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## TRIBAL FAMILY LAW CLIENTS: A PRACTITIONER'S GUIDE TO BEST SERVE YOUR CLIENT IN CHILD SUPPORT PROCEEDINGS

Jerry Ford, Jillian Held, and Nancy Mendez\*

### INTRODUCTION

There has been a vast growth in the complexity of tribal family law practice requiring a careful study by the practitioner of the options open to tribal members. As an introduction to the representation of tribal members in family law, this discussion will not be a detailed look at statutory or case law, but instead will be an overview with suggestions for further investigation and research. It is apparent throughout the country that non-tribal lawyers need to educate themselves about the nature and functions of tribal courts.<sup>1</sup> Most attorneys have no accessible source of information on tribal courts, so they can easily be flustered when a client falls under tribal court jurisdiction.<sup>2</sup> This article is meant to be a practical guide designed to help an attorney obtain a basic understanding of the three competing American child support systems, how they interact, and in which forum your client should be advised to appear. The article will

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The contents of this presentation are solely the responsibility of Mr. Ford, and do not represent the policies of the Pierce County Prosecuting Attorney, the Washington State Division of Child Support, the Washington Association of Prosecuting Attorneys nor any Indian Tribe. Jillian Held and Nancy Mendez are 2015 J.D. candidates of Seattle University School of Law and members of *The American Indian Law Journal*.

<sup>1</sup> Carole Goldberg & Duane Champagne, *Promising Strategies: Tribal-State Court Relations*, 2013 TRIBAL POLICY AND PLANNING INST., available at <http://www.walkingoncommonground.org/files/Promising%20Strategies%20Tribal-State%20Court%20Final%203-13.pdf> (last visited May 19, 2014).

<sup>2</sup> *Id.*

describe three common types of child support tribunals that a practitioner may encounter including a brief discussion of the applicable laws they operate under. Next, this article will lay out how the tribal court, state court, and state administrative processes interact and clash. Finally, using three examples, the article provides suggestions for evaluating your client's needs.

### **I. AMERICAN CHILD SUPPORT SYSTEMS**

Tribal members, like any other clients, will come into your office expecting you to have the expertise to guide them through a very challenging and emotionally distraught phase of their lives. It is essential you understand the basic nature of child support within your jurisdiction and be able to explain to the client how the child support bureaucracy impacts Native Americans. Knowledge of the system will help you to give your client appropriate advice so they may make an informed decision. Currently, most states have three systems. Each system is clearly distinct yet intertwined in what can appear to be a confused and illogical manner. All three have advantages and disadvantages depending upon the client's needs, your abilities, and the hearing options available. You may be dealing with a state family court, an administrative agency (such as the Washington State Division of Child Support), or a tribal court.

Over the last forty years a fairly complicated and often seemingly disjointed working arrangement has developed. Each entity's interaction with the other systems has not always been easy and yet the forums have become somewhat intertwined. Fortunately, in more recent years the tribal court, state court, and administrative agencies have started to work together and are more inclined to respect each entity's rulings. You may, depending on your fact pattern and goals, be considering two or even three legal arenas at once. What follows is a brief description of each system, the nature of its work, and some of the major ways they interact with one another. After ten years of working with these three entities, I find new issues, conflicts, and opportunities arising almost every day. Understanding the function of the area of child support law as a whole will aid in breaking down even the most complicated case to allow for manageable solutions.

### **A. State Court**

Each state has a court system that deals with child support. Generally speaking, the Superior Court ensures that parents are giving child support to their children. Organizations such as the Office of Child Support Enforcement, which partners with federal, state, tribal, local governments, and others, promote parental responsibility and ensure that children receive support from both parents, even when they live in separate households.<sup>3</sup>

Until the 1970s, the only real option for family law issues in Washington State was the Superior Court. Today, the Superior Court remains the most familiar and, for many, the most comfortable way to litigate. Because they have been in existence since statehood and maintain a continuously heavy caseload, there exists a vast amount of statutory and case law to answer most questions a family law attorney may have. While each state and county within a particular state has some individuality in terms of setting local rules and other matters, there are now statewide pattern forms and child support schedules that were designed to simplify practice and aid in predictability of outcomes.<sup>4</sup> Superior Courts manage cases with a fairly strict schedule to ensure efficient case flow.<sup>5</sup> The Superior Court Judges or Commissioners have a great deal of flexibility in drafting temporary orders while the case awaits a scheduled trial. Holding an actual family law trial can mean delays of months or even years depending upon local court congestion. It is very common to come to a resolution by agreement or through hearings in front of the Court

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<sup>3</sup> OFF. OF CHILD SUPPORT ENFORCEMENT, <http://www.acf.hhs.gov/programs/css/about> (last visited May 19, 2014).

<sup>4</sup> Chapter 26 of the Revised Code of Washington (RCW) is the main statutory basis for family law cases, and includes, dissolution, WASH. REV. CODE § 26.09, parentage, WASH. REV. CODE § 26.26, and child support schedule, WASH. REV. CODE § 26.19. Familiarize yourself with these and ancillary other provisions that were created to guide your practice in Superior Court.

<sup>5</sup> WASH. REV. CODE § 26.12.010 (2014).

