Children, Tribes, and States

Adoption and Custody Conflicts over American Indian Children

Barbara Ann Atwood
Mary Anne Richey Professor of Law
James E. Rogers College of Law
The University of Arizona

Carolina Academic Press
Durham, North Carolina
Copyright © 2010
Barbara Ann Atwood
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Atwood, Barbara Ann, 1947-
   Children, tribes, and states : adoption and custody conflicts over American Indian children / Barbara Ann Atwood.
   p. cm.
1. Indian children--Legal status, laws, etc.--United States. 2. Custody of children--Law and legislation--United States. 3. Adoption--Law and legislation--United States. I. Title.
KF8210.C45A98 2010
346.7301'73--dc22

2009048878

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America
To Peter, Aaron, and Charles
Contents

Acknowledgments xi

Introduction 3

Chapter One • A Child’s Indian Identity 17
  Part One. Indian Identity 19
    A. Modern Realities 19
    B. Tribal Sovereignty — A Preliminary Comment 25
    C. The Indian Child as Key to Survival 29
    D. Tribal Membership — Evolution, Meaning, Implications 34
  Part Two. The Child’s Perspective on Indian Identity 46
  Conclusion 54

Chapter Two • Tribal Courts, Tribal Jurisdiction 57
  Part One. Tribal Courts 60
  Part Two. Tribal Jurisdiction in Family Disputes 71
    A. Supreme Court Jurisprudence 72
    B. Mapping a Jurisdictional Framework 81
  Part Three. Intersystem Recognition — Moving from Comity to Uniform Law 90
    A. Comity 90
    B. The Impact of Uniform Child Custody Jurisdiction Law 94
  Conclusion 109

Chapter Three • Tribal Family Law 113
  Part One. The Distinctive Voice of Tribal Courts in Family Disputes 116
    A. Sources of Law 116
    B. The Parent-Child Relationship 121
    C. The Role of Extended Family Members 133
Part Two. Adoption from a Tribal Perspective 142
   A. The Anglo-American Approach, in Brief 142
   B. Tribal Perspectives 144
   Conclusion 150

Chapter Four • The Indian Child Welfare Act — Policies and
   Controversies 153
   Part One. Structure and Operation of Indian Child Welfare Act 155
      A. Background 155
      B. Overview of ICWA 163
         i. Findings and Definitions 163
         ii. Jurisdictional Provisions 169
         iii. Procedural Protections 174
         iv. Placement Preferences 181
      C. Mississippi Band of Choctaw Indians v. Holyfield 182
   Part Two. Debating ICWA Policy 185
      A. The Question of Race and Individual Rights 185
      B. Effectiveness of ICWA 193
   Conclusion 200

Chapter Five • Flashpoints under ICWA 201
   Part One. The Existing Indian Family Exception 204
      A. Origin of the Doctrine 204
      B. Constitutional Implications 209
      C. Policy Concerns 216
   Part Two. Good Cause Exception to Placement Preferences 217
      A. The Statutory Standard of § 1915 and Children’s
         “Best Interests” 217
      B. Construing § 1915 to Preclude a “Best Interests” Determination 223
   Part Three. Looking beyond the Grand Narrative 229
   Part Four. Legislative Proposals 241
   Conclusion 247

Chapter Six • Permanency Alternatives for Indian Children 251
   Part One. The Combined Impact of ICWA and ASFA 253
      A. Policies Underlying ASFA 253
      B. The Interface of ICWA and ASFA 260
   Part Two. Permanency for Indian Children in State Court Proceedings 268
   Part Three. Tribal Visions of Permanency 273
   Conclusion 280
CONTENTS ix

Chapter Seven • The Voice of the Indian Child 283
   Part One. The Child’s Right of Participation under ICWA and Other Federal Law 286
   Part Two. Indigenous Children’s Right of Participation under International Law and Tribal Law 293
   Part Three. Promise and Peril of Increasing Children’s Participation under ICWA 300
   Conclusion 314

Index 317
Acknowledgments

No academic book project is ever a solitary endeavor, and this work is no exception. I am indebted to many people who committed time and thought to helping me sharpen the writing and clarify my thinking. I thank my colleagues Jim Anaya, Paul Bennett, Ellen Bublick, Robert Glennon, Kenney Hegland, Robert Hershey, James Hopkins, Jane Korn, Kay Kavanagh, Andy Silverman, Melissa Tatum, Brent White, and Robert Williams for conversation and extremely helpful feedback on drafts of chapters and earlier works that have been revised for the book. Former Dean Toni Massaro was a source of steady encouragement and an inspiration by example.

I have had great luck in hiring talented student research assistants that helped immensely with various aspects of this project. They include Izetta Chambers, Sarah Collier, Guadalupe Gutierrez, Celeste Hall, Meaghan Kramer, Leslie Lorenzano, Deborah Moulton, Rebecca Stahl, Kara Thompson, and Sam Young. Leslie Lorenzano deserves special thanks for her steadfast reading of every chapter. I have also benefitted enormously from the skill and generous assistance from expert reference librarians at the James E. Rogers College of Law, including especially Maureen Garmon and Alexandra Delgado. Sean Crane and Shaun Esposito also were terrific in responding to targeted research requests. Carol Ward, Barb Lopez, and Judith Parker provided skillful (and cheerful) word processing and editing assistance.

In addition, I appreciate the insights about tribal court jurisprudence and Native ways of viewing the world that I’ve received from numerous tribal judges, including Hon. Lucilda Valenzuela of the Tohono O’odham Tribal Judiciary, Hon. Fred Lomayesva of the Hopi Tribal Court, Hon. Violet Lui Frank of the San Carlos Apache Tribal Court, and Hon. Carol Redcherries, of the Northern Cheyenne Tribal court.

I presented many of the ideas expressed in this book at colloquia and conferences over a number of years, including the Fourth Annual Wells Conference on Adoption Law at Capital University in Columbus, Ohio, in 2008; the 2008 North American Regional Conference of the International Society of Family Law in Vancouver, Canada; the 2008 Annual Conference of South-
western Indian Law Clinics, in Albuquerque, New Mexico; the 4th World Congress on the Rights of the Child in Capetown, South Africa, in 2005; the Robert N. Endries Distinguished Faculty Workshop at Syracuse University College of Law in 2002; the 2001 North American Regional Conference of the International Family Law Society in Kingston, Ontario; and the Annual Tribal-State Judges Forum in 1999, in Phoenix, Arizona. I always benefitted from the comments and suggestions of participants at these events.


I am deeply grateful to Keith Sipe and Carolina Academic Press for publishing this book. Among the various people who worked on the project, Karen Clayton deserves special praise for her professionalism and patience throughout the editing and production process.

Finally, I thank my husband Peter Eisner, a true partner in all that I do. His rock-solid strength, energy, and creative vision never cease to amaze me.