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Children's Representation Spotlight.

Lifelong Learning.

By: Paula Davenport

When I was an elementary school teacher in Alaska, teaching third grade, I remember one of my students always needing to stand up and be moving and almost dancing while at his desk, and I, as a new teacher, kept reminding him to stay seated. One day when I asked him to stay seated, I looked at his face and he looked so defeated. I mean this kid was getting his work done and he wasn't bothering anyone, so why was I making him sit when sitting wasn't working for him? I learned some lifelong lessons that day. First, I earned that child's trust that day because he felt like I saw him for who he was and what his needs were, and second, is that I needed to be a lifelong learner in working with humans, whether children or adults.

Like all of you, I am impressed every day by the strength and vulnerability of these children to make room in their life to allow me to guide them in getting their voice heard in this difficult and grueling process that is dependency. These kids are brave and even in their quiet, they say a lot. After 16 years of representing parents in the system, which was also rewarding, I was thrilled that I would be able to come full circle in my life work. I also knew that it required that I meet them on their level and where they are at if they were going to let me in. I brought coloring books and crayons to my first home visit as a CRP attorney as the children were 6 and 7. It was profound what I was able to learn from these kids while they were doing something they loved…coloring. I was able to explain what a lawyer is, and what I needed from them, and they were able to tell me a whole lot about their family and their parents. I now carry various things in my bag when I go to home visits to see my clients whether it's a journal for teenager, a squishy toy for a young child, or a story book like the Hungry Caterpillar.

Believe me, I realize that meeting kids at their level is nothing new to all of you CRP attorneys. As a parents' attorney for 16 years prior to this, I had to use these same skills and had the good fortune of observing children's attorneys in Spokane County doing this all the time. I am in awe of all of you. Since starting here in Benton/Franklin Counties, I have been able to see and learn so much from the other CRP attorneys who have been doing this for years whether it is new and different ways to approach children, or problem solving difficult legal issues we are presented with. We all come from varying backgrounds and perhaps other prior careers that drive us to do this work.

Overall, I see a lot of lifelong learners in the mix of CRP attorneys, and I am beyond grateful to be doing this work with all of you. I am also forever grateful for that third grader who taught me a valuable lesson as a teacher that has led me to doing this rewarding work.

LEGISLATIVE AND CASE LAW UPDATES

The Supreme Court Delivers Historic Win for Native American Identity

Written in collaboration with Marci Comeau, OPD

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) "to remedy the historical and persistent state-sponsored destruction of Native [American] families and communities."[1] At the time, "empirical data showed that Native children were separated from their families at significantly higher rates than non-Native children, and in "some States, between 25 and 35 percent of Indian children were living in foster care, adoptive care, or institutions."[2] The Washington State Supreme Court opined:

> This history of centuries of policies of removal and assimilation predates

[1] *In re the Matter of Z.J.G.*, 196 Wash.2d 152, 157 (2020).

[2] Id. at 165.

> ICWA; the removal of children from their families and tribal communities and placement in foster care or adoption is but one of the many atrocious governmental policies intended to destabilize Native communities and ultimately end them.[3]

Today Indian children continue to experience higher rates of state intervention than the general population. In Washington State a 2018 report by the Washington State Institute of Public Policy concluded that Native children were nearly five times more likely to be removed and six times more likely to remain in the system longer than White children.[4]

Despite a claim by the Washington State Supreme Court that "Washington still has more work to do," ICWA faced an existential threat in the case of *Haaland v. Brackeen et al.* where a constitutional challenge to ICWA was before the United States Supreme Court. Then on Thursday, June 15, 2023, Justice Amy Coney Barrett, authoring the Supreme Court's majority opinion, delivered a historic ruling upholding the constitutionality of the Indian Child Welfare Act.

The 7-2 opinion rejected a series of challenges to ICWA. Among the challenges were claims that Congress lacked authority to enact ICWA, that several provisions violated the Tenth Amendment's anticommandeering principle, and that ICWA unconstitutionally employs racial classifications.