Commissioner in *mini trials* based on written documentation and oral argument of attorneys.<sup>6</sup>

In Washington, Superior Court is where most family law cases begin and end. It is the rare case that proceeds up on appeal. The court has the ability to enforce, eliminate, or supersede an Administrative Order entered by, for example, the Division of Child Support (DCS), whether taken on appeal from the administrative action or by the filing of a new action in Superior Court.<sup>7</sup> Many attorneys believe they can get a *better* deal in front of the court as opposed to the administrative process, though this appears to be just a feeling and never, to this writer's knowledge, been objectively shown to be true.<sup>8</sup>

Over the last four decades, an extensive system of interaction between DCS and the Superior Courts through the local County Prosecuting Attorneys has slowly developed. Each county has created a dedicated unit for the establishment, enforcement, and collection of child support. These small family law units carry large caseloads and are staffed by Deputy Prosecuting Attorneys and support staff. Services are free, but the prosecutor's office does not represent either party and are incapable of providing the personal attention found in private representation. Under contract from DCS and often following agreed upon best practices, prosecutors have a great influence on the court, as they are seen as unbiased and trustworthy. The potential impact of a prosecutor's involvement on the outcome of your case cannot be understated and must be considered in the development of a litigation strategy for the tribal client.<sup>9</sup> Keep in mind that every state is different and every agency is different.<sup>10</sup> In Washington, while there are standards set

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<sup>6</sup> WASH. REV. CODE § 26.12.010 (2014).

<sup>7</sup> WASH. REV. CODE § 26 (2014).

<sup>8</sup> Courthouse gossip can be both a source of information and a way of spreading misconception. Always confirm the veracity of any such claim before making it a part of your practice.

<sup>9</sup> It should not be assumed that the average family law prosecutor has more than a rudimentary knowledge of tribal clients and tribal court. As a practitioner, you may be placed in the position of educating the prosecutor.

<sup>10</sup> Contrast Oregon, where there is a completely different set up for child support establishment and enforcement, yet the results obtained appear to be similar. OR. CHILD

for uniform practice, each county maintains its individuality in the type of cases it will accept as well as the manner in which these cases are dealt with.<sup>11</sup> It is this flexibility that allows local entities to produce effective results while still meeting the needs of its constituents.

Unfortunately, you may find that in your state, there may not be a lot of interaction or apparent understanding by the Superior Court about Tribal Family Court.<sup>12</sup> This lack of interaction can be a real detriment, as the Superior Court does not, by its large workload, generally take into account cultural issues that may have great meaning within the tribal justice system and to your client. As an attorney for a Native American client, you should familiarize yourself with every option available to your client, and make an educated decision as to whether or not your client would benefit from having their case heard in one forum rather than another.<sup>13</sup>

State courts have a connection with the administrative system as it serves as the resource for appeal from adverse administrative decisions by DCS Administrative Law Judges.<sup>14</sup> A party may remove a child support

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SUPPORT PROGRAM, *available at* <http://www.oregonchildsupport.gov/Pages/Index.aspx> (last visited May 19, 2014).

<sup>11</sup> These policies are political in nature based upon the decisions of the locally elected prosecuting attorney. For example, a county may choose to opt out of enforcement cases using the civil contempt proceedings. Each county has a working agreement with the Division of child support. WASH. REV. CODE § 39.34.

<sup>12</sup> As we all know, each tribe is a separate sovereign jurisdiction and there is no unified body of statutory or case law. This can work to the disadvantage of your tribal client, as Superior Court Judges are very busy and have little time to educate themselves on the intricacies of the various tribal courts in this state.

<sup>13</sup> In a few states and counties, such as Pierce County in Washington State, there is an active effort to screen for tribal cases when they are referred to prosecutors to determine which court process is the most appropriate. This screening is done objectively, but also with the intent to respect the tribal courts and allow cases that are tribal in nature, to be brought in the most appropriate forum. Further, cases that are retained by the Pierce County Prosecutor are identified as tribal, and to the extent possible, are treated with cultural sensitivity. However, you cannot count on this and you may meet strong resistance from the system, once again depending on the location and culture. The state system is designed for the general population case and the ability of the court to deviate from the norm is never guaranteed.

<sup>14</sup> WASH. REV. CODE § 74.20A.055 (2014).

case from the administrative process at any time, and the Superior Court's orders will for the most part supersede any administrative order.<sup>15</sup>

### **B. Administrative Processes**

Since the 1970s, there has developed an alternative process to the courts in various states. Your state may or may not have these options available to your client, so you should familiarize yourself to any existing administrative process. The OCSE has an excellent resource for practitioners that list both state and tribal agencies dedicated to child support.<sup>16</sup>

For example, in Washington, DCS is a large bureaucracy, funded by the federal government, concentrating mainly on the establishment and enforcement of child support obligations.<sup>17</sup> DCS focuses its efforts on child support cases where parentage and/or the basic obligation to pay support have been established, such as when a married couple divorces and the custodial parent goes on Temporary Aid for Needy Families (TANF), or when unmarried parents have signed an Acknowledgment of Parentage.<sup>18</sup> The process involves non-lawyer caseworkers gathering information, following precise, often inflexible guidelines, and sending out written notice to the parties of how much child support will be set.<sup>19</sup> Prior to the order going into effect, there is an opportunity for a contested hearing before an Administrative Law Judge.<sup>20</sup> Once the administrative order is established, DCS begins collection efforts, which most always

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<sup>15</sup> The Superior Court has the ability to adopt and incorporate an administrative order as well as defer the setting of child support to an administrative agency. WASH. REV. CODE § 74.20A.055 (1)(7). This ability to remove cases to Superior Court can often lead to a second "bite at the apple" if there are adverse results in the administrative process.

<sup>16</sup> OFFICE OF CHILD SUPPORT ENFORCEMENT, <http://www.acf.hhs.gov/programs/css/state-and-tribal-child-support-agency-contacts-map> (last visited May 19, 2014).

<sup>17</sup> WASH. REV. CODE § 74.20.010 (2014).

<sup>18</sup> WASH. REV. CODE §§ 74.20.40(1)-(2) (2014).

<sup>19</sup> WASH. REV. CODE § 74.20A.055 (2014).

