A Seat at the Table: Tribal Legal Representation in Out-of-State Indian Child Welfare Act Cases

APRIL OLSON

They made me stand. The small courtroom was packed with the usual parties in an Indian Child Welfare Act (ICWA) case: attorneys and social workers and a few observers who took up all the remaining seats. I stood against a wall while we waited for the judge to begin oral argument on my motion. After the judge called on me, I expected someone would offer me a seat or at least a small patch of table for my files, but no one did. Instead, I balanced my notebook and other materials on the edge of a low wall while I argued the tribe's motion. As an ICWA attorney, I am used to not having a seat at the table (literally) or sitting off to the side in a courtroom. Juvenile courtrooms are small, and tribes are often the odd man out. Ironically, I was in the courtroom precisely because my client, an out-of-state tribe, was denied a seat in this court proceeding. The tribe's attorney, an attorney with over 20 years of experience, had filed a motion to intervene and transfer jurisdiction to the tribal court, and the court refused to consider the motion because she was not an Arizona-licensed attorney. This begs the question, what is a right without the means to enforce it?

ICWA is a federal law that sets minimum standards for state court "child custody proceedings" involving Indian children.[1] A child custody proceeding includes a foster care placement, a termination of parental rights proceeding, a pre-adoptive placement, or an adoptive placement.[2] An Indian child is one who is a member of a federally recognized Indian tribe or eligible for membership.[3] A common ICWA case involves a state court dependency matter in which Indian children were removed from the custody of their parents by social services.

ICWA was passed in response to many years of federal and state policies that involved removing Indian children from their homes, often for no reason, and placing them in non-Indian foster or adoptive homes or boarding schools in a deliberate campaign to assimilate Indians into Western culture.[4] ICWA attempts to prevent these practices by setting minimum standards that govern state child custody proceedings and adoptions involving Indian children. These standards include, among others, preferences that support placement with extended family members and heightened burdens of proof for placing Indian children in foster care and terminating parental rights. ICWA has often been called the "gold standard" in child welfare practice, because it advocates for only removing a child when there is no other safe alternative, it lessens the trauma of removal by promoting placement with family and community, and it requires that families receive "active efforts" and intensive services to prevent the breakup of the family, all while centering cultural connections for the child.

An important aspect of the ICWA is that it recognizes the inherent authority of Indian tribes over their children and families and provides Indian tribes with an absolute right to intervene in state child custody proceedings involving tribal members.[5] This unconditional right to intervene allows tribes to become parties to such proceedings, take

positions on matters such as where children are placed, and ensure the requirements of ICWA are followed. Therefore, tribes must have legal representation in such cases to enforce ICWA. Legal representation in ICWA cases gives tribes a seat at the table. Many tribes are represented in ICWA proceedings by tribal attorneys employed through tribal attorneys general or other in-house counsel.

Although ICWA is a federal law, its provisions are implemented in state courts wherever Indian families and children are located. As a result, many tribes, especially large ones, have ICWA cases in multiple states across the country. The Navajo Nation, whose lands span three states, currently has ICWA cases in about 25 states. The Gila River Indian Community has ICWA cases in 20 states. In most years, the Cherokee Nation participates in ICWA child custody proceedings in all 50 states.[6] Providing legal representation in all these jurisdictions is an overwhelming challenge. Most tribes have in-house attorneys who are licensed in a few states. How then does a tribe intervene and participate in an ICWA case in a state other than its home state?[7]

Over time, tribes have employed numerous strategies to ensure tribal participation in out-of-state ICWA cases. Tribes often participate in out-of-state cases through a social worker who appears by phone. This can be problematic if a tribe needs to file pleadings or take legal positions, particularly ones adverse to other parties in the case. Appearing by phone also has disadvantages that include not being able to fully hear or see parties or communicate tribal positions.

In other situations, tribal attorneys appear as the tribal "ICWA representative" in states where the tribal attorney is not licensed. In such cases, tribal attorneys can assist the court with locating extended family for placement and advise the court on other tribal matters of culture and custom but generally cannot file legal pleadings or take other actions that may be considered the unauthorized practice of law. Tribal attorneys can also apply to appear pro hac vice in out-of-state cases. However, pro hac vice fees are often high and are usually assessed per case. Even then, a tribal attorney must associate with local counsel, which can be cost prohibitive. Separately hiring local counsel to represent a tribe in an ICWA case also comes at a cost that is unaffordable to many tribes.

