IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

HOLLY C.,
Appellant,

v.

TOHONO O'ODHAM NATION, BRIAN S. AND G.C.,
Appellees.

No. 2 CA-JV 2018-0101

ELIZABETH F. AND HOLLY C.,
Petitioners,

v.

HON. LORI B. JONES, JUDGE PRO TEMPORE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF PIMA,
Respondent,

and

DEPARTMENT OF CHILD SAFETY; TOHONO O'ODHAM NATION, BRIAN S. AND G.C.,
Real Parties in Interest.

No. 2 CA-SA 2019-0027 (Consolidated)
Filed October 4, 2019

Appeal from the Superior Court in Pima County
Special Action Proceeding
No. JD20180146
The Honorable Lori B. Jones, Judge Pro Tempore

APPEAL DISMISSED
SPECIAL ACTION JURISDICTION ACCEPTED;
RELIEF GRANTED IN PART AND DENIED IN PART

COUNSEL

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OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 In these consolidated appellate proceedings, we consider, as a matter of first impression, jurisdictional questions involving the interplay of Arizona's child safety statutes, title 8, A.R.S.; the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901–1963; and the Uniform Child Custody Jurisdiction and Enforcement Act (the UCCJEA), A.R.S. §§ 25-1001 to

25-1067, as applied to private dependency proceedings in which Elizabeth F. sought custody of her seven-year-old grandson G.C. Because Holly and Elizabeth continue to challenge the jurisdiction of the Tohono O'odham Nation (the "Nation") to issue legal-decision-making and parenting-time orders in separate domestic relations proceedings pending in the Nation's court since 2017, issues of comity between separate sovereigns may also be implicated.

¶2 As addressed below, we let stand the respondent judge's decision declining to order G.C.'s emergency removal from the home of his paternal great aunt, Mary S. On the limited record before us, however, the evidence and analysis is insufficient to support the respondent's dismissal of the dependency on jurisdictional grounds. We therefore vacate the dismissal in the 2019 dependency proceeding and remand the case for further proceedings.[1]

Consolidation

¶3 In No. 2 CA-JV 2018-0101, Holly C. appealed from the juvenile court's dismissal of the dependency petition her mother, Elizabeth, had filed in March 2018. This court dismissed the appeal for lack of jurisdiction, concluding that Holly, a respondent in a dependency proceeding against her, was not "aggrieved" by its dismissal, as required for an appeal under A.R.S. § 8-235(A).[2] Our supreme court vacated that decision, concluded Holly was entitled to an appeal, and remanded the case to this court for reinstatement and "disposition . . . on the merits." *Holly C. v. Tohono O'odham Nation*, No. CV-19-0023-PR (Ariz. May 28, 2019) (order). Pursuant to that order, the appeal in No. 2 CA-JV 2018-0101 has been reinstated.

¶4 Three weeks before our supreme court issued the remand order in No. 2 CA-JV 2018-0101, Elizabeth and Holly filed the instant petition for special-action relief, No. 2 CA-SA 2019-0027, in which they

[1]A juvenile court "must determine whether a child is dependent based upon the circumstances existing at the time of the adjudication hearing." *Shella H. v. Dep't of Child Safety*, 239 Ariz. 47, ¶ 12 (App. 2016). Accordingly, we focus primarily on the relief requested in the 2019 special action and refer herein to the "respondent judge" who presided over both dependency proceedings. Because the resolution of the special action obviates the need to address the same issues raised in the appeal in No. 2 CA-JV 2018-0101, we dismiss that appeal as moot.

[2]Elizabeth F. did not file a notice of appeal from the 2018 dismissal.

contend the respondent judge abused her discretion by refusing to exercise jurisdiction in the second dependency proceeding, which commenced when Elizabeth filed her March 2019 petition. In that dependency petition, Elizabeth raised some of the same arguments she had raised in her 2018 dependency proceeding, but she also argued that changed circumstances warranted the exercise of "emergency jurisdiction" under ICWA and the UCCJEA.

¶5 This court consolidated these matters on its own motion. Both cases involve the respondent judge's rulings dismissing the dependency proceedings on jurisdictional grounds. Elizabeth and Holly have also filed notices of appeal from the April 2019 dismissal of the second dependency proceeding, but the remedy by appeal is not equally "speedy," as briefing is not yet complete. Ariz. R. P. Spec. Act. 1(a) ("special action . . . not . . . available where there is an equally plain, speedy, and adequate remedy by appeal"). In addition, the special action raises legal issues related to the manner in which jurisdiction is to be determined in these circumstances, a matter of statewide importance that relates to child welfare. *See Monique B. v. Duncan*, 245 Ariz. 371, ¶¶ 9-10 (App. 2018) (accepting special-action jurisdiction "[b]ecause the petition presents a legal issue of first impression in applying the UCCJEA [to title 8 proceedings], is likely to recur and involves the welfare of a child"). In our discretion, we accept special-action jurisdiction. *See id.*

Factual and Procedural Background

¶6 The following facts are undisputed. As an enrolled member of the Nation, Brian sought tribal enrollment for G.C., which was approved on June 6, 2016. On December 9, 2016, the Arizona Department of Economic Security ("ADES") filed a "Petition to Establish Child Support (Post Paternity)" in Pima County Superior Court ("Child Support Proceeding"). On May 1, 2017, that trial court entered a judgment establishing Brian's child support obligations. The form of order specified paternity had previously been established by his filing a voluntary acknowledgment of paternity with the ADES. *See* A.R.S. § 25-812(D); *cf. Michael J., Jr. v. Michael J., Sr.*, 198 Ariz. 154, ¶ 12 (App. 2000) (ICWA only "requires that a putative Indian father acknowledge or establish paternity") (citing *Coconino Cty. Juv. Action No. J-10175*, 153 Ariz. 346, 350 (App. 1987) and noting that court "applied ICWA despite the lack of a formal paternity proceeding, where the putative father acknowledged paternity and enrolled the child in his tribe"). On a portion of the form titled "[o]ther findings and orders," the court noted, "There is a parenting time order from [the Tohono O'odham] tribal court."

¶7 That court may have been referring to a custody action Brian had filed on February 22, 2017, in the Judicial Court of the Nation ("Parenting-Time Proceeding"). Holly does not dispute that she appeared in that proceeding and responded to Brian's petition without challenging the Nation's jurisdiction.[3] On October 18, 2017, apparently pursuant to a stipulation filed by Brian and Holly, the Nation's court awarded Brian sole legal decision-making authority and primary parenting time for G.C., with review hearings scheduled to consider whether Holly "should be awarded supervised parenting time given the concerns over her mental state and ability to parent" G.C.[4] On February 20, 2018, ADES filed a motion in the Child Support Proceeding to terminate Brian's child support obligations, based on his having had physical custody of G.C. after September 2017. The trial court granted that motion on April 2, 2018.

Dismissal of the First Dependency Proceeding (No. 2 CA-JV 2018-0101)

¶8 On March 16, 2018, while the motion to terminate support was pending, Elizabeth filed a dependency petition in Pima County Superior Court alleging Brian had neglected G.C. by failing to maintain suitable living conditions and was unable to parent G.C. due to alcohol and marijuana use. She also alleged that he had "a history of aggravated assault" and had "engaged in serious domestic violence with [Holly] between 2010 and 2018." Elizabeth sought custody of G.C., asserting in an affidavit that she had "lived with" and "supported" G.C. from his birth until Brian was awarded physical custody in the Parenting-Time Proceeding and that Holly "has a history of mental health issues that make

[3] For example, in her recent motion for placement filed in the Nation's court, Holly stated, "The parties have been involved in ongoing litigation in this court for the past several years," further noting, "The issues originally included legal decision making and parenting time."

