

Indian Law on the Bar Exam: No Family Left Behind

By Gabriel S. Galanda



An Associated Press story ran the day after Christmas about Heather and Clint Larson, non-Indian Utah citizens, and Talon, the 6-month-old boy they adopted. "After a months-long court battle," the story went, "the couple had to hand him over to representatives of the birth mother's American

Indian tribe, Minnesota's Leech Lake Band of Ojibwe, and watch him being driven away."

"It was horrific. We lost our child," said Heather Larson.

"The wrenching, personal struggle for both sides has been complicated by a jurisdictional fight over who has the authority to decide what should happen to the boy."

The Christmas story about the Larsons, non-Indian Utah citizens, and Talon, exemplifies why over the last several years New Mexico, Washington and South Dakota have begun to bar-test federal Indian jurisdiction, including the Indian Child Welfare Act of 1978.

In Washington, a resolution once signed by scores of Native and non-Native lawyers stated that "the integrity and competence of the legal profession in this state would be enhanced if attorneys licensed by the [Washington State Bar Association] generally understood significant federal jurisdictional Indian principles . . . such that every bar-licensed attorney will receive knowledge reasonably necessary for the representation and protection of all who are subject to Washington State law."

Talon's story is precisely the type of legal drama state bar leaders should seek to avoid by so resolving to test, and in turn testing, on federal Indian laws like the ICWA. In 2004, Washington state recognized that practitioner familiarity with the jurisdictional complexities at play in Indian Country will protect the Larsons and Talons of the world – not to mention the judiciary, practicing bar, state child-welfare agencies, and our Indian governments, families and children. Accordingly, Washington included federal Indian law on its bar exam beginning in 2007. New Mexico was the first to do so; in 2002, and South Dakota has since done the same.

Given the deeply personal nature of custody disputes, it is not yet clear exactly how the system failed the Larsons and Talon. According to an AP source, "it looks like the Utah adoption agency didn't do enough investigating about whether the 1978 law would apply to Talon." The Leech Lake Band stated in a release that when placing Talon with the Larsons, the adoption agency disregarded a tribal court order for the pick-up and return of Talon to Minnesota under the banner of Indian jurisdiction and tribal custody. The National Indian Child Welfare Association wrote *Indian Country Today*, suggesting that the Utah adoption agency also failed to wait ten days after Talon's birth before getting judicial certification that his mother wanted him adopted as required by the ICWA. NICWA further believes that the agency and state court did not give federally required consideration to placing Talon, his birth family or tribe.

In 1978, Congress declared "that there is no resource that is more vital to the continued existence and integrity

AS INDIAN LAW PRACTITIONERS NOW ADVANCE THIS CAUSE IN STATES LIKE ARIZONA, OKLAHOMA, MONTANA AND WISCONSIN, CRITICS WORRY THAT TESTING FEDERAL INDIAN JURISDICTION WOULD UNNECESSARILY FAVOR INDIANS AND THUS DISPARATELY IMPACT ANY AND ALL NON-NATIVES. THEIR WORRY IS SIMPLY MISPLACED, BECAUSE INCLUDING FEDERAL LAWS LIKE THE ICWA ON THE BAR EXAM BENEFITS EVERYONE – NOT JUST INDIANS.

of Indian tribes than their children ... [and] that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions." 25 U.S.C. 1901(3), (4). Congress was of course obliged to pass a law

specific to Indian families and children because tribal parents and children have a unique political status as members of sovereign tribal governments. And Congress, pursuant to the Constitution, treaties and statutes, is charged with a trust responsibility for the protection and preservation of Indian tribes and their resources, including Indian children; which forms the basis for the ICWA.

In Talon's instance, the ICWA required the Utah state court to recognize the Leech Lake tribal court's jurisdiction over the termination of parental rights, or at least pay full faith and credit to the tribal court's prior custody order. 25 U.S.C. 1911(b), (d). (The tribal court can assert over Talon's custody and issue any such order because tribal governments possess "the right . . . to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).) It appears the Utah court ultimately followed federal law, but not before upending at least three lives.