<sup>20</sup> WASH. REV. CODE § 74.20A.56 (2014). See also WASH. STATE DEP'T OF SOC. AND HEALTH SERV.'S., [www.DSHS.wa.gov/dcs/tribal](http://www.DSHS.wa.gov/dcs/tribal) (last visited May 19, 2014).

include payroll deduction and can escalate to asset seizure, denial of passports, and revocation of state licenses for driving, among others.<sup>21</sup>

DCS has a solid working relationship with the local county prosecutors. Cases are referred to the prosecutor for parentage establishment, for modification of child support, for protection of state interests in initial dissolutions and third party proceedings, and for court based contempt proceedings in cases in which all other child support collection efforts have failed.<sup>22</sup> DCS provides prosecutors with access to a vast array of information resources, which gives them a tremendous advantage in court. Litigation proceeds under established federal timelines connected to funding which encourages the rapid progression of cases.<sup>23</sup> Once the prosecutors have finished a case, it is sent back to DCS by the prosecutor for further enforcement action.<sup>24</sup>

DCS also has made substantial efforts to establish working relationships with the twenty-nine federally recognized tribes in Washington State. The legislature is aware of the independent sovereignty of the tribes and has enacted RCW 26.25, which calls for cooperation between the state and tribes over child support issues. The statute sets forth a platform and a rulemaking authority for the creation of working agreements between the state and tribal child support programs.<sup>25</sup> These are working agreements for sharing cases and information, including limited access by the tribal child support programs to state databases and other resources. DCS has established a tribal unit to make and maintain

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<sup>21</sup> These actions can be very devastating to the paying parent as it can prevent out of country travel, restrict the ability to drive a car or operate a business as well the loss of substantial assets such as bank accounts and vehicles. DCS is also authorized to certify cases to the IRS for the seizure of tax refunds. These are very serious remedies, which demand immediate attention by the client.

<sup>22</sup> WASH. REV. CODE § 74.20A.030(2) (2014).

<sup>23</sup> The scope of which is determined by individual Interagency Agreements between DCS and each county.

<sup>24</sup> *Id.*

<sup>25</sup> WASH. REV. CODE § 26.25 (2014). The Personal Responsibility and Work Opportunity Act of 1996, P.L. 104-193, gives federally recognized tribes the *option* to create federally financed child support programs under Title IV-D of the Social Security Act. There are currently 49 tribal child support programs in various stages of development. In Washington, the tribes currently with programs are the Colville, Lummi, Nooksack, Port Gamble S'Klallam, Puyallup, Quinault, Suquamish, and Tulalip Tribes.



contacts with each tribe with a varying amount of success.<sup>26</sup> Over the years, a system of recognition of tribal cases and reassignment of these tribal cases to individual tribes has been developed.<sup>27</sup> Active participation by local courts in this process has been problematic, but DCS is conducting outreach to local prosecutor offices through collaboration in training and the development of standardized best practices. The current lack of inclusion of the Superior Court in this process can impact both the tribes and the individual client. Misidentification of tribal cases may result in the failure to provide the proper legal and cultural forum for the resolution of tribal family law disputes.

### **C. Tribal Courts and Child Support Programs**

In 1975 Title IV-D of the Social Security Act, provided the legal basis for child support enforcement programs, and initiated child support programs among the states.<sup>28</sup> Tribes were left out of this mandate, and child support programs were not initiated among tribes.<sup>29</sup> Many years later, recognizing the gap it had created for Indian children, the federal government provided funding for tribal child support programs.<sup>30</sup> In order for a tribe to operate an IV-D program it has to meet objectives laid out in 45 C.F.R. § 309.65.<sup>31</sup> There are fourteen requirements needed to establish a child support program.<sup>32</sup> Some of these requirements include a description of the population subject to the jurisdiction of the tribal court or administrative agency, administrative and management procedures, procedures for the establishment of paternity, procedures for the

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<sup>26</sup> See WASH. REV. CODE § 74.20 (2014).

<sup>27</sup> The ability of DCS to develop and implement a process to accurately identify tribal cases has met with mixed results. Results are often determined by the specific workers assigned to the task and their ability to spot and properly designate tribal cases. The state also uses a somewhat limited definition of what constitutes a tribal case and often has difficulty with multi-jurisdictional and urban Indian clients. Mistakes are made and are caught, if at all, only after the case is reviewed by others. See *also* WASH. STATE DEP'T OF SOC. AND HEALTH SERV.'S, [www.DSHS.wa.gov/dcs/tribal](http://www.DSHS.wa.gov/dcs/tribal) (last visited May 19, 2014).

<sup>28</sup> This was the first attempt to create standardized national child support programs.

<sup>29</sup> NAT'L TRIBAL CHILD SUPPORT ASS'N, <http://www.supporttribalchildren.org/about.htm> (last visited May 19, 2014).

<sup>30</sup> *Id.*

<sup>31</sup> 45 C.F.R. § 309.65 (2013).

<sup>32</sup> *Id.*

distribution of child support collections, and procedures for intergovernmental case processing.<sup>33</sup> These are just a handful of requirements listed in the C.F.R., but compliance with all fourteen helps ensure that tribes' programs are functioning as best they can with the goal of providing the fairest child support case management possible to all parties.

Over the last decade, the Tribes of Washington have become an example of how tribal nations can take control of their most important asset: their children. Each tribe has the option of establishing child support and TANF programs for their members and other local, non-member Indians.<sup>34</sup> Each program has its own unique structure and takes on the cultural and legal traditions of the nation in which it operates. Some programs are adversarial and modeled after state courts while others, that have a child support court, are conciliation-based with the goal of obtaining agreed orders in every case.<sup>35</sup> Such variations are the reason why it is difficult to issue a single definition of what constitutes a tribal child support program.