[4] The full record of the Nation's Parenting-Time Proceeding is not before us. Orders filed from that proceeding suggest Holly was incarcerated when the October custody order was entered. Although the Nation's court informed Holly the order was "final, and appealable," it does not appear an appeal was filed. We express no opinion about the accuracy of the trial court's finding in the Child Support Proceeding that a parenting-time order had been issued by the Nation's court. We are also unware of any appeal from the child support order that might have challenged that finding.

it difficult for her to parent right now" and, additionally, was on felony probation.

¶9 In temporary orders entered pursuant to A.R.S. § 8-841(F),[5] the juvenile court ordered the Department of Child Safety (DCS) to conduct an investigation, including "a safety check of the child[]'s home," but it declined Elizabeth's request that she be awarded temporary custody. An initial dependency hearing was scheduled for April 6, 2018.

¶10 Two days before that hearing, on April 4, 2018, the Nation's court held a custody review hearing and was informed that Elizabeth had filed the dependency petition in Pima County. That court found the parties had acknowledged its subject matter and personal jurisdiction when they stipulated to Brian's having sole legal-decision-making authority, and it further found it "continues to have jurisdiction over the subject minor child, as the child is a registered member of the Tohono O'odham Nation." The Nation's court reaffirmed supervised visitation guidelines previously entered for Holly, ordered that DCS records be provided for an in-chambers review, and scheduled an evidentiary hearing for June 27, 2018.

¶11 On April 6, 2018, at the initial dependency hearing in Pima County Juvenile Court, Brian entered a special appearance for the purpose of challenging the court's jurisdiction and filed a motion to dismiss the dependency proceeding on that ground. In it, he argued the Nation had continuing, exclusive jurisdiction over G.C.'s custody pursuant to both the UCCJEA and ICWA.

¶12 The juvenile court scheduled briefing on Brian's motion to dismiss and continued the hearing until May 15, 2018, stating it did not believe an evidentiary hearing would be needed. DCS, which was not a party but had submitted a court-ordered investigation report, asked that it be excused from further proceedings, advising the court, "Our report documents that we do not believe that a dependency exists at this time." After confirming that none of the parties objected, the court granted DCS's request to be excused.[6]

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[5]The statute provides: "On the filing of the [dependency] petition, the court may issue any temporary orders necessary to provide for the safety and welfare of the child." § 8-841(F).

[6]The investigator who prepared the report was not present, and the juvenile court did not formally admit the DCS report.

¶13 Before commencing the continued hearing in May, the respondent judge conducted an on-the-record conference call with the tribal court judge and informed him of her intention to dismiss the private dependency, having concluded "the UCCJEA does apply and the Nation does have continuing jurisdiction in this matter." The hearing was commenced, the parties offered argument, and the juvenile court granted the motion to dismiss, citing provisions of the UCCJEA and stating, "The Nation was the first court to make a custody determination and therefore it has exclusive continuing jurisdiction absent any temporary emergency jurisdiction issues, which are not present in this situation." Similarly, in its signed minute entry, the court wrote, "The Nation issued the original custodial determination and will continue to hold hearings in the matter; therefore, pursuant to the UCCJEA the jurisdiction of these proceedings remains solely with the Nation." Holly's appeal in No. 2 CA-JV 2018-0101 followed, and we have reinstated that appeal after remand.

Dismissal of the Second Dependency Proceeding (No. 2 CA-SA 2019-0027)

¶14 On March 14, 2019, Elizabeth filed a second dependency petition in which she alleged G.C. was dependent because Brian was incarcerated[7] and Holly was residing in an inpatient substance abuse rehabilitation facility. In her petition, Elizabeth specifically asked the juvenile court to exercise "emergency jurisdiction," citing both ICWA and the UCCJEA. She argued, as she had in the 2018 proceeding, that the order in Pima County's Child Support Proceeding—not the parenting order entered by the Nation's court—was the initial custody determination under the UCCJEA. In contrast to Brian's earlier representation that he was "currently residing in Tucson" but had "lived on the Tohono O'Odham reservation for most of his life,"[8] Elizabeth asserted that "[n]o one involved in this case has, since the child was born, or ever, resided on the Tohono

[7] Elizabeth alleged in the petition that Brian had recently been arrested. On July 22, 2019, Holly and Elizabeth filed a motion to expand the record, which we granted, to include evidence that Brian has pleaded guilty to child molestation pursuant to a plea agreement that calls for a minimum prison term of ten years.

[8] In his motion to dismiss the 2018 dependency proceeding, Brian had argued the Nation had exclusive jurisdiction under ICWA, asserting "[t]he Nation is his true, fixed and permanent home," and thus his and G.C.'s domicile, "notwithstanding his current circumstances."

O'odham reservation, including [Brian]." Elizabeth asked that G.C. be placed with her if he were removed from his current home.

¶15 In temporary orders issued after the dependency petition was filed, the juvenile court declined to order G.C.'s removal, noting that he "may be residing with paternal relatives." But the court again directed DCS to conduct an investigation and provide a written report of its findings before the initial dependency hearing.

¶16 In the "Findings" section of that report, DCS stated that G.C. was residing with Mary S., his paternal great aunt,[9] who had obtained a power of attorney related to his custody.[10] DCS confirmed that Brian was incarcerated and that Holly was in a rehabilitation center, and it found that both Elizabeth's and Mary's homes "were clean, appropriate, and did not pose any health or safety factor for [G.C.]." But DCS reported that James, G.C.'s uncle, also lived with Mary and had a "long criminal history," a history of substance abuse, and has been diagnosed with bi-polar disorder that he "self-medicates" with medical marijuana. In addition, DCS reported that G.C. "has special educational and possible behavioral health needs that the paternal family has failed to address," despite referrals from his school.

¶17 In conclusion, the DCS report reflected "a concern of the appropriateness of [Mary's] home due to James . . . residing in the home," noting that James would not "pass a preliminary background check" for the purpose of placement. DCS also expressed "additional concerns" about Mary's "ability to protect [G.C.] from Brian and James," as well as the family's failure to follow through with the school's referrals. DCS

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[9]Although the report referred to Mary as G.C.'s "grandmother," the parties clarified this relationship at the initial dependency hearing, and the attorney for the Nation told the respondent judge that Mary "would be considered a grandmother" "under O'odham culture and tradition."

[10] Pursuant to A.R.S. § 14-5104, "[a] parent or a guardian of a minor . . . , by a properly executed power of attorney, may delegate to another person, for a period not exceeding six months, any powers he may have regarding care, custody or property of the minor child or ward," except the "power to consent to marriage or adoption of the minor." Brian and Mary also executed a private guardianship agreement in favor of Mary, an action permitted, under limited circumstances, by Tohono O'odham law. T.O. Code, tit. 3, ch. 1, § 1606.

recommended "that [G.C.] be taken into state custody" and "recommend[ed] placement with [Elizabeth] at this time," but it stated it "would consider reassessing placement if James . . . did not reside in [Mary's] home."

¶18 At the initial dependency hearing in April 2019, Elizabeth told the respondent judge, "What we argue and have argued in the past is that this court's jurisdiction is based on emergency jurisdiction," but she did not identify any statutory basis for that requested determination. She argued the "biggest problem" was that the court had "heard no evidence" and was "making decisions" about jurisdiction "without having any hearing."[11]

¶19 The Nation told the respondent judge the dependency "should be dismissed" and "a referral should be made to [the Nation's] Child Welfare Division." It noted the court's ruling in Elizabeth's 2018 dependency proceeding and argued, as it had in that case, that the Nation had "exclusive jurisdiction under the UCCJEA" based on the "final order of custody to the father" the court had issued in October 2017.

