



The Third Department recently tackled an interesting question of jurisdictional priority in custody matters over an Indian child, holding that the Indian Child Welfare Act did not grant exclusive jurisdiction over the child's custody to the tribal courts, and that the child's custody should have been determined in New York following a best interests hearing. Let's take a look at that opinion and what else has been going on in the New York appellate courts over the last week.

## SECOND DEPARTMENT

### TORTS, STORM IN PROGRESS RULE

*Rowland v Brooklyn Hosp. Ctr., 2026 NY Slip Op 02861 (2d Dept May 6, 2026)*

**Issue:** Does New York's common-law storm in progress rule apply to an accident that occurs inside of a building?

**Facts:** When Plaintiff was walking on crutches in the entrance of Brooklyn Hospital Center, she slipped and fell on water in the entryway. It was raining outside at the time of the accident. Plaintiff thereafter sued the hospital, alleging that it was negligent in maintaining the vestibule where she fell. Following discovery, the hospital moved for summary judgment dismissing the complaint, arguing that under "New York's common-law storm in progress rule, it could not be held liable for an accident caused by precipitation from a storm that occurred while the storm was ongoing. BHC also argued that it did not have actual or constructive notice of the alleged condition, and that it took reasonable steps to address any tracked-in rain."

Supreme Court denied the hospital's summary judgment motion. Although the court later granted reargument, it ultimately adhered to the original determination denying summary judgment.

**Holding:** The Appellate Division, Second Department affirmed, holding that "New York's common-law storm in progress rule does not apply to an accident that occurs inside of a building as a result of tracked-in precipitation or other conditions." The court explained that the common-law storm in progress rule was formulated in New York precedent more than a century ago, and under its current formulation, it provides that "a property owner will not be held liable for accidents occurring as a result of the accumulation of snow or ice on its premises until an adequate period of time has passed following the cessation of the storm, within which time the owner has the opportunity to ameliorate the hazards caused by the storm."

The purpose of the rule, which is to relieve property owners of the obligation to remove snow or ice while continuing storm conditions would render such efforts fruitless, has not changed. Thus, the rule does not apply to an icy condition that existed prior to the storm that is the subject of the litigation. Further, while a lull in the storm does not impose a duty to remove the accumulation of snow or ice before the storm ceases in its entirety, if the storm has passed and precipitation has tailed off to such an extent that there is no longer any appreciable accumulation, then the rationale for continued delay abates, and commonsense would dictate that the rule not be applied. Even if a storm is ongoing, once a property owner elects to remove snow or ice, it must do so with reasonable care or it could be held liable for creating a hazardous condition or exacerbating a natural hazard created by the storm."

The court noted that it had "has not expanded the storm in progress rule to include hazards that have been tracked-in to interior spaces," and declined to do so here. Thus, the court held, "removing tracked-in hazards during an ongoing storm is not a fruitless endeavor, and therefore the suspension of a property owner's duty of care with respect to such hazards is not justified. Rather, tracked-in conditions from a storm in progress are to be treated by the principles governing premises liability generally."

Here, the court held, the hospital failed to demonstrate that it "did not have constructive notice of the alleged wet floor in the vestibule where the plaintiff slipped and fell" and "that it had undertaken a sufficient remedial action, by placing a floor mat in the vestibule at some point before the accident occurred, relative to the danger posed by the alleged hazard under the circumstances." Thus, summary judgment was properly denied.

# THIRD DEPARTMENT

## FAMILY LAW, INDIAN CHILD WELFARE ACT, UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

*Matter of Kody II. v Shaunta JJ., 2026 NY Slip Op 03044 (3d Dept May 14, 2026)*

**Issue:** Does the Indian Child Welfare Act grant jurisdictional priority to determine custodial issues to tribal courts over New York Family Court where the Indian child is born to unwed parents, one of whom is a member of the tribe?

**Facts:** The mother and the father “are the unwed parents of the subject child (born in 2022). The mother is a member of the Navajo Nation such that the child is also a member by ancestry. The child was born in New Mexico but lived on the Navajo Nation reservation in Utah with the mother until she was roughly eight months old. Thereafter, in March 2023, the mother and the child relocated to New York to reside with the father. One year later, the mother returned to the reservation, where she has since remained. The child, however, continued to reside with the father in New York.”

Upon her return to the reservation, the mother filed in the Navajo Nation Family Court for a domestic abuse protection order and a temporary order of protection against the father. “The Navajo Court granted the mother a temporary order of protection, as well as temporary sole custody of the child.” Upon being served with that Navajo Court order, the father moved in New York Family Court for “emergency temporary sole custody of the child . . . , disclosing that the child was the subject of ongoing legal proceedings in the Navajo Court. Following a hearing two days later, at which the father and the attorney for the child were present and the issue of jurisdiction was raised and discussed extensively, Family Court issued a temporary order awarding sole legal and physical custody of the child to the father upon the basis that ‘the Utah court’ did not have jurisdiction.”