The Tulalip Tribe of Washington State is a good example of a successful tribal child support program. The Tulalip's program started in 2009, and provides services to children who are enrolled members of the tribe, Indian children living within the tribe's boundaries, and to any non-Indians who consent to the jurisdiction of the tribe.<sup>36</sup> As stated above, children are one of the most important assets to tribes and will carry on tribes' customs, tradition, and values. The Tulalip child support program has four established responsibilities that it owes to the children within its jurisdiction: "establish paternity for any child up to and including 18 years of age; establish and modify child support obligations; enforce child

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<sup>33</sup> *Id.*

<sup>34</sup> See STATE/TRIBAL CHILD SUPPORT PARTNERSHIPS IN WASHINGTON STATE, <http://www.dshs.wa.gov/pdf/esa/dcs/tribal/TribalPartnerships.pdf> (last visited May 19, 2014).

<sup>35</sup> *Id.*

<sup>36</sup> TULALIP TRIBE, PROCEDURE MANUAL AND GUIDELINES, TULALIP CHILD SUPPORT PROGRAM (2009), *available at* [http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/child\\_support\\_enforcement/Child-Support-Procedures-Final-Documents-6-25-09.pdf](http://www.tulaliptribes-nsn.gov/Portals/0/pdf/departments/child_support_enforcement/Child-Support-Procedures-Final-Documents-6-25-09.pdf) (last visited May 19, 2014).

support obligations with both tribal and non-tribal employers; and locate custodial and non-custodial parents.”<sup>37</sup> These responsibilities are necessary in order to provide the best support for the tribe’s children while keeping in line with federal guidelines and tribal tradition.

Although a number of tribes, like the Tulalips, have advanced child support programs, most tribes are lacking in the development of these services.<sup>38</sup> Many tribal children are not provided with the opportunity to have adequate child support establishment and enforcement.<sup>39</sup> It is important that tribes realize the benefits that can come from operating their own child support programs. First, the tribe will have jurisdiction over any child support case involving children from their tribe or anyone who consents to their jurisdiction.<sup>40</sup> Second, tribal members will have easier access to a program that exists within their reach and will most likely be more apt to seek support if they know the program is both culturally and legally based in fairness.<sup>41</sup> Third, tribes can determine how best to distribute child support payments and how to make support systems most efficient.<sup>42</sup> These are beginning steps to ensure a smooth operation, but it must be understood that each program will find its own way based upon the needs of its people. The one common goal is providing proper services in a timely, culturally based manner.

It is important to note that a tribal member having his or her case heard in the tribe’s court does not necessarily gain an advantage. Many non-member or non-Indian individuals fear tribal court, thinking they will be at some sort of disadvantage, but tribal courts are simply looking to decide cases in the best interests of the child.<sup>43</sup>

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<sup>37</sup> *Id.* at 6.

<sup>38</sup> There are currently only eight active tribal child support programs in Washington, while there are twenty-nine Federally Recognized Tribes in the state.

<sup>39</sup> *Id.*

<sup>40</sup> *Tribal Child Support Enforcement... Why Bother?*, NAT’L TRIBAL CHILD SUPPORT ASS’N, available at [www.dshs.wa.gov/ppt/esa/dcs/tribal/whybother.ppt](http://www.dshs.wa.gov/ppt/esa/dcs/tribal/whybother.ppt) (last visited May 19, 2014).

<sup>41</sup> *Id.* at 4.

<sup>42</sup> *Id.* at 6.

<sup>43</sup> This statement is based upon many years of observation by this writer of tribal courts, both as a state’s attorney and a tribal judge.

## II. STATUTORY LAW AND ITS APPLICATION IN EACH COURT

The rules and regulations under which tribal programs and their connected judicial and administrative process operate are taken just as seriously as those in Superior Court or the administrative process. However, do not make the mistake of relying on state procedures in tribal court, because failure to be aware and follow tribal rules can be fatal to your client's position. Never assume what works in one tribal court will work in another, as each court acts independently as a measure of sovereignty. Finally, always take the time to research the tribal court in which your client may be appearing. The major federal laws and regulations regarding child support are laid out below.

One of the main statutory authorities on tribal child support programs and enforcement is 45 C.F.R. § 309. Section 309, and all of its subparts, explains general program provisions, procedures, requirements, funding, accountability, monitoring, and reporting requirements.<sup>44</sup> The federal regulation is directed more toward the tribe than any particular client. It lays out what a tribe must do in order to establish and maintain a child support program, such as providing copies of tribal laws, codes, and regulations that focus on child support issues.<sup>45</sup> The regulation attempts to answer many questions regarding how the tribe will receive funding for the program and what must be included in an application to start a program.<sup>46</sup> Additionally, it states what options a tribe has if it is not approved to run a program within its boundaries, like submitting a request for reconsideration.<sup>47</sup>

Another major statutory authority is 45 C.F.R. § 286. This regulation focuses on TANF.<sup>48</sup> It has five major sections that include general provisions and definitions about TANF, tribal TANF funding, TANF planning and processing, accountability and penalties, and reporting and

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<sup>44</sup> 45 C.F.R. § 309 (2013).

<sup>45</sup> Administration for Children and Families, 69 Fed. Reg. 16638 (Mar. 30, 2004), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2004-03-30/pdf/04-6457.pdf> (last visited May 19, 2014).

<sup>46</sup> *Id.* at 16643.

<sup>47</sup> *Id.* at 16651.

<sup>48</sup> 45 C.F.R. § 286 (2014).

data requirements.<sup>49</sup> This section answers many important questions regarding TANF: how a tribe can apply to establish and maintain a TANF plan and program; what information the tribe must include in its TANF plan about a program participant's work participation requirements; what exactly includes work for these participants; and descriptions of particular circumstances that may affect TANF applications for some participants.<sup>50</sup> Section 286 contains sections targeted at the actual needs and requirements of the client, unlike 45 C.F.R. § 309, which only covers the requirements of the tribe.

Outside of the federal regulations, tribes have the flexibility to tailor tribal child support laws and regulations to their specific customs and traditions. Laws and regulations will vary between tribes. While some things may be efficient for one tribe, that does not mean they will be efficient for all tribes. Being allowed this flexibility can help tribes design a program that will bring the most success and support to the children of their tribe.