¶20 DCS also relied on the UCCJEA, arguing the respondent judge had "temporary emergency jurisdiction" under those statutes. It also referred to the procedure the juvenile court had followed in 2018, suggesting the appropriate action under the UCCJEA would be for the juvenile court to contact the Nation's judge, in his role as "legal authority representing the home state," "to see whether [he is] willing to cede jurisdiction to the state courts." But "[u]ntil then," DCS said, it "believes there is a dependency in place" and it wanted "to step in and take custody of [G.C.]." Holly joined in the arguments made by Elizabeth and DCS.

¶21 Brian responded, "All of their emergency situations are hypotheticals or future what ifs, not the imminent physical danger of the child, which is required to be shown under ICWA." G.C.'s attorney agreed with the Nation's and Brian's arguments about jurisdiction, and she also disputed DCS's report, telling the juvenile court, "[G.C. is] doing very well in [Mary's] home. He's very attached in the home. He has been well-cared for in the home." She maintained issues related to Brian's detention and James's presence in the home "would be better addressed in the Tribal Court" because of its familiarity with the family.

[11]Before the close of the hearing, the juvenile court admitted the DCS investigation report, over the objections of Brian, G.C., and the Nation.

¶22 After additional argument and a review of her notes from the 2018 hearing, the respondent judge dismissed the 2019 dependency proceeding and referred the matter to the Nation's Child Welfare Division, stating, "[A]bsent any temporary emergency jurisdiction issues, which I do not find today, [the Nation] continue[s] to have jurisdiction over this issue." When asked, however, the respondent declined to state whether she was finding that the Nation had "continuing exclusive jurisdiction." The respondent denied Elizabeth and Holly's motion for reconsideration, and they filed their petition for special action, as well as notices of appeal.[12]

¶23 In their special-action petition, Holly and Elizabeth alleged the respondent judge abused her discretion in declining to exercise "emergency jurisdiction" without holding an evidentiary hearing. They have withdrawn their request for remand on that issue, however, in light of the change in circumstances—specifically, the Nation's order awarding Holly physical and legal custody of G.C. Because consideration of an emergency removal may arise again, however, we briefly address the relevant standards.[13]

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[12]In addition, on April 15, 2019, Holly sought relief in the Nation's Parenting-Time Proceeding, requesting an accelerated hearing on her motions to set aside Mary's guardianship and to have G.C. placed in her care. On July 10, the Nation's court granted Holly's motions and awarded her "sole legal decision-making authority" and "primary parenting time" for G.C. The court noted that Elizabeth "is ready, willing and able to oversee [Holly's] follow through with respect to her sobriety," and it declined to refer the matter to the Nation's Child Welfare Division, conditioned on Holly's obtaining negative results in regularly scheduled hair-follicle drug testing. We asked the parties for supplemental briefing on the issue of mootness, because, as a practical matter, Holly and Elizabeth appear to have obtained substantial relief through the Nation's recent orders. We acknowledge, however, that these important jurisdictional questions are capable of repetition and may evade review. *See Kondaur Capital Corp. v. Pinal County*, 235 Ariz. 189, ¶ 8 (App. 2014) ("[W]e may elect to consider issues that have become moot 'if there is either an issue of great public importance or an issue capable of repetition yet evading review.'") (quoting *Bank of New York Mellon v. De Meo*, 227 Ariz. 192, ¶ 8 (App. 2011)).

[13]At oral argument, Holly and Elizabeth argued the respondent judge's dismissal of the dependency was not moot, in part because the Nation's award of custody in the Parenting-Time Proceeding is "revocable"

¶24 They next contend the respondent erroneously concluded the UCCJEA precluded state jurisdiction over the dependency proceeding because "this dependency action is not a 'child custody action' as regulated under Title 25, A.R.S." They also rely on A.R.S. § 25-1004(A), which provides, "A child custody proceeding that pertains to an Indian child . . . is not subject to" Arizona's UCCJEA "to the extent" that proceeding "is governed by" ICWA.

¶25 In the alternative, they argue that if the UCCJEA applies, the Child Support Proceeding "qualified as a custody proceeding." They thus suggest the Pima County child support order was an initial custody determination under A.R.S. § 25-1031(A), and they challenge the validity of "all of the tribal court proceedings."

Discussion

¶26 We review issues of law, including statutory interpretation and a court's jurisdictional authority, de novo. *David C. v. Alexis S.*, 240 Ariz. 53, ¶ 8 (2016) (statutory interpretation); *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 7 (App. 2009) (jurisdiction). To the extent a court's jurisdictional determination rests on disputed facts, however, we accept the court's findings if reasonable evidence and inferences support them. *See Demetrius L. v. Joshlynn F.*, 239 Ariz. 1, ¶ 9 (2016).

¶27 As the respondent judge observed at the close of the last hearing, these matters present complicated questions of jurisdiction. Whether Arizona may properly exercise jurisdiction in this matter depends on specific, step-by-step findings of statutorily defined factors. Depending on the application of title 8, ICWA, or the UCCJEA, these factors vary—and,

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and a change in that award could result in G.C.'s being in the "same situation" of placement with paternal relatives. In contrast, they argued the respondent's decision to deny G.C.'s emergency removal is now moot due to the Nation's decision changing his placement. But G.C.'s placement with paternal relatives—the "same situation" Holly and Elizabeth seek to avoid by continuing to pursue relief from dismissal of the dependency—was the very basis of Elizabeth's claim to emergency jurisdiction in her dependency petition. Guidelines for the involuntary removal of an Indian child on an "emergency" basis, like the removal of an Indian child through a full dependency proceeding, are matters of statewide importance, and we decline to find one issue moot and the other not.

in some instances, these statutes, enacted to address different issues, define the same or similar terms differently.

¶28 For example, title 8 generally affords the juvenile court jurisdiction over children who are "present" in the State of Arizona. A.R.S. § 8-532(A) (juvenile court has "exclusive original jurisdiction" over termination petitions when child "present in this state"); *see also David S. v. Audilio S.*, 201 Ariz. 134, ¶ 7 (App. 2001) (parents' relocation did not deprive juvenile court of jurisdiction over dependency when "child remains in this state"). But that jurisdiction is limited by ICWA, which affords an Indian tribe exclusive jurisdiction when a "child custody proceeding," as defined, involves "an Indian child who resides or is domiciled within the reservation of such tribe." 25 U.S.C. § 1911(a). And the UCCJEA does not refer to either presence or domicile, defining "[h]ome state," for a determination of jurisdiction, as "[t]he state in which a child lived with a parent or a person acting as a parent"—an expressly defined term—"for at least six consecutive months immediately before the commencement of a child custody proceeding." A.R.S. § 25-1002(7), (13); *see also Welch-Doden v. Roberts*, 202 Ariz. 201, ¶ 33 (App. 2002) (construing § 25-1002(7) as requiring child's residence in "home state" for six consecutive months, with some portion of that time falling within six months immediately prior to commencement of proceeding).

¶29 Of some relevance here, ICWA and the UCCJEA also differ in defining the child-custody proceedings to which they apply. Under ICWA, that term includes "any action removing an Indian child from [his] parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator . . . where parental rights have not been terminated," but it provides the "term . . . shall not include a placement based upon . . . an award, in a divorce proceeding, of custody to one of the parents." 25 U.S.C. § 1903(1).[14] In contrast, the UCCJEA defines "[c]hild custody proceeding" to include "a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from domestic violence, in which legal custody, physical custody or visitation with respect to a child is an issue or in which that issue may appear." § 25-1002(4).