In addition, some state courts will refuse to allow an out-of-state tribal representative to appear by phone, give testimony, or file documents. As discussed below, a tribe may challenge these actions, arguing that ICWA provides an absolute right to intervene under federal law, but often the state court case will continue without tribal participation during an appeal. Refusing to permit tribes to participate in ICWA cases unless they have local legal counsel defeats the very purpose of the act.

Although ICWA was passed in 1978, the first reported decision to discuss the legal right to intervene and participate was not issued until 15 years later.[8] In *State ex rel. Juvenile Dept. of Lane County v. Shuey*, the Confederated Tribes of the Grande Ronde Community of Oregon ("Grande Ronde") filed a motion to intervene in a case where the Oregon Children's Services Division (CSD) removed a child from her mother's custody. The trial court denied the motion because it was not signed by an attorney. Under Oregon law, all pleadings must be signed by an attorney. Grande Ronde retained legal counsel and filed a motion to reconsider the ruling. After briefing and oral argument, the trial court upheld the denial of the original motion to intervene because it was not signed by an attorney, as required by Oregon law.

On appeal, the Oregon Court of Appeals saw the issue as one of federal preemption:

> "When a state law 'interferes or is incompatible with federal and tribal interests,' the Supreme Court requires balancing tribal and state interests. ... Here, we must first determine whether the requirement that a tribe be represented by an attorney in an ICWA proceeding 'interferes with or is incompatible with' the tribe's right to intervene and its interest in its children. If we find an interference or incompatibility, then we must balance the competing state and tribal interests."[9]

Balancing the interests at stake, the court of appeals reversed and remanded with instructions to grant the motion to intervene. The court held that ICWA preempted state statutes requiring groups and associations to be represented by an attorney when applied to an Indian tribe's attempt to intervene in child custody proceeding under ICWA. The court explained:

> "[t]ribal participation in state custody proceedings involving tribal children is essential to effecting the purposes of the ICWA. The state interests represented by ORS 9.160 and ORS 9.320 are outweighed by those purposes and the tribal interests that they represent. With the applicable preemption test weighted in favor of tribal interests, the state requirement of representation by an attorney is preempted in the narrow context of these ICWA proceedings."[10]

The next case to explore this issue in depth arose nearly 15 years later in Iowa.[11] In that case, an Indian mother wanted to terminate her parental rights and place her child with a non-Indian family. After presenting the mother and the mother's consent to terminate directly to the district court in June, an adoption attorney mailed notice to the tribe advising them of a July 27 hearing. Shortly thereafter, the tribe filed a motion to intervene and requested a continuance. The court granted the motion to intervene and continued the hearing so that the tribe could investigate the adoptive placement.

On the day before the rescheduled hearing, the tribe faxed a resolution to the court that stated the child's eligibility for membership in the tribe, the belief that ICWA had been violated because a child custody proceeding had occurred without notice to the tribe, the tribe's intent to ask for preferred placement if the mother relinquished her rights, and the tribe's appointment of their ICWA director as the tribal representative in the case. The court again continued the case until Nov. 1 so that all parties could consider the tribe's resolution. On Nov. 1, the court held a termination hearing. The adoption attorney and the mother's attorney objected to the tribe appearing by phone. The guardian ad litem argued that the tribe's ICWA director should not be able to present evidence because she was not a lawyer. The tribe asked for a continuance to appear in person. The court denied the continuance and allowed the tribe to remain on the phone but prohibited the ICWA director from presenting any evidence. The court then proceeded to terminate parental rights.

The tribe filed an appeal arguing, inter alia, that the court erred by refusing to allow the ICWA director to act as a representative of the tribe at the November 1 hearing. The Iowa Supreme Court agreed and held that an Indian tribe should be permitted to represent itself in ICWA proceedings. Citing *State ex rel. Juvenile Dept. of*

Lane County v. Shuey, the court stated, "[t]ribal participation in state custody proceedings involving tribal children is essential to effectuating the purposes of the ICWA" and "the state's interest in adequate representation and compliance with procedure and protocol in general cannot compare with a tribe's interest in its children and its own future existence."[12] The court was also sensitive to the economic hardships faced by tribes and noted that many tribes lack the resources for legal representation. This fact remains true today.