### III. HOW TRIBAL COURTS AND STATE COURTS WORK TOGETHER

Relationships between tribal courts and state courts have historically been strained.<sup>51</sup> There has been much tension between the two for various reasons such as different cultures, legal traditions, histories, and economic positions.<sup>52</sup> It was not until the late 1980s that the two began to work together. In 1989, the Conference of Chief Justices, along with the State Justice Institute and the National Center for State Courts launched the Prevention of Jurisdictional Disputes Project.<sup>53</sup> This project attempted to reconcile disputes among tribal, state, and federal

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<sup>49</sup> *Id.*

<sup>50</sup> 45 C.F.R. §§ 286.65 - 286.190 (2013).

<sup>51</sup> See Carole Goldberg & Duane Champagne, *Promising Strategies: Tribal-State Court Relations*, TRIBAL LAW AND POL'Y INST., <http://www.walkingoncommonground.org/files/Promising%20Strategies%20Tribal-State%20Court%20Final%203-13.pdf> (last visited May 19, 2014).

<sup>52</sup> *Id.*

<sup>53</sup> Aaron F. Arnold et al., *State and Tribal Courts: Strategies for Bridging the Divide*, CENTER FOR COURT INNOVATION 11, <http://www.courtinnovation.org/sites/default/files/documents/StateAndTribalCourts.pdf> (last visited May 19, 2014).

court systems, and eventually developed the tribal-state court forum.<sup>54</sup> Walking on Common Ground, an organization that promotes tribal-state-federal collaborations, lists ten states that have tribal-state court forums.<sup>55</sup> The role of the forums is to have regular meetings in which challenges and communication problems are discussed and resolved.<sup>56</sup> Diligent attorneys should familiarize themselves with whether or not their state has such an organization, as the information that these forums provide may ultimately benefit a client in a family law proceeding. A practitioner with limited resources and pressed for a resolution by the client would benefit from these organizations because tribal-state court forums usually create and support problems that enforce child support obligations on Indian reservations.<sup>57</sup> For example, in Washington, the DCS and the State Tribal Relations Unit (STRU) seek to negotiate such intergovernmental agreements.<sup>58</sup> Many tribes have agreements with the state they are located in, or have guidelines on how to conduct child support proceedings.<sup>59</sup>

When serving your client, it is important to know your state rules on family law and child support. In working with a client and preparing to take the matter to either state or tribal court, you must know how state law applies in tribal court. Tribal courts do have broad authority to hear civil disputes, particularly in the area of domestic relations, such as child custody proceedings.<sup>60</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> *Tribal-State Forums*, WALKING ON COMMON GROUND, <http://www.walkingoncommonground.org/state.cfm?topic=6> (last visited May 19, 2014).

<sup>56</sup> WASH. REV. CODE § 74.20A.030(2) (2014).

<sup>57</sup> *Tribal State Relations*, TRIBAL COURT CLEARINGHOUSE, [http://www.tribal-institute.org/lists/state\\_relations.htm](http://www.tribal-institute.org/lists/state_relations.htm) (last visited May 19, 2014).

<sup>58</sup> *Id.*

<sup>59</sup> For a comprehensive list and link to pdfs of such agreements, please refer to: *Types of Tribal Agreements*, WASH. ST. SOC. AND HEALTH SERV.'S, <http://www.dshs.wa.gov/dcs/tribal/csagreements.asp> (last visited May 19, 2014). There are many tribes such as the Colville Confederated Tribes, Kalispel Tribe, and Lower Elwha Klallam Tribe that maintain child support agreements.

<sup>60</sup> *What are Tribal Courts?* BUREAU OF JUST. ASSISTANCE, <https://www.bja.gov/evaluation/program-adjudication/tribal1.htm> (last visited May 19, 2014).

According to federal law, tribal courts are not obligated to recognize state court decisions, but may be required to do so under tribal law.<sup>61</sup> For the most part, comity between the state and tribal court is present, and tribal courts may feel inclined to recognize state court judgments to assume that state courts recognize their own.<sup>62</sup> Per 25 U.S.C. § 1919, states and Indian tribes are authorized to enter into agreements with each other with respect to Indian children and jurisdiction over child custody proceedings.<sup>63</sup> However, note that Congress has enacted legislation that gives tribal courts exclusive jurisdiction over child custody proceedings in certain cases.<sup>64</sup> For example, 28 U.S.C. § 1738B gives full faith and credit for child support orders.<sup>65</sup> This is a crucial piece of information to keep in mind when dealing with child support.

If the tribe is going to initiate an IV-D plan and attempt to implement a child support program, 45 C.F.R. § 309.120 stipulates what a tribe must include in their IV-D plan regarding intergovernmental procedures. The C.F.R. states that a tribe or tribal organization must specify in the IV-D that it will respond to, and cooperate with, State and other tribal agencies, and that the tribe will recognize other child support orders issued from State or other tribal organizations under the Full Faith and Credit for Child Support Orders Act.<sup>66</sup> This regulation stipulates the importance of tribes working together with other tribes and states.

Such full faith and credit between states and tribes can be very beneficial to both parties. A tribe can help the state by providing the state with any information it may have about an enrolled member of their tribe. Having extra information about an individual needing to pay child support will help the state locate and collect from that individual.<sup>67</sup> A harmonized

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<sup>61</sup> *Role of Tribal Courts, Question 11*, NATIVE AM. RTS. FUND, <http://www.narf.org/icwa/faq/role.htm#Q11> (last visited May 19, 2014).

<sup>62</sup> *Id.*

<sup>63</sup> 25 U.S.C. § 1919 (2006).

<sup>64</sup> 25 U.S.C. § 1911(a) (2006).

<sup>65</sup> 28 U.S.C. § 1738B (2006).

