contempt is usually brought by the prosecutor.
- Burden of Proof is beyond a reasonable doubt.
- Criminal contempt proceedings are punitive in nature and can result in incarceration, a fine, or both.
- These proceedings are intended to punish past conduct that violates an existing court order.

Criminal Contempt (Cont.)

- The contemnor is entitled to all of the tribal and Indian Civil Rights Act protections provided to persons charged with a crime.



DOES IT MATTER IF THE VIOLATOR IS INDIAN OR NON-INDIAN?

- ICRA applies to all defendants in tribal courts
- Tribal courts have criminal jurisdiction over acts committed by Indians within their Indian country
- Tribal courts have criminal jurisdiction over non-Indians that violate Protection Orders in their Indian country—if the tribe meets Section 904 of VAWA 2013 requirements

INDIAN CIVIL RIGHTS ACT

- **§ 1302. *Constitutional Rights: No Indian tribe in exercising powers of self-government shall:***
- **(a) In general**
- No Indian tribe in exercising powers of self-government shall...
- *10. deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.*

Requirements in order to criminally prosecute non-Indians for Violation of Protection Orders under VAWA § 904

- Special Domestic Violence Criminal Jurisdiction over violation of protection orders applies **only** if the violation is of the portion of the protection that
 - *Protects against violent or threatening acts or harassment against, sexual violence against, contact or communication with, or physical proximity to, another person;*
 - *Was issued against the defendant;*
 - *Is enforceable by the participating tribe; and*
 - *Is consistent with 18 U.S.C. § 2265(b), governing Full Faith and Credit given to Civil Protection Orders*
 - *Includes jurisdictional and notice requirements*

REMEMBER: What VAWA 2013 Section 904 Does NOT Cover

- Victim and Defendant are both non-Indian - A tribe may not exercise special domestic violence criminal jurisdiction if neither the defendant nor the alleged victim is an Indian.
- Non-Indian Defendant Lacks Sufficient Ties to the Indian Tribe – Defendant must either
 - Reside in the Indian country of the participating tribe;
 - Be employed in the Indian country of the participating tribe; or
 - Be a spouse, intimate partner, or dating partner of a tribal member, or an Indian who resides in the Indian country of the participating tribe.
- The crime did not take place in the Indian Country of a participating tribe
- Tribe chooses not to exercise this VAWA 2013 section 904 jurisdiction

SUMMARY CONTEMPT

Summary Contempt

- Summary contempt is also sometimes referred to as “direct contempt”.
- It is a tool available to tribal courts to maintain the orderly administration of justice.
- Courts may find a defendant in summary contempt to suppress acts of violence or disrespect that occur in open court.
- Two examples of summary contempt include shouting expletives inside the courtroom while the court is in session or physically attacking (or threatening to physically attack) court personnel in the courtroom while the court is in session.
- All courts have the inherent power to maintain the safety, order and integrity of the court. In the examples cited above, a tribal court judge could summarily (e.g. immediately) detain a non-Indian contemnor to preserve the safety, integrity, and order of the court.
- Defendant may be put in jail as punishment. Procedures are much less than in criminal contempt but must at least include the ability of the defendant to explain their position.

Summary Contempt (Cont.)

- “To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court’s dignity and authority is necessary. It has always been so in the courts of common law and the punishment imposed is due process of law. “*Pounders v. Watson*, 521 U.S. 982 (1997) citing *Cooke v. United States*, 267 U.S. 517 (1925).

YOU MAKE THE CALL

- Joe, a member Indian, violates a Protection Order in the Deer Tribe's Indian country.
- The Protection order provision violated: “do not physically assault the Petitioner.”
- Can the Deer Tribal Court hold Joe in Civil Contempt?
- Can the Deer Tribal Court hold Joe in Criminal Contempt?

YOU MAKE THE CALL

- Joe, a non-Indian, violates a Protection Order in the Deer Tribe's Indian country
- The Protection order provision violated: "do not physically assault the Petitioner."
- Joe works at the Deer Tribal Casino
- The victim is a member of the Deer Tribe
- Can the Deer Tribal Court hold Joe in Civil Contempt?
- Can the Deer Tribal Court hold Joe in Criminal Contempt?

YOU MAKE THE CALL

- Joe is a non-Indian who has appeared at a show cause hearing in the Deer Tribal Court for a Protection Order violation (“do not assault the Petitioner”).
- Joe is held in civil contempt and must pay a fine of \$500 to the court.
- On the way out of the Deer Tribal Court, Joe pushes a Deer Tribal Law Enforcement Officer.
- Can the Deer Tribal Court hold Joe in Criminal Contempt?

Criminal Contempt Code

- Jurisdiction
- Define criminal contempt
- Set out procedures
 - Notice
 - Hearing
 - Tribe has burden of proof
 - Standard of proof is beyond a reasonable doubt
 - Jury
 - Punishment – punitive but not too punitive – must be reasonable – can be jail and/or fine.

Civil Contempt Code

- Jurisdiction
- Define civil contempt
- Set out procedures
 - Notice
 - Hearing
 - Person seeking contempt order has burden of proof
 - Standard of proof is preponderance of the evidence (can be clear and convincing)
 - Judge hears case
 - Punishment – cannot be punitive, must be coercive (can include jail, fine, seizure of property, etc.)

Summary Contempt Code

- Jurisdiction – in the courtroom or so near as to disrupt the proceedings
- Define - will want to leave this fairly vague since it will be hard to list all things that could rise to contempt.
- Procedures
 - No written notice needed out of an abundance of caution you want to warn the person first that another instance of the same conduct will be considered contemptuous
 - Can be done immediately
 - Best to allow opportunity for person to speak
- Judge
- Punishment – is punitive but cannot be excessive (a few days, a small fine, etc.)

- Tribal Jurisdictional Charts and info: <http://www.tribal-institute.org/lists/pl280.htm>; <http://www.tribal-institute.org/lists/jurisdiction.htm>; www. Tribal protectionorders.com
- Confidentiality for tribal victims: <http://www.tribal-institute.org/download/NativeVictimsSexualAssault.pdf>; <http://www.niwrc.org/resources/webinars>
- Tribal Victim Rights: www.victimlaw.org; http://www.ncai.org/tribal-vawa/webinars/Webinar_PPT_RE_Victim_Rights_Part_I.pdf
- Tribal Protection Orders: www.tribalprotectionorders.org
- VAWA 2013: http://tribal-institute.org/lists/vawa_2013.htm; <http://www.ncai.org/tribal-vawa>
- Sexual Assault: <http://niccsa.org/>
- Sex Trafficking in Indian country: www.tribalcoalitions.org
- Victim Services for sex trafficking victims: www.tribalcoalitions.org
- Violence Against Tribal Women and Children: Ending Violence So Children Can Thrive: www.justice.gov/defendingchildhood

- CREATIVE CIVIL REMEDIES AGAINST NON-INDIAN OFFENDERS IN INDIAN COUNTRY
 - <http://www.swclap.org/uploads/file/d03f27dc405e4a0aa821aedef4bc7bd04/Creative%20Civil%20Remedies%20Against%20Non-Indian%20Offenders%20In%20Indian%20Country.pdf>
- National Council of Juvenile and Family Court Judges
 - www.ncjfcj.org
 - Resource Center - (800) 527-3223 or email fvdinfo@ncjfcj.org

Questions?

- THANK YOU!!!!

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