The father then submitted written opposition to the Navajo Court domestic abuse petition, but as a result of conflicting notices of the time of the hearing, failed to appear. As a result, the “Navajo Court issued an order upon the father’s default that prohibited direct communication between the mother and the father and, despite the father not having been on notice that the issue of custody was to be addressed, granted the mother sole legal and physical custody of the child.”

“In May 2024, Family Court issued another temporary order, upon the agreement of the parents and the AFC, granting sole legal and physical custody to the father with parenting time to the mother via phone and/or video calls. The father thereafter amended his original custody petition, raising concerns regarding the mother’s living conditions. The parties’ litigation continued throughout the remainder of 2024 and into 2025, focused upon the issue of jurisdiction. On this issue, in June 2025, the parents, represented by counsel, executed and filed a stipulated motion in the Navajo Court to modify the DAPO to allow for direct communication between the parents and further stipulating that ‘[m]atters pertaining to child custody . . . shall be addressed [and] resolved exclusively’ in the Family Court of Columbia County.”

After two years of litigation, the New York Family Court, sua sponte and without holding a best interests hearing, changed temporary physical custody of the child to the mother, concluding that “the mother ought to have custody of her child.” Although the father obtained an emergency stay from the Appellate Division, Third Department the next day, the child was already by that time travelling with the mother to the reservation, despite the father’s attempts to provide the Appellate Division order to the mother before they reached the reservation.

“The following day, on January 15, 2026, the Navajo Court and Family Court held a conference, in the absence of the parties, during which Family Court expressed its intent to relinquish jurisdiction to the Navajo Court and ‘make the appeal to this Court moot.’ Accordingly, that same day, Family Court entered an order dismissing the father’s petition, with prejudice, for lack of jurisdiction. The court’s written decision and order clarified the basis for its determination, concluding that the Navajo Court had exclusive jurisdiction under ICWA.”

**Holding:** The Appellate Division, Third Department reversed, holding that the Indian Child Welfare Act did not apply to the custody of this child and thus the Navajo Courts did not have exclusive jurisdiction over the child’s custody. The court reasoned that “ICWA mandates that ‘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.’ Significantly, however, by its own language ICWA defines a ‘child custody proceeding’ subject to ICWA’s restrictions as ‘foster care placement,’ ‘termination of parental rights,’ ‘preadoptive placement’ or ‘adoptive placement.’ However, statutory language expressly mandates that the term ‘shall not include . . . an award, in a divorce proceeding, of custody to one of the parents.’ Consistent with its stated purpose to address concerns with the governmental removal of an Indian child from his or her tribal home, relevant federal regulations provide that ICWA does not apply to an award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding. The published guidelines of the Federal Bureau of Indian Affairs regarding the intended application of ICWA are similarly informative, instructing state courts that, as the Act specifically exempts from ICWA’s applicability awards of custody to one of the parents in divorce proceedings, the exemption necessarily includes awards of custody to one of the parents in other types of proceedings as well, such that ICWA does not apply to an award of custody to one of the parents, in a divorce proceeding or otherwise.”

Here, the court held, “ICWA is inapplicable to the custody proceeding at issue here, inasmuch as it concerns solely competing petitions for custody by the child’s parents — there is no application for the governmental removal of the child from either parent or for the ter-

mination of parental rights. We find no legal authority to support the mother’s position that we should instead adopt the Navajo Court’s contrary interpretation of ICWA.” Thus, the court explained, the issue was one of jurisdictional priority between the Navajo Nation laws and New York’s. To resolve these kinds of jurisdictional disputes over child custody, New York has adopted the Uniform Child Custody Jurisdiction and Enforcement Act, which mandates that “tribal court custody determinations made in substantial conformity with the jurisdictional standards of its provisions be afforded full faith and credit. Thus, where simultaneous proceedings have been commenced in the tribal court’s jurisdiction in substantial conformity with the UCCJEA, this state’s court shall stay its proceeding and communicate with the tribal court and, if this state’s court is not determined to be a more appropriate forum, the court of this state shall dismiss the proceeding.”

Because the child had lived with the father for more than six months prior to commencement of the custody proceedings, the UCCJEA provided that New York was considered the child’s home state. And although “we find that the DAPO proceeding before the Navajo Court constitutes a proceeding concerning the custody of the child within the meaning of the UCCJEA for purposes of preemption, and that it had already been commenced at the time when the father commenced his proceeding in Family Court, the Navajo Court’s exercise of jurisdiction over that proceeding was not in substantial conformity with the UCCJEA’s provisions. Specifically, the Navajo Nation Code provides that ‘the Tribal Court may hear child custody matters involving Navajo children wherever they may arise;’ such that ‘it is . . . the child’s status as a Navajo, not her presence within the Navajo Nation that allows for jurisdiction.’ Because that assertion of jurisdiction is not in conformity with the UCCJEA, and, as this state is the child’s ‘home state’ within the meaning of the UCCJEA, there was no basis for this state to cede jurisdiction to the Navajo Court.”

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