<sup>66</sup> 28 U.S.C. § 1738B (2006).

<sup>67</sup> See NATALIE O'DONNELL, NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE-TRIBAL PARTNERSHIPS ON CHILD SUPPORT, (2005), *available at* [http://www.ncsl.org/Portals/1/documents/pubs/lbriefs/2005/05LBJan\\_childsupport.pdf](http://www.ncsl.org/Portals/1/documents/pubs/lbriefs/2005/05LBJan_childsupport.pdf) (last visited May 19, 2014).



relationship between states and tribes help legitimize programs and further assist Native American children.

Washington State and its tribes continue to work together to create new programs and processes, and attempt to strengthen the already existing ones. In order for this relationship to be maintained and for it to produce successful results, Washington State realizes the importance of respecting tribal sovereignty.<sup>68</sup> Each tribe varies in its culture, values, and traditions. It is important for states to help tribes when in need, but maintain a distance that allows the tribes to function as they see best for their members. According to the Washington State Department of Social and Health Services (DSHS), this is exactly what the state of Washington seeks to do.<sup>69</sup> DSHS seeks to negotiate agreements between the two governments, provide assistance and training to tribes and anyone working in child support programs, and helps promote those programs.<sup>70</sup> Having all tribes and states across the country recognize the importance of a functional intergovernmental relationship could be very beneficial to tribes' future. Having this intergovernmental relationship can be beneficial to all parties involved and is one of the keys to beginning tribal programs.

#### IV. EVALUATION OF YOUR CLIENTS' NEEDS

As an attorney desiring to practice in tribal court, the administrative system, and state court, you must understand the working realities of your local family law systems so you can help your client make an informed decision. In addition to reading case law, rules, and statutes, it is imperative that you investigate the tribunals available to you. Get to know other practitioners, introduce yourself to the local court clerks, and observe proceedings to get a feel of how the system operates. This will give you a well-rounded take on what can be accomplished and determine the proper direction for your client. Once developed, your evaluation techniques can safely guide you in your approach to the court. Given the complexity of litigation involved in modern tribal family law, it is imperative

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<sup>68</sup> *Tribal Relations*, WASH. STATE DEP'T OF SOC. AND HEALTH SERV.'S, <http://www.dshs.wa.gov/dcs/Tribal/default.asp> (last visited May 19, 2014).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*



that you build a solid working base of the impact that all three of these systems will have on your client.

Familiarizing yourself with local state court processes is fairly easy, as there are local rules and often a county bar association. Develop a working relationship with whichever judicial officer that deals with your client's cases by showing respect, being on time, and always keeping your word. Remember that simple and genuine courtesy go a long way. Always attend any CLE or other meetings where fellow legal practitioners can get to know you better. Understand what the court desires and cater to what they want to hear while maintaining honesty and integrity.

It is important that you study the state statutes and regulations that set forth the operations of the administrative process. Further, if your client is going to be or is already in the administrative system, get a signed release from your client so you can talk to the Support Enforcement Officer and/or Claims Officer responsible for your client's case. Child support is often set by the issuance of proposed administrative orders that go into effect unless there is a challenge. Administrative Law Judges hear contested hearings telephonically and issue final enforceable orders. Claims officers will appear at these hearings to represent DCS and you should make contact and discuss with them whether an agreement is possible. It is best to be respectful, yet direct about what you want. Keep in mind that you may remove the case to Superior Court if you are unhappy with the result. Administrative hearings are no place to lose your composure as you are potentially building a record for Superior Court review.

It is clear that it may be a complicated and confusing process to practice in three divergent tribunals and it will take some time to perfect your skills and confidence. Investment of time and adopting an attitude of patient learning will smooth your way to better results for your clients and create more business for you as your reputation spreads.

## **V. CLIENT QUESTIONNAIRES**

Most lawyers use a client questionnaire to begin a case. As a part of this process, several key issues must be addressed with the tribal

client. These questions include physical location, tribal enrollment, tribal or state public assistance, and tribal economic issues. Specific answers to certain questions can aid the development of a sound understanding of your client's problems.

The first subject is the physical location of the parties. Does anyone reside on a federally recognized reservation; and if so, has either party commenced an action in tribal court? This can save a lot of time because if an action has been commenced against or by your client and one of the parties' lives on a reservation, then your choices are much more limited. If your client resides on the reservation, ask if there are any concerns over which jurisdiction the case should be brought. Make sure to use questions designed to be clearly understood by your lay client. For instance, a bad experience with a criminal or civil action in tribal court might sour the client's mind on a family law action. The same can be said of state court and/or the administrative process. Your client's feelings on this issue are very critical to your relationship with the client. If your client resides off the reservation, especially out of state, then your options to utilize tribal court may be constrained due to the limited nature of the court's jurisdiction regarding service.

The second issue is tribal enrollment. Are either party enrolled members of a federally recognized tribe? Many people claim Native American heritage, but do not qualify for enrollment purposes. If only one party is enrolled, do the children qualify for enrollment or have they been enrolled? If both parents are enrolled in the same tribe and living on the same reservation, enrollment of the children becomes a non-issue. If each parent is enrolled in a different tribe, determining which tribe the children could be enrolled may be a significant factor in making the venue decision. Financially, it may make a significant difference if there are per capita and other benefits available.<sup>71</sup> In addition, cultural and family issues may guide your client in determining which tribe is proper for enrollment. This is

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<sup>71</sup> As an example, if the father is a member of a tribe without significant economic benefits and the mother is enrolled Puyallup, there is a distinct advantage to enrolling the child as a Puyallup, both in terms of per capita, but also the many other benefits offered to Puyallup Tribal members.

another area of potential strong feelings by the client and you must approach the issue with sensitivity.