[14]The regulations have clarified that this exception applies to "[a]n award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding." 25 C.F.R. § 23.103(b)(3).

¶30 Many of the factual issues identified by these statutes are unrelated to a substantive claim of dependency and pertain only to a question of jurisdiction. *See Michael J., Sr.*, 198 Ariz. 154, ¶ 7 (court's role "when deciding jurisdictional issues under ICWA is to decide '*who* should make the custody determination concerning [the] child[]—not what the outcome of that determination should be'" (alteration in original) (quoting *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 53 (1989))). Other jurisdictional facts may appear "intertwined with the merits of the case." *Bonner v. Minico, Inc.*, 159 Ariz. 246, 256 (1988). In a given case, these might include the question of an "[e]mergency removal or placement"—a limited exception to a tribe's exclusive jurisdiction over a resident or domiciled Indian child, 25 U.S.C. § 1922, or "temporary emergency jurisdiction" under the UCCJEA, A.R.S. § 25-1034. [15] "[T]he resolution" of such intertwined, disputed issues "is for the fact-finder," which, in these matters, is the respondent judge. *Bonner*, 159 Ariz. at 256 (plaintiff entitled to jury resolution of disputed jurisdictional facts intertwined with merits, but "[i]f the parties . . . are not entitled to a jury because of the nature of the issues, the trial court will hear and determine the [jurisdictional fact] issues as it would any other contested factual issues"); *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 506 (App. 1987) (when court's subject matter jurisdiction is challenged, it "may take evidence and resolve factual disputes essential to its disposition of the motion"); *see also* A.R.S. § 8-844 (findings to be made by juvenile court at dependency adjudication); *cf. Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4 (App. 2002) (juvenile court "trier of fact" in proceeding to terminate parental rights).

¶31 As discussed below, the respondent judge need not reconsider, on remand, her decision declining to authorize G.C.'s "emergency" removal from Mary's custody. We conclude, however, that the respondent abused her discretion in dismissing the dependency proceeding based on a flawed interpretation of the UCCJEA and without

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[15]ICWA does not prevent a state's "emergency removal of an Indian child . . . located off the reservation, from his parent or Indian custodian . . . , under applicable State law, in order to prevent imminent physical damage or harm to the child." § 1922. The UCCJEA provides an Arizona court with "temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse." § 25-1034. The parties said little about these standards in their arguments below.

first fully investigating, taking evidence as required, the question of whether the Nation had exclusive jurisdiction under ICWA based on the principle of "domicile[]." 25 U.S.C. § 1911(a); *see also Mississippi Band of Choctaw Indians*, 490 U.S. at 48 ("'Domicile' is not necessarily synonymous with 'residence,' and one can reside in one place but be domiciled in another." (citations omitted)).[16]

¶32 The participants bear some responsibility for failing to bring certain factors, as defined by statute or federal regulation, to the respondent judge's attention. In other circumstances, we might be inclined to regard such issues as waived. *See*, *e.g.*, *K.B. v. State Farm Fire & Cas. Co.*, 189 Ariz. 263, 268 (App. 1997). But "when we consider the interpretation and application of statutes, we cannot be limited to arguments made in the trial court if that would cause us to reach an incorrect result." *Am. Family Mut. Ins. Co. v. Continental Cas. Co.*, 200 Ariz. 119, n.1 (App. 2001). Moreover, in a matter involving the application of ICWA, "[t]o imply a waiver of jurisdiction would be inconsistent with the ICWA objective of encouraging tribal control over custody decisions affecting Indian children." *Gila River Indian Cmty. v. Dep't of Child Safety*, 242 Ariz. 277, ¶ 27 (2017) (alteration in original) (quoting *In re J.M.*, 718 P.2d 150, 155 (Alaska 1986)). Accordingly, we provide the following guidance for proceedings on remand. *Cf. Angel B. v. Vanessa J.*, 234 Ariz. 69, ¶ 18 (App. 2014) (outlining "possible options on remand regarding jurisdiction" in light of "importance of finality in severance cases").

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[16] 25 C.F.R. § 23.2 now defines "[d]omicile" as follows:

> (1) For a parent or Indian custodian, the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain indefinitely even though the person may be currently residing elsewhere.
>
> (2) For an Indian child, the domicile of the Indian child's parents or Indian custodian or guardian. In the case of an Indian child whose parents are not married to each other, the domicile of the Indian child's custodial parent.

Primacy of Application between Title 8, ICWA, and the UCCJEA

¶33 As relevant here, a juvenile court is authorized to adjudicate a child dependent upon finding he "has no parent or guardian willing to exercise or capable of exercising [proper and effective parental] care and control." A.R.S. § 8-201(15)(a)(i). Generally, the Arizona legislature has granted the juvenile division of the superior court exclusive original jurisdiction over dependency proceedings. *See* A.R.S. §§ 8-202(B), 8-841; *see also* Ariz. Const. art. 6, § 15. In addition, § 8-202(F) establishes the primacy of the juvenile court, vis-à-vis other Arizona superior courts, with respect to orders involving a child's dependency.

¶34 But § 8-202 is of little help in determining jurisdiction when there is a competing jurisdictional claim of another state or, as in this case, an Indian tribe. *See*, *e.g.*, *Angel B.*, 234 Ariz. 69, ¶ 14 (concluding "the UCCJEA applies to private severance proceedings under Arizona law"); *see also* A.R.S. § 8-815(B) ("If the child is subject to [ICWA], the court and parties shall meet all requirements of [that] act that are not prescribed" by title 8, chapter 4); Ariz. R. P. Juv. Ct. 52(D)(9) (at initial dependency hearing, "[i]f ICWA applies, the court shall make findings pursuant to the standards and burdens of proof as required under ICWA and the Regulations").[17]

¶35 In *Angel B.*, this court addressed the relationship between title 8 proceedings and the UCCJEA, "a uniform act adopted in all 50 states and

[17]In *Steven H. v. Arizona Department of Economic Security*, our supreme court noted that, as of 2008, the Bureau of Indian Affairs (BIA) had promulgated only non-binding guidelines to "assist state courts in complying with ICWA." 218 Ariz. 566, ¶ 24 (2008). But effective December 12, 2016, the BIA adopted binding regulations "to improve ICWA implementation," having "found that implementation and interpretation of the Act has been inconsistent across States," "contrary to the uniform minimum Federal standards intended by Congress." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38779 (Jun. 14, 2016) (comments to 25 C.F.R. § 23); *see also Gila River Indian Cmty. v. Dep't of Child Safety*, 238 Ariz. 531, ¶ 17 (App. 2015) (noting "binding" nature of adopted regulations). Our supreme court has amended juvenile court rules to reflect the authority of these regulations. *See*, *e.g.*, Ariz. R. P. Juv. Ct. 8 ("All provisions of [ICWA] and Part 23 of Title 25 of the Code of Federal Regulations ("Regulations"), including any amendments to those provisions, govern proceedings subject to ICWA.").

the District of Columbia." 234 Ariz. 69, ¶ 7. We recognized that title 8's "broad exclusive jurisdictional grant" over child welfare actions "could be read to conflict" with title 25's "requirement . . . of deference to a court from another state with exclusive, continuing jurisdiction," and we concluded, "[T]he exclusive jurisdictional grant" in title 8 "must yield to the requirement to recognize an initial child custody determination by a court in another state with original jurisdiction under the UCCJEA." *Id.* ¶¶ 13-14. We reasoned that "[s]uch a construction" is not only "consistent with decisions in other states," but also "avoids what would be a significant constitutional Full Faith and Credit Clause issue." *Id.* ¶ 14. This required deference to the UCCJEA also applies to dependency proceedings brought under title 8. *See Monique B.*, 245 Ariz. 371, ¶ 1 (superior court correctly vacated dependency, termination, and adoption orders upon learning of Alabama custody order establishing that state's exclusive, continuing jurisdiction over child under the UCCJEA).[18]