Haaland v. Brackeen, No. 21-376 (Slip Op.), June 15, 2023, arises from three separate child custody proceedings, all governed by ICWA. The "petitioners" (Chad and Jennifer Brackeen, the adoptive parents of A.L.M. and prospective adoptive parents of A.L.M.'s sibling, Y.R.J.; Altagracia Hernandez, the mother of Baby O.; Nick and Heather Libretti, adoptive parents of Baby O.; Jason and Danielle Clifford, foster parents, and the State of Texas) filed suit in federal court, challenging ICWA as unconstitutional. The United States responded, defending the constitutionality of the law, and several Indian Tribes intervened to defend the law ("respondents"). In Federal District Court, the petitioners asserted that (1) Congress lacked the authority to enact ICWA, (2) ICWA violated the anticommandeering principle of the Tenth Amendment, (3) the placement preferences in ICWA violate the nondelegation doctrine; and (4) ICWA unlawfully uses racial classifications to hinder non-Indian families from fostering or adopting.

The District Court granted the petitioners' motion for summary judgment on their constitutional claims. On appeal, the Fifth Circuit reversed in part and affirmed in part. The Fifth Circuit concluded that (1) ICWA does not exceed Congress's Article I legislative power; (2) ICWA does not violate the nondelegation doctrine; and (3) some of ICWA's placement preferences satisfy equal protection. However, the Fifth Circuit affirmed the lower court's decision finding portions of ICWA to violate the anticommandeering requirements of the Tenth Amendment, including the "active efforts" requirement, the qualified expert witness requirement, and recordkeeping requirements. The Fifth Circuit was equally divided as to whether ICWA's "third placement preference" unconstitutionally discriminated on the basis of race, and as a result, the Fifth Circuit left in place the lower court's decision that these preferences were unconstitutional.

On appeal to the United States Supreme Court, the court heard oral argument on this matter on November 9, 2022. The court received briefing from the parties and multiple amici, including but not limited to 25 states (and Washington D.C.), the County of Los Angeles, Casey Family Programs, Family Defense Providers, 497 Indian Tribes and 62 Tribal Organizations, the ACLU, the ABA, the National Indigenous Women's Resource Center, the National Association of Counsel for Children, the American Psychological Association, the American Academy of Pediatrics and American Medical Association, the American Historical Association, members of Congress, professors, Indian Law professors, and more!

[3] Id.

[4] Id. at 172.

1. Congressional Authority Generally.

The petitioners, who were challenging ICWA's constitutionality, asserted that domestic relations were the sole province of the state and beyond federal regulation. The majority disagreed. "Congress's power to legislate with respect to Indians is well established and broad."[5] For instance, the Indian Commerce Clause authorizes Congress to regulate commerce with tribes and the Treaty Clause, although an executive function, permits Congress to act where authorized. The majority continues, "[c]onsistent with that breadth, we have not doubted Congress's ability to legislate across a wide range of areas, including criminal law, domestic violence, employment, property, tax, and trade."[6] Yet, the majority also acknowledges that Congress's power is not absolute. Still, the majority rejected the claim that ICWA impermissible intrudes upon the State's authority over domestic relations. The majority writes:

> [T]he Constitution does not erect a firewall around family law. On the contrary, when Congress validly legislates pursuant to its Article I powers, we have not hesitated to find conflicting state family law preempted, notwithstanding the limited application of federal law in the field of domestic relations generally…. In fact, we have specifically recognized Congress's power to displace the jurisdiction of state courts in adoption proceedings involving Indian children.[7]

Accordingly, the majority concludes that there is no exception to Congress's authority over family law and "[a]s James Madison said to Members of the First Congress, when the Constitution conferred a power on Congress, "they might exercise it, although it should interfere with the laws, or even the Constitution of the States."[8]

Next, the majority rejected the argument that ICWA impermissibly exceeds Congress's authority. In essence, the challengers asserted that there is no clear textual basis for enacting ICWA. However, the majority dismissed these claims as inconsistent with precedent. Citing examples, the majority notes that Congress's authority is not limited to Indian Tribes as government entities and that while children are not commodities implicating the commerce clause, "the Indian Commerce Clause encompasses not only trade but also Indian affairs."[9] The majority concludes