A key question is whether either party receives state or tribal TANF. If so, the choices available may be limited.<sup>72</sup> If the client is receiving state TANF, the State has an interest in the litigation and may file either an administrative or Superior Court action, depending on the circumstances of the case, i.e. whether parentage has been established. If a private action is filed in Superior Court concerning a TANF client, the state, through the local prosecuting attorney, will intervene on the issues of child support and medical coverage. In some situations, if a client is receiving tribal TANF, the state will act in cooperation with the tribal TANF agency and initiate or intervene depending on the nature of the case. The state may set support, basic custody, and establish TANF arrears belonging to either the state or tribal TANF agency.<sup>73</sup>

Finally, there needs to be an examination of the economic situation of both parties. Is per capita available? Does either of the parties engage in treaty protected fishing or hunting? Are the parties employed in tribal government or tribal enterprises? Try to obtain actual amounts of tribal income to create an accurate financial picture. Although it may be difficult to get information from your client, due to their privacy concerns, it is important to emphasize to them the necessity of the information. As your experience grows with certain tribes, this task will become easier, as not only the practitioner will understand the sources of the income but can

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<sup>72</sup> Tribal TANF, while funded as Washington State TANF, under Title IV-A of the Social Security Act, operates under unique rules specifically designed by each tribe. You cannot assume that the individual who qualifies for TANF and the recipient of the benefit is the same. Tribal TANF programs can be for a single tribe or multiple tribes, such as the South Puget Intertribal Planning Agency (SPIPA), which supplies TANF to several tribes and enrolled members of outside tribes who reside within the SPIPA service area. It should also be noted that an individual could receive Tribal TANF as well as Washington State Food and Medical Assistance at the same time.

<sup>73</sup> Internal DCS Handbook, Sections 33.015, 33.020 and 33.025. Be very careful when filing an action when your client is on TANF, as it can become very expensive to litigate when the state or Tribe could have done the case for free. This is often not a major issue except for Pro Se filings, as these clients often lack sufficient funds to pay the cost of hiring private counsel.

determine the precise worth of the benefits for income calculation purposes.

An accurate determination of tribal income and assets is crucial. Collection of child support from tribal income can be problematic, especially if the state is the collecting agency due to the sovereign immunity tribes enjoy from state action.<sup>74</sup> However the situation has been improved through collection agreements between DCS and the Tribes.<sup>75</sup> You may also discover that Tribal Codes will exclude certain income from tribal sources for child support purposes. When such resources are counted under state law, filing the case in Superior Court may be preferable.

By simply supplementing your current case evaluation techniques, you can gather the information necessary to file in the proper forum and determine what result you should seek. With time, you will gain better case assessment skills and litigation management.

### **A. *Application***

The following examples are designed to present multiple issues in order to help the reader develop the necessary assessment skills to practice in this area. Be aware that no two cases are alike and the determinations made in these examples may not fit the situation that your client is in, and will probably change with the passage of time and new developments in the law. The three scenarios below contain elements of actual cases that have occurred in my practice.

#### **1. *Example One***

Your unmarried client—who has Native American heritage, but is not an enrolled tribal member—is the mother of two children she conceived with an enrolled Native American of a local tribe who lives and works on his home reservation. Your client is sure this man is the only possible father. Your client is not on TANF or public assistance of any

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<sup>74</sup> WASH. REV. CODE § 74.20.040(3) (2014).

<sup>75</sup> WASH. REV. CODE § 26.25.010 (2014).

sort. The alleged father's reservation has a child support program and a tribal court.

*i. Analysis*

The first determination you make is that, since there is no TANF being paid, you have your choice of any available, suitable forum. It is assumed, for these examples, that you have familiarized yourself with the three systems. If the father receives per capita or other tribal benefits not used to calculate income for child support purposes, tribal court may not be the best option. Your client's chances for a higher support order are substantially greater if you file in Superior Court. If the children potentially qualify for enrollment, you will not be able to default the alleged father because it will be necessary to prove lineage to meet either heritage or blood quantum for enrollment. Personal service on the reservation to accomplish this has its own problems due to issues of state jurisdiction on tribal land. Once you have obtained a final order from Superior Court, it can often be registered and enforced in tribal court, subject to any restrictions found in either the tribal law or the usual and ordinary practices of the court.<sup>76</sup>

If your client cannot afford a private attorney, your client may seek either the services of the tribal child support program or the state through an application for services filed with DCS. The client may make an application to either, but if the system is working right, the client will end up obtaining a parentage order through the tribe as per the current working agreement of the state and tribes with child support programs. However mistakes may happen, cases may be misidentified, and the client could end up in Superior Court. You should advise your client that the service received will not be as personal as with private representation. At this point your client will have sufficient information to make an informed decision whether to proceed with your representation in a specific forum or seek governmental aid through the state or the tribe.

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<sup>76</sup> This brings the case back full circle to the original issue of tribal income. The likelihood that the father's per capita income, if not available for child support calculation, is also not subject to be involuntarily collected to satisfy a child support obligation is highly likely. Once again this depends on the jurisdiction.

There exists the strong possibility that costs may drive the decision and result in the loss of your client.

## ***2. Example Two***

Your client is a recently separated father, an enrolled Washington tribal member living off the reservation, and married to an enrolled tribal member of a different Washington tribe who also lives off the reservation with the two children of the marriage. The mother's tribe has a child support program and mother receives a tribal TANF grant from her tribe and state Food Assistance. Your client's tribe does not have a child support program. The children are eligible for enrollment in either tribe, but are more connected to the mother's family. The father wants to pay a "reasonable" amount of child support and see his children on a regular basis. He makes a very good income and desires private representation.