¶36 The respondent judge's focus on the UCCJEA suggests she may have relied on these authorities in dismissing Elizabeth's dependency proceedings. But, just as this court has concluded that Arizona jurisdiction under title 8 must yield to a court having original, exclusive jurisdiction under the UCCJEA, when a dependency pertains to an Indian child, ICWA, as an act of Congress, initially takes precedence over both title 8 and the UCCJEA provisions in title 25. *See*, *e.g.*, *Valerie M. v. Ariz. Dep't of Econ. Sec.*, 219 Ariz. 331, ¶ 16 (2009) ("ICWA expressly provides that certain 'minimum Federal standards' apply in state court custody proceedings involving Indian children." (quoting 25 U.S.C. § 1902)); *Jared P. v. Glade T.*, 221 Ariz. 21, ¶ 18 (App. 2009) ("ICWA imposes requirements on state courts when an Indian child is the subject of a child custody proceeding.").

¶37 As our supreme court has explained, "Congress did not displace state law in favor of uniform standards." *Valerie M.*, 219 Ariz. 331, ¶ 16. Rather, "it recognized that federal requirements would be in addition to state law requirements, which will themselves prevail over federal law if

[18] In light of these decisions, as well as the UCCJEA's definition of a "[c]hild custody proceeding" as including "a proceeding for . . . dependency," § 25-1002(4), we reject Holly and Elizabeth's conclusory assertion, without citation to authority, that "this dependency action is not a 'child custody action' as regulated under Title 25."

they are more protective of parental rights." *Id.* (citing 25 U.S.C. § 1921);[19] *see also* § 8-815(B) ("the court and parties shall meet all requirements" of ICWA not prescribed by state statutes). Thus, although consideration of jurisdiction in this matter must begin with ICWA, it may not end there. As Brian argued in support of his motion to dismiss the 2018 dependency proceeding for lack of jurisdiction, even though § 25-1004(A) provides a proceeding "is not subject to" Arizona's UCCJEA "to the extent" it "is governed by ICWA," federal law requires that Arizona's UCCJEA, which generally applies to dependency proceedings, *see Monique B.*, 245 Ariz. 371, ¶¶ 11, 20, will apply in this case if it affords a higher standard of protection to Brian or an Indian custodian responsible for G.C.'s care.

ICWA

¶38 "Congress enacted ICWA in 1978 based on concerns that Indian families and tribes were threatened by alarmingly high rates of removal of Indian children from them by non-tribal entities, including state courts." *Valerie M.*, 219 Ariz. 331, ¶ 12. Some of its provisions "allocate[] jurisdiction between tribal and state courts over Indian child custody cases," while others "mandate[] certain procedural safeguards and substantive requirements for state court proceedings." *Id.* "In interpreting ICWA, we attempt to give effect to the will of Congress as expressed in the statutory language, which we construe liberally in favor of the interest in preserving tribal families." *Id.* ¶ 10.

¶39 Consistent with its focus on the removal of Indian children by non-tribal entities, ICWA applies to any "child custody proceeding," defined to include "any action, other than an emergency proceeding, that may culminate in" "an [involuntary] action removing an Indian child from [his] parent or Indian custodian for temporary placement in a foster home . . . where parental rights have not been terminated." 25 C.F.R. § 23.2 ("Foster-care placement").[20] An "[e]mergency proceeding means and

[19] "In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under [ICWA]," the court "shall apply the [more protective] State or Federal standard." 25 U.S.C. § 1921.

[20] The same statute provides that "child custody proceeding" "shall not include a placement based . . . upon an award, in a divorce proceeding, of custody to one of the parents." § 1903(1)(i); *see also* 25 C.F.R.

includes any court action that involves an emergency removal or emergency placement of an Indian child." *Id.*

¶40 Thus, ICWA applies to both "child custody proceeding[s]" and "emergency proceeding[s]," *see* 25 C.F.R. § 23.103(a), but it imposes different standards for each. *See* 25 C.F.R. § 23.104 (distinguishing regulations that apply to "emergency" proceeding from those that apply to "child-custody" proceeding); 25 C.F.R. § 23.113 (standards for emergency proceeding). The jurisdictional questions also vary with the type of proceeding. Specifically, ICWA does not preclude "the emergency removal of an Indian child . . . from his parent or Indian custodian . . . under applicable State law, in order to prevent imminent physical damage or harm to the child." § 1922.[21] And a state may exercise such emergency jurisdiction regardless of the residence or domicile of an Indian child. *See* 25 C.F.R. § 23.2 (defining "Emergency proceeding" to include "any court action that involves an emergency removal or emergency placement of an Indian child").

¶41 In contrast, in other ICWA child-custody proceedings—such as a dependency proceeding seeking the removal of an Indian child—a juvenile court "must determine the residence and domicile of the Indian child." 25 C.F.R. § 23.110(a). "If either the [child's] residence or domicile" is on the tribe's "reservation,"[22] "the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive

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§ 23.103(b)(3) (ICWA does not apply to "[a]n award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding").

[21] *See also* Ariz. R. P. Juv. Ct. 47.3 (citing 25 C.F.R. § 23.113(b)(1)) (court-authorized emergency removal requires probable-cause findings that "temporary custody of the child is clearly necessary to protect the child from suffering abuse or neglect," that "remaining in the child's current home is contrary to the welfare of the child," and, "[a]dditionally, for an Indian child," that "temporary custody is necessary to prevent imminent physical damage or harm to the child").

[22] *See supra* n.16 (definition of "domicile"); § 1903(10) ("'reservation' means Indian country," *see* 18 U.S.C. § 1151, "and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation").

jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding." *Id.* If the Indian child is not subject to the exclusive jurisdiction of a tribe, a state court "shall transfer such [child-custody] proceeding" to the tribe, upon petition—"absent objection by either parent" or "good cause to the contrary." § 1911(b).

¶42 If a state court retains jurisdiction of a non-emergency child custody proceeding under these provisions, certain "procedural safeguards and substantive requirements" are mandated by ICWA. *Valerie M.*, 219 Ariz. 331, ¶ 12. Specifically,

> [n]o foster care placement may be ordered in [a child-custody] proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(e). In addition, in a non-emergency situation, "[a]ny party seeking to effect a foster care placement of . . . an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." § 1912(d); *see also S.S. v. Stephanie H.*, 241 Ariz. 419, ¶¶ 15-21 (App. 2017) (ICWA provisions, including "active efforts" requirement, apply in private termination proceeding involving Indian child).

Denial of Request for G.C.'s Emergency Removal

¶43 As seen above, ICWA may apply in different ways and in different proceedings pertaining to the same Indian child. *See* 25 C.F.R. § 23.2 ("[t]here may be several child-custody proceedings involving any given Indian child," and "[w]ithin each child-custody proceeding, there may be several hearings"). Specifically, an Indian child may be subject to "[p]retrial" emergency proceedings as well as an adjudication of removal and placement pursuant to a dependency, a child-custody proceeding. 25 C.F.R. § 23.113 (standards for emergency proceedings, categorized as "Pretrial Requirements"; providing that "emergency proceeding can be terminated by . . . [i]nitiation of a child-custody proceeding subject to the

provisions of ICWA"); *see also* 25 C.F.R. § 23.2 (separately defining "[c]hild-custody proceeding" and "[e]mergency proceeding").