But one must ask: What were the lawyers thinking before Talon was initially placed with the Larsons? What

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about the adoption agency's counsel? Talon's guardian ad litem or CASA (to the extent either were even involved)? The state court judge? More to the point: Did all of those jurists fail to consider whether or to what extent the ICWA affected Talon's adoption? Did they fail to fully consider Talon's tribal cultural identity when determining what was in his best interests? 25 U.S.C. 1901(5). Did they fail to acknowledge that the Leech Lake Tribal Court had concurrent jurisdiction and that tribal adjudication of the matter was preferred? Did they simply fail to spot the breadth of ICWA issues before Talon was initially placed with the Larsons – before they developed a sacred parent-child bond?

Or, given what NICWA rightly describes as “the straightforward adoptive requirements of ICWA,” did all of these jurists think through the various federal and tribal legal issues, only to proceed with Talon's adoption as if ICWA did not exist?

No matter, despite the fact that Utah is home to five federally recognized tribes and thousands more dislocated or “off-reservation” Indians (like Talon's mother), Utah does not require lawyers to learn the ICWA as a prerequisite to being bar licensed. It should – as should the 20-odd other states home to large Indian populations or significant tribal lands, according to a resolutions passed by NCAI and the Affiliated Tribes of Northwest Indians in 2004.

As Indian law practitioners now advance this cause in states like Arizona, Oklahoma, Montana and Wisconsin, critics worry that testing federal Indian jurisdiction would unnecessarily favor Indians and thus disparately impact any and all non-Natives. Their worry is simply misplaced, because including federal laws like the ICWA on the bar exam benefits everyone – not just Indians.

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go out and practice law and do it well and do it sensibly. If they run into a problem that involves jurisdiction, sovereignty, or economy involving a tribe, hopefully they'll have an understanding of how to approach those kinds of problems and be sensitive culturally as well as in terms of their legal knowledge.

“Another goal I would really like is that the university, for historical reasons and missions reasons, can in time be seen and perceived by the Indian community, by the tribes, as a real and important partner.”

Jack McNeel is an Indian Country Today correspondent.

Tribal communities and Indian children get enhanced protection; against adoption agencies, which have historically pillaged Indian families by removing tribal children and placing them in non-Indian adoptive homes and institutions. The fact remains that many state local private adoption agencies still do not honor the ICWA, in large part because states do not properly enforce the federal law. And even with state oversight, the Washington State Racial Disproportionally Advisory Committee recently reported that Indian kids remain significantly more likely to be displaced than White children, in large part due to “non-Native American workers who may mislabel traditional and safe Native American patterns of supervision as neglect.” Such circumstances are apparently lost on CNN's Campbell Brown, who on national television ignorantly called the ICWA “a ridiculous law” in reference to Talon. Thankfully, the lawyers in my state know better.

Adoptive non-Native parents like the Larsons also get better protection; from their counsel, who should at a minimum be able to recognize when federal laws and tribal jurisdictional issues require careful study. Those parents get protection against developing a sacred family connection with a child like Talon, only to have the child removed from their loving arms by operation of law. Those parents also get protection against being dragged into a desperate “jurisdictional fight,” when jurisdiction is clear under federal law. Thankfully, the lawyers in my state know better.

Thankfully, as a result of federal Indian law bar exam policy, families and Native children living in New Mexico, Washington and South Dakota are less likely to fall through the legal cracks, like the Larsons and Talon did. And thankfully, the citizens and licensed law practitioners of those three states are less likely to read a Christmas story like Talon's.

Let's hope that sooner or later, people living in the other twenty-plus states that constitute Indian Country will be so fortunate. Let's urge other states to require the lawyers they license to learn federal Indian law and the ICWA. Let's make sure no family – be they Native, non-Native or multi-racial – is left behind.

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