### ***i. Analysis***

In this example the analysis is driven by the fact the mother is on tribal TANF. It is only a matter of time until either the mother's tribe or the state takes action. The case is complicated by the fact that no one lives on the reservation and jurisdictional issues are blurry. No matter where your client goes, the government, whether state or tribal is going to follow. He does not have the option of using his own tribe as a resource because they do not deal with child support. One choice of the client is to wait. Waiting is not recommended, as you do not want to be on the defensive from the beginning and be forced to defend in your opponent's forum. The other choice is to file in the mother's tribal court or state court. A careful examination of the codes and rules of both courts can help make the decision. Pay close attention to the detail of each system in making your recommendation because utilizing the proper forum is crucial in litigation involving TANF. The government in the form of the tribe or state will be involved and you must assess your client's financial outcome in each scenario.

Further, the importance of cultural issues to your client's case must be determined. If they are a strong part, then strongly consider filing in Mother's tribal court. If they are not so important or even detrimental, then

consider filing in state court. If you file in tribal court, be sure you understand both the written and unwritten policies of the court and shape your argument to take advantage of the playing field you have been dealt. Listen carefully to the clerk, do your homework and make sure your client understands that he may be in on the defensive in a different tribe than his own. So respect and understanding by both of you will go a long way to obtaining a successful result.

### **3. *Example Three***

Your client is an enrolled tribal member, not living on the reservation, and the alleged parent of a child by a mother enrolled in an out-of-state tribe. The child has also been enrolled in the mother's tribe. Your client does not receive tribal benefits or public assistance and his tribe does not have a child support program. The mother has filed a Uniform Interstate Family Support Act (UIFSA) request through her home tribal child support program for the establishment of your client as a parent, the setting of child support, the establishment of child support arrearages, and the requirement that your client provide day care assistance and health care insurance. The local prosecutor has served your client, to appear in Superior Court, and your client has brought the Summons and Petition to your office. Your client is not sure he is a parent, and if he is found to be a parent, he is quite upset that he may not seek residential time or custody of his child in the UIFSA action.<sup>77</sup>

#### ***i. Analysis***

The first thing to do in this situation is to understand that your client is caught up in bureaucracy. Your client is in state court because he does not reside on a reservation. Genetic Testing is mandatory and failure to comply can lead to a contempt action being filed and/or a default order being entered establishing him as father and potentially setting an

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<sup>77</sup> The Uniform Interstate Family Support (UIFSA) has been adopted by the states to ease the establishment and collection of interstate child support. It is codified in Washington as WASH. REV. CODE § 26.21A (2014). Recently, UIFSA has begun to be used by tribal child support programs to send cases to both out of state tribal and state child support agencies. Custody and residential time are reserved for the home state of the child and are not addressed in these types of proceedings.



unrealistic amount of current child support and the establishment of a large judgment for past due support. Once he is found to be the father, then the hard work begins. In order to obtain the best result, you must obtain as much information about his situation and that of the mother. You must prepare and serve on the state detailed documentation setting forth your clients position.<sup>78</sup>

After parentage is established, the first issue to be determined is current support. Be prepared to provide accurate, up to date information and solidly prepared child support worksheets. If imputation or assignment of an income is made to your client, make sure that the court is made aware of the lessened earning power and higher unemployment rates among Native Americans.<sup>79</sup> Don't be afraid to be innovative in Superior Court, even if there is no precedent. Further, the state does not represent the absent mother and you can negotiate directly with her to create a situation most favorable to your client. For instance, a reduced amount of back support, and/or a child support payment that is more affordable. As far as medical insurance coverage, each state sets its own policies for parental coverage, cost sharing, and medical decision making. For instance, Washington State has determined that Indian Health Service coverage available to the child along with the absence of no cost health insurance available to the non-custodial parent satisfies the medical insurance requirement of state law.<sup>80</sup>

In addition, you should gather information concerning the past relationship between the parties, how your client was told he was a parent, and any child support whether cash or any kind your client may have

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<sup>78</sup> Experience shows that in many UIFSA cases, the recommendations of the state as well as the financial documentation of the mother are taken at face value. This is a grievous error. Pour over every detail and ask the state for what you need to present your best case. Failure to provide this information can be used against the state to gain the sympathy of the court.

<sup>79</sup> Imputation of income has a particular meaning in Washington State Law; see WASH. REV. CODE § 26.19.071(6)(2014). There is a five step standard set forth which requires the calculation of income to follow specific priorities.

<sup>80</sup> The following website is useful concerning enrolled tribal members responsibilities to provide health care coverage under Washington Child Support Orders: *Enforcing Medical Support on a Tribal Case*, WASH. DEP'T OF SOC. AND HEALTH SERV.'S, <http://www.dshs.wa.gov/pdf/esa/dcs/tribal/tribal13.pdf> (last visited May 19, 2014).



provided. Also, determine if your client's extended family members have supported the child by traditional tribal methods. Back support can be reduced or eliminated depending on the circumstances of the case, and equity plays a large determination in the final outcome.

By a careful examination of the intergovernmental child support system, the client can receive effective representation of a tribal client in a UIFSA action. Your understanding and confidence will help you prepare your client for the potential outcomes of the litigation, whether good or bad.

### CONCLUSION

The intricate relationship between competing family law systems in tribal court, Superior Court, and the administrative process can be daunting. However, it need not prevent the maximization of return through the gathering of accurate client data, knowledge of the system, and the creation of a solid litigation plan based on the uniqueness of your client's issues. The tribal family law litigator can be the key element in not only protecting his tribal client, but impacting the system by influencing new procedures and creating questions in the minds of those controlling these systems to jump start thinking about improvements in the services provided to all citizens of the local community, tribal or not. The most crucial step that an effective attorney can take in competently representing a tribal client is to thoroughly research all the options available to the client. Determining which court to try a case in, and knowing and respecting the procedures of the appropriate forum, whether state or tribal, can make all the difference to the outcome of the case. While there have been great steps in the cooperation between tribal court and state court, there is still a long way to go, and the attorney should not assume that any forum chosen will be sensitive to the client's needs. A well-informed attorney can make all the difference in the outcome of a case for the tribal family law client.