¶44 In promulgating regulations for ICWA, the BIA wrote that "emergency proceedings" are "distinct from 'child-custody proceedings,'" "should be as short as possible," and "may end with the initiation of a child-custody proceeding subject to the provisions of ICWA (e.g., the notice required by § 23.111, time limits required by § 23.112)." Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38778, 38793, 38821 (Jun. 14, 2016) (comments to 25 C.F.R. § 23, suggesting "preliminary protective hearing" as example of "emergency proceeding"). The agency explained that "[t]he 'imminent physical damage or harm' standard applies only to emergency proceedings, which are not subject to the same procedural and substantive protections as other types of child-custody proceedings," and that "Congress established a high bar for emergency proceedings that occur without [this] full suite of protections." *Id.* at 38794. The BIA emphasized, "[T]he immediacy of the threat is what allows the State to temporarily suspend the initiation of a full 'child-custody proceeding' subject to ICWA." *Id.* at 38795. Thus, "[w]here harm is not imminent, issues that might at some point in the future affect the Indian child's welfare may be addressed either without removal, or with a removal on a non-emergency basis (complying with the Act's section 1912 requirements)." *Id.*

¶45 In the proceedings below, neither Holly nor Elizabeth alleged G.C.'s removal was required based on his exposure to imminent physical damage or harm, nor did the DCS investigation show, any immediate threat that would warrant such relief.[23] *Id.* Nor did Holly and Elizabeth seek G.C.'s removal subject to the "full suite" of ICWA's requirements, *id.* at 38794, including expert testimony and a showing that the petitioner had made active but unsuccessful efforts to prevent the breakup of the Indian

[23]Because the standard for removing G.C. pursuant to an "emergency proceeding" under ICWA is more protective of Brian's custodial rights than the standard for "[t]emporary emergency jurisdiction" under the UCCJEA, *see supra* n.15, we apply the ICWA standard to Holly and Elizabeth's assertion of an "emergency," *see supra* ¶ 37. DCS told the respondent judge it agreed with Elizabeth's assertion of an "emergency," but it is unclear whether it had this standard in mind, as it did not utilize the statutory tools available to it when it finds a child is in imminent danger. *See* A.R.S. § 8-821(A), (D), (K); *Dep't of Child Safety v. Stocking-Tate*, 247 Ariz. 108, ¶¶ 10-11 (App. 2019) (identifying procedures for taking emergency custody through Maricopa County court order or based on exigent circumstances).

family. In the event of future proceedings, we emphasize that Elizabeth could not have prevailed on her request for temporary custody without meeting one of these two ICWA standards.

Dismissal of the 2019 Dependency

¶46 In contrast, we conclude the respondent's denial of Elizabeth's "emergency" custody request did not necessitate dismissal of the dependency proceeding as well. As noted, ICWA is concerned with the removal of Indian children, and a dependency does not always require removal. As the BIA recognized, "[t]here are circumstances in which it may be appropriate to provide services to the parent or initiate a child-custody proceeding with the attendant ICWA protections (e.g., those in [25 U.S.C. § 1912] and elsewhere in the statute), but removal or placement on an emergency basis is not appropriate." ICWA Proceedings, 81 Fed. Reg. at 38794; *see also* A.R.S. § 8-891 (authorizing "[i]n-home intervention" in dependency proceeding). Alternatively, if the juvenile court were to retain jurisdiction, Elizabeth could continue to pursue the dependency and an award of custody, but she would be required to do so in compliance with ICWA's requirements for a full child-custody proceeding. *See supra* ¶ 44.[24] Because G.C. is an Indian child, these standards will continue to apply to any involuntary removal proceeding, regardless of Brian's participation.

Jurisdiction over the Dependency as an ICWA Custody Proceeding

¶47 "An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe . . . ." § 1911(a). In order to determine—or to rule out—whether exclusive jurisdiction is held by a tribe, a state court "must determine the residence and domicile of the Indian child." 25 C.F.R. § 23.110(a); *see also* ICWA Proceedings, 81 Fed. Reg. at 38808 ("[T]he final rule identifies the determinations that a State court must make to assess its jurisdiction.").

¶48 At the May 2018 hearing on Brian's motion to dismiss, the respondent judge said the following about domicile: "With respect to the first issue, the domicile issue. The Court finds that the parties are not

[24]DCS chose not to participate in this special action and has not challenged the respondent's denial of its informal request to intervene. In the absence of any meaningful challenge to this aspect of the respondent's ruling, we decline to address it.

domiciled on the reservation. But I just want to make that clear on the record that I don't believe that—that affected me dismissing the case. But I don't think they're domiciled." We appreciate that the respondent recognized this as the first step of the analysis, but, without more, we must remand for a more definite determination of this pivotal, jurisdictional issue, based on record evidence.

¶49 On remand, should the respondent judge determine the juvenile court and the Nation have concurrent jurisdiction under ICWA, because G.C. neither resides nor is domiciled on the reservation, *see* § 1911(b), the parties may raise the application of § 1921 with respect to any state or federal law that "provides a higher standard of protection" for Brian's rights. § 1921.[25] Although Brian argued the UCCJEA provided such a higher standard, he relied only on the fact that the Nation's October 2017 custody order was first-in-time under the UCCJEA, without the required consideration of G.C.'s home-state affiliation. Based on the current filings, we see no need for the respondent judge to consider application of the UCCJEA on remand. We nonetheless offer the following guidance to correct flaws in the analyses proposed by the participants and adopted by the respondent in the proceedings below.

UCCJEA

¶50 In 2019, the respondent appears to have relied on the conclusion she had reached in the 2018 dependency proceeding, that the Nation had "issued the original custodial determination and will continue to hold hearings in the matter" and that, "therefore, pursuant to the UCCJEA the jurisdiction of these proceedings remains solely with the Nation." But, although we agree with the respondent judge that the Nation's court issued the *first* "child custody determination" pertaining to G.C.,[26] § 25-1002(3), we cannot discern a basis for the respondent's apparent

[25]In the case of concurrent jurisdiction under ICWA, a state court may only transfer a child-custody proceeding to tribal court if neither parent objects. § 1911(b). Holly has indicated she would object to such a transfer.

[26]A "[c]hild custody determination" "[m]eans any judgment, decree or other order of a court, including a permanent, temporary, initial and modification order, for legal custody, physical custody or visitation with respect to a child." § 25-1002(3)(a). But it "[d]oes not include an order relating to child support or any other monetary obligation of an

conclusion that the Nation's Parenting-Time order was an "*initial* child custody determination" as defined by § 25-1031(A)(1) (emphasis added), that gave rise to exclusive continuing jurisdiction under A.R.S. § 25-1032(A).

¶51 In her comments from the bench in 2018, the respondent judge referred to A.R.S. § 25-1036(A), which pertains to "[s]imultaneous proceedings" and provides, in relevant part, as follows: "[A] court of this state shall not exercise its jurisdiction under this article if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state [or Indian tribe] having jurisdiction substantially in conformity with this chapter." *See also* § 25-1004(B) (Arizona's UCCJEA applicable to Indian tribes). But, as we concluded in *Welch-Dodens*, a mere determination that a custody proceeding was filed "first-in-time" does not establish jurisdiction under the UCCJEA. 202 Ariz. 201, ¶ 46. Instead, in order for § 25-1036(A) to apply, "the first-in-time filing must be in a state 'having jurisdiction substantially in conformity with this chapter.'" *Id.* ¶ 47 (quoting § 25-1036(A)).