One year later, the Nebraska Supreme Court came to a similar conclusion in *In re Interest of Elias*. In that case, the trial court denied the Ponca Tribe of Nebraska's motion to intervene because it was not signed by an attorney. The court reversed, holding "the Tribe's right to intervene under the federal Indian Child Welfare Act (ICWA) preempts Nebraska's laws regulating the unauthorized practice of law."[13] The court concluded that "tribal participation in state custody proceedings involving Indian children is essential to achieving the goals of ICWA," and that the tribal interests represented by ICWA outweigh the state interests expressed in the unauthorized practice of law statute.[14]

The three cases above, combined with the federal preemption doctrine, provide support for any tribe asserting its rights in an ICWA proceeding outside their home state. Litigation, of course, takes time and is costly. Litigating the issue of tribal representation in ICWA cases also requires hiring local counsel to litigate the issue in the non-home state. Meanwhile, the child custody proceeding will continue without the input of the tribe, and valuable time is lost. In the case I described at the beginning of this article, after the court denied the out-of-state tribal attorney's motion, the tribe hired me because a motion to terminate parental rights was also pending. Had they not hired local counsel, they would not have had legal representation in the termination of parental rights proceedings. In the end, this was crucial because the juvenile court denied the motion to terminate parental rights and returned the children to their home. Had the tribe not intervened and actively participated with legal representation, the result may have been different.

More recently, states have begun adopting rules or laws that expressly permit out-of-state tribal attorneys to appear in ICWA cases or that relax the pro hac vice rules so that tribal attorneys may appear without the financial burdens of fees and retaining local counsel. As of November 2020, at least nine states recognize the unique issues faced by tribes trying to obtain effective legal representation in ICWA cases in non-home states.[15] These states have passed laws or rules that either relax the pro hac vice requirements or hold that tribal attorneys in ICWA cases are not subject to the laws governing practice-of-law.

The first state to pass such a law was Nebraska, in 2015. Under the Nebraska Indian Child Welfare Act, as under the federal ICWA, a tribe can intervene at any point in the proceeding and "[t]he Indian child's tribe or tribes and their counsel are not required to associate with local counsel or pay a fee to appear pro hac vice in a child custody proceeding" under the Nebraska ICWA.[16] In 2018, California amended its pro hac vice rule to provide that the requirement to associate with local counsel "does not apply to an applicant seeking to appear in a California court to represent an Indian tribe in a child custody proceeding governed by the Indian Child Welfare Act."[17]

Minnesota amended its General Rules of Practice for Courts in 2019 to provide that the general rules of practice do not apply to attorneys who represent Indian tribes in juvenile protection matters.[18] Wisconsin also amended its Supreme Court Rules in 2019 to provide that a nonresident attorney who seeks to appear for the limited purpose of representing a tribe in an ICWA proceeding does not have to pay pro hac vice fees or associate with local counsel.[19] And this year, Utah amended its practice rule to exempt non-Utah licensed attorneys from the requirements of its pro hac vice rule if such attorneys are in good standing in another U.S. jurisdiction and will appear for the limited purpose of participating in a child custody proceeding under ICWA.[20]

Other states have amended their pro hac rules to relax the financial and local counsel requirements if certain conditions are met. The states of Oregon, Michigan, Washington, and Arizona have all amended their pro hac vice rules to allow tribal attorneys to represent their clients in ICWA cases without associating with local counsel or paying the pro hac vice fee if they are representing a tribe in a child custody proceeding under ICWA and they submit a pleading to intervene affirming eligibility of the child.[21] Oregon also relaxes its pro hac requirements if an attorney represents an Indian parent or custodian.[22] A state may also have additional requirements to apply for special pro hac status, such as submitting a certificate of good standing from the attorney's home state. It is important to review all of the rules carefully.