> We recognize that our case law puts petitioners in a difficult spot. We have often sustained Indian legislation without specifying the source of Congress's power, and we have insisted that Congress's power has limits without saying what they are. Yet petitioners' strategy for dealing with the confusion is not to offer a theory for rationalizing this body of law—that would at least give us something to work with. Instead, they frame their arguments as if the slate were clean. More than two centuries in, it is anything but.[10]

2. Anticommandeering Clause.

In a surprising reversal of the Fifth Circuit, the Supreme Court found that the provisions of ICWA did not impermissibly require State officers to administer or enforce a federal regulatory program, otherwise known as the anticommandeering clause. The majority concludes that "[t]o succeed, [the petitioners] must show that §1912(d) harnesses a State's legislative or executive authority."[11] And the majority notes that "[l]egislation that applies 'evenhandedly' to state and private actors does not typically implicate the Tenth Amendment."[12] After reviewing the applicability of ICWA to both private and state actors, the Supreme Court held that the

[5] *Brackeen v. Haaland*, Pg. 20.
[6] Id.
[7] *Brackeen* at 22-23.
[8] *Brackeen* at 23.
[9] *Brackeen*, Pg 24.
[10] *Brackeen*, Pg 22.
[11] *Brackeen*, Pg 27.
[12] *Brackeen*, Pg. 28.

petitioners failed to meet their burden. "When a federal statute applies on its face to both private and state actors, a commandeering argument is a heavy lift—and petitioners have not pulled it off."[13] More specifically:

- The Supreme Court rejected the petitioners' challenge to the "active efforts" requirement of ICWA. The Supreme Court concludes that this requirement does not harness a state's legislative or executive authority, because the provision applies to "any party" who initiates a proceeding to involuntarily terminate parental rights – including private individuals and private agencies. Since the "active efforts" requirement applies evenhandedly to state and private actors, it does not implicate the Tenth Amendment.

- Similarly, the notice requirement, expert witness requirement, and evidentiary standards of ICWA do not violate the anticommandeering requirements of the Tenth Amendment.

- The Supreme Court also concluded that the placement preferences, as set forth under ICWA, do not violate the Tenth Amendment's anticommandeering provision. The Supreme Court ruled that the requirement for a "diligent search" for placements that satisfy ICWA's hierarchy, which applies to both public and private parties, does not demand the use of state sovereign authority. The Supreme Court concludes that, while ICWA requires state courts to apply placement preferences in making custody decisions, Congress can require state courts to enforce federal law, and state law is preempted to the extent of any conflict with a federal statute.

- Finally, the Supreme Court rejected the petitioners' challenge to ICWA's requirement that courts maintain or transmit records of custody proceedings involving Indian children pursuant to the anticommandeering clause. The Supreme Court relied upon precedent indicating that Congress may impose ancillary recordkeeping requirements related to state court proceedings without violating the Tenth Amendment.

3. Equal Protection.

Lastly, the Supreme Court left unresolved the equal protection and non-delegation claims regarding ICWA's placement preferences, holding that the petitioner's claims of equal protection and non-delegation lacked standing under article III and did not address their merits. As to the individual petitioners, the families themselves sought an injunction preventing federal parties from enforcing ICWA and a declaratory judgment that ICWA was unconstitutional. But the Supreme Court found that enjoining the federal parties would not address any injury, since state courts and state agencies apply ICWA. Lastly, the Supreme Court held that Texas lacked standing as *parens patriae* to bring an action against the government.

MARK YOUR CALENDARS!

Joint Contractor Conference.

We are excited to announce a joint conference "Families Stronger Together" with OPD and the Children's Home Society of Washington. This conference will be in-person at UW Tacoma. More details will follow. For now, we request that you save the date, September 11 – 12, 2023.

[13] *Brackeen*, Pg. 30.


SAVE THE DATE – SEPTEMBER 11 & 12, 2023
University of WA Tacoma – Phillips Hall
Annual Conference 2023
~ Families Stronger Together ~
Brought to you by the WA State Office of Public Defense, The WA Office of Civil Legal Aid, and the Children's Home Society of WA