¶52 We explained that § 25-1031 is "the statutory starting place for determining initial jurisdiction" under the UCCJEA. *Id.* ¶ 15. And the starting point within that statute is § 25-1031(A)(1), which provides that a state court has "jurisdiction to make an initial child custody determination" if it

> is the home state of the child on the date of the commencement of the proceeding, or was the

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individual." § 25-1002(3)(b). We therefore reject Holly and Elizabeth's argument that the order issued in the Child Support Proceeding qualified as a child-custody determination and that "the primary purpose of the IV-D proceeding was to establish Brian's paternity under A.R.S. § 25-803(C)." First, the attorney general initiated the "[p]ost [p]aternity" Child Support Proceeding, "pursuant to [A.R.S. §§] 25-320, 25-500 through 25-535," "to establish a child-support obligation." Second, even were we to agree that the Child Support Proceeding was a "proceeding . . . for . . . paternity," and therefore a "child custody proceeding" under § 25-1002(4), that does not render any order entered in such a proceeding a "[c]hild custody determination," a term of legal consequence separately defined by § 25-1002(3).

> home state of the child within six months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state.

"Home state," in turn, is defined as "[t]he state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding, including any period during which that person is temporarily absent from that state." § 25-1002(7)(a).[27]

¶53 As we recognized in *Welch-Doden*, "[i]f a state is the 'home state' under this paragraph, it has jurisdiction. There is no further factual inquiry on the jurisdictional issue." 202 Ariz. 201, ¶ 15 (citation omitted; emphasis omitted). In contrast, additional paragraphs in § 25-1031(A) identify circumstances in which a state "may have jurisdiction when it does not qualify as the home state" under paragraph (A)(1). *Id.* We thus emphasized that the UCCJEA prioritizes home state jurisdiction and was enacted with a "fundamental purpose" of establishing "the certainty of home state jurisdiction." *Id.* ¶¶ 30, 33. In that case, because Oklahoma had "home state jurisdiction" based on the child's residency, we concluded Arizona could not exercise jurisdiction "substantially in conformity with" the UCCJEA, regardless of whether a child-custody proceeding was first initiated in this state. *Id.* ¶ 47 (quoting § 25-1036(A)); *see also Duwyenie*, 220 Ariz. 501, ¶¶ 11-12 (under UCCJEA, first-in-time custody proceeding filed in tribal court, pertaining to non-resident Indian child, did not afford jurisdiction substantially in conformity with the UCCJEA and so did not "take[] precedence over Arizona's home-state jurisdiction").

¶54 At the hearings in these matters, neither the respondent judge nor the parties questioned whether the Nation had home-state jurisdiction under the UCCJEA, and the respondent received no evidence relevant to

[27]Thus, unlike ICWA, which requires consideration of both residence and domicile, *see* 25 U.S.C. § 1911(a), home state jurisdiction under the UCCJEA is based only on where a child "lived with a parent or a person acting as a parent." § 25-1002(7)(a); *see also* § 25-1002(13) (defining "[p]erson acting as a parent").

that determination.[28] If Holly and Elizabeth are correct, however, that G.C. has never lived on the Nation's reservation,[29] then the Nation did not have home-state jurisdiction under § 25-1031(A)(1).

¶55 Had the respondent been required to consider jurisdictional standards under the UCCJEA, she would have further needed to determine whether any other state—such as Arizona—has home state jurisdiction under § 25-1031(A)(1) (if the Nation does not)[30] before considering whether the Nation had a UCCJEA-compliant basis for exercising jurisdiction under § 25-1031(A)(2), (3), or (4) in the ongoing Parenting-Time Proceeding. We emphasize that the UCCJEA only requires deference to another state's jurisdiction when the other state (or Indian tribe) has exercised jurisdiction substantially in compliance with the UCCJEA. *See*, *e.g.*, §§ 25-1036(A), (B); 25-1053(A). For example, the Nation is correct that § 25-1004(C) provides that "[a] child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced" by the state. But whether

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[28] None of the parties addressed the issue of "home-state" jurisdiction under the UCCJEA in hearings before the respondent judge. Although we might regard the issue as waived, we decline to do so here. *See Ruesga v. Kindred Nursing Ctrs., L.L.C.*, 215 Ariz. 589, n.3 (App. 2007) (court exercised discretion to address argument first raised on appeal "because it implicates the meaning and effect of a statute").

[29] Like ICWA, which incorporates 18 U.S.C. § 1151 in its definition of "reservation," *see* § 1903(10), the Nation's Civil Code defines its "Territorial Jurisdiction" to include "allotments and fee lands, and all other lands held in trust by the United States for the Tohono O'odham Nation." T.O. Code, tit. 4, ch. 1, § 1-101(c)(1). The Supreme Court has cautioned that the federal definition "contemplates that isolated tracts of 'Indian country' may be scattered checkerboard fashion over a territory otherwise under state jurisdiction. In such a situation, there will obviously arise many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory." *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 429 n.3 (1975).

[30] Although Holly and Elizabeth argue Arizona is G.C.'s home state "as a matter of law," issues remain regarding G.C.'s residence and, in light of some of Elizabeth's assertions, whether he lived in Arizona "with a parent or a person acting as a parent" for the requisite six-month period. § 25-1002(7)(a); *see also Welch-Doden*, 202 Ariz. 201, ¶ 33.

the "factual circumstances" here are in substantial conformity with UCCJEA's jurisdictional standards will depend largely on evidence related to the location of G.C.'s residence "with a parent or a person acting as a parent," § 25-1002(7)(a), during the relevant time periods. If Holly and Elizabeth are correct that the Nation did not exercise jurisdiction "under factual circumstances in substantial conformity" with the UCCJEA's jurisdictional standards, § 25-1004(B), the UCCJEA would not require Arizona courts to recognize or enforce the Nation's child-custody determinations. *See Duwyenie*, 220 Ariz. 501, ¶ 12 (exercise of jurisdiction by tribal court in South Dakota did not substantially comply with UCCJEA because "the parties and the child resided in Gila County, Arizona where the child was born"); *see also In re Marriage of Margain & Ruiz-Bours*, 239 Ariz. 369, ¶¶ 26-27 (App. 2016) (distinguishing "legal circumstance" of whether other court exercised jurisdiction in substantial conformity with UCCJEA from factual circumstances meeting the UCCJEA's jurisdictional standards).

Recognition and Enforcement of Tribal Court Orders as Matter of Comity

¶56 Finally, Holly and Elizabeth assert that "the Nation lacked jurisdiction to enter the [parenting-time] order" under the UCCJEA, that "the Nation's court . . . is violating" the UCCJEA, and that, therefore, "all of the tribal court proceedings . . . are void." They cite § 25-1004 as authority for the proposition that the UCCJEA "applies to Indian tribes equally as states." Although they do not expressly ask this court to rule that the Nation's orders are void, in the event they raise similar arguments on remand, we address these issues to clarify the law about the application of the UCCJEA to the Nation. Specifically, we clarify that recognition and enforcement of the Nation's parenting-time orders may be appropriate as a matter of comity, even if not statutorily required by § 25-1004(C).[31]

¶57 As an initial matter, § 25-1004(B) provides only that "[a] court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying" UCCJEA's jurisdictional standards. In addressing the substantially similar provision in New Mexico's UCCJEA, that state's supreme court has explained that it requires state courts "to honor the

[31]Although ICWA requires that full faith and credit be granted to Indian child-custody proceedings conducted by any Indian tribe, § 1911(d), that provision is limited to child-custody proceedings as defined by ICWA. *See supra* ¶ 28. The Nation's Parenting-Time Proceeding falls outside that definition. *See id.*

[UCCJEA-compliant] decisions of tribal courts for continuing jurisdiction purposes." *Garcia v. Gutierrez*, 217 P.3d 591, ¶ 15 (N.M. 2009). But the provision "has no power to similarly bind the tribal courts, because unless the tribes have passed legislation similar to the UCCJEA, they are not subject to its commands." *Id.*

¶58 The Nation thus cannot be said to be "violating" the UCCJEA, because it has not adopted that uniform state law and is not bound by it. We see nothing to suggest that the Nation has failed to exercise jurisdiction in accordance with its own laws and system of governance.[32] In such circumstances, we agree with the New Mexico Supreme Court that, even if "the State has proper jurisdiction" under the UCCJEA, "that jurisdiction is not exclusive of the tribe." *Garcia*, 217 P.3d 591, ¶ 15. The court in *Garcia* recognized that its determination of "concurrent jurisdiction could potentially result in conflicting orders emanating from tribal and state courts," and so "runs counter to the purpose of . . . the UCCJEA." *Id.* ¶ 64.