The efforts to allow tribal attorneys to appear and practice in out-of-state ICWA cases were led by tribes themselves or tribal, state, federal court forums. In California, Arizona, and Michigan, tribal, state, and federal court forums lead the efforts to amend the pro hac vice rules. In Wisconsin, the rule change was proposed by the Menominee Indian Tribe of Wisconsin.[23] As mentioned earlier, only nine states have adopted rules that allow out-of-state tribal attorneys to participate in ICWA cases, but more states are likely to follow suit.

Under ICWA, tribes have the absolute right to intervene in state child custody proceedings involving Indian children. That right is severely undermined if tribes cannot have a seat at the table by being represented by tribal attorneys in these matters. While tribes can argue in each case that the federal preemption doctrine requires state courts to allow them to intervene and fully participate in out-of-state cases, pursuing that course on a case-by-case basis could be costly and time consuming, and could lead to inconsistent results. A more effective way to facilitate tribal representation in ICWA cases would be for each state to waive or relax pro hac vice rules, waive pro hac fees, and waive the requirement to associate with local counsel, for a licensed out-of-state tribal attorney who seeks to represent a tribe in an ICWA case in state court. Under either approach, tribes deserve a seat at the table by having legal representation in ICWA cases. ⊙

April Olson is a partner at Rothstein Donatelli LLP in Tempe, Ariz. Her practice focuses exclusively on tribal law and federal Indian law, and a significant part of her work involves Indian Child Welfare Act cases.

Endnotes

[1]25 U.S.C. §§ 1901-1963.
[2]*Id*. at § 1903(1).
[3]*Id*. at § 1903(4).

[4]*See* Cohen's Handbook of Federal Indian Law § 1.04, at 81-82 (2005 ed.).
[5]25 U.S.C. § 1911(c).
[6]Data regarding number of cases for Navajo Nation, Gila River Indian Community, and Cherokee Nation on file with author.
[7]For purposes of this article only, I use "home state" to describe the state in which a tribe has attorneys licensed. I use "non-home state" or "out-of-state" to refer to states where a tribe does not have attorneys licensed. This term in no way suggest that a tribe's ancestral lands are limited to their home states. I recognize and acknowledge that many tribes have ancestral lands in multiple states and many tribes were forcefully relocated against their will.
[8]*State ex rel. Juvenile Dept. of Lane County v. Shuey*, 850 P.2d 378 (Or. Ct. App. 1993).
[9]*Id*. at 188 (internal citations omitted).
[10]*Id*. at 191.
[11]*In re N.N.E.*, 752 N.W.2d 1 (Iowa 2008).
[12]*Id*. at 12.
[13]*In re Elias*, 767 N.W.2d 98, 100 (Neb. 2009).
[14]*Id*. at 1031.
[15]Neb. Rev. Stat. § 43-1504(3); Or. R. Unif. Trial Ct., R. 3.170(9); Mich. Ct. R. 8.126(B); Wash. R. Adm. & Prac., R. 8(b)(6); Cal. R. Ct., R. 9.40(g); Minn. R. Juv. Proc., R. 3.06; Wis. R. Sup. Ct., R. 10.03(cm); Utah R. Sup. Ct. Prof. Prac., R. 14-802(r); Ariz. R. Sup. Ct., R. 39 (a)(13).
[16]Neb. Rev. Stat. § 43-1504(3)).
[17]Cal. R. Ct., R. 9.40(g).
[18]Minn. R. Juv. Proc., R. 3.06.
[19]Wis. R. Sup. Ct., R. 10.03(cm).
[20]Utah R. Sup. Ct. Prof. Prac., R. 14-802(r).
[21]Or. R. Unif. Trial Ct., R. 3.170(9); Mich. Ct., R. 8.126(B); Wash. R. Adm. & Prac., R. 8(b)(6); Ariz. R. Sup. Ct., R. 39 (a)(13).
[22]Or. R. Unif. Trial Ct., R. 3.170(9).
[23]*See In the Matter of the Petition to Amend Supreme Court Rule (SCR) 10.03(4), Regarding Pro Hac Vice admission for Nonresident Counsel Appearing in Matters Involving the Indian Child Welfare Act*, No. 18-04 (Feb. 12, 2019), https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=234887.