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[32] Unlike the UCCJEA, which determines home-state jurisdiction based on a child's residence with a parent for a specified time period, §§ 25-1002(7)(a), 25-1031(A)(1), the Tohono O'odham Code authorizes the Nation's courts to exercise jurisdiction over "[a]ny action concerning the custody, adoption, guardianship, commitment or paternity of the Tohono O'odham child, provided that the Tohono O'odham courts *shall have exclusive jurisdiction over any Tohono O'odham child who is domiciled* within the territorial jurisdiction of the Nation." T.O. Code, tit. 4, ch. 1, § 1-101(b)(7) (emphasis added). Similar to the definition for "domicile" relevant to ICWA determinations, *see supra* n.16, the Tohono O'odham Code defines "[d]omicile" as "a person's true, fixed and permanent home and the place to which a person intends to return even though actually residing elsewhere," adding that it "shall also mean a person's actual place of residence," and further adding, "Members of the Nation *are presumed to be domiciled* within the territorial jurisdiction of the Nation." T.O. Code, tit. 4, ch. 1, § 1-101(c)(4) (emphasis added). In light of these provisions, the Nation's exercise of jurisdiction to address the custody of a Tohono O'odham child member is, at the very least, colorable in the context of the Nation's own legal system. *Cf. Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) (when custody issue was "still pending before the Tribal Court, the district court properly exercised its discretion and dismissed th[e] case due to Plaintiff's failure to exhaust tribal court remedies"; noting exception to federal exhaustion rule if tribe's exercise of jurisdiction was not colorable or plausible).

But it also noted that "[o]ther jurisdictions have recognized that comity provides the 'best general analytical framework for recognizing tribal judgments.'" *Id.* ¶ 66 (quoting *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997)). And it emphasized that New Mexico "has a long and laudable tradition of comity between state and tribal courts." *Id.* ¶ 65. So, too, does Arizona. *See*, *e.g.*, *Beltran v. Harrah's Ariz. Corp.*, 220 Ariz. 29, ¶ 11 (App. 2008) ("Arizona courts have generally recognized tribal court judgments as a matter of comity," with comity defined as circumstance in which "courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation, but out of deference and mutual respect" (quoting *Leon v. Numkena*, 142 Ariz. 307, 311 (App. 1984))). Should the respondent judge, on remand, be called upon to determine whether to recognize and enforce the Nation's Parenting-Time determinations, these authorities provide guidance about the relevant inquiries.

¶59 In any event, we decline to declare the Nation's orders "void." Although we used that term to describe certain tribal orders in *Duwyenie*, 220 Ariz. 501, n.9, we might more accurately have said that we declined to recognize and enforce those orders, for the reasons stated in that opinion, as we question whether an Arizona court may ordinarily review the Nation's rulings as to its own jurisdiction when those decisions have not been appealed through the Nation's justice system.[33] *See Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985) ("the federal question whether a tribal court has exceeded the lawful limits of its jurisdiction" must first be exhausted through "remedies available . . . in the Tribal Court system" before the "claim may be entertained by a federal

[33]We reject Holly and Elizabeth's suggestion that *Duwyenie* requires that Arizona courts decline to enforce the tribal court's parenting-time orders. In that case, we declined to recognize tribal court-custody proceedings and the passage of special legislation under the principle of comity when the trial court had found that both actions "violated due process" and were based on the father's unauthorized removal of a child to another state. *Duwyenie*, 220 Ariz. 501, ¶ 9 & n.3. We explained, "[T]he principle of comity does not apply 'under certain conditions . . . including if the parties were not afforded due process . . . or if recognition of the judgment would be contrary to fundamental public policy.'" *Id.* (alteration in original) (quoting *Beltran*, 220 Ariz. 29, ¶ 11). The facts here, including Holly's continuing participation in the tribal court proceeding, are readily distinguishable.

court"); *Beltran*, 220 Ariz. 29, ¶ 23 ("The proper forum for correcting any error by the tribal court . . . is the tribal appellate court . . . ."). [34] Thus, "Arizona courts properly refuse to accept jurisdiction over a case when doing so 'would undermine the authority of the tribal courts,'" *id.* (quoting *Williams v. Lee*, 358 U.S. 217, 223 (1959), "or would 'usurp[the] legitimate exercise of asserted tribal court jurisdiction,'" *id.* (quoting *Smith Plumbing Co. v. Aetna Cas. & Sur. Co.*, 149 Ariz. 524, 529 (1986)); *see also Atwood*, 513 F.3d at 948 (plaintiff's voluntarily "avail[ing] himself" of tribal forum by appearing there in original custody dispute provided "at least a 'colorable' basis" for tribe's jurisdiction; exhaustion through tribal court system required); *cf. Simmonds v. Parks*, 329 P.3d 995, 1022 (Alaska 2014) (tribal court's termination order "entitled to full faith and credit under ICWA because [parents] failed to exhaust tribal court remedies before collaterally attacking the decision in state court").

Disposition

¶60 We accept jurisdiction of this special action, and we grant relief in part by remanding this case for further proceedings in the 2019 matter. Because that more recent dependency proceeding has superseded the dependency appeal remanded for further consideration in No. 2 CA-JV 2018-0101, we now dismiss that 2018 appeal as moot.

¶61 At Holly and Elizabeth's invitation, we do not address whether the respondent judge abused her discretion in denying their request, without reference to relevant ICWA standards, to remove G.C. from his custodian's care based on an "emergency." With respect to the respondent judge's dismissal of the entire dependency proceeding, jurisdictional questions remain. We vacate the dismissal order and remand the case in order for the respondent to receive the evidence needed to address those questions, as detailed above, first fully determining how ICWA applies. If G.C. is found to reside or be domiciled within the Nation's reservation, as all terms are defined, the Nation has exclusive jurisdiction

[34] Holly and Elizabeth suggest the Nation's ability to "manage the situation was a question of fact," citing Holly's outburst during the 2019 dependency hearing, asserting, "[T]here has been no fair trial in Tribal Court." But the Supreme Court has explained, "alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement established in *National Farmers Union*, . . . and [such an exception] would be contrary to the congressional policy promoting the development of tribal courts." *Iowa Mut. Ins. v. LaPlante*, 480 U.S. 9, 19 (1987).

and the dependency must be dismissed. 25 U.S.C. § 1911(a). If the respondent determines that this is not the case, the tribe and the state of Arizona have concurrent jurisdiction under ICWA. § 1911(b).

¶62 In that instance, unless the parties establish an appropriate application of 25 U.S.C. § 1921 with respect to any federal or state statute that employs a standard that is more protective of a parent's rights than ICWA, the respondent may proceed under the requirements of ICWA. In the absence of any further argument that the UCCJEA employs such a standard, the UCCJEA has no relevance to the pending dependency proceeding, which is governed, in the first instance, by ICWA.